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: 19 June 2008

Original: English

IN TRIAL CHAMBER III

Before: **Judge Krister Thelin, Pre-Trial Judge**

Registrar: **Mr. Hans Holthuis**

Decision of: **19 June 2008**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

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

The Office of the Prosecutor

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

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I, Krister Thelin, Judge 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"), having been designated as pre-trial Judge in this case on behalf of Trial Chamber III ("the Trial Chamber"), pursuant to Rule 65 *ter* (A) of the Rules of Procedure and Evidence ("Rules"),

BEING SEISED of a "Prosecutor's Response to 'Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions'" filed on 25 April 2008 ("Prosecution Response"), in which the Prosecution provided details requested by the Trial Chamber of twenty witnesses[1] ("the proposed witnesses") identified by the Prosecution whose statements had not previously been disclosed pursuant to Rule 66 (A)(ii) of the Rules and whom the Prosecution had included on its list of witnesses filed on 14 March 2008, pursuant to Rule 65 *ter* (E) ("the Rule 65 *ter* witness list"),

NOTING the procedural history of this matter, as set out in the Trial Chamber's "Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions" issued on 22 April 2008 ("22 April Decision"),[2] in particular, that disclosure of statements of witnesses pursuant to Rule 66(A)(ii) was to be completed by 15 October 2007,

NOTING that, at a status conference held on 12 March 2008, the Prosecution undertook to disclose the statements of the proposed witnesses within seven days from the date of filing of the pre-trial brief[3] and that disclosure of the unredacted statements of four of the proposed witnesses was made on 20 March 2008,[4] disclosure of redacted statements of fifteen of the remaining proposed witnesses was made on 1 April 2008,[5] in accordance with an Order for Extension of Time issued by me on 1 April 2008, and that the Prosecutor has indicated that there is no statement in relation to the one remaining witness,[6]

NOTING that certain of the Prosecution submissions have contained contradictory or confusing information[7] but that the Prosecution now asserts that Annex A to the Prosecution Response

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[1] Prosecutor's Response to "Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions", 25 April 2008 ("Prosecution Response"), Annex A.
[2] Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, 22 April 2008 ("22 April 2008 Decision"), paras 2-7.
[3] Status Conference, 12 March 2008, T.161.
[4] Disclosure was also made at the same time of unredacted statements of another four witnesses who are no longer included in the 20 'protected witnesses', 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, 4 April 2008 ("Prosecution Response of 4 April 2008"), para. 2.
[5] Ibid.
[6] Ibid., para. 10b.
[7] See, e.g. [Confidential] Prosecution 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, 20 March 2008, para. 4,

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contains "the definitive list" of witnesses that the Prosecution has "at some time indicated were added to the witness list",[8]

NOTING the assertions made by the Prosecution in the Prosecution Response that: (a) five of the proposed witnesses were identified in connection with the preparation of submissions pursuant to Rule 92 *bis* and *ter*; (b) eight were identified and selected in response to the notices of alibi filed on behalf of the two accused; (c) five will testify in relation to crimes allegedly perpetrated in Višegrad; (d) one is a Prosecution employee who will produce 360-degree photographs of some of the alleged crime scenes; and (e) one, witness VG-118, has been withdrawn,[9]

NOTING the objections raised by the defence for Sredoje Lukić filed on 3 and 10 April 2008, objecting to the non-disclosure of information relating to approximately 30% of the witnesses to be called in this case and seeking further explanation of the reasons why disclosure was not made in September 2007 as ordered, together with a request for the order of further dates for disclosure and extension of time for filing the Defence pre-trial brief,[10]

RECALLING that, at a status conference held on 7 September 2007 and after consultation with the parties both at that conference and at a Rule 65 *ter* conference held the day before, I ordered disclosure pursuant to Rule 66 (A)(ii) to be completed by 15 October 2007, and for the Prosecution pre-trial brief and related filings, including the Rule 65 *ter* witness list, to be filed no later than 14 March 2008,[11] and that no objections were raised by the Prosecution as to the implications of the five-month period between the date set for completion of disclosure and the date set for filing of the Prosecution pre-trial brief,

RECALLING that the 22 April Decision sets out the jurisprudence relating to amendment of a Rule 65 *ter* witness list and the factors to be taken into consideration, in particular that "[t]he Trial Chamber must also be mindful of the Prosecution's duty to present the available evidence to prove its case" and that the Trial Chamber was 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

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Prosecution Response of, 4 April 2008, para. 8 and Prosecution's Motion to Amend 65 ter Witness List, 11 April 2008, para.3 re witnessVG-017.

[8] Prosecution Response, fn. 6.

[9] Ibid., paras 6–8.

[10] [Confidential] 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 Parte Annex A, 3 April 2008, para. 12; [Confidential] 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, 10 April 2008.

[11] Status conference, 7 September 2007, T. 124.

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moment in time",[12] all of which reasoning is hereby incorporated into and forms part of this current Decision,

CONSIDERING, as preliminary matters, that: (1) witness VG-118 has been withdrawn from the Rule 65 *ter* witness list;[13] (2) witness VG-120 is to be withdrawn from the Rule 65 *ter* witness list,[14] which request is hereby granted; and (3) the Prosecution has specified that witness VG-032 was identified as a 'potential witness' in error,[15] given that disclosure of the statement of this witness was made prior to 15 October 2007 pursuant to Rule 66 (A)(i),

CONSIDERING that the Prosecution seeks to call proposed witness Zoran Lesić solely to address some of the exhibits to be tendered in this case and that there is no reason to do so unless and until any valid objection is raised in connection with those exhibits,

CONSIDERING that the fact that certain of the proposed witnesses were identified in connection with the preparation of submissions pursuant to Rule 92 *bis* and 92 *ter* does not in and of itself warrant disclosure after the time directed by the pre-trial Judge, as it is the timing of disclosure of their proposed testimony that is at issue, rather than the method by which it is presented,

CONSIDERING that it is for the Prosecution to establish its witness list, provided that timely disclosure has been made to the defence, subject to the overall review of the number of witnesses by the Trial Chamber at the Pre-Trial Conference pursuant to Rule 73 *bis* (C)(i),

CONSIDERING, however, that Rule 66 (A)(ii) requires the Prosecution to make available: "within the time-limit prescribed by ... the pre-trial Judge ... copies of the statements of all witnesses whom the Prosecutor intends to call at trial" so that, in order to meet its obligations pursuant to Rule 66 (A)(ii), the Prosecution needed to have made a determination of "all witnesses whom [it] intends to call at trial" as at 15 October 2007, and it is observance of this requirement for disclosure that is currently at issue, rather than the ability of the Prosecution to establish its witness list as it sees fit in the period prior to submission pursuant to Rule 65 *ter* (E),

CONSIDERING that, as pre-trial Judge, it is my duty to ensure that the proceedings are not unduly delayed and that the obligations the parties are required to meet are timely fulfilled, and that the power to enforce such obligations by the imposition of sanctions is contained in Rule 65 *ter* (N) and Rule 68 *bis* of the Rules,

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[12] 22 April Decision, paras 9-10.
[13] Ibid., paras 11 and 20.1.
[14] Prosecution's Fifth Confidential Motion for Protective Measures and Status Report on Contact with Prosecution Witnesses, 28 May 2008, para. 3.
[15] Prosecution Response, fn. 6, confirming that this witness was selected at the time of confirmation of the indictment.

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CONSIDERING that the notification of the defence alibis occurred after the date fixed by me for Rule 66 (A)(ii) disclosure and therefore the inclusion on the Rule 65 *ter* witness list of witnesses VG-089 and VG-097,[16] in respect of whom the Prosecution states: "The Prosecution will only call the following witnesses to rebut evidence of alibi introduced during the course of the Defence case",[17] and whose redacted statements were disclosed on 15 February 2008[18] and 1 April 2008, is justified,

CONSIDERING that the position with regard to proposed witness Mitar Vasiljević is the same as for witnesses VG-089 and VG-097, in that the Prosecution asserts in Annex A to the Prosecution Response (the definitive list) that this witness "was selected in February 2008 to rebut the alibi of the Accused"[19] and therefore his inclusion on the witness list for this limited purpose is also justified, again noting that full disclosure was made on 20 March 2008,

CONSIDERING that the remaining six witnesses who have been identified as giving evidence pertaining to the alibi defences, namely witnesses VG-035, VG-085, VG-094, VG-119, VG-121 and VG-123, were selected in February and March 2008[20] and are not intended to be restricted to rebuttal of the alibi evidence but will also testify in relation to the charges in the indictment,[21]

CONSIDERING that no explanation or justification has been provided as to why these proposed witnesses are now being called to testify not only in relation to the alibi defences but also in relation to crimes charged in the indictment, although the Prosecution asserts: "For many of these witnesses their ability to testify to events relevant to the alibi defence was an important factor in the decision to add them to the witness list",[22]

CONSIDERING further that, in the case of witnesses VG-035, VG-085, VG-094 and VG-119,[23] the Prosecution has been in possession of the statements of these witnesses for several years prior to including their names on the Rule 65 *ter* witness list and so could have made disclosure as directed in September 2007, and certainly could have made disclosure as soon as the decision was made for

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[16] An application has also been filed pursuant to Rule 92 *ter* in relation to this witness, *see* Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*, 14 February 2008.
[17] Prosecution Motion to Amend 65 *ter* Witness List, 11 April 2008, para. 4, confirmed in the Prosecution Response, Annex A.
[18] Disclosure of this statement was made in support of the Rule 92 *ter* application; *see* fn16 above.
[19] Prosecution Response, Annex A, item 20.
[20] Ibid., Annex A.
[21] Ibid.
[22] Ibid., para. 7.
[23] The Prosecution filings in relation to the existence of any statement of this witness are contradictory: *see* Prosecution Response of 4 April 2008, para. 10f and the Prosecution Response, Annex A, item 13, compared with the Prosecution's Fourth Confidential Motion for Protective Measures with Ex Parte Annexes A, B, C, F and G and Confidential Annexes D and E, 30 April 2008, Annex B.

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the proposed witness to testify to matters other than the alibi defences and prior to the filing of the Rule 65 *ter* list,

CONSIDERING therefore that the inclusion in the Rule 65 *ter* witness list of witnesses VG-035, VG-085, VG-094 and VG-119 for the purpose of rebutting the alibi evidence is justified, taking into consideration that redacted disclosure was made on 1 April 2008, but that they should not be included for the purposes of testifying to the charges in the indictment, in light of the delay in disclosure of their statements to the defence,

CONSIDERING that, in the case of witnesses VG-121 and VG-123, the Prosecution did not interview the witnesses until after including them on the Rule 65 *ter* witness list,[24] and that it is inappropriate for the Prosecution to make its application in this manner rather than make a motion to amend the Rule 65 *ter* witness list once it had obtained the necessary statements, made an evaluation of the utility of inclusion of such witnesses on the list and ascertained the willingness of each witness to testify,[25]

CONSIDERING that, with the exception of VG-126, the Prosecution has been in possession of the statements of the remaining proposed witnesses for several years prior to inclusion on the Rule 65 *ter* witness list,[26] and that, as with certain other proposed witnesses discussed above, these proposed witnesses should not be included on the Rule 65 *ter* witness list in light of the delay in disclosure of their statements to the defence,

CONSIDERING that the position with regard to witness VG-126 is the same as for witnesses VG-121 and VG-123 discussed above, in that the evidence of this witness has only recently come into the possession of the Prosecution,

CONSIDERING the powers vested both in the pre-trial Judge and the Trial Chamber by virtue of Rule 65 *ter* (N) and Rule 68 *bis* to impose sanctions upon a party which fails to perform its disclosure obligations, and in consideration of the imminent commencement of the trial, the issue of inclusion of witnesses on the Rule 65 *ter* witness list for whom there was delay in disclosure of their statements shall, pursuant to Rule 65 *ter* (N), be reported to the Trial Chamber for final determination,

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[24] Prosecution Response, para. 10f.

[25] It is also noted that such approach would have rendered unnecessary the applications that have since been made by the Prosecution to remove certain of the proposed witnesses from the Rule 65 *ter* witness list.

[26] The submissions concerning VG-122 are contradictory: *see* Prosecution Response of 4 April 2008, para. 10f and Prosecution Response, Annex A, item 16.

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CONSIDERING that for witnesses VG-121, VG-123 and VG-126, in view of the imminent commencement of the trial, the inclusion of these witnesses on the Rule 65 *ter* witness list is a matter more properly determined by the Trial Chamber that will hear the case,

FOR THE FOREGOING REASONS:

(1) confirm the inclusion on the Rule 65 *ter* witness list of proposed witness VG-032;

(2) confirm the removal from the Rule 65 *ter* witness list of proposed witness VG-118;

(3) grant the request for removal from the Rule 65 *ter* witness list of proposed witness VG-120;

(4) deny the inclusion on the Rule 65 *ter* witness list of proposed witness Zoran Lesić, without prejudice to the right of the Prosecution to apply for reinstatement at a later stage if warranted;

(5) permit the Prosecution to include on its Rule 65 *ter* witness list, subject to the final determination of the number of witnesses by the Trial Chamber that will hear the case: (a) the proposed witnesses VG-089, VG-097 and Mitar Vasilijević for the stated purpose of rebuttal of alibi evidence only; and (b) proposed witnesses VG-035, VG-085, VG-094 and VG-119, insofar as their evidence serves to rebut the alibi evidence;

(6) in accordance with Rule 65 *ter* (N) report the matter of admission of the testimony of proposed witnesses VG-035, VG-085, VG-094 and VG-119, insofar as it relates to the charges in the indictment, to the Trial Chamber for determination as to whether or not such evidence should be excluded on the ground of unjustified delay in disclosure;

(7) refer the matter of admission of the testimony of proposed witnesses VG-121, VG-123 and VG-126 to the Trial Chamber that will hear the case for determination as to whether or not the inclusion of these witnesses should be permitted in whole or in part at this stage of the proceedings;

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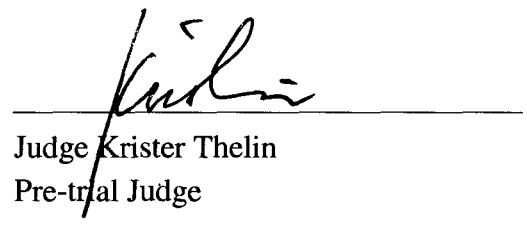
(8) in accordance with Rule 65 *ter* (N) report the matter of admission of the testimony of the remaining proposed witnesses, namely VG-005, VG-042, VG-064. VG-087, VG-104 and VG-122 to the Trial Chamber for determination as to whether or not the evidence of such witnesses should be excluded on the ground of unjustified delay in disclosure.

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



Judge Krister Thelin
Pre-trial Judge

Dated this nineteenth day of June 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

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