

**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-05-87/1-T
Date: 4 March 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision: 4 March 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO AMEND THE
RULE 65 TER EXHIBIT LIST WITH ANNEXES A AND B**

The Office of the Prosecutor:

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1. This Trial Chamber (“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 the “Prosecution’s Motion to Amend the 65^{ter} Exhibit List with Annexes A and B”, filed by the Office of the Prosecutor (“Prosecution”) on 6 February 2009 (“Motion”), whereby it seeks leave to add 24 documents to its Rule 65^{ter} list and remove 21 of the documents currently on the list. Counsel for Vlastimir Đorđević (“Defence”) responded to the Motion on 20 February 2009 (“Response”).¹

I. BACKGROUND

2. The Prosecution filed its Pre-Trial Brief on 1 September 2008, accompanied by, *inter alia*, its Rule 65^{ter} exhibit list.² The trial phase of this case started on 27 January 2009.

3. By its Motion, the Prosecution seeks addition to the Rule 65^{ter} list of six categories of documents.³ These are an updated List of Missing Persons compiled by the Office for Missing Persons and Forensics (“OMPF”); documents relating to the scheduled murder incident alleged to have taken place in Podujevo on 28 March 1999; documents relating to the cessation of the Accused’s employment; documents relating to the Accused’s letter to the “Nedeljni Telegraf”; documents relating to the transfer of bodies from Kosovo to Serbia; and “other” documents, including an order relating to the use of volunteers and a decision on the establishment of the Ministry of Interior (“MUP”) Collegium.⁴ It submits that the addition to the Rule 65^{ter} list of the documents in most of these categories does not affect the Accused’s ability to prepare his defence.⁵ In its Response, the Defence opposes the addition of the documents, save for documents 2-11 and documents 14 and 15.⁶ It submits, generally, that the Prosecution has not shown good cause as to why it did not seek to add these documents to the Rule 65^{ter} list at an earlier date.⁷ It further opposes the removal of the 21 documents from the Rule 65^{ter} list.⁸

¹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Response to Prosecution’s Motion to Amend the Rule 65^{ter} List with Annexes A and B”, 20 February 2009.

² *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, “Prosecution’s Submissions Pursuant to Rule 65^{ter}(E) with Confidential Annex I, Annex II and Annex III”, 1 September 2008 (“Prosecution’s Pre-Trial Brief”).

³ Motion, para 2.

⁴ Motion, para 2.

⁵ Motion, *see* paras 8, 14, 16, 25, 27. The Chamber notes that the Prosecution makes no submission in this regard for the category of documents relating to the alleged killings in the town of Podujevo (paras 9-11), and that for the documents relating to the transfer of bodies from Kosovo to Serbia, it submits that “[a]ny potential prejudice to the ability of the Accused to prepare his defence is likely to be minimal as these exhibits were previously made available to the Defence.” (Motion, para 20).

⁶ *See* Response, paras 12 and 14.

⁷ Response, para 6.

⁸ Response, para 8.

II. DISCUSSION

4. The Chamber recalls that there is a difference between the admission of a document into evidence as an exhibit and its inclusion in the Prosecution's List of proposed exhibits submitted pursuant to Rule 65ter of the Rules of Procedure and Evidence ("Rules"). The purpose of the Rule 65ter list is to give notice to the Defence of the intention by the Prosecution to rely on the document during trial which will allow the Defence to prepare its case accordingly. The Chamber, at this stage, does not need to assess the relevance and probative value of such documents; this assessment will occur at the stage of admission of these documents as exhibits during trial, governed by the rules of admissibility of evidence applied by the Tribunal. The Chamber recalls, however, that a party should not be granted leave to add documents that are obviously irrelevant to its Rule 65ter list.⁹ Finally, a document may not be added to the Rule 65ter list if its addition at the stage of the proceedings would unduly prejudice the rights of the Accused to prepare their defence.

1. Document 1

5. Document 1 is an updated version of the "List of Missing Persons" compiled by the OMPF ("List"). The Prosecution submits that this List is relevant to, *inter alia*, an assessment of the extent of criminal means, including murder, employed in Kosovo, as well as to the scope of the transfer of bodies from Kosovo to Serbia.¹⁰ According to the Prosecution, an earlier version of this List was included in the Prosecution's Rule 65ter list filed along with its Pre-Trial Brief on 1 September 2008, and further, the List was disclosed to the Defence on 9 December 2008.¹¹ The Prosecution submits that the addition of this document to the Rule 65ter list does not impair the Accused's ability to prepare a defence in a timely manner.¹²

6. The Defence submits that it is not in the position to assess how often the List is updated by the OMPF, and what specific changes were made to it.¹³ It submits that such an updated version of the List would only be necessary if the changes made to it reflect upon any of the incidents as charged in the Indictment, and that should this be the case, the Prosecution should point out the relevant changes to the List.¹⁴

7. Only the surrogate sheet of document 1 is available to the Chamber on e-court. However, from the submissions made by the parties, the Chamber is satisfied that the List is of sufficient

⁹ *Prosecutor v. Bošković and 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", 14 November 2007, para 5.

¹⁰ Motion, para 7.

¹¹ Motion, para 8.

¹² Motion, para 8.

¹³ Response, para 10.

relevance to this case for the present purposes. As it has not been able to review the List, the Chamber is not aware of the specific changes that have been made to it, and whether and to what extent these changes have an impact on the crimes charged in the Indictment. While it does not believe that the Accused would be prejudiced by the admission of the List at this very early stage of the proceedings, the Chamber directs the Prosecution to inform the Defence of the specific changes relevant to this case reflected in the updated version of the List.

2. Documents 2-13

8. Documents 2-9 are autopsy reports carried out in Priština hospital on 30 and 31 August 2000 on behalf of the ICTY of bodies exhumed from a grave site in Podujevo. The Prosecution submits that they pertain to victims listed in Schedule L of the Indictment, relating to the charge of murder in the town of Podujevo on 28 March 1999.¹⁵ Document 10 is entitled “Podujevo Grave Site”, and contains, *inter alia*, a case summary of the bodies exhumed at this site, and reports by a British forensic team from August 2000. Document 11 is a report by the Organisation for Security and Co-operation in Europe (“OSCE”) including a record of exhumations that took place in July of 1999, with predominantly photographs of the grave site and the individual bodies. The Prosecution submits that it disclosed documents 2-11 to the Defence on 9 October 2008.¹⁶ Document 12, as appears from the surrogate sheet available in e-court, is a BBC documentary entitled “Kosovo-Saranda’s story” and is said to relate to the experiences of Saranda Bogujevci at her home in Podujevo on 28 March 1999. The Prosecution submits it received this documentary from the BBC on 12 November 2008 and disclosed it to the Defence two days thereafter.¹⁷ Document 13 is a report dated 11 March 2002 by the MUP’s “Administration for Fighting Organized Crime” related to the investigation of the “Škorpioni” unit, part of the Special Anti-Terrorist unit of the MUP (“SAJ”), for war crimes against civilians pursuant to the criminal code of Serbia. This investigation relays the involvement of members of the “Škorpioni” unit in the alleged massacre in Podujevo. The Prosecution submit that this document is relevant because it indicates that with the consent of the Accused, the “Škorpioni” became part of the MUP SAJ on 25 March 1999, and were then sent to Podujevo where they “fired on women and children.”¹⁸ According to the Prosecution, document 13 was disclosed to the Defence on 19 January 2009.¹⁹ The Prosecution submits that these documents are relevant and probative to establishing the commission of murders in Podujevo.²⁰ Finally, it submits that documents 2-13 were not included on the Rule 65ter list filed on 1

¹⁴ Response, para 11.

¹⁵ Motion, para 9.

¹⁶ Motion, para 10.

¹⁷ Motion, para 10.

¹⁸ Motion, para 9.

¹⁹ Motion, para 10.

September 2008 because they were located in the Office of the Prosecutor's evidence collection after this date.²¹

9. The Defence does not object to the addition of documents 2-11 to the Rule 65*ter* list, subject to the Prosecution laying the proper foundation, authenticity and reliability of these documents through a specialized or expert witness.²² The Chamber considers that the forensic material contained in documents 2-11 is relevant to this case, and in light of the fact that the Defence does not object to their addition, it considers it appropriate to add these documents to the Rule 65*ter* list.

10. The Defence submits that documents 12 and 13 disclosed to the Defence in the autumn of 2008, should have been added to the Rule 65*ter* list much earlier.²³ It submits further that with respect to document 13, the report concerning the participation of "Škorpioni" in the scheduled incident in Podujevo, it is unknown when this report was received by the Prosecution. It submits that on this basis, there is no good cause justifying a request for addition of this report after the start of trial.²⁴

11. The Chamber is satisfied that both document 12 and 13 are relevant to this case, specifically to the scheduled incident of murder in paragraph 75(l) of the Indictment. Concerning document 12 especially, the Chamber notes that Saranda Bogujevci, the individual said to feature in the BBC documentary, is a witness expected to give evidence in this case. With respect to document 13, while noting that the Prosecution has not indicated in its Motion when it received the report, the Chamber does not consider that there is any reason to assume that the Prosecution did not act in good faith when disclosing it to the Defence on 19 January 2009. The Defence was in the possession of both documents 12 and 13 before the start of trial. The addition of these documents to the Rule 65*ter* list at this very early stage of the trial does not, in the view of this Chamber, prejudice the Accused.

3. Documents 14-15

12. Document 14 is a letter by the Accused dated 30 April 2001 in which he requests his retirement. Document 15 is a decision dated 3 May 2001 by Minister of the Interior Dušan Mihaljović, terminating the Accused's employment and granting his request for early retirement. The Prosecution submits that these two documents, in light of the alleged role of the Accused as Assistant Minister of the Serbian ministry of Internal Affairs and Chief of the Public Security

²⁰ Motion, para 10.

²¹ Motion, para 10.

²² Response, para 12.

²³ Response, para 13.

²⁴ Response, para 13.

Department during the time period of the Indictment, are of central relevance to this case and are consistent with facts already agreed upon between the parties.²⁵ The Prosecution is of the position that the addition of these documents at this stage of the trial is not likely to disadvantage the Accused's ability to prepare his case.²⁶

13. The Defence does not oppose the addition of documents 14 and 15 to the Rule 65*ter* list,²⁷ and the Chamber deems that they are relevant to this case. It is therefore appropriate to allow their addition to the Rule 65*ter* list.

4. Documents 16-24

14. Document 17 is a notification by the editor of Nedeljni Telegraph to the Deputy Prosecutor for War Crimes, Dragoljub Stanković, in which the editor forwards a letter written to him by the Accused. Document 18 is a letter written by the Accused to Nedeljni Telegraph in which he, *inter alia*, counters a number of allegations that had been published about him, speaks about the structure of the MUP and his own role within it, details the engagement of the MUP in Kosovo in 1998 and 1999, and discusses the alleged refrigerator truck incident. According to the Prosecution, this letter is relevant because it relates to the Accused's knowledge of what was happening in Kosovo during the relevant time period, and his culpability for the criminal allegations made against him, of which he seeks to exculpate himself.²⁸ Document 16 is the envelope the letter was mailed in. The Prosecution submits that these documents were disclosed to the Accused on 26 November 2008.²⁹

15. Document 19 is an Official Note by the MUP Crime Police Administration dated 11 July 2001 and concerns an interview conducted with two individuals relating to the refrigerated truck incident. Document 20 is a letter by Dragan Ilić to the Accused dated 19 April 1999 requesting the approval of a payment of 10,000 dinars for "operational expenses" incurred during the implementation of Operation "Dubina II". Document 21 is a proof of receipt by Dragan Ilić of those 10,000 dinars. Document 22, in e-court, is entitled "Report regarding payment of operative expenses for Dubina 2". The Chamber notes that the BCS original of this document, as uploaded in e-court, is dated 22 April 1999 whereas the English translation relates to dates in 1997. The English translation in e-court, therefore, does not appear to be a translation of the original uploaded under the same number.

²⁵ Motion, paras 12, 14. See also Exhibit P1, Items 30 and 31.

²⁶ Motion, para 14.

²⁷ Response, para 14.

²⁸ Motion, para 15.

²⁹ Motion, para 16.

16. The Prosecution submits that documents 19-22 form a larger subset of documents that are already on the Rule 65*ter* list, relating to a number of Prosecution witnesses.³⁰ In the Prosecution's submission, document 19, which the Prosecution intends to use with witness K84, was disclosed to the Defence on 27 November 2008, and the evidence of K84, as submitted, has been apparent to the Defence for some time.³¹ In addition, the Prosecution submits that two other exhibits already on the Rule 65*ter* list contain similar information to that of document 19, and, therefore, are unlikely to prejudice the Accused in the preparation of his defence.³² Further, the Prosecution submits, besides being relevant to the transfer of bodies from Kosovo to Serbia – an operation codenamed “Dubina 2” - documents 20-22 are additionally relevant to establishing the powers and authority of the Accused in this respect.³³ These documents were disclosed to the Defence in November and December of 2008.³⁴

17. Document 23 is an Order signed by the Accused in April of 1999³⁵ that relates to the admission of foreign volunteers into VJ units, and specifically, the method for this admission. Document 24 is a decision dated 4 December 1998 whereby a Collegium of the MUP was set up. It includes a list of members of this Collegium, including the Accused, and summarizes its functions. The Prosecution submits that document 23 was disclosed to the Defence on 19 December 2008 and again on 30 January 2009, while document 24 was disclosed on 19 January 2009.³⁶

18. The Defence submits that the Prosecution has not indicated when it came into the possession of documents 16-24.³⁷ It opposes the addition of Documents 16-24 on the basis that there has been no good cause which would justify allowing addition to the Rule 65*ter* list now that trial has begun.³⁸

19. The Chamber notes, as submitted by the Defence, that the Prosecution has not, for any of documents 16-24, provided information as to when it received these documents. All of the documents, however, were disclosed to the Defence prior to the start of trial. There is no information that would point to anything other than the Prosecution acting in good faith in this regard. For the purposes of this Decision, the Chamber will review, below, whether the documents being sought for addition to the Rule 65*ter* list are not “obviously irrelevant” to the case.

³⁰ Motion, para 17.

³¹ Motion, paras 18-19.

³² Motion, para 20.

³³ Motion, para 21.

³⁴ Motion, paras 21, 22.

³⁵ The Chamber notes that it is unclear from the English translation whether the order is signed on 11 or on 14 April 1999.

³⁶ Motion, paras 25, 27.

³⁷ Response, paras 15, 17.

³⁸ Response, paras 15, 17.

20. Concerning documents 16-18, the Chamber has reviewed this material, especially the letter written by the Accused (document 18). For the purposes of its determination at this stage, the Chamber finds that the documents are sufficiently relevant to this case to warrant their addition to the Rule 65ter list. The Accused has been in possession of these documents since November of 2008. The addition of this material to the Rule 65ter list does not reflect upon the question of admissibility of this document. In light of the fact that the trial is still in its early stages, it is the view of the Chamber that the Defence is not prejudiced by this addition to the Rule 65ter list.

21. With respect to documents 19-21, the Chamber notes that the Prosecution has asserted, in its Pre-Trial Brief, that the MUP was involved in the disinterment and transfer of bodies initially buried in Kosovo to Serbia, in an attempt to cover them up.³⁹ The Chamber has reviewed these documents and is of the opinion that they include sufficiently relevant information to this case to warrant addition to the Rule 65ter list. However, as noted, with respect to document 22, the English translation of document 22 available on e-court does not appear to match the original. The Chamber directs the Prosecution to upload the correct English translation of document 22 and will reserve its decision of the addition of document 22 to the Rule 65ter list, until the Prosecution confirms it that the correct version has been uploaded. It will then render an oral decision with regard to the addition of document 22 to the Rule 65ter list.

22. Concerning document 23, in view of the allegations set forth in the Prosecution's Pre-Trial Brief and the Indictment regarding the incorporation and use of volunteers with a criminal background in VJ and MUP units,⁴⁰ the Chamber is satisfied that it is relevant to this case. Further, it was disclosed to the Defence prior to the start of trial. The Chamber does not believe that the Accused would be prejudiced by the addition of this document to the Rule 65ter list at this early stage of the trial.

23. With respect to document 24, a decision issued on the establishment of the Collegium of the MUP, the Chamber notes the Defence submission that this document contains two pages that were not part of the original decision, and that it is not clear why they were annexed to the document.⁴¹ The Chamber is not in a position to determine how many pages were included in the original decision and why, if they were not, they were annexed to this particular document. Challenges to the authenticity or reliability of the proposed document are more appropriately raised when the document is proposed for admission into evidence. For the purposes of this Decision, the Chamber is satisfied that this document is sufficiently relevant to warrant its addition to the Rule 65ter list.

³⁹ See Prosecution's Pre-Trial Brief, paras 167-173, and Motion, para 17.

⁴⁰ Indictment, *see*, for example, para 20; Prosecution's Pre-Trial Brief, paras 84-87.

⁴¹ Response, para 16.

5. 21 Documents for which removal from the Rule 65ter list is sought

24. The Defence opposes the removal of 21 exhibits from the Rule 65ter list, as proposed by the Prosecution. It submits that notice had been given to the Defence of the Prosecution's intention to rely on these documents, and that further, these exhibits are relevant because many relate to KLA activities and criminal actions.⁴² It is the position of the Defence that these documents should stay on the Rule 65ter list in the instance that the issue they pertain to arises in the course of the Prosecution's case.⁴³ The Chamber is of the view that it is for the Prosecution to decide which documents it wishes to include on its Rule 65ter list, hereby giving its notice of the materials it will seek to rely on during the Prosecution case. This will not preclude the Defence from seeking to tender any of these documents if so decides in the future. The Chamber does not consider, therefore, that there any compelling reasons as to why these 21 documents should remain on the Rule 65ter list.

III. DISPOSITION

25. For the foregoing reasons, and pursuant to Rule 65ter(E) of the Rules, the Chamber **GRANTS** the Motion save that it **RESERVES** its decision with respect to document 22.

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

Dated this fourth day of March 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]

⁴² Response, para 8.

⁴³ Response, para 8.