



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: 4 October 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: 4 October 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 26 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* of the Rules of Procedure and Evidence (“Rule 65 *ter* Witness List” and “Rules”, respectively) to include expert witness, Professor Berko Zečević, and to disclose his expert report pursuant to Rule 94 *bis*(A).¹ The Prosecution indicates that Professor Zečević is proposed as a *viva voce* witness.²

2. The Prosecution argues that the addition of Professor Zečević to the Rule 65*ter* Witness List and the disclosure of his expert report are in the interests of justice and will not prejudice Mr. Tolimir (“the Accused”).³ The Prosecution also submits that Professor Zečević’s evidence pertains to the construction and use of modified air bombs by the VRS in Bosnia and Herzegovina in 1994–1995 and has direct relevance to the intent, as demonstrated in particular by the Accused in his proposal of 21 July 1995 to the Command of the VRS Main Staff in which he stated that the most propitious means of the destruction of the population of Žepa would be by means of chemical weapons or aerosol grenades and bombs.⁴ The Prosecution contends that Professor Zečević’s evidence is further responsive to the position taken by the Defence in the Pre-Trial Brief⁵ regarding the use of chemical and certain other weapons.⁶

3. The Prosecution therefore submits that the admission of the expert report and the inclusion of Professor Zečević on the Rule 65 *ter* Witness List will not prejudice the Accused or impose an

¹ Motion, paras. 1, 11.

² Motion, paras. 2, 10.

³ Motion, para. 2.

⁴ Motion, para. 7.

⁵ Zdravko Tolimir’s Submission with a Pre-Trial Brief Pursuant to Rule 65 *ter*(F) and Notification of the Defence of Alibi in Respect of Some Charges, 30 September 2009, paras. 259–260.

⁶ Motion, para. 8.

undue burden upon Defence, considering the limited issues to which the proposed expert evidence pertains and “the pre-trial status of the proceedings”.⁷

B. Response

4. The “Response to 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* of 25 January 2010” was submitted on 8 February 2010 in BCS and filed confidentially in English on 10 February 2010 (“Response”). It is the position of the Accused that the report is irrelevant to the case and that there is no valid reason for submitting it at a very late phase in the pre-trial proceedings.⁸ The Accused submits that no chemical weapons or aerosol grenades and bombs were used in the sector of Žepa and that the use of expert reports on the nature and characteristics of individual combat equipment is irrelevant and only leads to a waste of time and money.⁹

5. The Accused submits that the primary topic of the report is modification of aircraft bombs and their use on the Sarajevo front and it would raise numerous issues which are beyond the range of the Third Amended Indictment.¹⁰ The Accused argues that the submission of Professor Zečević’s expert report at a very late stage made it “absolutely impossible” for him to verify the statements in the expert report and investigate matters raised by it,¹¹ that summoning of Professor Zečević would require substantial engagement on the part of the Accused to prepare for cross-examination and that the Accused would have to call witnesses and experts who would testify on the events and the situation on the Sarajevo front.¹²

6. For these reasons, the Accused requests that the Chamber dismiss the Motion.¹³

II. APPLICABLE LAW

A. Rule 65 *ter* Witness List

7. It is settled jurisprudence that a Chamber may grant a motion for amendment of the Rule 65 *ter* Witness List if it is satisfied that this is in the interests of justice.¹⁴ In making this decision,

⁷ Motion, para. 10. The Chamber notes that the motion was filed during the pre-trial phase.

⁸ Response, para. 3.

⁹ Response, para. 4.

¹⁰ Response, para. 6.

¹¹ Response, para. 9.

¹² Response, para. 11.

¹³ Response, para. 13.

¹⁴ *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*,

the Chamber must ensure that there will be no prejudice to the Accused as a result of the late addition of witnesses.¹⁵ 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.¹⁶

8. 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.¹⁷ Equally the Chamber must ensure that the right of the accused to have adequate time and facilities to prepare his defence¹⁸ is fully respected.

B. Rule 94 bis

9. 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
- (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.

Case No. IT-08-91-T, Decision Granting in Part Prosecution's Motion for Leave to Amend its Rule 65 *ter* List of Witnesses, confidential, 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, confidential, 19 February 2010 ("*Karadžić* Decision"), para. 5.

¹⁵ *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 ("*Limaj* Decision"), para. 3.

¹⁶ *Karadžić* Decision, para. 5; *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.

¹⁷ *Stanišić and Zupljanin* 4 December 2009 Decision, para. 15.

¹⁸ Article 21(4)(b) of the Statute of the Tribunal ("*Statute*").

III. DISCUSSION

A. Addition to 65 ter list

10. It is the Prosecution case that Professor Zečević's evidence is directly relevant to the Accused's intent, particularly as demonstrated in a proposal of 21 July 1995 relating to the use of aerosol grenades and bombs in connection with Žepa.¹⁹ Professor Zečević's evidence concerns the nature of fuel-air bombs and the capacity of the VRS to manufacture, deploy and use these weapons in 1995.²⁰ As such, the expected testimony of this witness is *prima facie* relevant and of probative value.

11. The Prosecution does not address directly the question why it has requested the addition of Professor Zečević to the 65 ter Witness List at such a late stage. It would appear that the full significance of his evidence for the present case was not apparent until the Accused filed its Pre-Trial Brief on 30 September 2009.²¹ The Chamber notes that the Motion was filed several months later.

12. Of particular importance is the question whether the interests of the Accused are adequately protected.²² The Chamber accepts the submission of the Prosecution that the proposed evidence "does not warrant a substantial reconsideration of the Defence strategy",²³ because the matters to be raised in Professor Zečević's testimony have a limited focus. On the other hand the Chamber does not accept the Prosecution assertion that the proposed evidence does not warrant a review of extensive additional materials.²⁴ The Accused will need to study the expert report of Professor Zečević, which is almost 200 pages long and is in parts highly technical; and it will have less time to do this, now that the case is at the trial phase. However, the Chamber finds that provided that the Accused is given adequate time for preparation, it will not be prejudiced by the addition of Professor Zečević to the 65 ter Witness List. The Chamber is also of the view that the addition of Professor Zečević will not cause undue delay in the proceedings in view of the nature of his evidence and the stage reached in the trial.

¹⁹ Motion, para. 7.

²⁰ Motion, para. 8, Annex A.

²¹ Motion, para. 8.

²² *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; *Đorđević* Decision, para. 5.

²³ Motion, para. 10.

²⁴ Motion, para. 10.

13. Upon weighing up the above considerations, the Chamber finds that it is in the interests of justice for Professor Zečević to be added to the Rule 65 *ter* Witness List, provided that he does not give oral testimony for at least another month.

B. Disclosure pursuant to Rule 94 bis

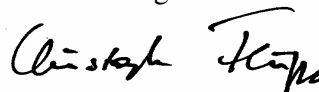
14. The Chamber notes that the Accused opposes the Motion and argues that the report of Professor Zečević is irrelevant to the case.²⁵ Rule 94 *bis*(C) provides that if the opposing party accepts the report of an expert witness, it may be admitted into evidence by the Trial Chamber without calling the witness to testify in person. In this instance the opposing party evidently does not accept the report. Therefore the condition given in Rule 94 *bis*(C) is not met. The Chamber however notes that Professor Zečević is proposed as a *viva voce* witness and thus the right of the Accused to cross examine him is guaranteed. Therefore the application of Rule 94 *bis*(C) is in any event moot.

IV. DISPOSITION

15. For these reasons, pursuant to Rules 54, 65 *ter*, 89 and 94 *bis*, the Chamber hereby **GRANTS** the Motion **IN PART** and **ORDERS** that:

- (1) leave shall be granted to amend the Rule 65 *ter* Witness List so as to include Professor Berko Zečević; and
- (2) Professor Zečević shall not testify before 4 November 2010.

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



Judge Christoph Flügge
Presiding Judge

Dated this fourth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ Response, paras. 3–4, 13.