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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: 31 August 2010

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: **31 August 2010**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR LEAVE TO AMEND THE RULE 65 *ter* WITNESS LIST AND FOR DISCLOSURE OF AN EXPERT WITNESS REPORT PURSUANT TO RULE 94 *bis*

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the "Prosecution's Motion for Leave to Amend the Rule 65*ter* Witness List and for Disclosure of an Expert Witness Report pursuant to Rule 94*bis*", filed on 8 January 2010 ("Motion"), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

A. Motion

1. In the Motion, the Prosecution sought the leave of the Chamber to amend the list of witnesses filed pursuant to Rule 65 *ter*(E)(iii) of the Rules of Procedure and Evidence ("Rules") to include expert witness, Michael Hedley, and to disclose his expert report pursuant to Rule 94 *bis*(A).[1] The Prosecution indicates that Michael Hedley is not proposed for *viva voce* testimony or testimony pursuant to Rule 92 *bis* or Rule 92 *ter*.[2] In its Motion, the Prosecution submits that it inadvertently omitted the "Report of the Examination and Recovery of Evidence from Kravica Warehouse, Bosnia and Herzegovina, September/October 2000" ("Report") from the "Prosecution's Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94bis and Attached Appendices A and B", filed on 13 March 2009 ("94 *bis* Notice").[3]

2. The Prosecution submits that the addition of Michael Hedley, who is a Scene of Crime Officer, and the disclosure of his Report would be in the interests of justice.[4] In particular, the expert report concerns the examination and recovery of evidence at the Kravica Warehouse and the Glogova gravesite and is *prima facie* relevant to and probative of material issues raised in the Indictment.[5] The Prosecution further submits that the Report has already been disclosed to the Accused and it will not in any way prejudice the Defence.[6]

B. Response

3. The Chamber notes that Mr. Tolimir ("the Accused") did not file a Response to the Motion and that he did not file a Notice pursuant to Rule 94 *bis*(B) in relation to the expert report attached to the Motion.

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[1] Motion, paras. 1, 13.
[2] See Motion, footnote 1.
[3] Motion, para. 1.
[4] Motion, para. 9.
[5] Motion, para. 2.
[6] Motion, paras. 3, 12.

II. APPLICABLE LAW

A. Rule 65 *ter* Witness List

4. It is settled jurisprudence that a Chamber may grant a motion for amendment of the Witness List if it is satisfied that this is in the interests of justice.[7] In making this decision, the Chamber must ensure that there will be no prejudice to the Defence as a result of the late addition of witnesses to the Witness List.[8] Factors to be taken into account in this regard are the *prima facie* relevance of the proposed evidence and probative value in accordance with Rule 89 (C), whether the moving party has acted diligently in identifying the proposed witness(es) and thereby demonstrated good cause for the request, the stage of the proceedings at which the request is made, and whether the addition would result in undue delay.[9]

5. As is the case for the addition of material to the Exhibit List, the Chamber must also be mindful of the Prosecution's duty to present the available evidence in its endeavour to prove its case.[10] Equally the Trial Chamber must ensure that the right of the accused to have adequate time and facilities to prepare his defence[11] is fully respected.

B. Rule 94 bis

6. Rule 94 *bis* reads as follows:

> (A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
>
> (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
>
> i. it accepts the expert witness statement and/or report; or
>
> ii. it wishes to cross-examine the expert witness; and

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[7] *Prosecutor v. Stanišić and Simatović,* Case No. IT-03-69-T, Decision on Prosecution Motion to Amend Rule 65 *ter* Witness List, 27 February 2008, p 5; *Prosecutor v. Stanišić and Zupljanin,* Case No. IT-08-91-T, Decision Granting in Part Prosecution's Motion for Leave to Amend its Rule 65 *ter* List of Witnesses, filed confidentially on 4 December 2009 ("*Stanišić and Zupljanin* 4 December 2009 Decision"), para. 14; *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Leave to Amend its Witness List to Add one Fact Witness, filed confidentially on 19 February 2010 ("*Karadžić* Decision"), para. 5,

[8] *Karadžić* Decision, para 5; *Prosecutor v. Limaj et al.,* Case No. IT-03-66-T, "Decision on Prosecution's Motion to Amend Witness List and for Protective Measures", 17 February 2005, para. 3.

[9] *Karadžić* Decision, para. 5; *Prosecutor v. Đordević,* Case No. IT-05-87/1-T, Decision on Prosecution's Motion for Leave to Amend its Rule 65 *ter* List, 14 May 2009, para. 5.

[10] *Stanišić and Zupljanin* 4 December 2009 Decision, para. 15.

[11] Article 21 (4) (b) of the Statute of the Tribunal ("Statute").

iii. it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

III. DISCUSSION

7. The Chamber has reviewed the Rule *65 ter* summary which is contained in Appendix A of the Motion and has also reviewed Michael Hedley's expert report entitled "*A Report of the Examination and Recovery of Evidence from Kravica Warehouse, Bosnia and Herzegovina, September/October 2000*", which is attached at Appendix B. The Prosecution submits that the expected evidence of Michael Hedley provides important forensic evidence establishing linkages between the victims killed at the Kravica Warehouse site and the Glogava gravesite[12] and that the evidence also assists to establish a DNA connection between the Kravica Warehouse and the secondary mass grave at Zeleni Jadar.[13] On the basis of the Rule *65 ter* summary, the expert report and the detailed submission made by the Prosecution with respect to the witness,[14] the Chamber is satisfied that the expected evidence of this witness is *prima facie* relevant to the case and of probative value.

8. Furthermore, of particular importance is the question of whether the interests of the Defence are adequately protected.[15] In this context, the Chamber should ensure that there will be no prejudice to the Defence as a result of the late addition of the witness to the Rule 65 *ter* list. The Chamber considers that adding Michael Hedley to the 65 *ter* witness list will advance the Tribunal's truth finding function.

9. Pursuant to Rule 94 *bis* a report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. The Chamber notes that the Prosecution filed its "Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94*bis* and Attached Appendices A and B" on 13 March 2009. The Chamber also notes the Prosecution's submission that the proposed expert report was disclosed to the Accused via the EDS on 17 September 2008.[16] The Chamber is satisfied that the proposed report was disclosed

[12] Motion, para. 9.

[13] Motion, para. 9.

[14] Motion, paras. 9 and 10, *See also* Motion, Appendices A and B.

[15] *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motion to Amend Witness List and for Protective Measures, 17 February 2005 ("Limaj Decision"), para. 3; *Prosecutor v. Limaj et al.*, Case No. IT 03-66-T, Decision on Prosecution's Motion II to Amend Witness List, 9 March 2005, para. 2; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion for Leave to Amend its Rule 65 ter List, 14 May 2009 ("Đorđević Decision"), para. 5.

[16] Motion, para. 12.

at an early stage and therefore considers that the Accused has had sufficient notice of it and the addition of the witness to the Rule 65 *ter* list will not prejudice or adversely affect his ability to prepare for trial.[17] The Chamber is also of the view that the addition of Michael Hedley to the Rule 65 *ter* list of witnesses will not cause undue delay of the proceedings.

10. For the foregoing reasons the Chamber finds that it is in the interests of justice for Michael Hedley to be added to the Rule 65 *ter* list.

11. The Prosecution has stated its intention to move for the admission of the evidence of the witness Michael Hedley pursuant to Rule 94 *bis*.[18] However, the Chamber notes that in the Motion, the Prosecution has only negatively indicated that Michael Hedley is "not proposed for *viva voce* testimony or testimony pursuant to Rule 92*bis* or Rule 92*ter*".[19]

12. Having found that the Defence did not file a Notice pursuant to Rule 94 *bis*(B) following the filing of the Motion, the Chamber must decide what consequence, if any, this has for the cross-examination rights of the Accused. In considering this, the Chamber notes the "Decision regarding Prosecution's Rule 94 *bis* Notice" filed on 6 March 2007 in *Prosecutor v Popović et al.* ("Popović Decision"), where the Trial Chamber held:

> Neither does the text of Rule 94 *bis* imply a waiver of cross-examination rights for failing to file a responding notice. Indeed, subparagraph (C)—which provides for the possible admission of expert reports without cross-examination—seems to require specific action by the opposing party before admission without cross-examination is appropriate. [20]

In the Popović Decision it was further held that the plain wording of Rule 94 *bis*(C) suggests that the only manner in which reports can be admitted under that Rule without calling the witness to testify in person is through explicit acceptance by the opposing party.[21] The Trial Chamber accepts the reasoning of the Popović Decision and concludes that the failure of the Defence to file a Notice pursuant to Rule 94 *bis*(B) does not imply waiver of cross-examination rights on the part of the Defence and therefore the expert report of Michael Hedley is not admissible pursuant to Rule 94 *bis*(C). The right of the Defence to cross examine the witness Michael Hedley is hereby affirmed.

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[17] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion for Leave to File a Supplemental Rule 65 ter Exhibit List, 18 March 2010, para. 8; *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Leave to Amend Its Rule 65 ter Exhibit List (Confidential), 8 May 2008, para. 5; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Third Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 23 April 2007, p.3.

[18] *See* Motion, Appendix A.

[19] See Motion, footnote 1.

[20] *Popović* Decision, para. 19.

[21] *Popović* Decision, para. 19. *See also* Rule 92 *bis* (B) (i).

IV. DISPOSITION

13. For these reasons, pursuant to Rules 65 *ter* and 94 *bis*, the Trial Chamber hereby

(1) **GRANTS** the Motion **IN PART**; and

(2) **DECIDES :**

(i) to grant leave to amend the Rule 65 *ter* witness list so as to include Michael Hedley.

(ii) that the expert report of Michael Hedley will not be admitted in evidence pursuant to Rule 94 *bis*(C).

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

Judge Christoph Flügge
Presiding Judge

Dated this thirty-first day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]