

**UNITED
NATIONS**



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: 14 May 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: 14 May 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**CONSOLIDATED DECISION ON PROSECUTION'S BAR TABLE
MOTIONS AND THE ACCUSED'S MOTION FOR EXTENSION OF TIME**

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 seized of (1) the “Prosecution’s Motion for Admission of Fourteen Exhibits From the Bar Table”, filed confidentially on 30 March 2012 (“30 March Motion”); (2) “Prosecution’s Motion for Admission of Two Exhibits from the Bar Table”, filed on 10 April 2012 (“10 April Motion” and collectively, “Bar Table Motions”); and (3) the Accused’s “Urgent Motion for Extension of Time Limits”, filed in English on 24 April 2012 (“Motion for Extension of Time”) and hereby renders a consolidated decision thereon.

I. SUBMISSIONS OF THE PARTIES

A. Bar Table Motions

1. General Submissions

1. In the 30 March Motion and the 10 April Motion, the Prosecution requests the admission of 14 and 2 documents (collectively, “Proposed Exhibits”), respectively, from the bar table pursuant to Rules 73, 89(C) and 94(B) of the Rules of Procedure and Evidence (“Rules”).¹ The Bar Table Motions also encompass the Prosecution’s request to add four of those documents—Rule 65 *ter* Nos. 07624, 07625, 07626, and 07627—to the Rule 65 *ter* Exhibit List before admitting them into evidence.²

2. The Prosecution submits that each of the Proposed Exhibits is relevant to and probative of material issues raised in the Indictment, and has set out more detailed submissions regarding the specific relevance of each.³ According to the Prosecution, each of the Proposed Exhibits bears the requisite indicia of reliability and authenticity for admission from the bar table, and their admission will advance the interests of justice by providing the Trial Chamber with a more complete record.⁴

3. As the submissions advanced in the Accused’s “Response to Prosecution’s Motion for Admission of Fourteen Exhibits from the Bar Table” (“Response to 30 March Motion”) pertain to specific proposed exhibits or categories thereof, they will be set out individually below.⁵

¹ 30 March Motion, para. 1; 10 April Motion, para. 1.

² *Ibid.*

³ 30 March Motion, paras. 2, 8–12; 10 April Motion, paras. 2, 9–22.

⁴ 30 March Motion, paras. 2, 24; 10 April Motion, paras. 2, 14.

⁵ Response to Prosecution’s Motion for Admission of Fourteen Exhibits From the Bar Table, filed in English on 9 May 2012. The Chamber notes that the Accused did not file a response to the 10 April Motion.

2. Specific Submissions

(a) 30 March Motion

(i) Proposed Exhibits Relating to Forensic Evidence

4. Rule 65 *ter* No. 07625 is a document entitled “Update to the Summary of Forensic Evidence – Exhumation of the Graves and Surface Remains Recoveries Related to Srebrenica”, while Rule 65 *ter* No. 07624 is a confidential annex to Rule 65 *ter* 07625, both of which are authored by Dušan Janc and dated 13 January 2012.⁶ According to the Prosecution, these documents collectively comprise an updated report containing “the most up to date forensic evidence concerning Srebrenica-related mass graves”, resulting from Janc’s use of the same methodology employed in the production of his April 2010 report, which the Chamber has found to be sufficiently reliable and has admitted as Exhibit P00170.⁷

5. Recalling that Rule 85 prescribes a specific sequence for the presentation of evidence, the Accused submits that in order to add Rule 65 *ter* No. 07624 and Rule 65 *ter* No. 07625 to the Rule 65 *ter* Exhibit List, the Prosecution would have needed to provide reasons for not seeking such addition at an earlier stage,⁸ or to provide reasons for admitting the documents as rebuttal evidence.⁹ According to the Accused, the Prosecution’s Rule 65 *ter* No. 07624 and Rule 65 *ter* No. 07625 requests “have put the Defence in a fairly awkward and pressing situation”.¹⁰ The Accused claims that as a result of the voluminous nature of Rule 65 *ter* No. 07624 and Rule 65 *ter* No. 07625, “work on [the Final Trial Brief] practically had to be suspended” and that the requisite steps to further analyse these documents “can considerably jeopardise the filing” of the Accused’s Final Trial Brief “even with the postponed time limit requested”.¹¹ In any event, the Accused contends, further detailed submissions would be needed for the Prosecution to indicate why it would be in the interests of justice to admit Rule 65 *ter* No. 07624 and Rule 65 *ter* No. 07625 following the conclusion of the defence presentation of evidence.¹²

6. The Accused further suggests that it is unclear whether the Prosecution considers Dean Manning, who authored several of the reports to which Rule 65 *ter* 07625 is linked, is an expert, and that if so, the Prosecution should have filed its request to add Rule 65 *ter* No. 07624 and Rule

⁶ 30 March Motion, paras. 9–10; Rule 65 *ter* No. 07625; Rule 65 *ter* No. 07624.

⁷ 30 March Motion, para. 10.

⁸ Response to 30 March Motion, para. 6. The Accused further notes that Rule 65 *ter* 07625 is dated 13 January 2012. *Ibid.*

⁹ Response to 30 March Motion, para. 8.

¹⁰ Response to 30 March Motion, para. 19.

¹¹ Response to 30 March Motion, para. 9.

¹² Response to 30 March Motion, paras. 6, 8.

65 *ter* No. 07625 to the Rule 65 *ter* Exhibit List pursuant to Rule 94 *bis*.¹³ Finally, the Accused highlights that the 30 March Motion does not explain the relationship between Exhibit P01777, “The Missing From Srebrenica – Report from 2009 on the Progress of DNA-Based Identification from the International Commission on Missing Persons”, and Rule 65 *ter* No. 07625, and submits that the two documents “contain a large amount of information which is similar in nature, but which now differs substantially”.¹⁴ In this regard, the Accused proposes that the Prosecution be ordered to specify which sections of Rule 65 *ter* 07625 differ from Exhibit P00170, to indicate the source of information for each specific update and whether such sources are already in evidence, and to specify the extent to which Rule 65 *ter* 07625 differs from Exhibit P01777.¹⁵

7. Rule 65 *ter* No. 05756 is a corrigendum to an earlier version of the April 2010 Janc Report that was produced in March 2009.¹⁶ The Prosecution submits that Exhibit P00170 “incorporates” Rule 65 *ter* No. 05756, which provides further detail regarding the specific number of bodies which should be excluded from the total number of bodies exhumed and identified from the Glogova mass graves, which has been set out in Exhibit P00170.¹⁷

8. Noting the Prosecution’s submission that “the corrigendum was included” in Exhibit P00170, the Accused contends that Rule 65 *ter* No. 05756 is “moot or superfluous”, and that the request to admit it into evidence should be denied.¹⁸

(ii) Proposed Exhibits Relating to the Accused

9. Rule 65 *ter* No. 04871 is an evaluation of the Accused’s VRS service signed by Ratko Mladić and dated 18 July 1994.¹⁹ The Prosecution submits that because it bears an official VRS stamp and Mladić’s signature, it is sufficiently reliable for admission, and that it is demonstrative of the Accused’s prominent position within the VRS Main Staff as well as the high esteem in which Mladić held him.²⁰

10. The Accused submits that Rule 65 *ter* 04871 supports his case and does not oppose its admission into evidence.²¹

¹³ Response to 30 March Motion, paras. 11–13.

¹⁴ Response to 30 March Motion, paras. 15–16

¹⁵ Response to 30 March Motion, paras. 17–18.

¹⁶ The Chamber notes that the March 2009 report appears on the Prosecution’s Rule 65 *ter* Exhibit List as Rule 65 *ter* No. 05754, which has not been admitted into evidence.

¹⁷ 30 March Motion, para. 11 (referring to Ex. P00170, p. 40).

¹⁸ Response to 30 March Motion, paras. 21–22.

¹⁹ 30 March Motion, para. 12.

²⁰ *Ibid.*

²¹ Response to 30 March Motion, para. 23.

11. Rule 65 *ter* No. 03946 is an order dated 18 August 1994 which was issued by the Accused to the Intelligence Department of the Sarajevo-Romanija Corps and relates to the transportation of a prisoner of war.²² The Prosecution contends that because this document bears an official Sarajevo-Romanija Corps stamp, it is authentic and reliable.²³ According to the Prosecution, the document is indicative of the Accused's "intimate involvement in prisoner of war matters" and is probative of his role and responsibilities during the Indictment period.²⁴

12. The Accused claims that Rule 65 *ter* 03946 "does not refer to facts which are important for establishing either the events or the responsibility of Zdravko Tolimir for the events in July 1995",²⁵ which the Chamber interprets as an assertion that Rule Rule 65 *ter* 03946 is irrelevant to the facts of the case.

(iii) Proposed Exhibits Relating to Personnel and Events in the Srebrenica area between May and July 1995

13. Rule 65 *ter* No. 00431 is a 20 page collection of receipts from the Hotel Fontana indicating the nights during which various personnel were accommodated at the hotel.²⁶ It also includes a cover page bearing an official stamp and indicating the total amount billed to the Bratunac Brigade at the end of July 1995.²⁷ More specifically, the seventh page of the collection, dated 15 July 1995, indicates that Vujadin Popović was accommodated for two nights at the Hotel Fontana.²⁸ The Prosecution submits that the Chamber may take judicial notice of the authenticity of Rule 65 *ter* No. 00431 pursuant to Rule 94(B) because it was admitted in the *Popović, et al.* case.²⁹

14. Rule 65 *ter* No. 02737 is an official Bratunac Brigade document dated 25 July 1995 signed for Vidoje Blagojević granting Ljubiša Beara approval to use a room in the Hotel Fontana from 13 to 17 July 1995.³⁰ The Prosecution states that it bears an official stamp.³¹

15. The Accused submits that he "does not see any need for these documents" but does not oppose their admission into evidence.³² He also contends that Rule 65 *ter* 00431 and Rule 65 *ter* 02737 are not relevant to the meetings at the Hotel Fontana.³³

²² 30 March Motion, para. 13.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Response to 30 March Motion, para. 32.

²⁶ 30 March Motion, para. 14; Rule 65 *ter* No. 00431.

²⁷ 30 March Motion, para. 14; Rule 65 *ter* No. 00431.

²⁸ 30 March Motion, para. 14; Rule 65 *ter* No. 00431, p. 7.

²⁹ 30 March Motion, para. 14.

³⁰ 30 March Motion, para. 15; Rule 65 *ter* No. 02737. The Chamber notes that although the Prosecution submits that the document grants Beara permission to use the room until 16 July 1995, the document itself reflects the date 17 July 1995.

³¹ 30 March Motion, para. 15.

16. Rule 65 *ter* No. 05885 is a Drina Corps order dated 29 May 1995 type-signed by Milenko Živanović and sent to the Zvornik and Bratunac Brigades as well as the Skelani Battalion, ordering that the ABiH be prevented from entering the area of Zeleni Jadar after the withdrawal of UNPROFOR from the Zeleni Jadar checkpoint.³⁴ The Prosecution submits that Rule 65 *ter* No. 05885 is a part of the Drina Corps collection, the authenticity of which was described by witness Tomasz Blaszczyk, and that because Rule 65 *ter* No. 05885 was admitted in the Popović case, the Chamber may take judicial notice of its authenticity.³⁵ According to the Prosecution, it provides “important contextual evidence concerning the lead up to the attack” on Srebrenica.³⁶

17. The Accused does not object to the admission of Rule 65 *ter* No. 05885, but contests the Prosecution’s characterisation of the document. According to the Accused, the document pertains to the establishment of a defence line to prevent the ABiH from taking over a specific territory and “cannot be placed in the context of plans for the attack on Srebrenica”.³⁷

18. Rule 65 *ter* No. 00057 and Rule 65 *ter* No. 00058 are public security reports dated 12 and 13 July 1995, respectively, both of which are type-signed by Dragomir Vasić, the Chief of the Zvornik Public Security Centre.³⁸ The Prosecution submits that the Chamber may take judicial notice of the authenticity of both documents because they were admitted in the *Popović et al.* case.³⁹ According to the Prosecution, these documents demonstrate the involvement of the Zvornik MUP in securing and sealing off the roads in and around Konjević Polje and Sandići on 12 and 13 July, and more specifically, position them in the area where 16 Muslim prisoners were captured and executed along the Jadar River later that day.⁴⁰

19. The Accused also does not object to the admission of Rule 65 *ter* No. 00057 and Rule 65 *ter* No. 00058, although he suggests that they support the defence case theory that “large number[s] of people . . . lost their lives in combat operations” and that there was no cooperation between the VRS and the MUP.⁴¹

20. Rule 65 *ter* No. 00046 is a daily combat report from the VRS Main Staff to the President of the Republika Srpska and the various VRS corps, type-signed by Radivoje Miletić standing in for

³² Response to 30 March Motion, paras. 24–25.

³³ Response to 30 March Motion, para. 25.

³⁴ 30 March Motion, para. 16; Rule 65 *ter* No. 05885.

³⁵ 30 March Motion, para. 16.

³⁶ *Ibid.*

³⁷ Response to 30 March Motion, para. 27.

³⁸ 30 March Motion, para. 17; Rule 65 *ter* No. 00057; Rule 65 *ter* No. 00058.

³⁹ 30 March Motion, para. 17.

⁴⁰ *Ibid.*

⁴¹ Response to 30 March Motion, para. 28.

the Chief of Staff and dated 14 July 1995.⁴² The report states that Drina Corps units were “receiving a large number of Muslim fugitives who were surrendering to them”,⁴³ which, according to the Prosecution, demonstrates the Main Staff’s knowledge of the capture of large numbers of Muslim prisoners on 14 July.⁴⁴ The Prosecution submits that the document bears an incoming stamp and the signature of the receiver, and that the Chamber may take judicial notice of the authenticity of the document because it was admitted in the *Popović et al.* case.⁴⁵

21. The Response does not address Rule 65 *ter* No. 00046.

(iv) Proposed Exhibits Relating to VRS Communications

22. The Prosecution submits that both Exhibits P01000 (MFI) and P01001 (MFI) establish that the VRS security organs, under the Accused’s overall responsibility, were responsible for information security and that the VRS had the means to secure confidential information through encryption.⁴⁶

23. Specifically, Exhibit P01000 (MFI) is a document authored and type-signed by Vujadin Popović, dated 23 June 1995, and addressed to intelligence and security organs of various VRS brigades and battalions.⁴⁷ The Prosecution submits that Popović highlights the confidentiality risks associated with radio communications and cautions that all measures should be taken to ensure that confidential documents are transmitted using cryptographic data protection, and that this demonstrates the importance that VRS placed on ensuring that secret military information was protected.⁴⁸ The Prosecution further submits that the document is a part of the Drina Corps collection, the authenticity of which was described by witness Tomasz Blaszczyk, and that Exhibit P01000 (MFI) was admitted in the *Popović et al.* case.⁴⁹

24. Exhibit P01001 (MFI) is a document dated 1 September 1995 sent to the various corps Security Departments,⁵⁰ which the Prosecution submits was type-signed and sent by Ljubiša Beara.⁵¹ According to the Prosecution, Beara “notes that it is imperative” relay and radio

⁴² 30 March Motion, para. 18; Rule 65 *ter* No. 00046, pp. 1, 4.

⁴³ 30 March Motion, para. 18; Rule 65 *ter* No. 00046, p. 3.

⁴⁴ 30 March Motion, para. 18.

⁴⁵ *Ibid.*

⁴⁶ 30 March Motion, para. 20.

⁴⁷ 30 March Motion, para. 19; Ex. P01000 (MFI).

⁴⁸ 30 March Motion, para. 19.

⁴⁹ 30 March Motion, para. 19.

⁵⁰ Ex. P01001 (MFI).

⁵¹ 30 March Motion, para. 20.

communications users use protected lines and coded teletype communication to transmit confidential information and maximise the use of code books.⁵²

25. The Accused submits that neither P01000 (MFI) nor P01001 (MFI) “relate to the events covered by” the Indictment.⁵³ He also contests the Prosecution’s interpretation of the documents, submitting that it is standard practice to protect secret military information, and that this duty was borne by the commanders of all structures of the army, not by the security organs.⁵⁴

(v) Rule 65 ter No. 02937b (confidential)

26. Rule 65 ter 02937b is a confidential intercepted communication dated 12 July 1995 at 12:10 p.m.⁵⁵ The Prosecution notes that, in the Chamber’s “Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table” dated 20 January 2012, the Chamber denied its admission into evidence as no English translation was available in e-Court,⁵⁶ but submits that this translation is now available and refers to its submissions set out in the “Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table”,⁵⁷ in which the Prosecution submitted that the participants in the conversation recorded in Rule 65 ter 02937b were Radislav Krstić, Chief of Staff of the Drina Corps and Rajko Krsmanović, Transport Officer of the Drina Corps.⁵⁸ According to the Prosecution, Krstić directs Krsmanović to send buses immediately,⁵⁹ and this direction should be considered in the context of Exhibit P00244, which records an earlier conversation,⁶⁰ and Exhibit P01564a, which contains a summary of the conversation recorded in Rule 65 ter 02937b.⁶¹

27. The Accused refers to his “position on intercepted communication as evidence . . . [which] has been stated several times during the trial” and declines to reiterate these submissions.⁶²

(b) 10 April Motion

28. The Prosecution proposes the admission of two documents, Rule 65 ter No. 07626 and Rule 65 ter No. 07627, each of which, it submits, are type-signed intelligence reports sent by the

⁵² *Ibid.* See also Ex. P01001 (MFI), p. 3.

⁵³ Response to 30 March Motion, para. 30.

⁵⁴ Response to 30 March Motion, para. 29.

⁵⁵ 30 March Motion, para. 21; Rule 65 ter No. 02937b.

⁵⁶ 30 March Motion, para. 21 (citing Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, para. 13).

⁵⁷ 30 March Motion, paras. 21–22.

⁵⁸ Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 27 September 2011, Appendix B.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ 30 March Motion, para. 22. The Chamber notes that in this regard, the Prosecution’s submission differs from that contained in Appendix B of the Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, wherein the Prosecution stated that Exhibit P01564a was a “subsequent conversation”. Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 27 September 2011, Appendix B.

Accused on 22 June 1995.⁶³ According to the Prosecution, both documents concern developments in the Srebrenica and Žepa areas on 21 and 22 June 1995, and are therefore relevant to establish the involvement of the Intelligence and Security Administrations in the preparations for the attacks on the two enclaves, as well as the Accused's presence in Crna Rijeka and his knowledge of the 10th Sabotage Detachment's activities.⁶⁴ The Prosecution further contends that the documents each bear an identifying strictly confidential number from the VRS Main Staff Sector for Intelligence and Security, as well as a stamp on the last page which corresponds to the stamp appearing on other Main Staff Communications, and that therefore they bear sufficient indicia of reliability for admission from the bar table.⁶⁵

29. The Chamber notes that the Accused did not file a response to the 10 April Motion.

B. Motion for Extension of Time

30. The Accused's Motion for Extension of Time encompasses two requests to extend the applicable time limits for him to (1) respond to the 30 March Motion and (2) submit his Final Brief. Since the Motion for Extension of Time was filed in English two days before the expiration of the Accused's time to respond to the 30 March Motion, having considered the arguments of the Parties, the Chamber partly granted the Motion for Extension of Time by extending the time limit for filing a response to the 30 March Motion to 3 May 2012.⁶⁶ Accordingly, the Chamber will confine its discussion to the Accused's request for an extension of time to submit his Final Trial Brief here.

31. The Accused contends that the 30 March Motion was submitted at "a very late stage" and "considerably disrupts the procedure for producing" his Final Trial Brief,⁶⁷ as a "significant period of time" must be devoted to analysing the Proposed Exhibits, particularly Rule 65 *ter* No. 07625.⁶⁸ The Accused also claims that it takes a "considerable amount of time" to review the documentation

⁶² Response to 30 March Motion, para. 31.

⁶³ 10 April Motion, paras. 8–10; Rule 65 *ter* No. 07626; Rule 65 *ter* no. 07627.

⁶⁴ 10 April Motion, paras. 10–12.

⁶⁵ 10 April Motion, para. 12.

⁶⁶ The Prosecution filed its "Response to Accused's Urgent Motion for Extension of Time Limits" on 26 April 2012. In relation to his request for an extension of time to respond to the 30 March Motion, the Accused submitted that Rule 65 *ter* Nos. 07624 and 07625 had not yet been translated, and that an analysis of Rule 65 *ter* No. 07625 was time consuming, as it had been "amended to a considerable extent", and that he needed time to analyse the Proposed Exhibits in order to decide whether it would be necessary to propose additional documents for admission which would be relevant to the issues raised by the Proposed Exhibits. Motion for Extension of Time, paras. 7–8. In its response, the Prosecution acknowledged the "pressing circumstances" underlying the Accused's requests, deferred to the Chamber's discretion, notified the Chamber that the translation of Rule 65 *ter* No. 07625 was provided to the Defence on 25 April 2012, and stated that although Rule 65 *ter* 07624 had not yet been translated, it is "simply an update" of the lists of victims provided in Exhibit P00167. Prosecution's Response to Accused's Urgent Motion for Extension of Time Limits, paras. 1–2. On these bases, the Chamber granted – by informal communication which is hereby put on the record – the Accused an extension of time to respond to the 30 March Motion until 3 May 2012.

⁶⁷ Motion for Extension of Time, para. 4.

adduced in the *Karadžić* case, and moreover, that confidential materials in that case have not yet been disclosed to him.⁶⁹ On this basis, the Accused requests an extension of time until 20 June 2012 in order to “take steps related to the analysis” of Rule 65 *ter* No. 07625 and Rule 65 *ter* No. 07624 and “evidence whose admission is sought by the Prosecution”, and submits that he does not believe that the extension he seeks will affect the timing of the closing arguments or the overall trial schedule.⁷⁰

32. While deferring to the Chamber’s discretion, the Prosecution requests that any new deadline for the Accused’s Final Trial Brief apply equally to both Parties.⁷¹

II. APPLICABLE LAW

A. Bar Table Motions

1. Rule 65 *ter*

33. The Chamber recalls that according to the Tribunal’s jurisprudence, in the exercise of its inherent discretion to manage the trial proceedings, a Trial Chamber may grant a request for the amendment of the party’s exhibit lists if it is satisfied that it is in the interests of justice to do so,⁷² and in such exercise, the Chamber must carefully balance any proposed amendment 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”).⁷³ In its assessment, the Chamber must consider whether the material sought for addition by the Prosecution is *prima facie* relevant and likely to be of probative value, as well as 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.⁷⁴

2. Admission from the Bar Table

34. 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.

⁶⁸ Motion for Extension of Time, para. 11.

⁶⁹ Motion for Extension of Time, para. 12.

⁷⁰ Motion for Extension of Time, paras. 13, 15.

⁷¹ Prosecution’s Response to Accused’s Urgent Motion for Extension of Time Limits, paras. 1, 3.

⁷² Decision on Prosecution Motion to Admit One Document From the Bar Table Pursuant to the Testimony of Ramiz Dumanjić (“Decision on Bar Table Motion to Admit One Document”), 6 March 2012, para. 10 (citations omitted).

⁷³ *Ibid* (citations omitted).

⁷⁴ *Ibid* (citations omitted).

35. The admission of evidence from the bar table is a practice established in the case-law jurisprudence of the Tribunal.⁷⁵ 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”.⁷⁶ Once these requirements are satisfied, the Chamber maintains discretion over the admission of evidence under Rule 89.

36. Moreover, Rule 85 (A) of the Rules of Procedure and Evidence (“Rules”) provides that

[. . .] unless otherwise directed, by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- i. evidence for the prosecution;
- ii. evidence for the defence;
- iii. prosecution evidence in rebuttal;
- iv. defence evidence in rejoinder;
- v. evidence ordered by the Trial Chamber pursuant to Rule 98; and
- vi. any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more charges in the indictment.

As the Appeals Chamber has recalled, according to the plain language of the Rule, this sequence must be followed unless—in the interests of justice—the Trial Chamber directs otherwise,⁷⁷ and “[a]s a general rule, the Prosecution must present the evidence in support of its case during its case in chief”.⁷⁸ The importance of the prescribed sequence emanates from the accused’s rights under Articles 21(4)(b) and (e) of the Statute to have adequate time and facilities for the preparation of his defence and to have a fair opportunity to challenge the evidence tendered by the Prosecution.⁷⁹

⁷⁵ Decision on Bar Table Motion to Admit One Document (citations omitted).

⁷⁶ *Ibid* (citations omitted).

⁷⁷ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution’s Appeal Against the Trial Chamber’s Order to Call Alibi Rebuttal Evidence During the Prosecution’s Case in Chief, 16 October 2008 (“*Lukić and Lukić* October 2008 Decision”), para. 22.

⁷⁸ *Lukić and Lukić* October 2008 Decision, paras. 11–12; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 216 (noting that the admission of rebuttal evidence, fresh evidence, and evidence pursuant to Rule 98 all constitute exceptions to the regular sequence of requiring the Prosecution to close its case and permitting the defence to begin answering allegations); *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR73.13, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009 (“*Prlić et al.* February 2009 Decision”), para. 23.

⁷⁹ *Prlić et al.* February 2009 Decision, para. 23 (citing *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008 (“*Delić* April 2008 Decision”), para. 22).

37. A common deviation from this general sequence involves a party's request to re-open its case for the purpose of admitting "fresh" evidence,⁸⁰ which necessitates specific justification.⁸¹ The Appeals Chamber has endorsed a definition of fresh evidence which envisages two categories thereof: (1) evidence which was not in the tendering party's possession at the time of the conclusion of its case and which by the exercise of reasonable diligence could not have been obtained at that time,⁸² and (2) evidence which was in the tendering party's possession at the close of its case but which becomes significant only in light of other newly acquired evidence.⁸³

38. In considering whether to allow a party to re-open its case with a view to admitting fresh evidence, the Chamber must first determine whether the tendering party could, with reasonable diligence, have identified and presented the evidence during its case-in-chief.⁸⁴ A Chamber may also consider whether the significance of documents already in the possession of the tendering party "could [. . .] have been reasonably understood" without other newly found evidence.⁸⁵ If not, the Chamber has discretion to admit the proffered evidence, but should consider whether its probative value is substantially outweighed by the need to ensure a fair trial, particularly with regard to the late stage of the proceedings,⁸⁶ and may properly decline to do so where it would not serve the "interests of justice".⁸⁷ Such an evaluation is "highly contextual, depending on the factual

⁸⁰ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 4 July 2011; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 1 September 2011; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Motion to Reopen Prosecution Case and Tender Documents Through the Bar Table, 1 October 2010; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Motion to Reopen the Prosecution Case and Tender Documents Through the Bar Table, 4 November 2010; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Prosecution's Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table, 5 November 2009; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, 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. *See also* *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Prosecution Motion to Reopen its Case-In-Chief (Death Certificates) and Tender Documents from the Bar Table, 26 July 2011; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Admitting Into Evidence Documents Supplementing the CHS, 25 November 2011, para. 29 (ultimately finding that the proffered material did not constitute fresh evidence).

⁸¹ *Prljić et al.* February 2009 Decision, para. 23 (citing *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeal Judgement"), para. 271, and *Delić* April 2008 Decision, para. 22).

⁸² *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 ("Čelebići Decision on Reopening"), para. 26; *Čelebići* Appeal Judgement, para. 279 (endorsing the Trial Chamber's definition of fresh evidence). Fresh evidence was defined in contrast to rebuttal evidence, which is limited to "evidence [for which admission is sought in order to] refute a particular piece of evidence which has been adduced by the defence", and the fact that fresh evidence is newly obtained does not necessarily render it admissible as rebuttal evidence; rather, a different basis for admissibility applies to fresh evidence. *Čelebići* Appeal Judgement, paras. 273, 276 (citing *Čelebići* Decision on Reopening, para. 23).

⁸³ *Prosecutor v. Popović, et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008 ("*Popović et al.* September 2008 Decision"), para. 11.

⁸⁴ *Čelebići* Appeal Judgement, para. 283; *Prosecutor v. Gotovina, et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermac and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010 ("*Gotovina et al.* July 2010 Decision"), para. 24.

⁸⁵ *Popović et al.* September 2008 Decision, para. 11.

⁸⁶ *Čelebići* Appeal Judgement, para. 283 (citing Rule 89(D)); *Gotovina et al.* July 2010 Decision, para. 24.

⁸⁷ *Prljić et al.* February 2009 Decision, para. 24.

circumstances of each case”,⁸⁸ and both the stage of the trial at which the introduction of such evidence is sought, as well as the potential delay its admission would cause “are matters highly relevant to the fairness to the accused”.⁸⁹

39. With regard to proposed evidence which does not constitute fresh evidence, a Trial Chamber may nevertheless order its admission where it would be “in the interests of justice” to do so.⁹⁰ In this regard, although a Trial Chamber is entitled to have the benefit of all relevant evidence put before it in order to reach an informed and well-balanced judgement, and its ability to accept evidence late in the trial but prior to judgement indeed conforms to the statutory requirement of a fair trial,⁹¹ the Appeals Chamber has held that the requirement that an accused be given a fair opportunity to challenge evidence tendered by the Prosecution is “all the more true if [the] evidence is tendered after the close of the Prosecution case”.⁹² Where an accused opposes the admission of such evidence, “a Trial Chamber must consider how it intends to strike the appropriate balance between the need to ensure the rights of the accused and its decision to admit such evidence”.⁹³

40. The Chamber further recalls and refers to the law applicable to the addition of documents to the Rule 65 *ter* Exhibit List and to the admission of evidence from the bar table as set out in its previous decisions.⁹⁴

⁸⁸ *Gotovina et al.* July 2010 Decision, para. 23 (“Where the admittance of [fresh] evidence constitutes a variation of the sequence of the presentation of evidence set out in Rule 85(A) of the Rules, the Trial Chamber may exercise its discretion to admit the evidence only where it is in the interests of justice.”).

⁸⁹ *Čelebići* Appeal Judgement, para. 290; *Čelebići* Decision on Reopening, para. 27 (“As a general rule, it may be considered that where the Prosecution seeks to adduce further evidence, the later in the trial that the request is made the less likely the Trial Chamber is to accede to the request [to reopen the case].”)

⁹⁰ *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Granting Prosecution’s Supplemental Bar Table Motion to Admit Nine Maps, 15 December 2011, para. 13 (referring to the Chamber’s authority under Rule 85). *See also Prlić et al.* February 2009 Decision, para. 23 (“[T]he Appeals Chamber cannot agree with the Appellants that there is an *absolute ban* for the Prosecution to tender evidence once its case presentation has been closed (save for rebuttal and re-opening).”). Yet the Appeals Chamber has also tentatively endorsed a Trial Chamber’s finding that evidence which was previously available to the Prosecution, and whose relevance did not arise unexpectedly and which merely remedied a defect in the case of the Prosecution was generally not admissible. *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 273 (“Although the Appeals Chamber would not itself use that particular terminology, it sees [. . .] no error in that statement when read in context.”). The Chamber thus considers that it must exercise caution when analysing the prospect of admitting evidence tendered from the bar table by a party after the close of its case.

⁹¹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 31 (concluding that because of this entitlement, the Prosecution’s Rule 68 disclosure obligations continue until the date of the delivery of the trial judgement).

⁹² *Delić* April 2008 Decision, para. 22.

⁹³ *Delić* April 2008 Decision, para. 22.

⁹⁴ Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012, paras. 9–10; Decision on First Motion by the Accused for Admission of Documents from the Bar Table, 7 February 2012, paras. 3–4.

B. Motion for Extension of Time

41. Although Rule 126 *bis* of the Rules prescribes that the usual time limit for filing a response to a motion is 14 days, Rule 127(A)(i) of the Rules provides that a Trial Chamber may, on good cause being shown by motion, enlarge or reduce any time prescribed by or under the Rules.

III. DISCUSSION

A. Bar Table Motions

1. Addition to the Rule 65 *ter* Exhibit List

42. 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. The four Proposed Exhibits which are not already on the Rule 65 *ter* Exhibit List are Rule 65 *ter* Nos. 07624, 07625, (07626, and 07627, respectively.

43. In its consideration of whether to grant the requested additions to the Rule 65 *ter* Exhibit list at this stage of the proceedings,⁹⁵ 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 the stage of the proceedings at which the materials were first provided to the Accused.

44. The Chamber notes that neither of the Bar Table Motions includes any submissions which would allow the Chamber to assess whether the Prosecution has acted with sufficient diligence in disclosing them to the Accused or in seeking their addition to the Rule 65 *ter* List. In fact, the only information available to the Chamber regarding the timing of when any of the Proposed Exhibits became available to the Prosecution is contained in the references listed on the first page of Rule 65 *ter* No. 07625, which indicate that the report has been updated to reflect updated data provided to the Tribunal by the International Commission on Missing Persons (“ICMP”) in December 2010.⁹⁶ The Chamber also observes that Rule 65 *ter* No. 07625 itself is dated 13 January 2012, a full six weeks prior to the submission of the 30 March Motion, and that a translation of Rule 65 *ter* 07625 was only made available to the Accused on 26 April 2012, more than two months after the close of

⁹⁵ The Defence case closed on 15 February 2012, having commenced on 23 January 2012. On 20 September 2011, the Chamber issued an order declaring the Prosecution case closed on 27 September 2011, save for the testimony of Witness 208 and any “Decisions on Motions relating to the evidence in the Prosecution case that are still pending on that day”. Order Regarding the Scheduling of the Defence Case and Related Matters, 20 September 2011.

⁹⁶ Rule 65 *ter* 07625, p. 1. The Chamber observes that one of the documents comprising this updated data set, ERN D000-3464, has already been admitted into evidence as Exhibit P01940 in February 2011.

the Accused's case. Under these circumstances, the Chamber does not consider that the Prosecution has acted with sufficient diligence so as to justify the addition of Rule 65 *ter* No. 07625 to the Rule 65 *ter* Exhibit List, particularly when to do so would prejudice the Accused given the late stage of the proceedings. Accordingly, the Prosecution's request to add Rule 65 *ter* Nos. 07624, 07625, 07626, and 07627 to the Rule 65 *ter* Exhibit List is denied.

2. Admission of Evidence from the Bar Table

45. At the outset, the Chamber observes that the Prosecution has not suggested that it seeks the admission of the Proposed Exhibits as rebuttal evidence, nor has it sought leave to reopen its case. Further, the Prosecution has not provided any information in either of the Bar Table Motions which would enable the Chamber to analyse the extent to which the remaining Proposed Exhibits might be properly characterised as fresh evidence or the extent to which other newly found evidence might have changed a reasonable understanding of the significance of the remaining Proposed Exhibits.⁹⁷ The Chamber therefore finds that the Prosecution has not established that any of the Proposed Exhibits constitute fresh evidence, thereby justifying a reopening of the Prosecution's case.

46. Accordingly, the question before the Chamber is whether authorising a variation of the sequence set out in Rule 85 in order to admit any of the Proposed Exhibits would be in the interests of justice.⁹⁸ The Chamber will thus analyse the remaining Proposed Exhibits solely through the lens of whether they satisfy the requirements for admission from the bar table, and if so, whether it would be in the interests of justice pursuant to Rule 85 to permit their admission into evidence at this late stage of the proceedings.

47. As a general matter, the Chamber accepts the Prosecution's submissions that the remaining Proposed Exhibits are relevant and probative as required by Rule 89(C). However, despite their relevance and probative value, the Chamber considers that, given the late stage of the proceedings, the impact that admitting the remaining Proposed Exhibits would have on the Accused's preparation of the Final Trial Brief, and the need to ensure the Accused's fair trial rights by permitting him to challenge the evidence against him, it would not be in the interests of justice or an expeditious trial to permit a variation from the general sequence set out in Rule 85 in order to admit the remaining Proposed Exhibits into evidence.

⁹⁷ The Chamber also observes that the Prosecution has not suggested that any of the Proposed Exhibits constitute rebuttal evidence.

⁹⁸ The Chamber is of the view that the convergence of the Parties' positions on the propriety of admitting certain Proposed Exhibits does not necessarily mean that admitting such Proposed Exhibits would be in the interests of justice.

B. Motion for Extension of Time

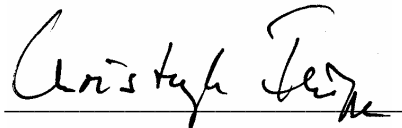
48. Turning to the Accused's request for an extension of time to submit his Final Trial Brief, the Chamber is mindful of the fact that the Accused spent time preparing the Response to the 30 March Motion, and to preparing for the contingency that the Proposed Exhibits might be admitted. The Chamber therefore finds that the Accused has shown good cause for granting an extension of time to file his Final Trial Brief. However, taking into account the fact that none of the Proposed Exhibits are admitted into evidence by this decision, an extension until 20 June 2012 would be disproportionate. The Chamber shall therefore set the deadline for the submission of the final briefs by both Parties for 11 June 2012.

IV. DISPOSITION

For these reasons, pursuant to Rules 65 *ter*, 85, 89, and 127 of the Rules, the Trial Chamber hereby

- (1) **DENIES** the Prosecution's 30 March Motion and 10 April Motion;
- (2) **GRANTS** in part the Accused's request for an extension of time to submit his Final Trial Brief until 11 June 2012;
- (3) **ORDERS** that the extension of time shall apply equally to both Parties; and
- (4) **GIVES NOTICE** that the Trial Chamber shall not entertain any further Motions seeking the introduction of additional evidence.

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



Judge Christoph Flügge

Presiding Judge

Dated this 14th day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]