



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-88/2-T

Date: 6 March 2012

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 6 March 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT ONE DOCUMENT
FROM THE BAR TABLE PURSUANT TO THE TESTIMONY OF RAMIZ
DUMANJIĆ**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution Motion to Admit one Document from the Bar Table Pursuant to the Testimony of Ramiz Dumanjić, with Appendix” filed publicly on 22 December 2011 (“Motion”), and hereby renders its Decision thereon.

I. SUBMISSIONS

A. The Motion

1. In the Motion, the Prosecution seeks the admission of one document to its Rule 65 *ter* Exhibit List, comprising excerpts from a memorial book titled “Martyr Imams” by Muharem Omerdić (the “Proposed Exhibit”).¹ The Prosecution further seeks the admission of the Proposed Exhibit from the bar table pursuant to Rules 73 and 89(C) of the Rules of Procedure and Evidence (“Rules”).²

2. The Prosecution submits that the book containing the excerpts which comprise the Proposed Exhibit was discovered by the Prosecution during the course of the video-conference link testimony, on 29 September 2011, of Prosecution Witness Ramiz Dumanjić (“Mr. Dumanjić”) during which he gave information, for the first time, concerning the killings of two Bosnian Muslim Imams, Safet Karaman from Višegrad and Hasib Ramić from Semizovac, in 1992, by Bosnian Serb forces.³ It submits that it did not know of or possess the book prior to Mr. Dumanjić’s testimony, and that, in any event, it would have been impracticable to use the publication during the course of his testimony “due to the circumstances under which Mr. Dumanjić testified and his condition.”⁴ The Prosecution asserts that it disclosed the memorial book to the Accused in its entirety on 14 December 2011.⁵

3. The Prosecution submits that the memorial book, from which the Proposed Exhibit is taken, details the killing of numerous Bosnian Muslim Imams captured throughout the war, including that of the two Imams Mr. Dumanjić’s testified about, as well as confirming the physical abuse and death of Žepa Imam Mehmed Hajrić in 1995.⁶ It submits that the Proposed Exhibit demonstrates the practice and notoriety of the killing of Bosnian Muslim religious figures by Bosnian Serb forces during the conflict, and that the murders of the two Imams detailed therein presents pattern

¹ Motion, para. 1.

² *Ibid.*

³ *Ibid.*, para. 10.

⁴ *Ibid.*

⁵ *Ibid.*, para. 11.

⁶ *Ibid.*, para. 1.

evidence and establishes the basis upon which Mr. Dumanjić believed that his life would be at risk if his identity and status as an Imam were to become known to Bosnian Serb forces who took over Žepa in July of 1995.⁷ As such, the Prosecution argues, the killings of the two Imams are directly relevant to the foreseeability of Mehmed Hajrić's killing and the forcible transfer of the inhabitants of Žepa, and therefore relevant to paragraphs 23.1 and 51–57 of the Indictment.⁸ The Prosecution submits, moreover, that the information contained in the Proposed Exhibit is both cumulative and corroborative of Mr. Dumanjić's evidence.⁹

4. According to the Prosecution, the Proposed Exhibit is *prima facie* relevant and of sufficient probative value for its addition to the Rule 65 *ter* Exhibit List, and in addition, bears sufficient indicia of reliability and authenticity for admission from the bar table.¹⁰ It asserts that any objections the Accused may have with respect to the Proposed Exhibit's reliability are matters of weight, and not admissibility.¹¹ Finally, the Prosecution submits that the admission of the Proposed Exhibit from the bar table will not prejudice the Accused arguing that should it be admitted the Accused would have enough time in advance of the Defence case to prepare and address any issues arising from its admission.¹² In addition, the Prosecution submits, the Proposed Exhibit presents facts that are cumulative to Mr. Dumanjić's evidence, which the Accused has already had an opportunity to cross-examine.¹³

B. The Response

5. In the response filed on 2 February 2012 ("Response"),¹⁴ the Accused submits that the memorial book from which the Proposed Exhibit is taken was disclosed at a very late stage in the proceedings, namely December 2011, and following the completion of the Prosecution's presentation of evidence.¹⁵ The Accused submits that the issues raised in the Motion should not be treated in any other way than as an attempt by the Prosecution to present arguments after the

⁷ *Ibid.*, para. 12.

⁸ *Ibid.*, paras 12–13.

⁹ *Ibid.*, paras 2, 12–13.

¹⁰ *Ibid.*, paras. 12, 14–15.

¹¹ *Ibid.*, para. 16.

¹² *Ibid.*, para. 17.

¹³ *Ibid.*, para. 17. The Chamber notes that while the Prosecution's Motion was filed on 21 December 2011, the English version of the Response was not filed before the Chamber until 2 February 2011, after the start of the Defence case.

¹⁴ Response to the Prosecution's Motion to Admit One Document from the Bar Table, submitted in BCS on 30 January 2012, filed in English on 2 February 2012. The Chamber was informed by the Registry that the Accused received the BCS version of the Motion only on 16 January 2012.

¹⁵ Response, paras. 4–5.

completion of its presentation of evidence, since the issues discussed in the Motion neither arise from the Indictment nor were they the subject of discussion during the course of the trial.¹⁶

6. It is the position of the Accused that given the late stage of the disclosure of the memorial book, as well as the late timing of the Motion, the Accused is prevented from examining and challenging the allegations contained in the memorial book.¹⁷ The Accused submits, further, that admitting a part of the memorial book into evidence at this stage of the proceedings would require the Accused to request additional time to investigate and submit evidence refuting the allegations raised in the Proposed Exhibit.¹⁸ It is the position of the Accused that granting the Motion would delay the proceedings, deprive him of his right to a fair and expeditious trial, and therefore not be in the interests of justice.¹⁹

7. The Accused moreover rejects the Prosecution's submission that the Proposed Exhibit is relevant to paragraphs 23.1 and 51–57 of the Indictment.²⁰ With respect specifically to the Prosecution's submission that the murders of Imams Safet Karaman and Hasib Ramić are relevant to the Indictment in so far as they establish the basis upon which Mr. Dumanjić believed his life would be at risk, the Accused submits that Mr. Dumanjić presented sufficient information during his testimony in court upon which the Chamber can make a determination of this claim.²¹ In addition, the Accused also challenges the Prosecution's submission that the Proposed Exhibit is cumulative to, and corroborative of, Mr. Dumanjić's evidence.²²

8. Lastly, the Accused challenges the reliability of the entirety of the memorial book from which the Proposed Exhibit was taken.²³ In particular, he submits that the references to the alleged murders of Imams Safet Karaman, Hasib Ramić as well as Mehmed Hajrić are unreliable and insufficiently corroborated in that no sources are included as to the circumstances of these individuals' deaths.²⁴

¹⁶ *Ibid.*, para. 6.

¹⁷ *Ibid.*, para. 7.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, paras. 8, 26–28.

²⁰ *Ibid.*, paras. 9–12.

²¹ *Ibid.*, para. 12.

²² *Ibid.*, para. 15.

²³ *Ibid.*, paras. 17–19, 24–25.

²⁴ *Ibid.*, paras. 20–23.

II. APPLICABLE LAW

A. Rule 65 ter Exhibit List

9. Pursuant to Rule 65 *ter* (E) (iii), the Prosecution is required to file the list of exhibits it intends to offer in its case and provide the Defence with copies of these exhibits at least six weeks before the Pre-Trial Conference. The Prosecution, however, is not strictly bound by this initial filing.²⁵ The primary purpose of the Rule 65 *ter* exhibit list is to ensure that the Defence is aware of the documents that the Prosecution intends to use during the trial, which will allow the Defence to prepare its case accordingly.²⁶

10. According to the jurisprudence of the Tribunal, a Trial Chamber, in the exercise of its inherent discretion in managing the trial proceedings, may grant a request for the amendment of the party's exhibit list, if it is satisfied that it is in the interests of justice to do so.²⁷ In carrying out this discretion, the Chamber must carefully balance any amendment to the list with the rights of the accused to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence pursuant to Articles 20 (1) and 21 (4)(b) of the Statute of the Tribunal ("Statute").²⁸ Factors that must be considered by the Chamber in this assessment are whether the material sought for addition by the Prosecution is *prima facie* relevant and likely to be of probative value to the charges in the indictment, and whether the Prosecution has demonstrated good cause for amending the list, bearing in mind the complexity of the case, ongoing investigations, and translation of documents and other materials.²⁹

²⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Admissibility of Borovčanin interview and the amendment of the Rule 65 *ter* Exhibit List, 25 October 2007 para. 18; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Prosecution's Motion to Amend the Exhibit List, 14 February 2008, para. 16.

²⁶ Decision on Prosecution's Motions regarding Rule 65 *ter* Witness and Exhibit Lists, Rule 92 *ter*, and Protective Measures ("*Tolimir* 2010 Decision"), filed confidentially on 30 March 2010, para. 7, citing to *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution's Sixth and Seventh Motions for Leave to Add Exhibits to its First Amended Exhibit List, confidential, 14 November 2007, ("*Boškoski* Decision"), para. 12; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, confidential, 8 May 2008, para. 5.

²⁷ *Tolimir* 2010 Decision, para. 7, citing to *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeal Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, ("*Popović* Appeal Decision"), para. 37.

²⁸ *Tolimir* 2010 Decision, para. 7, citing to *Popović* Appeal Decision, para. 37. See also *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion to Amend the 65*ter* Exhibit List, confidential, 4 March 2008, ("*Šešelj* Decision"), para. 20; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Eleventh, Twelfth and Thirteenth Prosecution Motions for Leave to Amend its Rule 65*ter* Exhibit List, 10 February 2010, ("*Stanišić and Simatović* Decision"), para. 26.

²⁹ *Tolimir* 2010 Decision, para. 7, citing to *Popović* Appeals Decision, para 37; *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution Motion for Leave to File a Fifth Supplemental Rule 65 *ter* Exhibit List with Annex A, confidential, 29 August 2008, para. 10.

In this respect, the Chamber must be satisfied that good cause is shown in amending the original list and that newly offered material is *prima facie* relevant, likely to be of probative value to the charges in the indictment, and of sufficient importance to justify the late addition.³⁰

11. The Chamber recalls that there is a significant difference in law between allowing a party to add materials to its Rule 65 *ter* exhibit list, and admitting these materials into evidence.³¹ While it is not necessary for the Chamber to make a full assessment of the relevance and reliability of the material sought to be added to the exhibit list, the Chamber shall not grant leave to add materials to the list that are “obviously irrelevant”.³²

B. Admission from the Bar Table

12. Rule 89 provides, in relevant part:

- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

13. The admission of evidence from the bar table is a practice established in the case-law jurisprudence of the Tribunal.³³ Evidence may be admitted from the bar table if it is considered to fulfill the requirements set out in Rule 89. Furthermore, for the admission of evidence from the bar table, “the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”.³⁴ Once these requirements are satisfied, the Chamber maintains discretion over the admission of evidence under Rule 89.

³⁰ See *Popović* Appeal Decision, para. 37; *Šešelj* Decision, para. 20; *Stanišić and Simatović* Decision, para. 26.

³¹ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Urgent Prosecution Motion for Leave to Amend its Exhibit List, filed on 17 October 2007, (“*Delić* Decision”), p. 4; see also *Bošković* Decision, para. 12.

³² *Delić* Decision, p. 4; see also *Bošković* Decision, para. 5; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, confidential, 8 May 2008, para. 7.

³³ See, e.g., Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, filed on 20 January 2012 (“*Tolimir* Bar Table Decision”); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table, 7 December 2009 (“*Đorđević* Decision”); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit, 14 March 2008; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 (“*Milutinović* Decision”).

³⁴ See *Tolimir* Bar Table Decision, para. 10, citing to *Đorđević* Decision, para. 4; *Milutinović* Decision, para. 18.

III. DISCUSSION

14. At the outset, the Chamber recalls that granting a variation of the Rule 65 *ter* exhibit list is a discretionary decision, and the Chamber may take into account various factors when deciding whether or not it is in the interests of justice to do so.

15. The Proposed Exhibit is comprised of the following excerpted material from the memorial book: (1) the cover page, (2) the publisher's foreword, (3) a five-page introduction and (4) entries concerning Mehmed Hajrić and the two Imams mentioned by Mr. Dumanjić, Safet Karaman and Hasib Ramić, respectively.³⁵ Having reviewed the Proposed Exhibit in the context of the Indictment, the Chamber is satisfied that it is not "obviously irrelevant", and that the *prima facie* threshold for the addition of the Proposed Exhibit to the Rule 65 *ter* Exhibit List has been met.

16. In its consideration, however, of whether to grant the requested addition to the Rule 65 *ter* Exhibit list at this stage of the proceedings,³⁶ the Chamber also takes into account whether the Prosecution has acted with sufficient diligence and thereby demonstrated good cause for seeking the addition of the material, and to what extent, if any, the Accused is prejudiced by the addition. In this context, the Chamber must consider, as a factor, the stage of the proceedings at which the materials were first provided to the Accused and sought to be added to the Rule 65 *ter* Exhibit List.

17. In the view of the Chamber, the Prosecution could and should have disclosed the memorial book to the Accused immediately following its discovery during the testimony of Mr. Dumanjić on or 29 September 2011, at which time it also should have filed its motion to add the Proposed Exhibit to the Rule 65 *ter* Exhibit List. Instead, it waited nearly three months to do this, and did not provide the Chamber with a satisfactory reason for this in the Motion.³⁷ The Prosecution's argument, moreover, that it would not have been able to use the memorial book with Mr. Dumanjić in any case "due to the circumstances under which Mr. Dumanjić testified and his condition", referring to the video-conference link testimony and the poor health of Mr. Dumanjić, is unfounded. Testimony via a video-conference link does not prevent either the use of documents by a witness, or putting the contents of documents to a witness during his testimony. The Chamber further takes the view that the time period between the disclosure of the memorial book to the Accused and the start

³⁵ See Motion, para. 11.

³⁶ The Defence case closed on 15 February 2012, having commenced on 23 January 2012. The Chamber is cognizant of the fact that the Prosecution filed its Motion in December of 2011, but notes that the Response was not filed before the Chamber in the English version until 2 February 2012.

³⁷ The Prosecution submission, in para. 18 of the Motion, that Mr. Dumanjić's testimony was heard shortly after the administrative date set by the Chamber for the closure of the Prosecution's case, namely 27 September 2011, and that the present application could "therefore not have been made before the end of the Prosecution's case was deemed close", has no bearing on the fact that the Prosecution could have made the application to add the Proposed Exhibit to the list at a far earlier stage than it did.

of the Defence case is too short to have reasonably expected the Accused to adequately review it so as to challenge its contents. The Chamber finds, therefore, that the Prosecution did not act diligently enough in either disclosing the memorial book from which the Proposed Exhibit was taken, or seeking the addition of the Proposed Exhibit to the Rule 65 *ter* Exhibit List.

18. Finally, and importantly, the Chamber notes the Prosecution's submission that the Proposed Exhibit goes to proof of paragraphs 23.1 and 51–57 of the Indictment, relating to the targeted killing of Bosnian Muslim leaders and the forcible transfer of the Bosnian Muslim population from Žepa in 1995. The Indictment directly links the Accused's criminal responsibility to these specific paragraphs.³⁸ Several witnesses have given evidence before the Chamber concerning these particular allegations.³⁹ The Accused could have cross-examined these witnesses on their knowledge or on the circumstances of the deaths of the Imams and to what extent they go to the proof of pattern evidence. In this respect, the Chamber notes that the Proposed Exhibit does not, contrary to the Prosecution's argument, merely "present facts that are largely cumulative to Mr. Dumanjić's evidence".⁴⁰ While Mr. Dumanjić had some knowledge of the death of Mehmed Hajrić,⁴¹ he did not however have any knowledge of the circumstances of the killings of the other two Imams, Safet Karaman and Hasib Ramić.⁴²

19. In the view of the Chamber, the addition of the Proposed Exhibit to the Rule 65 *ter* Exhibit List with the intended result of its admission into evidence through the bar table, at this late stage of the proceedings, and without granting the Accused the right to conduct further investigations and possibly (re)call witnesses to examine or cross-examine them on the important issues raised in the Proposed Exhibit, as attributed by the Prosecution, would violate his rights to a fair trial. Furthermore, granting the Accused's request for additional time to investigate and possibly (re)call witnesses would delay the proceedings.⁴³ In striking a balance between the Prosecution's duty to present the available evidence to prove its case with the Accused's right to have adequate time and facilities to prepare a defence and to be tried without undue delay, the Chamber is of the view that the addition of the Proposed Exhibit to the Rule 65 *ter* Exhibit List would infringe upon the

³⁸ See paragraphs 60 and 61 of the Indictment.

³⁹ See e.g., Hamdija Torlak, Esmā Palić Meho Džebo, Milenko Todorović, Zoran Čarkić.

⁴⁰ See Motion, para. 17.

⁴¹ The basis of Mr. Dumanjić's knowledge is what he was told by Mehmed Hajrić's father, namely, that the "Serbian army seized him from the UNPROFOR personnel", transferred him to "the Rogatica camp", where he was registered by the Red Cross and subsequently "killed [...] under the pretext that he had attempted to flee, to break away." Ramiz Dumanjić, T. 17931–17932 (29 September 2011). When asked if he learned why Mr. Hajrić was killed he testified that he believed this must have been because he was an Imam. Ramiz Dumanjić, T. 17934 (29 September 2011).

⁴² Ramiz Dumanjić, T. 17943, 17957–17958 (29 September 2011). He heard on the radio that one of them was "picked up" by "[a]s far as I know" the "Serb army", and killed, while he does not know about the circumstances of the killing of the other Imam. Ramiz Dumanjić, T. 17957–17958 (29 September 2011).

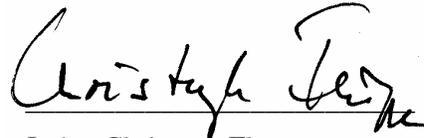
Accused's right to a fair and expeditious trial, enshrined in Articles 20(1) and 21(4)(b) of the Statute.

20. The Chamber concludes, for the foregoing reasons, that it is not in the interests of justice to grant addition of the Proposed Exhibit to the Rule 65 *ter* Exhibit List. As a consequence of denying the Motion in this respect, the request for admission into evidence from the bar table is moot.

IV. DISPOSITION

Accordingly, for the reasons mentioned above, the Chamber will deny the Prosecution's request to add the Proposed Exhibit to its Rule 65 *ter* Exhibit List and hereby **DENIES** the Motion.

Done in English and French, the English text being authoritative.



Judge Christoph Flügge

Presiding Judge

Dated this sixth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴³ The Chamber considers that this would have been the case even if the decision on the Motion had been rendered during the presentation of the Defence case.