



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-08-91-T
Date: 14 April 2010
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 14 April 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION GRANTING IN PART THE
PROSECUTION'S MOTION OF 18 FEBRUARY 2010 TO
AMEND ITS RULE 65 *TER* EXHIBIT LIST AND
DENYING THE SUPPLEMENTAL MOTION OF
2 MARCH 2010**

The Office of the Prosecutor

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TRIAL CHAMBER II (“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:

- “Prosecution’s motion to amend its Rule 65 *ter* list of exhibits”, filed on 18 February 2010 (“Motion”), whereby the Prosecution seeks leave to add 98 exhibits¹ to and to remove 109 exhibits² from its Rule 65 *ter* list, and
- “Prosecution’s supplemental motion to Prosecution’s motion to amend its Rule 65 *ter* list of exhibits”, filed on 2 March 2010 (“Second Supplemental Motion”), whereby the Prosecution renews its request “in relation to 20 [of the 98] documents relating to communications within RSMUP”,³ the addition of which to the Prosecution’s Rule 65 *ter* list was denied by the Trial Chamber in an oral decision of 25 February 2010 (“First Oral Decision”).⁴

I. PROCEDURAL HISTORY

1. On 16 February 2007, before the joinder of the cases against Mićo Stanišić and Stojan Župljanin, the Prosecution filed pursuant to Rule 65 *ter*(E) of the Rules of Procedure and Evidence (“Rules”) a revised pre-trial brief and related submissions, which included a list of exhibits it intended to offer in the case of Mićo Stanišić.⁵ On 21 May 2008, the Prosecution sought to amend that exhibit list “by removing 741 items from the exhibit list and by adding 363 items”.⁶
2. On 23 September 2008, the cases against Mićo Stanišić and Stojan Župljanin were joined.⁷ On 8 May 2009, the Trial Chamber ordered the Prosecution to file, *inter alia*, “a consolidated list of exhibits it intends to proffer” as specified in Rule 65 *ter*(E)(iii) and declared moot the Prosecution’s

¹ The Trial Chamber notes a discrepancy in the number of exhibits the Prosecution proposes: while the Prosecution proposes the addition of 98 documents in paragraph 1 of the Motion, it appears to seek to add 95 documents in paragraph 3 of the Motion. The Trial Chamber counts 94 documents as listed at Annex A, B, C, D, E and F to the Motion.

² The Trial Chamber counts 108 documents as listed at Annex G to the Motion.

³ Second Supplemental Motion, para. 1, referring to Rule 65 *ter* nos. 3500 to 3520 with the exception of Rule 65 *ter* no. 3507 that was tendered as Rule 65 *ter* no. 10146 and admitted into evidence as P395 on 19 November 2009.

⁴ Hearing, 25 Feb 2010, T. 6856-6858.

⁵ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution’s revised pre-trial brief, 16 Feb 2007.

⁶ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution’s motion seeking leave to amend its Rule 65 *ter* exhibit list, with confidential annexes, 21 May 2008, para. 1.

⁷ *Prosecutor v. Stanišić*, Case No. IT-04-79-PT and *Prosecutor v. Župljanin*, Case No. IT-99-3 6/2-PT, Decision on Prosecution’s motion for joinder and for leave to consolidate and amend indictments, 23 Sep 2008.

motion of 21 May 2008 to amend its Rule 65 *ter* exhibit list.⁸ On 8 June 2009, the Prosecution filed a consolidated pre-trial brief and related submissions pursuant to Rule 65 *ter*(E) in the joined case.⁹

3. On 23 February 2010, the Defence of Mićo Stanišić (“Stanišić Defence”) responded to the Motion, objecting in part (“Response”).¹⁰ On 24 February 2010, the Defence of Stojan Župljanin (“Župljanin Defence”, collectively “Defence”) responded that it joined in the response of the Stanišić Defence.¹¹

4. On 25 February 2010, the Trial Chamber issued the First Oral Decision whereby it denied the Motion in respect to 23 of the documents subject of the Motion and decided to remain seised of the Motion in all other respects.¹²

5. On 26 February 2010, the Prosecution filed a supplemental motion to the Motion (“First Supplemental Motion”), whereby it renewed its request to add to its exhibit list proposed Rule 65 *ter* nos. 3563, 3565 and 3569 that are also subject of the Motion.¹³

6. On 2 March 2010, the Prosecution sought leave to reply and replied to the Response (“Reply”).¹⁴ The Trial Chamber will grant leave to reply.

7. On 3 March 2010, after hearing the parties on the matter in court, the Trial Chamber granted the First Supplemental Motion and allowed the Prosecution to add proposed Rule 65 *ter* nos. 3563, 3565 and 3569 to its exhibit list (“Second Oral Decision”).¹⁵

8. On 10 March 2010, the Stanišić Defence objected to the Second Supplemental Motion, as did the Župljanin Defence on 16 March 2010 (“Stanišić Supplemental Response” and “Župljanin Supplemental Response”, respectively).¹⁶

⁸ Scheduling order for submission of pre-trial-briefs and other material pursuant to Rule 65 *ter*, 8 May 2009, p. 3.

⁹ Prosecution’s pre-trial brief, 8 Jun 2009.

¹⁰ Response by Mr. Stanišić to Prosecution’s motion to amend its 65ter list of exhibits, 23 Feb 2010.

¹¹ Hearing, 24 Feb 2010, T. 6855.

¹² Hearing, 25 Feb 2010, T. 6856-6858. The 23 documents are Rule 65 *ter* nos. 3500 to 3520, 3557 and 3559.

¹³ Prosecution’s supplemental motion for leave to amend its rule 65ter exhibit list with regard to documents related to ST-80, ST-81 and ST-179, confidential, 26 Feb 2010.

¹⁴ Prosecution’s motion seeking leave to reply and proposed reply to Defence response to Prosecution motion to amend its 65 *ter* list of exhibits, 2 Mar 2010.

¹⁵ Hearing, 3 Mar 2010, T. 7193-7195.

¹⁶ Response by Mr. Stanišić to Prosecution’s supplemental motion to Prosecution motion to amend its 65ter list of exhibits, 10 Mar 2010; Župljanin response to Prosecution’s supplemental motion to Prosecution motion to amend its 65ter list of exhibits, 16 Mar 2010.

II. SUBMISSIONS

A. General submissions

9. The Prosecution groups the documents it seeks to add into seven different categories: (1) documents related to communications within RSMUP, (2) documents stemming from recent interviews, (3) intercepts of conversations, (4) “Miloš” documents, (5) recently received or re-evaluated documents, (6) previously withdrawn documents and (7) technical matters.

10. The Prosecution argues that “Trial Chambers have granted Prosecution motions to amend *65ter* lists [...] at late stages of the trial itself, thus demonstrating the proper flexible approach to the exercise of their discretion.”¹⁷

11. The Prosecution submits that after filing its pre-trial brief it “interviewed new witnesses in the course of its investigations and [that] certain issues have become clearer as the trial progresses [exposing] the relevance of the documents the Prosecution presently seeks to add to its list.”¹⁸ It submits that of “the 95 [*sic*] proposed exhibits, 19 were formerly included in the *65ter* list and subsequently withdrawn in a motion”, that “the documents are relevant” and that they “can and will be utilised with forthcoming witnesses and will enhance the Trial Chamber’s ability to consider the issues in the case.”¹⁹ The Prosecution further submits that all the documents have been disclosed to the Defence.²⁰

12. In response, the Defence submit that the Prosecution “should not be allowed to expand and modify its case as the trial progresses”, arguing that the Prosecution is “presumed to know its case long before filing its Pre-Trial Brief” and submitting that “in this case the Prosecution files for amendments either right before or after every third witness testifies.”²¹ The Defence submits that the Prosecution’s practice “is not only contrary to the existing jurisprudence, but it also creates a problem in keeping track of changes for all parties to the case”.²² In this respect, the Defence contends that repeated amendments of the Rule *65 ter* exhibit list raise issues of “compliance with human rights standards of fairness [...] and [infringe] rights of the Accused set out in Articles 20

¹⁷ Motion, para. 22.

¹⁸ *Id.*, para. 2.

¹⁹ Motion, para. 3.

²⁰ *Id.*, para. 4.

²¹ Response, para. 18. See also *id.*, para. 19, where the Defence urges the Trial Chamber to consider “that Mr. Stanišić was indicted on 24 February 2005”, that “pre-trial phase in this case lasted for four and a half years” and that the Prosecution “had plenty of time and resources to prepare the case”.

and 21 of the Statute”.²³ It is the Defence’s view that “[a]mendments of the 65ter list can only be exceptions and not a right that the Prosecution can exercise two or even three times a month in the course of the trial.”²⁴

13. In reply, the Prosecution acknowledges the discrepancies in the annexes to the Motion and states that it rectifies them in amended versions of the annexes attached to the Reply.²⁵ It submits that the Defence’s claim that motions seeking to amend a Rule 65ter list of exhibits are “contrary to the existing jurisprudence” is an incorrect statement of the law.²⁶ The Prosecution submits that it has not reconsidered its case but has only reviewed “the body of documentary evidence it seeks to produce into evidence, as the case progressed and as the Accused reveal or clarify the nature of their defence.”²⁷ The Prosecution states that it “applied restraint when compiling its original 65ter list, being “[m]indful of the burden on the Trial Chamber” and “the order by the Pre-Trial Chamber [of 8 May 2008] to reduce the scope [of] its case”.²⁸ Lastly, the Prosecution states that as the Defence has not identified “any specific prejudice as a result of the addition of these documents [...] the Trial Chamber should find that the interests of justice call for granting the Prosecution’s Motion.”²⁹

B. Specific submissions to categories of documents

1. Documents related to communications within RSMUP (Annex A to the Motion)

14. In the First Oral Decision, the Trial Chamber denied the Motion in respect of this category of documents. However, these documents are also subject of the Second Supplemental Motion, wherein the Prosecution expresses its “understanding that the [First Oral Decision] was not intended to imply permanent exclusion of documents which are manifestly relevant to an issue in the case.”³⁰ The Prosecution argues that it “intends to use these documents with upcoming witnesses ST-126

²² *Id.*, para. 20, where the Defence also argues that “numerous documents the Prosecution seeks to add to the 65ter list are already on the list, while at the same time, the Prosecution seeks to withdraw a number of documents that are already exhibited”.

²³ *Id.*, para. 23.

²⁴ *Ibid.*

²⁵ Reply, para. 3.

²⁶ *Id.*, para. 4, where the Prosecution also provides examples of instances in other cases where the Rule 65 ter exhibit list have been amended.

²⁷ Reply, para. 5, where the Prosecution also argues that “[t]he fact that the Defence were ordered to supplement their pre-trial briefs [...] is a clear demonstration of the reluctance by the Defence to give details of what were issues in the case”.

²⁸ *Ibid.*, referring to *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Interim decision on Prosecution’s motion and supplement for leave to amend the indictment, confidential, 4 Apr 2008 and *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Invitation pursuant to Rule 73 bis(D), 8 May 2008 (“8 May 2008 Invitation”).

²⁹ *Id.*, para. 8.

³⁰ Second Supplemental Motion, para. 5.

and ST-167 [who] will not be called to testify before May 2010.”³¹ For these reasons, the Prosecution renews its application for the addition of those documents.

15. The Defence submit that the Prosecution cannot “supplement” the Motion in respect of “what has already been decided on.”³²

2. Documents stemming from recent interviews (Annex B to the Motion)

16. The Prosecution submits that this category consists of 23 documents which were “either recently obtained during the course of witness interviews or which were already in the possession of the Prosecution but their relevance was perceived only during the course of these interviews.”³³ The Prosecution states that 18 of them “were highlighted or provided during the interview of witness ST-216” and that “the relevance of the remaining six documents was made obvious during the course of the interview of witness ST-214.”³⁴ The Prosecution submits that the documents “were disclosed between September and December 2009, except for five documents [which were] disclosed in early February 2010.”³⁵

17. The Defence argue that the Prosecution does not identify which of these documents were obtained from the “recently” interviewed witnesses and which have been in its possession “while the Prosecution did not see their relevance until [*sic*] interviewed additional witnesses.”³⁶ The Defence submit that “[i]n any case, the Prosecution interviewed ST-216 on 24 November 2009, while ST-214 was interviewed on 8 September 2009”, which, in the Defence’s view, would have enabled the Prosecution to file the Motion earlier, giving more notice to the Defence.³⁷

18. In reply, the Prosecution submits that it “had in mind the Trial Chamber’s repeated guidance, that overly inclusive lists of exhibits may be counterproductive when assessing the totality of evidence at the end of trial” and that for this reason, “the Prosecution assessed the existing documents on its list of exhibits prior to filing this consolidated Motion.”³⁸ The Prosecution also submits that the Defence’s contention that the Prosecution failed to indicate “which of these documents were obtained recently and which ones were already in its possession

³¹ *Id.*, para. 6.

³² Stanišić Supplemental Response, para. 7; Župljanin Supplemental Response, para. 4.

³³ Motion, para. 8. The Trial Chamber counts 26 documents in Annex B and not 23 as submitted by the Prosecution.

³⁴ Motion, para. 8. It is noted that this would amount to 24 documents.

³⁵ *Ibid.*

³⁶ Response, para. 28.

³⁷ *Ibid.*

³⁸ Reply, para. 9, referring to a statement by Judge Harhoff at the hearing on 22 October 2009 (T. 1952) that the “experience from all other trials before this Tribunal is that the amount of evidence that comes before the Judges is just so overwhelming.”

[...] is not relevant consideration for the determination of the matter”.³⁹ In its view, the “key factor” is that the Prosecution “discovered the majority of these documents when conducting internal searches of its databases when preparing for witness interviews.”⁴⁰

19. The Prosecution states that it amends Annex B in view of the fact that proposed Rule 65 *ter* nos. 3523 and 3527 are already on the exhibit list and that 3525 and 3536 have already been admitted as P27 and P114.⁴¹

3. Intercepts of conversations (Annex C to the Motion)

20. The Prosecution submits that this category “consists of six intercepts, which could be introduced through the evidence of witnesses ST-187 and ST-214”.⁴² The Prosecution states that these documents have been in its possession and that a further review revealed their relevance and importance to the case.⁴³ According to the Prosecution, five of these documents were disclosed to the Defence “several years ago” and one of them, Rule 65 *ter* no. 3544 was disclosed in September 2009.⁴⁴ In the Prosecution’s view, the Defence cannot, therefore, “be disadvantaged by the addition of these documents.”⁴⁵

21. The Defence repeats its objection as set out in a previous motion concerning intercepts and submits that “arguments regarding ST-214 are the same [as those proffered in response to the Prosecution’s application regarding the Annex B documents].”⁴⁶ The Defence also states that as ST187 was interviewed in 2004, “the Prosecution, once again, seeks to add documents on the eve of his testimony in this trial.”⁴⁷

22. In reply, the Prosecution states with regard to ST187 that “[t]he five intercepts were originally withdrawn from the list prior to the Prosecution’s decision to add witness ST-187 to its witness list on 8 June 2009” and that “[a] review of the material related to this witness in

³⁹ *Id.*, para 10.

⁴⁰ *Ibid.*, where the Prosecution also argues that “[t]hese documents will assist the Trial Chamber in understanding the evidence of the witness in relation to topics such as the perpetrators of crimes who were members of the RSMUP, awareness of the RSMUP leadership of the participation of policemen in crimes, material capacity by the leaders to take measures against perpetrators, absence of any measures taken against Serb perpetrators or members of the RSMUP, measures taken only against non-Serbs”.

⁴¹ Reply, para. 11.

⁴² Motion, para. 9.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Response, para. 29, where the Defence refers to its Motion for exclusion of records of intercepts of conversations, with Annex A, 15 Oct 2009.

⁴⁷ Response, para. 29.

preparation for his testimony highlighted their relevance.”⁴⁸ It further states that ST187 “will be testifying at the end of the month of March” and that “[w]ith regards to the document related to ST-214, arguments expressed in [response to the Prosecution’s application regarding the Annex B documents] equally apply to proposed 65ter 3544.”⁴⁹

4. “Miloš” documents

23. The Prosecution submits that these documents are subject of a pending motion for admission of the testimony of ST182 pursuant to Rule 92 *ter* and that it has included these documents in the Motion “in the event the Trial Chamber denies the Prosecution’s motion [...] to facilitate their use during the witness’ testimony.”⁵⁰

24. The Defence submits that as ST182 was interviewed by the Prosecution on 1 April 2009 it “should have evaluated his evidence and accompanying documents from previous trials prior to filing its Pre-Trial Brief”.⁵¹

5. Recently received or re-evaluated documents (Annex D to the Motion)⁵²

25. The Prosecution submits that the 28 documents in this category “were either obtained in recent months, or have been in the possession of the Prosecution but only recently has their relevance become apparent.”⁵³ It states that 15 documents in this category were disclosed between September and December 2009 and that the remaining documents were disclosed in early February 2010.⁵⁴ The Prosecution states that the documents consist “mainly of RSMUP dispatches, decisions, memos and letters emanating from various police stations (SJB), regional centres (CSB) and RSMUP headquarters”.⁵⁵ The documents also include photographs which, the Prosecution argues, “will support the evidence of upcoming witnesses describing crime scenes and locations listed in the Indictment.”⁵⁶

⁴⁸ Reply, para. 13.

⁴⁹ *Ibid.*

⁵⁰ Motion, para. 10, referring to Prosecution’s motion for admission of evidence of witness ST-182 pursuant Rule 92 *ter*, with confidential annexes, confidential, 15 Jan 2010. The Trial Chamber notes that the documents under this category are not listed at the annexes to the Motion.

⁵¹ Response, para. 30.

⁵² The Trial Chamber recalls that by its First Oral Ruling it allowed the Prosecution to amend its Rule 65 *ter* exhibit list in respect to three documents within this category. i.e. proposed Rule 65 *ter* Nos. 3563, 3565 and 3569.

⁵³ Motion, para. 11.

⁵⁴ Motion, para. 12.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

26. The Prosecution makes specific submission with regard to two documents in this category that “were referred to during the testimony of witness ST-200”.⁵⁷ Rule 65 *ter* no. 10273, which is “a video of the barricades incident in March 1992 in Sarajevo”, was marked for identification as exhibit no. P980 pending a motion by the Prosecution to add it to the exhibit list.⁵⁸ The Prosecution submits that the relevance of this video “became clear during the proofing session of the witness.”⁵⁹ The second document, Rule 65 *ter* no. 3573, is an article in the *Oslobodenje* newspaper dated 14 October 1990, which was referred to during the testimony of ST200 in relation to the creation of the Serbian National Council and in response to the Defence’s cross-examination relating to the SDA’s alleged setting up of a National Defence Council.⁶⁰ The Prosecution submits that “this issue was never raised in any of the Defence filings” and that the document will assist the Trial Chamber.⁶¹

27. The Defence states that “[o]nce again the prosecution did not differentiate which documents are recently obtained and which are recently re-evaluated.”⁶²

28. In reply, the Prosecution submits that this category “was in fact envisaged to avoid filing further motions on a witness by witness scenario”.⁶³ It argues that “[w]ith the exception of documents related to the municipality of Vlasenica, the Prosecution does not expect to use these documents before the month of April.”⁶⁴ The Prosecution states that it amends Annex D of the Motion to reflect the fact that Rule 65 *ter* no. 3566 is on the Prosecution’s exhibit list.⁶⁵

6. Previously withdrawn documents (Annex E to the Motion)

29. The Prosecution submits that this category consists of 11 documents that were previously on the Prosecution’s Rule 65 *ter* exhibit list filed with the pre-trial brief filed against the Mićo Stanišić on 16 February 2007 but which were “excised in the *21 May 2008 Motion*, prior to the arrest and transfer of the Accused Župljanin and prior to the joinder of the cases”.⁶⁶ It argues that it has determined upon review of the documents that they are “clearly relevant and significant and should be reinstated on the *65ter* list.”⁶⁷ The Prosecution submits that the documents were disclosed to the

⁵⁷ Motion, para. 13.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Response, para. 31.

⁶³ Reply, para. 14.

⁶⁴ *Ibid.*

⁶⁵ *Id.*, para. 15.

⁶⁶ Motion, para. 14 (*italics in the original*).

⁶⁷ *Ibid.*

Defence “at the latest by 16 February 2007” and argues that “the reinstatement of these documents will therefore cause no prejudice.”⁶⁸

30. The Defence submits that the Prosecution’s request to reinstate these documents confirms the Defence submission that “the Prosecution keeps re-evaluating its case and tailors it depending on evidence heard in court”.⁶⁹

31. In reply, the Prosecution states that the Defence “provides a generic objection, without an indication of any prejudice suffered in reinstating documents that were previously removed from the 65*ter* list.”⁷⁰ It states that it amends Annex E to the Motion to reflect the fact that Rule 65 *ter* nos. 237 and 1868 have been admitted into evidence as exhibits 1D64 and P796.⁷¹

7. Technical matters (Annex F to the Motion)

32. The Prosecution states that this category consists of two documents.⁷² The Prosecution states that Rule 65 *ter* no. 1929 “was previously withdrawn as it appeared to be a duplicate [but] further verification showed that it is in fact the cover letter for 65*ter* 325 and for this reason, 65*ter* 1929 will not be reinstated but will be merged with 65*ter* 325.”⁷³ With respect to Rule 65 *ter* 1647, the Prosecution states that it “was previously withdrawn as it appeared to be a duplicate of 65*ter* 84” but that “[o]n second review, it is clear that 65*ter* 84 is a government decision relating to the state of an imminent threat of war, whereas 65*ter* 1647 is the implementation of the government’s decision by the Minister of Defence Bogdan Subotić.”⁷⁴ The Prosecution accordingly seeks to reinstate Rule 65 *ter* 1647.⁷⁵

33. The Defence points out that Rule 65 *ter* no. 1647 “is exhibited as 1D170.”⁷⁶ The Defence does not make any submission in respect of Rule 65 *ter* no. 1929.

34. In reply, the Prosecution states that it amends Annex F to the Motion to reflect the fact that Rule 65 *ter* no. 1647 has been admitted into evidence as exhibit 1D170.⁷⁷

⁶⁸ *Ibid.*

⁶⁹ Response, para 32.

⁷⁰ Reply, para. 16.

⁷¹ *Ibid.*

⁷² Motion, para. 15. The Trial Chamber notes that Annex F includes only one document with Rule 65 *ter* no. 1647.

⁷³ Motion, para. 15.

⁷⁴ *Id.*, para. 16.

⁷⁵ *Ibid.*

⁷⁶ Response, para. 33.

⁷⁷ Reply, para. 17.

8. Documents sought to be withdrawn from the Rule 65 *ter* exhibit list (Annex G to the Motion)

35. The Prosecution seeks leave to remove from its Rule 65 *ter* exhibit list “109 documents it considers to have only marginal relevance to the issues in this trial”.⁷⁸

36. The Defence notes that 20 of the documents are requested to be withdrawn “due to the fact that they are already on the 65*ter* exhibit list, albeit under different 65*ter* numbers.”⁷⁹ The Defence additionally identifies 16 documents that have already been exhibited and classifies 14 documents as “already withdrawn” by the Prosecution.⁸⁰

37. In reply, the Prosecution states that it amends Annex G to address the discrepancies noted by the Defence.⁸¹ The Prosecution states that the 16 documents already exhibited “were recently admitted through witness ST-92 and that the Registry’s internal memorandum confirming their admission had not been distributed [which] led to an internal oversight”. The Prosecution, therefore, does not request their withdrawal.⁸² The Prosecution further states that the “14 documents which were already withdrawn by a previous motion [...] are now removed from the amended version of *Annex G*.”⁸³

III. APPLICABLE LAW AND DISCUSSION

38. The Trial Chamber will, in the exercise of its discretion, assess if it is in the interests of justice to grant the Motion.⁸⁴ The Trial Chamber will carefully balance any amendment of the exhibit list with an adequate protection of the rights of the accused.⁸⁵ In so doing, the Trial Chamber must be satisfied, taking into account the specific circumstances of the case, that good cause is shown for amending the exhibit list and that the newly offered material is relevant and of sufficient importance to justify the late addition.⁸⁶ The Trial Chamber may also take into account other factors

⁷⁸ *Id.*, para. 23.

⁷⁹ Response, para. 21. Rule 65 *ter* nos. 418 same as 120; 931 same as 1633; 1598 same as 97; 1621 same as 1229; 1622 same as 1230; 1624 same as 1231; 1625 same as 1232; 1626 same as 1236; 1627 same as 1238; 1628 same as 1243; 1629 same as 1245; 1631 same as 1247; 1632 same as 930; 1636 same as 1257; 1829 same as 49; 2476 same as 1589; 3007 same as 823; 3157 same as 3113; 3179 same as 2572 and 3381 same as 283.

⁸⁰ Response, Annex A, p. 3

⁸¹ Reply, para. 18.

⁸² *Ibid.*

⁸³ *Ibid* (italics in the original).

⁸⁴ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on appeals against decision admitting material related to Borovčanin’s questioning, 14 Dec 2007, para. 37; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution second motion to amend Rule 65 *ter* exhibit list, 11 Sep 2008, para. 10 (“*Lukić* Decision”).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

which speak in favour or against amending the exhibit list,⁸⁷ including whether the moving party has exercised due diligence in identifying at the earliest opportunity the documents that it seeks to add to its exhibit list⁸⁸ and whether the Defence would suffer undue prejudice as a result of the amendment of the exhibit list.⁸⁹

39. The Defence argues that repeated amendments of the Rule 65 *ter* exhibit list “raises issues of compliance with human rights standards of fairness” and that “[a]mendments of the 65ter list can only be exceptions”.⁹⁰ The Trial Chamber does not agree with this submission. The jurisprudence is clear that amendments of the exhibit list are permitted provided that the Trial Chamber finds that it would be in the interest of justice, as set out above, to grant the late addition.⁹¹

40. The Prosecution argues that as the Defence has not identified “any specific prejudice as a result of the addition of these documents [...] the Trial Chamber should find that the interests of justice call for granting the Prosecution’s Motion.”⁹² The Trial Chamber disagrees; the fact that the Defence has not identified any undue prejudice does not relieve the Prosecution from showing why it would be in the interest of justice to grant its late request to amend the exhibit.

41. The Prosecution submits that it has reviewed “the body of documentary evidence it seeks to produce into evidence, as the case progressed and as the Accused reveal or clarify the nature of their defence.”⁹³ However, the Prosecution did not indicate what triggered its review of “the body of documentary evidence” or which aspects of the Accused’s defence that have been ‘revealed’ or ‘clarified’. The Trial Chamber finds that such a generic submission does not support the Prosecution’s request to amend the exhibit list.

42. The Trial Chamber has identified several discrepancies regarding the number and status of documents subject of the Motion.⁹⁴ While, to use the Prosecution’s expression, “clerical errors”⁹⁵ may occur, the Trial Chamber reminds the Prosecution to exercise diligence in making submissions on technical matters to ensure a complete and correct record.

⁸⁷ *Lukić* Decision para. 10; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s motion for leave to amend Rule 65 *ter* witness list and exhibit list, confidential, 6 Dec 2006, p. 7 (“*Popović* Decision”).

⁸⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-81-T, Decision on motion to amend witness and exhibit list, 16 Jan 2008, p.6 (“*Prlić* Decision”).

⁸⁹ *Lukić* Decision para. 12; *Popović* Decision p. 8; *Prlić* Decision, p. 5.

⁹⁰ Response, para. 23.

⁹¹ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on fifth, sixth, seventh and eight Prosecution’s motions for leave to amend its Rule 65 *ter* exhibit list, 24 Apr 2009, paras 23-25.

⁹² Reply, para. 8.

⁹³ Reply, para. 5.

⁹⁴ See supra fn. 1,2, 33, 34, 72 and infra paras 55-58.

⁹⁵ Reply, para. 1.

43. The Prosecution states that it took into account the 8 May 2008 Invitation in exercising “restraint when compiling its original 65*ter* list”.⁹⁶ The Trial Chamber recalls that the purpose of the 8 May Invitation was to “reduc[e] the scope of the Indictment by at least one third”⁹⁷ but not to reduce the Prosecution’s exhibit list. The Trial Chamber is not persuaded that this invitation would have any constraining effect on the Prosecution’s exhibit list. It is recalled that Rule 65 *ter*(E)(iii) requires the Prosecution to include on its list the “exhibits the Prosecutor intends to offer”. Given the reasons of fair notice to the Defence of the Prosecution’s case, which underlie this provision, the Trial Chamber cannot see that the Prosecution would be prevented from, or even encouraged, to provide as streamlined an exhibit list as possible. For these reasons, the Trial Chamber holds that the Prosecution’s compliance with the 8 May 2008 Invitation does not constitute good cause to grant the Motion.

44. The Trial Chamber will now turn to each category of documents:

45. By the First Oral Decision, the Trial Chamber denied the Motion in respect of 20 documents relating to communications within the RSMUP (Annex A to the Motion), which are subject of the Motion and Second Supplemental Motion.⁹⁸ In the Second Supplemental Motion, the Prosecution repeats the arguments made in the Motion in support of its request. Notwithstanding the Prosecution’s view that the First Oral Decision “was not intended to imply permanent exclusion” of the documents,⁹⁹ the Trial Chamber has already ruled on the matter finding that the Prosecution “ha[d] neither shown good cause nor due diligence to justify, less than one week before the testimony of ST-166 the addition of the documents.”¹⁰⁰ For this reason, the Trial Chamber finds that the mere resubmission of arguments on a matter that has been decided does not merit further consideration and will deny the Second Supplemental Motion.

46. With regard to the category of documents stemming from recent interviews (Annex B to the Motion), the Prosecution submits that it only perceived their relevance while preparing for or conducting the interviews of ST214 and ST216. The Chamber recalls that these witnesses were recently added to the Prosecution’s witness list.¹⁰¹ It, therefore, considers that the Prosecution has

⁹⁶ *Id.*, para. 5 referring to *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Interim decision on Prosecution’s motion and supplement for leave to amend the indictment, confidential, 4 Apr 2008 and *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Invitation pursuant to Rule 73 *bis*(D), 8 May 2008.,

⁹⁷ 8 May 2008 Invitation, p. 3.

⁹⁸ Annex A of the Motion lists 21 documents. As highlighted by the Trial Chamber in its First Oral Decision one of these documents, Rule 65 *ter* 3507, had already been admitted into evidence as P395.

⁹⁹ Reply, para. 5.

¹⁰⁰ Hearing, 25 Feb 2010, T.6858.

¹⁰¹ Decision granting Prosecution’s motion to add ST216 to its Rule 65 *ter* witness list, 29 Jan 2010 (“29 Jan 2010 Decision”) and Decision on Prosecution’s further submission on the substitution of witnesses ST188 and ST194, 25 Feb 2010 (“25 Feb 2010 Decision”).

shown good cause in respect of its request to add the documents listed in Annex B to its exhibit list. The Trial Chamber is satisfied that these documents are *prima facie* relevant and sufficiently important and will grant the Motion in this respect. The Trial Chamber recalls that it has previously decided that ST214 may only be called to testify towards the end of the Prosecution's case-in-chief and that ST216 may only be called after 31 March 2010.¹⁰² It will order that the Prosecution may not use these documents in court until ST214 or ST216 takes the stand and considers that this will mitigate any potential undue prejudice arising from the late addition of these documents to the Prosecution's exhibit list.

47. With regard to the category of intercepts of conversations (Annex C to the Motion), the Trial Chamber considers the fact that the Prosecution may have disclosed documents to the Defence "several years ago" to be insufficient, in itself, to establish good cause. This category consists of six intercepted conversations. In respect of the five intercepts related to ST187, Rule 65 *ter* no. 1991, 1989, 1425 and 1067, and 1064,¹⁰³ the Trial Chamber holds that the Prosecution ought to have included these intercepts on its exhibit list filed on 8 June 2009. The Prosecution does not specify what triggered a need for a further review beyond stating that the relevance of five of the intercepts was "highlighted" when the Prosecution began preparing for the testimony of ST187. This is insufficient to establish good cause for the late request to amend the exhibit list in this respect. With regard to the remaining intercept, Rule 65 *ter* no. 3544, the Prosecution states that it is "related to ST214".¹⁰⁴ However, the Trial Chamber notes that ST192, who has been on the Prosecution witness list since 8 June 2009, is a participant in the intercepted communication. It seems that this fact should have prompted the Prosecution to include the intercept on its exhibit list. For these reasons, the Trial Chamber finds that the Prosecution has not shown good cause for its request and will, therefore, deny the Motion in respect of this category.

48. Similarly, with regard to the "Miloš" documents, which the Prosecution intends to use during the testimony of ST182, the Trial Chamber notes that ST182 has been on the Prosecution's witness list since 8 June 2009. The Prosecution does not provide any reason as to why it only now seeks to add them to the exhibit list. As the Prosecution has failed to show good cause for the late addition, the Trial Chamber will deny the Motion in this respect.

49. With regard to the category of recently received or re-evaluated documents (Annex D to the Motion), the Prosecution only gives detailed reasons in support of the late addition of two

¹⁰² 25 Feb 2010 Decision, p. 6 and 29 Jan 2010 Decision, p. 4 respectively.

¹⁰³ Reply, para. 13 and Annex C.

¹⁰⁴ Reply, para. 13.

documents that were referred to during the testimony of witness ST200: proposed Rule 65 *ter* no. 10273 and Rule 65 *ter* no. 3573.

50. In respect of proposed Rule 65 *ter* no. 10273, “a video of the barricades incident in March 1992 in Sarajevo”, the Prosecution states that its relevance became clear during the proofing session of ST200. However, the Trial Chamber notes that the Rule 65 *ter* summary of witness ST200, filed on 8 June 2009, specifically provides that the witness “was present at meetings in the Delegates Club of the Assembly and the Holiday Inn attended by Rajko Đukic and other members of the Bosnian Serb leadership, when the barricades were erected in Sarajevo in March 1992.”¹⁰⁵ In the Trial Chamber’s opinion, this should have prompted the Prosecution to include the document on its Rule 65 *ter* list. The Prosecution has therefore failed to establish good cause and the Trial Chamber will deny the Motion in this respect.

51. The content of proposed Rule 65 *ter* no. 3573, an article in the *Oslobodenje* newspaper, was discussed in court on 17 February 2010.¹⁰⁶ The Prosecution argues that this document will assist in clarifying the issue of “the creation of the Serbian National Council” and “the SDA’s alleged setting up of a National Defence Council” that the Prosecution claims “was never raised in any of the Defence filings”.¹⁰⁷ The Trial Chamber considers that this document may assist in clarifying issues discussed in court. As the Trial Chamber cannot identify any undue prejudice to the Defence arising from the late addition of this document to the Prosecution’s exhibit list, it will grant the Motion in this respect.

52. With regard to the remaining 23 documents in this category, the Prosecution does not indicate the reasons for their late addition beyond asserting that they are relevant to the case. The Prosecution does not specify which of the documents were recently received or provide specific dates of their receipt. Nor does the Prosecution provide which of them were re-evaluated or on what basis. As the Prosecution has failed to show good cause, the Trial Chamber will deny the Motion in this respect. This decision will not affect the status of the three documents the Trial Chamber allowed the Prosecution to add to its Rule 65 *ter* exhibit list by its Second Oral Decision, that is, Rule 65 *ter* Nos. 3563, 3565 and 3569.¹⁰⁸

¹⁰⁵ ST200 Rule 65 *ter* summary, Prosecution’s pre-trial brief, public with confidential appendices, 8 Jun 2009, appendix 4, p. 2136 and Corrigendum to confidential annexes 3 and 4 of the Prosecution’s pre-trial brief of 8 June 2009, with confidential annexes, 22 Jun 2009, appendix 4, p. 2590.

¹⁰⁶ Hearing, 17 Feb 2010, T. 6467-6472.

¹⁰⁷ Motion, para. 13.

¹⁰⁸ *Supra* paras 5 and 7.

53. With regard to the category of previously withdrawn documents (Annex E to the Motion) the Trial Chamber recalls that the fact that a document at some point in the past was on the Prosecution's Rule 65 *ter* exhibit list but was later removed does not *per se* constitute good cause to amend the list. The Trial Chamber notes that the Prosecution does not indicate reasons for the late addition of these documents beyond asserting that they are relevant to the case. As the Prosecution has failed to show good cause, the Trial Chamber will deny the Motion in this respect.

54. With regard to the document with proposed Rule 65 *ter* no. 1929 within the category of technical matters (Annex F to the Motion), the Trial Chamber is of the opinion that the Prosecution has not shown good cause for its late inclusion. However, considering that the document is the cover letter of a report already on the Rule 65 *ter* exhibit list and that the Trial Chamber cannot identify that the Defence would suffer undue prejudice from the late addition of this document, it will grant the Motion in this respect.

55. With regard to the documents the Prosecution seeks to withdraw from its Rule 65 *ter* exhibit list (Annex G of the Motion), the Trial Chamber notes that 19 of the documents the Prosecution seeks to withdraw are duplicates of documents already on the Prosecution's Rule 65 *ter* exhibit list.¹⁰⁹ Given that the Prosecution seeks their withdrawal, not on the basis of the fact that they are duplicates but on the basis of their "marginal relevance to the issues in this trial"¹¹⁰ the Trial Chamber would have expected the Prosecution to seek the withdrawal not only of the 19 duplicates but also of their corresponding originals. The Trial Chamber will, therefore, seek clarification from the Prosecution in this regard before ruling on the Motion in respect of these documents.

56. The Trial Chamber notes that among the above-mentioned 19 documents, Rule 65 *ter* no. 3381,¹¹¹ is a duplicate of Rule 65 *ter* no. 283 as it appears in ecourt. However, Rule 65 *ter* no. 283 in ecourt does not correspond to document Rule 65 *ter* no. 283 on the Prosecution's Rule 65 *ter* exhibit list.¹¹² The Trial Chamber requests clarification from the Prosecution in that respect.

¹⁰⁹ The Defence identifies 20 duplicates in the Response, see *supra* fn. 79 and Response para. 21. However, the document with Rule 65 *ter* no. 418 does not exist on the Prosecution's Rule 65 *ter* list, therefore that the Trial Chamber counts only 19 duplicates.

¹¹⁰ Motion, para. 23.

¹¹¹ Motion, Annex G, p. 11. The document is a report of the Ministry of Interior, CSB Banja Luka entitled "List of citizens who have move out and into the area covered by sector", dated May 1993.

¹¹² This document is entitled "Overview of data on the number and ethnic structure of population according to municipalities in the area of the Banja Luka RDB Centre for 1991 and 1995", Prosecution's pre-trial brief, public with confidential appendices, 8 Jun 2009, appendix 7, p. 2042.

57. The Defence have also identified within this category 16 documents that have already been admitted into evidence.¹¹³ In addition, the Trial Chamber also notes that six other documents, Rule 65 *ter* nos. 40, 664, 1516, 1644, 1971, 2693, have also been admitted into evidence. The Chamber notes that three of these documents, Rule 65 *ter* nos. 40, 664 and 1971, were tendered into evidence by the Prosecution after the filing of the Motion, and again reminds the Prosecution to exercise diligence in making submissions on technical matters, such as exhibits.¹¹⁴

58. The Defence have identified within this category 14 documents as having been “already withdrawn”.¹¹⁵ However, the Trial Chamber notes that these documents were never part of the Prosecution’s Rule 65 *ter* exhibit list filed on 8 June 2009 in the present case.¹¹⁶ As the Prosecution cannot withdraw documents that are not on its exhibit list, the Trial Chamber will disregard the Motion in this respect.

IV. DISPOSITION

59. Pursuant to Article 20(1) and Article 21(4)(b) of the Statute and Rules 54 and 65 *ter* of the Rules, the Trial Chamber:

GRANTS the Prosecution leave to reply;

GRANTS the Motion **IN PART**;

GRANTS leave to the Prosecution to add to its Rule 65 *ter* exhibit list the following documents:

¹¹³ Response, Annex A, p. 3. These are Rule 65 *ter* nos. 197, 251, 471, 916, 931, 1587, 1591, 1851, 1874, 1884, 1899, 1909, 1923, 1924, 1930 and 2392. Rule 65 *ter* no. 931 is not uploaded into e-court and is a duplicate of Rule 65 *ter* no. 1633 that has been admitted into evidence as P427.18.

¹¹⁴ As P1074, P1094 and P1091 on 15, 18 and 16 March 2010 respectively.

¹¹⁵ Response, Annex A, p. 3. These are Rule 65 *ter* nos. 240, 314, 315, 460, 473, 585, 1138, 1308, 1449, 1657, 1670, 1881, 1961, 2306. The Trial Chamber notes that Rule 65 *ter* no. 240 has a duplicate on the Rule 65 *ter* exhibit list of 8 June 2009 i.e. Rule 65 *ter* no. 1660.

¹¹⁶ Neither Rule 65 *ter* no. 418 is to be found on the Prosecution’s Rule 65 *ter* exhibit list in the present case. The Prosecution’s request to withdraw, among others, these documents in the case against Mićo Stanišić was declared moot by the Trial Chamber, see *supra* paras 1-2.

- (a) From the category of documents stemming from recent interviews: proposed Rule 65 *ter* nos. 3521, 3522, 3424, 3526, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3570, 3571, 3572 as in amended Annex B to the Reply;
- (b) From the category of recently received or re-evaluated documents: proposed Rule 65 *ter* no. 3573;
- (c) From the category of technical matters: proposed Rule 65 *ter* no. 1929;

ORDERS the Prosecution not to use any documents listed in paragraph a) above until the relevant witness, that is, ST214 or ST216, testifies;

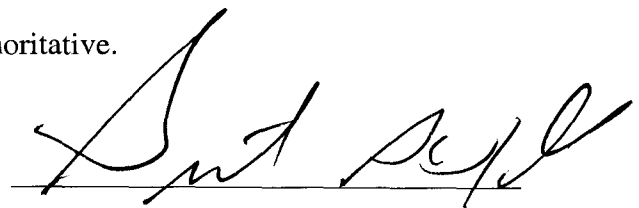
GRANTS leave to withdraw documents with Rule 65 *ter* nos. 71, 130, 355, 362, 590, 903, 922, 964, 966, 988, 989, 1422, 1547, 1553, 1558, 1561, 1590, 1888, 1985, 2059, 2067, 2123, 2124, 2141, 2150, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2169, 2647, 2672, 2821, 2841, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2933, 3011, 3012, 3021, 3049, 3052 and 3055;

ORDERS the Prosecution to clarify the Motion and the document status in respect of Rule 65 *ter* nos. 931, 1598, 1621, 1622, 1624, 1625, 1626, 1627, 1628, 1629, 1631, 1632, 1636, 1829, 2476, 3007, 3157, 3179 and 3381 as well as their duplicates with Rule 65 *ter* nos. 1633, 97, 1229, 1230, 1231, 1232, 1236, 1238, 1243, 1245, 1247, 930, 1257, 49, 1589, 823, 3113, 2572 and 283;

DENIES the Motion in all other aspects; and

DENIES the Second Supplemental Motion.

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



Judge Burton Hall
Presiding

Dated this fourteenth day of April 2010

At The Hague

The Netherlands

[Seal of the Tribunal]