

**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-T

Date: 5 September 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Christine Van den Wyngaert
Judge Pedro David

Registrar: Mr. Hans Holthuis

Decision of: 5 September 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF
EXHIBIT AND CONVERSION OF MODE OF TESTIMONY FROM
RULE 92 *BIS* TO RULE 92 *TER* AND ON CONFIDENTIAL
PROSECUTION MOTION FOR ADMISSION OF EVIDENCE
PURSUANT TO RULE 92 *BIS* WITH CONFIDENTIAL ANNEXES A
AND B, AND CONFIDENTIAL AND *EX PARTE* ANNEXES C AND D**

The Office of the Prosecutor

Mr. Dermot Groome
Mr. Frédéric Ossogo
Ms. Laurie Sartorio
Mr. Stevan Cole
Ms. Francesca Mazzocco

Counsel for the Accused

Mr. Jason Alarid for Milan Lukić
Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

TRIAL CHAMBER III 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”);

BEING SEISED of the “Motion for admission of exhibit and conversion of testimony from 92 *bis* to 92 *ter*”, with one annex, filed by the Prosecution on 25 July 2008 (“Motion”), whereby the Prosecution requests:

- the addition to its exhibit list of:
 - 1) a video interview conducted with Witness VG-014 (“video interview”) by the Commission for Gathering Facts on War Crimes in the Republic of Bosnia and Herzegovina; and
 - 2) a video clip of Witness VG-014 among a group of refugees who fled Višegrad (“video clip”);¹ and
- that the video interview be authenticated by one of three witnesses:
 - a. Miršad Tokača, who is listed on the Prosecution’s witness list as a witness pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence, but whose previous testimony in the *Vasiljević* case the Prosecution would seek to introduce pursuant to Rule 92 *ter* in order to enable the witness to authenticate the video interview in court;
 - b. Witness VG-032, who has yet to testify; or
 - c. Witness VG-014, who concluded his testimony on 11 July 2008, but whom the Prosecution would seek to recall in order to authenticate the video interview;

BEING ALSO SEIZED of the “Confidential Prosecution motion for admission of evidence pursuant to Rule 92 *bis* with confidential Annexes A and B, and confidential and *ex parte* Annexes C and D”, filed confidentially and *ex parte* on 15 February 2008 (“Rule 92 *bis* Motion”), in so far as this motion relates to the transcript of the testimony in the *Vasiljević* case of Miršad Tokača;²

CONSIDERING that the Prosecution’s request to introduce the evidence of Miršad Tokača pursuant to Rule 92 *ter* supersedes the Rule 92 *bis* Motion with respect to this witness;

¹ Motion, paras 7, 8. The Chamber notes that Annex A to the motion lists in total 11 video clips contained on the DVD which the Prosecution provided to the Defence and the Chamber, Motion, fn. 4 and Annex A.

² Decision on Prosecution motion for admission of evidence pursuant to Rule 92 *bis* of the Rules, 22 August 2008 (“Rule 92 *bis* Decision”), para. 3. See further Rule 92 *bis* Motion, para. 27.

NOTING the Prosecution submission that the video interview and the video clip are relevant and probative to issues before the Trial Chamber;³

NOTING the Prosecution submission that the video interview was discovered on 14 July 2008 as a result of the Prosecution's investigation of the alibi of the Defence of Milan Lukić;⁴

NOTING the Prosecution submission that the video interview was disclosed to the Defence of Milan Lukić and the Defence of Sredoje Lukić on 23 July 2008, that the authentication of the video interview would take minimal court time, and that as a result there is no prejudice to the Accused to add the video interview and the video clip to the Prosecution's exhibit list;⁵

NOTING "Milan Lukić's response to the Prosecution motion for admission of exhibit and conversion of mode of testimony from 92 *bis* to 92 *ter*", filed confidentially on 8 August 2008 ("Response"), whereby the Defence of Milan Lukić requests that the Motion be denied "as the proposed evidence does not meet the standards of relevance and probative value, and further is not verifiable";⁶

NOTING the Defence submission that the video interview "should have been produced prior to the testimony of VG-014" and that "other clips submitted in this video on 23 July 2008, in particular an interview with VG-114, were previously disclosed on 4 July 2008";⁷

NOTING the Defence submission that the video is "merely cumulative" to what Witness VG-014 testified to before the Chamber, that "there is no concrete information as to when this video was taken", and that, therefore, the video interview does not have probative value;⁸

NOTING the Defence submissions regarding the proposed manner of authenticating the video interview:

- that testimony by Miršad Tokača pursuant to Rule 92 *ter*(A) cannot be used for authentication of the video interview of VG-014 as that provision specifically requires the witness to attest "that the written statement or transcript reflects *that* witness' declaration";⁹ and

³ Motion, paras 7-9.

⁴ Motion, para. 16.

⁵ Motion, paras 7, 16, 17.

⁶ Response, para. 1.

⁷ Response, para. 2. See Annex A to the Motion.

⁸ Response, paras 5-7.

⁹ Response, para. 11 (emphasis in the original).

- that laying a foundation for the video interview through VG-032 would be unsatisfactory because that witness “was not present during the interview, nor was he present in any clip from the video”;¹⁰
- that it would not be in the interest of expeditious proceedings to call VG-014 to testify again;¹¹

NOTING the “Prosecution’s request for leave to reply and reply to ‘Milan Lukić’s response to the Prosecution motion for admission of exhibit and conversion of mode of testimony from 92 *bis* to 92 *ter*’, filed on 15 August 2008 (“Reply”), wherein the Prosecution submits, in particular, that it is not seeking to admit the video interview “as a 92*ter* statement of Miršad Tokača” but that the Prosecution “has requested that Miršad Tokača’s testimony be converted from 92*bis* to 92*ter* so that he can offer evidence in addition to his previous testimony”, in particular “foundational evidence to authenticate the video”;¹²

NOTING that the Defence of Milan Lukić and the Defence of Sredoje Lukić in their respective responses to the Rule 92 *bis* Motion object to the admission into evidence pursuant to Rule 92 *bis* of any of the material subject to that motion, thus including the evidence of Miršad Tokača, but submit, in the alternative, that should the Chamber decide to admit the evidence they should be permitted to cross-examine the relevant witnesses;¹³

NOTING the Prosecution replies to the responses of the Defence of Milan Lukić and the Defence of Sredoje Lukić to the Rule 92 *bis* Motion;¹⁴

CONSIDERING that in the exercise of its discretion of whether to grant the Motion the Trial Chamber will examine whether the Prosecution has shown good cause for its request and whether

¹⁰ Response, para. 12.

¹¹ Response, para. 10.

¹² Reply, para. 4. The Chamber grants the Prosecution leave to reply.

¹³ Response of defence counsel for Milan Lukić to “Confidential Prosecution first motion for the admission of evidence pursuant to Rule 92 *bis* with confidential Annexes A and B, and confidential and *ex parte* Annexes C and D”, filed on 28 March 2008, paras 7, 8, 9, 15-17, 19, 20; Response of defence counsel for Sredoje Lukić to “Confidential Prosecution motion for the admission of evidence pursuant to Rule 92*bis* with confidential Annexes A and B, and confidential and *ex parte* Annexes C and D”, filed on 28 February 2008, paras 7, 8, 9, 11-14, 16. For a detailed review of the arguments of the Defence of Milan Lukić and of the Defence of Sredoje Lukić, see Rule 92 *bis* Decision, paras 11-14.

¹⁴ Prosecution motion for leave to reply to the “Response of defence counsel for Milan Lukić to ‘Confidential Prosecution first motion for the admission of evidence pursuant to Rule 92 *bis* with confidential Annexes A and B, and confidential and *ex parte* Annexes C and D’” and reply, filed confidentially on 4 April 2008; Prosecution motion for leave to reply to the “Response of defence counsel for Sredoje Lukić to ‘Confidential Prosecution motion for the admission of evidence pursuant to Rule 92*bis* with confidential Annexes A and B, and confidential and *ex parte* Annexes C and D’” and reply, filed confidentially on 6 March 2008. The Prosecution was granted leave for these replies by the Rule 92 *bis* Decision, paras 6, 8.

the proposed exhibit sought to be added is relevant and of sufficient importance to justify its late inclusion on the exhibit list;¹⁵

CONSIDERING that the Chamber may also take into account other factors which speak in favour or against addition to the exhibit list,¹⁶ and that it must carefully balance any amendment to the list with an adequate protection of the rights of the Accused enshrined in Articles 20(1) and 21(4)(b) of the Statute;¹⁷

CONSIDERING that the video interview and the video clip are *prima facie* relevant, have probative value and are of sufficient importance to be added to the exhibit list;

CONSIDERING, in view of when the video interview and the video clip were obtained by the Prosecution, that the Prosecution has shown good cause for adding them to the exhibit list at this point of the proceedings;

CONSIDERING that the addition of the video interview and the video clip to the Prosecution's exhibit list at this point in the proceedings will not cause unfair prejudice to the Accused;

CONSIDERING, also in view of the cross-examination by the Defence of Milan Lukić of Witness VG-014, that it is in the interest of justice that the video interview and the video clip be added to the Prosecution's exhibit list;

CONSIDERING that it would be the most appropriate that the video interview and video clip be authenticated through the testimony of Miršad Tokača;

CONSIDERING that the Defence of Milan Lukić has misunderstood the modality proposed by the Prosecution for the authentication of the video interview and the video clip through the testimony of Miršad Tokača and that the authentication of these videos is not to be carried out pursuant to Rule 92 *ter*;

CONSIDERING that the transcript of the testimony of Miršad Tokača in the *Vasiljević* case on 21 September 2001 is relevant and probative pursuant to Rule 89(C) and that it may be admitted into evidence once the conditions laid down in Rule 92 *ter* have been complied with;

¹⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on appeals against decision admitting material related to Borovčanin's questioning, 14 December 2007 ("*Popović* Appeal Decision"), para. 37.

¹⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's motion for leave to amend Rule 65 *ter* witness list and Rule 65 *ter* exhibit list, filed confidentially on 6 December 2006 ("*Popović* Decision"), p. 7.

¹⁷ *Popović* Appeal Decision, para. 37; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Prosecution's motion to amend its Rule 65 *ter* list, 15 December 2005, p. 3; *Popović* Decision, p. 8; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on amending the list of exhibits relative to the report of Reynaud Theunens, 12

PURSUANT TO Rule 54, Rule 65 *ter*, and Rule 92 *ter* of the Rules of Procedure and Evidence;

GRANTS the Motion and allows the addition of the video interview and the video clip to the Prosecution's exhibit list;

ORDERS the admission into evidence of the transcript of the testimony of Miršad Tokača in the *Vasiljević* case on 21 September 2001 once the conditions laid down in Rule 92 *ter* have been complied with; and

ORDERS the Prosecution to provide the Defence of Milan Lukić, the Defence of Sredoje Lukić and the Chamber by Wednesday 10 September 2008 with a DVD containing only the video interview and the video clip.

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



Judge Patrick Robinson
Presiding

Dated this fifth day of September 2008

At The Hague

The Netherlands

[Seal of the Tribunal]

February 2008, para. 8; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on list of exhibits, 7 September 2007, p. 4.