

**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-98-32/1-PT

Date: 22 April 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Krister Thelin, pre-trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 22 April 2008

PROSECUTOR

v.

**MILAN LUKIĆ
AND
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO AMEND RULE
65 TER WITNESS LIST AND ON RELATED SUBMISSIONS**

The Office of the Prosecutor

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Mr. Frédéric Ossogo
Mr. Stevan Cole
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Counsel for the Accused

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Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

1. Background and submissions

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seized of the “Prosecution’s motion to amend 65 *ter* witness list”, filed confidentially on 11 April 2008 (“Motion”), wherein the Prosecution:

- 1) states that it no longer intends to call ten witnesses at trial and “moves for their removal from the Prosecution’s witness list”,¹ and
- 2) “identifies the following witnesses as witnesses for which [the Prosecution] will seek to introduce their evidence through a different method:
 - (i) VG-002 – to change from *viva voce* to 92 *bis*.
 - (ii) VG-022 – to change from 92 *bis* to 92 *ter*.”²

The Prosecution also states that it will only call witnesses VG-063, VG-071, VG-089 and VG-097 “to rebut evidence of alibi introduced during the course of the Defence case”.³ In addition to the Motion, several related submissions concerning the Prosecution’s witness list have been made and which are appropriate to consider in this context.

2. At the status conference on 12 March 2008, the Prosecution indicated that during the process of finalising its submissions pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence (“Rules”), due on 14 March 2008, the Prosecution had identified additional witnesses whom it had previously not disclosed to the Defence pursuant to Rule 66(A)(ii) (“proposed witnesses”).⁴ The Prosecution stated that the witnesses in question had “just been selected in the last few days” and undertook to disclose the statements required by Rule 66(A)(ii) within a week of the filing of its Rule 65 *ter* submissions.⁵ The Prosecution was thereupon directed to provide explanation in its pre-

¹ Motion, para. 3, referring to witnesses VG-006, VG-026, VG-031, VG-048, VG-051, VG-077, VG-080, VG-081, VG-082, and VG-118.

² Motion, para. 5. The Prosecution also submits that “[i]f the Chamber grants the Prosecution’s request to reduce the size of the case the estimated time required to introduce its evidence (excluding cross-examination and procedural discussions) is 82 hours if the Prosecution’s motions under 92 *bis* and 92 *ter* are granted”, *id* para. 6, submitting that this is a 42% reduction of the time previously estimated by the Prosecution in its Rule 65 *ter* submission on 14 March 2008. The Prosecution adds that if its motions pursuant to Rule 92 *bis* and Rule 92 *ter* are denied and all Prosecution evidence is heard *viva voce* then it will take 132.5 hours to present the Prosecution case (excluding cross-examination and procedural discussions), a reduction of 33%, *ibid*.

³ Motion, para. 4.

⁴ Status Conference, 12 March 2008, T. 160-161.

⁵ Status Conference, 12 March 2008, T. 161.

trial brief as to why it would only disclose the statements of the proposed witnesses after the submission of the pre-trial brief.⁶

3. On 14 March 2008, the Prosecution filed its submissions pursuant to Rule 65 *ter*(E), however the Prosecution did not provide any information as directed at the status conference.⁷ On 20 March 2008, the Prosecution submitted a status report wherein the Prosecution indicated that some of the 22 proposed witnesses were added to rebut alibi evidence of the Defence and some were added “to address the substantive charges in the indictment”, without identifying which were which.⁸ The Prosecution explained that at the time of the filing of its Rule 65 *ter*(E) submissions, “the Prosecution decided to add to the witness list 22 witnesses that had not been identified as witnesses previously in regularly scheduled 65 *ter* or status conferences”.⁹ The Prosecution requested an extension until 30 April 2008 to comply with its disclosure obligation pursuant to Rule 66(A)(ii), at which point the Prosecution would either disclose the unredacted statements of the new witnesses or submit applications for protective measures.¹⁰ The Prosecution also requested permission to provide the Defence with the redacted statements of 15 listed witnesses, noting that it had already disclosed the Rule 66(A)(ii) material with respect to seven of these witnesses.¹¹

4. On 1 April 2008, the pre-trial Judge ordered the Prosecution to disclose to the Defence the redacted statements of the 15 listed witnesses by 1 April 2008, and to file “no later than Friday 4 April 2008 [...] its detailed explanation as to the reasons for delayed disclosure of the statements of each of the additional witnesses”.¹² The pre-trial Judge remained seized of the other items of relief sought by the Prosecution. On 3 April 2008, the Defence of Sredoje Lukić objected to the request for stay of the Prosecution’s disclosure obligation, noting that, as it is under an obligation to submit its pre-trial brief by 25 April 2008, it would violate “the rights of the Accused to have a fair trial and enjoy equality of arms” if disclosure were stayed beyond that deadline.¹³ The Defence of Sredoje Lukić therefore requests that the Prosecution be ordered to disclose the remaining statements pursuant to Rule 66(A)(ii) before 25 April 2008, or, if the Prosecution’s request is

⁶ Status Conference, 12 March 2008, T. 161.

⁷ Prosecution’s pre-trial brief pursuant to Rule 65 *ter* (E) (I), filed publicly with two public annexes and confidential Annex C; Prosecution’s list of witnesses pursuant to Rule 65 *ter* (E) (II), filed confidentially on 14 March 2008; Prosecution’s list of exhibits pursuant to Rule 65 *ter* (E) (III), filed confidentially on 14 March 2008.

⁸ Prosecution’s status report on disclosure of material for newly identified Prosecution witnesses with confidential Annex A and request for further extension of time, filed confidentially on 20 March 2008 (“Status Report”), para. 2.

⁹ Status Report, para. 2.

¹⁰ Status Report, paras 5, 8(a).

¹¹ Status Report, paras 4, 8(b).

¹² Order for extension of time, filed publicly on 1 April 2008. At the status conference on 4 September 2007, T. 124, a workplan was set according to which disclosure pursuant to Rule 66(A)(ii) was to be completed before 15 October 2007.

¹³ Response of Sredoje Lukić to “Prosecution’s status report on disclosure of material for newly identified Prosecution witnesses with confidential and *ex parte* Annex A and request for further extension of time” with confidential and *ex*

granted, that the Defence be granted an extension to file its pre-trial brief either until 14 May 2008 or, alternatively, two weeks after disclosure is completed pursuant to Rule 66(A)(ii) (“Defence Request”).¹⁴

5. On 4 April 2008, the Prosecution responded to the order of 1 April and submitted that it “[understood] the Pre-Trial Chamber’s request for an ‘explanation’ as a request for further information in relation to the reasons why the Prosecution seeks to disclose only redacted versions of these witnesses’ statements”.¹⁵ In its view, Rule 66(A)(ii), and in particular its last clause,¹⁶ places “a rolling obligation upon the Prosecution to disclose statements to the Defence upon making a decision to call these witnesses.¹⁷ As the proposed witnesses were “selected by the Prosecution after the October 2007 disclosure deadline”,¹⁸ its “obligation to disclose [was] thus triggered by its decision to call these witnesses, which was taken on the date it filed its Pre-Trial Brief.”¹⁹ In “partial correction to its previously submitted estimates”, the Prosecution noted that in total 19, not 22, witnesses were added to the witness list after the October 2007 disclosure deadline.²⁰

6. The Prosecution submits that several of the proposed witnesses have not been seen in person by the Prosecution for many years. When they were interviewed, some witnesses expressed serious security concerns; moreover, some witnesses who were recently contacted by phone have also expressed such concerns.²¹ Six witnesses have never been interviewed by the Prosecution but were selected based on statements given to other organisations.²² Of these six, four relate to anticipated alibi evidence of the Defence and two were selected “for substantive evidentiary purposes.”²³ The Prosecution submits that due to “the potential vulnerability” of these yet-to-be-interviewed witnesses it should be granted delayed disclosure also in relation to them.²⁴ Lastly, the Prosecution submits that it would submit a motion wherein it would seek leave to “drop from its witness list”

parte Annex A, filed confidentially on 3 April 2008 (“Response of Sredoje Lukić”), paras 10, 12. The deadline of 25 April 2008 was set in the workplan adopted at the 4 September 2007 status conference, T. 124.

¹⁴ Response of Sredoje Lukić, para. 14

¹⁵ Prosecution’s response to order of the Pre-Trial Judge in relation to delayed disclosure of statements of new witnesses pursuant to Rule 66(A)(ii) and reply to Sredoje Lukić’s response of 3 April 2008, filed confidentially on 4 April 2008 (“Prosecution Response”), para. 7.

¹⁶ The Prosecution refers to the phrase “shall be made available to the defence when a decision is made to call those witnesses”, Prosecution Response, para. 6.

¹⁷ Prosecution Response, para. 6.

¹⁸ Prosecution Response, para. 6.

¹⁹ Prosecution Response, para. 6.

²⁰ Prosecution Response, para. 9.

²¹ Prosecution Response, paras 8, 10(e), referring to witnesses VG-024, VG-030, VG-035, VG-042, VG-085, VG-094, VG-104 whom the Prosecution has not seen in person for between seven and eleven years. With respect to witnesses VG-024 and VG-030, the Prosecution states that it has been unsuccessful in contacting them in order to clarify their evidence and the need for protective measures since the case was returned to the Prosecution in July 2007, Prosecution Response, para. 8.

²² Prosecution Response, para. 10(e).

²³ Prosecution Response, para. 10(e).

²⁴ Prosecution Response, para. 8 (witnesses VG-024 and VG-030).

witnesses VG-017, VG-026, VG-031, and VG-118.²⁵ The Trial Chamber notes that the latter three witnesses are included in the subsequently filed Motion, however no mention is made of witness VG-017 as being “dropped”.²⁶

7. On 10 April, the Defence of Sredoje Lukić sought leave to submit a proposed reply. Leave is hereby granted. The Defence argues that the Prosecution misunderstood the pre-trial Judge’s order of 1 April 2008 according to which, in its view, the Prosecution was to explain why it “was not able to disclose this mass of statements earlier”.²⁷ In the Defence’s view, the Prosecution has not provided any such information and should therefore be ordered to provide additional detailed explanation as to the reasons for delayed disclosure.²⁸

2. Discussion

8. Before the Trial Chamber are several matters. First, the Prosecution’s requests in the Motion to remove ten witnesses from its witness list and to change the manner of testimony of two witnesses. Secondly, how to treat the Prosecution’s late inclusion on its witness list of the proposed witnesses, who had not previously been identified or disclosed. Thirdly, whether or to what extent the Defence Request should be granted. The Trial Chamber will consider each matter in turn.

a. The Motion

9. It is settled jurisprudence that a Trial Chamber may grant a motion requesting amendment of a Rule 65 *ter* witness list if it is satisfied that it is in the interests of justice to do so.²⁹ This standard has been applied both to requests for amendment made before³⁰ and after the commencement of trial.³¹ In view of the rights of the Accused to a fair and expeditious trial, and to have adequate time and facilities for the preparation of his defence, the Trial Chamber must ensure that the Accused

²⁵ Prosecution Response, paras 8, 10(c).

²⁶ Motion, para. 3.

²⁷ Sredoje Lukić’s motion for leave to reply to “Prosecution’s response to order of the Pre-Trial Judge in relation to delayed disclosure of statements of new witnesses pursuant to Rule 66(A)(ii) and reply to Sredoje Lukić’s response of 3 April 2008” and reply, filed confidentially on 10 April 2008, para. 9.

²⁸ *Id.* para. 10.

²⁹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Prosecution motion to amend its Rule 65 *ter* witness list, filed confidentially on 21 December 2006 (“D. Milošević Decision”), para. 8, with further references.

³⁰ *Id.* See further *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-PT, Decision on motion for leave to amend its original Rule 65 *ter* witness list dated 7 November 2005 with Annexes A and B, filed confidentially on 5 May 2006, para. 4; and *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on motion for leave to amend the Prosecution’s witness and exhibit lists, filed confidentially on 9 July 2007 (“Delić Decision”), p. 6;

³¹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution’s second motion for leave to amend its Rule 65 *ter* witness list and for admission of witness statement and associated exhibits, filed confidentially on 19 April 2007, p. 5; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution’s motion II to amend witness list, filed publicly on 9 March 2005, para. 2; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Prosecution’s motion to vary its Rule 65 *ter* witness list, filed publicly on 7 February 2005 (“Halilović Decision”), p. 6.

will not be prejudiced as a result of the addition of witnesses.³² However, the Trial Chamber must also be mindful of the Prosecution's duty to present the available evidence to prove its case.³³

10. Factors to be taken into account when assessing whether it would be in the interests of justice to grant an amendment include whether the moving party has shown good cause for its request, the stage of the proceedings at which the request is made, whether granting the amendment would result in undue delay of the proceedings and the repetitive or cumulative nature of the testimony.³⁴ The Trial Chamber may also consider the complexity of the case, on-going investigations, and translation of documents and other materials.³⁵ This Trial Chamber is also of the view that it is relevant to consider whether the moving party has exercised due diligence in identifying proposed witnesses at the earliest possible moment in time.

11. With respect to the request to remove ten witnesses, the Trial Chamber recalls that it is in principle for each party to decide which witnesses to call to prove its case.³⁶ The deadline for the Defence to file its Rule 65 *ter*(F) submissions is 25 April 2008, a date which is fast approaching. The removal of ten witnesses may therefore have an impact upon the preparations of the Defence, in particular where the Defence has spent time in the past to review material pertaining to these witnesses. However, the Trial Chamber does not consider any such impact to cause unreasonable prejudice to the Defence. It is clear that the Defence will not have to respond to the evidence of the witnesses, who are removed from the witness list. Moreover, the removal of these witnesses will benefit the expediency of the proceedings. This request should therefore be granted.

12. With regard to witnesses VG-002 and VG-022, the Trial Chamber considers that the Prosecution may enter in its witness list the change of the manner in which it wishes these witnesses to testify. However, whether the witnesses will ultimately be heard in the manner proposed will depend upon the determination of motions pursuant to Rules 92 *bis* and 92 *ter* in respect of these witnesses.

b. The proposed witnesses

13. Initially, the Trial Chamber notes that there is a certain confusion as to the number of new witnesses included in the witness list filed on 14 March 2008. In its status report of 20 March 2008,

³² Delić Decision, p. 6; D. Milošević Decision, para. 9, referring to *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision Prosecution motion for leave to amend its Rule 65 *ter* witness list to add Shaun Byrnes, filed on 11 December 2006, para. 4.

³³ Delić Decision, p. 6.

³⁴ D. Milošević Decision, para. 10 with further references.

³⁵ Delić Decision, p. 6.

³⁶ Halilović Decision, p. 6.

the Prosecution submitted that 22 new witnesses were added.³⁷ However, on 4 April 2008 the Prosecution stated “in partial correction to its previously submitted estimates which inaccurately included [witnesses VG-017, VG-024, VG-026, VG-030 and VG-031] -- that in total 19 witnesses have been added to the Prosecution’s witness list after [the expiry of the October 2007 deadline].”³⁸ The Trial Chamber notes that the Prosecution does not indicate in its witness list who the new witnesses are. The Prosecution should be ordered to provide clarity in this respect.

14. On 4 September 2007 a detailed workplan for pre-trial preparations was adopted, according to which the Prosecution was to complete Rule 66(A)(ii) disclosure by 15 October 2007.³⁹ As noted above, the Trial Chamber has twice in the recent past directed the Prosecution to explain why it was unable to identify the proposed witnesses and make disclosure to the Defence in accordance with the workplan. On both occasions, the Prosecution failed to comply. The Trial Chamber notes in this context that on a previous occasion it extended this deadline upon the Prosecution’s request in respect of new witnesses, however the Trial Chamber has not received any such request from the Prosecution in respect of the proposed witnesses.⁴⁰

15. While it is in principle for each party to decide which witnesses to call to prove its case, the parties are under a general obligation to meet set deadlines and to act with due diligence in their preparations. The Trial Chamber notes that, pursuant to Rule 65 *ter*(N), and provided that the procedure laid down therein has been complied with, it may impose sanctions upon parties that do not meet their obligations pursuant to Rule 65 *ter*. In a situation where the deadline set for Rule 66(A)(ii) disclosure expired several months ago, it would have been incumbent upon the Prosecution to request an extension of the applicable deadline as and when it became aware of new witnesses whom it intended to call. Without such a request from the Prosecution, the Trial Chamber and, more importantly, the Defence are kept under the assumption that the required disclosure has been completed in accordance with the deadline laid down in the workplan.

16. The Prosecution argues that the last clause of Rule 66(A)(ii) imposes a “rolling obligation” upon the Prosecution to disclose witness statements to the Defence when the Prosecution has made

³⁷ Status Report, para. 2.

³⁸ Prosecution Response, para. 9. The Trial Chamber also recalls that the Motion does not include witness VG-017, who the Prosecution apparently intends to seek leave to remove from its witness list (Motion, para. 3). This witness is listed in Annex A to the Motion which includes the “Proposed 65*ter* Amended Witness List”. It is of course open to the Prosecution to seek such leave in respect of this witness in a subsequent motion.

³⁹ Status Conference, 4 September 2007, T. 124. At the status conference, counsel for the Prosecution stated that the deadline of 15 October 2007 for Rule 66(A)(ii) disclosure was “quite satisfactory”, *id.* T. 119.

⁴⁰ Decision on Prosecution motion for pre-trial protective measures, filed confidentially on 5 November 2007 wherein the Prosecution was ordered (p. 4) either to file by 7 November 2007 a reasoned motion detailing the specific need for protective measures of certain witnesses, or to disclose no later than 9 November 2007 the witness statements of the witnesses in question pursuant to Rule 66(A)(ii) and in accordance with the workplan adopted on 4 September 2007. The Prosecution did not file a request on 7 November 2007.

a decision to call the witnesses in question. The Prosecution submits in this context that that decision was taken on the date the Prosecution filed its pre-trial brief.⁴¹ The Trial Chamber does not agree. Rule 66(A) sets out a clear obligation upon the Prosecution to disclose certain material to the Defence, an obligation which is only circumscribed by Rules 53 and 69. Rule 66 is fundamental in ensuring, *inter alia*, that the Defence has adequate time and resources to examine all relevant material and to prepare its case.⁴² This is particularly important in order to ensure equality of arms as the only way in which the Defence can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely.⁴³ This is the light in which Rule 66, and Rule 65 *ter*, should be seen.

17. The first part of Rule 66(A)(ii) provides that the Prosecution shall disclose copies of the statements of all witnesses whom the Prosecution “intends to call to testify at trial” within a time-limit prescribed by the Trial Chamber or the pre-trial Judge. Once that time-limit has passed, but before the witness list has been filed, it would be counter-intuitive to the purpose of Rule 66, if the Prosecution could withhold information of new witnesses with reference to not yet having taken the decision to call the witnesses in question. Embedded in the last clause of Rule 66(A)(ii) is, therefore, a duty upon the Prosecution to exercise diligence when selecting witnesses, all in the interest of ensuring orderly and fair preparations for trial. This is even more clear in view of the fact that Rule 65 *ter*(E)(ii) requires the Prosecution to submit “the list of witnesses the Prosecutor intends to call”. Certainly, decisions to include witnesses in the witness list, that is, decisions on which witnesses to call, must have been taken at a much earlier point in time than the date on which the list is filed. Thus, inclusion of witnesses upon the Prosecution’s witness list, once it is ultimately submitted, is contingent upon disclosure having been carried out pursuant to Rule 66(A)(ii) in accordance with the workplan.

18. The Prosecution has not been clear as to why it was unable to select the proposed witnesses before the expiry of the Rule 66(A)(ii) deadline and why it could only disclose the required statements after 14 March 2008.⁴⁴ The Trial Chamber notes that the Prosecution has been in touch with several of the proposed witnesses many years ago. These, therefore, appear not to be new or

⁴¹ Prosecution Response, para. 6.

⁴² *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on defence objection to Prosecution continued disclosure, filed publicly on 7 May 2004, p. 2. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on joint defence motion seeking the Trial Chamber to order the Registrar to provide the defence with BCS transcripts of proceedings in two past cases before the International Tribunal, filed publicly on 6 March 2006, p. 3.

⁴³ *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39&40-T, Decision on Prosecution motion for clarification in respect of application of Rules 65 *ter*, 66 (B) and 67 (C), filed publicly on 1 August 2001, para. 7, also holding with reference to withholding documentary material that “[t]he Prosecution, by not disclosing the documents prior to trial, places the Defence in a position in which it will not be able to prepare properly; and it is this fact that is likely to lead to a violation of the principle of equality of arms.”

⁴⁴ See *supra* paras 2, 3, 5.

unknown witnesses to the Prosecution. The Trial Chamber further notes that six of the proposed witnesses – four of whom concern potential alibi evidence from the Defence – have never been interviewed by the Prosecution. In view of the uncertainty surrounding the circumstances in which the proposed witnesses were identified and selected, the Prosecution should be ordered to provide detailed explanations in these respects in relation to each of the proposed witnesses. In consideration of the advanced stage of the pre-trial proceedings, the deadline for this should be short. Following the Prosecution's submissions, the Trial Chamber will then consider to which extent it will accept the proposed witnesses.

c. The Defence Request

19. In relation to the Defence Request, the Trial Chamber considers that the deadline set in the workplan should remain in place. However, in view of the situation regarding the proposed witnesses, the Defence's submissions are to be based on the Prosecution's disclosure carried out pursuant to Rule 66(A)(ii) as per the workplan, including to the extent the relevant deadline was at any time extended by the Trial Chamber. The Defence will be granted an opportunity to file an addendum to its submissions should the Trial Chamber's subsequent findings in relation to the proposed witnesses so require.

3. Disposition

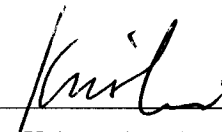
20. For the above reasons, the Trial Chamber, acting under Rules 54 and 65 *ter* of the Rules:

1. **GRANTS** the Motion in respect of the removal of the ten witnesses and the change of the manner of testimony of witnesses VG-002 and VG-022;
2. **ORDERS** the Prosecution to provide the Trial Chamber by 25 April 2008 with:
 - a) the state of the Prosecution's witness list after permitted disclosure pursuant to Rule 66(A)(ii) had been carried out in accordance with the deadline set in the work plan, *i.e.* as at 15 October 2007 or as subsequently extended in relation to specific witnesses;
 - b) the number and identity of the witnesses that the Prosecution decided after 15 October 2007 to include on its witness list filed on 14 March 2008;
 - c) in relation to each proposed witness, a detailed explanation of when the Prosecution obtained the relevant information to include the witness on its witness list, including the specific circumstances which may have prevented the Prosecution from seeking an extension of the 15 October 2007 deadline

or why the Prosecution otherwise had good cause to delay disclosure pursuant to Rule 66(A)(ii);

3. **REJECTS** the Defence Request and affirms the deadline of 25 April 2008 for the submission of the Defence Rule 65 *ter*(F) submissions, and
4. **REMAINS SEIZED** of the matter.

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



Judge Krister Thelin
Pre-trial Judge

Dated this twenty-second day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]