



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: 22 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:** 22 September 2008

**PROSECUTOR**

v.

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

***PUBLIC***

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**DECISION ON MOTION FOR LEAVE TO AMEND  
PROSECUTION'S LIST OF WITNESSES WITH  
ANNEXES A AND B INsofar AS IT CONCERNS  
WITNESSES VG-042 AND VG-064**

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**TRIAL CHAMBER III** (“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 “Motion for leave to amend Prosecution’s list of witnesses with Annexes A and B”, filed confidentially by the Prosecution on 8 September 2008 (“Motion”), whereby the Prosecution, inter alia, seeks to 1) substitute Witness VG-085 for Witness VG-042, and 2) substitute Witness VG-071 for Witness VG-064.<sup>1</sup>

#### **A. Relevant procedural history**

1. By oral ruling on 18 September 2008, the Chamber ordered the Defence to file responses to the Motion insofar as it pertains to VG-042 by 19 September 2008.<sup>2</sup> On the same date, the Defence of Milan Lukić responded with regard to both VG-042 and VG-064,<sup>3</sup> and the Defence of Sredoje Lukić responded to the motion in its entirety.<sup>4</sup> The present decision therefore disposes of the Motion insofar as it relates to the substitution of VG-042 for VG-085 and VG-064 for VG-071.

2. The further procedural history with respect to the two witnesses under consideration was set out in detail in the Chamber’s decisions of 22 April 2008, 8 July 2008 and 23 July 2008.<sup>5</sup>

#### **B. Submissions**

##### **1. Prosecution**

3. The Prosecution submits that it is in the interest of justice to substitute VG-042 for VG-085 and VG-064 for VG-071 because the Prosecution has streamlined its case both pursuant to orders of the Chamber and by its own motion.<sup>6</sup> Furthermore, the Prosecution submits the trial proceedings “are still in a relatively early stage”, which it argues supports amending its witness list at this stage.<sup>7</sup> The Prosecution also notes, as it has done in numerous filings before the Chamber, that the Defence of Milan Lukić “did not file its Further Submissions in Regard to Defence of Alibi until 18 July 2008, less than two months ago” and has “radically changed its alibi” for two of the incidents

<sup>1</sup> The Chamber renders this decision publicly as there is nothing herein which requires it to be issued confidentially.

<sup>2</sup> Hearing, 18 September 2008, T. 1831.

<sup>3</sup> Milan Lukić’s response to the Prosecution’s motion for leave to amend Prosecution’s list of witnesses (with regard to witnesses VG-042 & VG-064), filed confidentially on 18 September 2008.

<sup>4</sup> Sredoje Lukić’s response to Prosecution’s “Motion for leave to amend Prosecution’s list of witnesses with Annexes A and B”, filed confidentially on 18 September 2008.

<sup>5</sup> Decision on Prosecution’s motion to amend Rule 65 *ter* witness list and on related submissions, 22 April 2008 (“22 April 2008 Decision”); Decision in relation to Prosecution proposed witnesses, filed confidentially on 8 July 2008 (“8 July 2008 Decision”); Decision on Prosecution motion for certification to appeal the Trial Chamber’s “Decision in relation to Prosecution proposed witnesses” specifically relating to VG-042 and VG-064”, filed confidentially on 23 July 2008.

<sup>6</sup> Motion, para. 8.

charged in the indictment.<sup>8</sup> In this respect, the Prosecution states that, since receiving the Further Submission, it “has conducted its alibi investigation with diligence and has identified a number of alibi rebuttal witnesses” as a result of which the Defence will have as much time as possible to prepare for their testimony.<sup>9</sup>

4. The Prosecution submits that insofar as the Motion concerns VG-042, it relates to a matter that directly affects the Prosecution’s ability to meet its burden of proof on count 6 and 7 of the indictment, that is, the Varda Factory incident.<sup>10</sup> The Prosecution argues that the evidence of VG-042 is not cumulative with other evidence and that this witness “is the only eye-witness to the Varda executions who knew Milan Lukić from before the event and saw him pull the trigger and kill the men”.<sup>11</sup> It is noted that the Defence “have been in possession of Witness VG-42’s relatively brief statement for approximately six months”.<sup>12</sup> Moreover, the Prosecution submits that in allowing the substitution of VG-042 for VG-085 “the Chamber still sanctions the Prosecution for the perceived non-compliance with [the pre-trial Judge’s] work plan in an appropriate way and does not compromise the Prosecution’s ability to prove its case”.<sup>13</sup>

5. With respect to the requested substitution of VG-064 for VG-071, the Prosecution states that the former witness is expected to offer a much more wide-ranging testimony, geographically and temporally speaking, than VG-071 concerning count 1, Persecutions, and specifically in relation to Milan Lukić.<sup>14</sup>

6. The Prosecution recalls that the Chamber on, 8 July 2008, denied a previous Prosecution motion to add, *inter alia*, these witness to its witness list. However, the Prosecution submits that in so doing, the Chamber must have “intended to deny [the Prosecution] the ability to call a witness not to make it impossible to meet its burden on a particular count.”<sup>15</sup> The Prosecution also submits that “such a severe sanction for what was never an intentional disregard of [the pre-trial Judge’s] work plan but an exercise of the Prosecutor’s rights under Rule 65 to select its witnesses would be [...] inappropriate and a miscarriage of justice”.<sup>16</sup>

<sup>7</sup> Motion, para. 10, where it is also submitted that the Prosecution has completed “a third of its case-in-chief”.

<sup>8</sup> Motion, para. 10.

<sup>9</sup> Motion, para. 10.

<sup>10</sup> Hearing, 18 September 2008, T. 1826.

<sup>11</sup> Hearing, 18 September 2008, T. 1827-1828.

<sup>12</sup> Hearing, 18 September 2008, T. 1828.

<sup>13</sup> Hearing, 18 September 2008, T. 1829. The Prosecution explains this by the fact that the Chamber would nevertheless only allow the Prosecution one witness, Motion, fn. 12.

<sup>14</sup> Motion, paras 21-23.

<sup>15</sup> Hearing, 18 September 2008, T. 1828.

<sup>16</sup> Hearing, 18 September 2008, T. 1828.

## 2. Defence of Milan Lukić

7. The Defence of Milan Lukić submits that it would be prejudiced if VG-042 or VG-064 were to be included on the Prosecution witness list at this point.<sup>17</sup> The Defence argues that it has relied upon the Chamber's decision of 8 July 2008, which denied the inclusion of these witnesses on the Prosecution witness list.<sup>18</sup> As a result of this decision, the Defence has not made any preparations in relation to these witnesses.<sup>19</sup> Moreover, the Defence submits that the details of the testimony of VG-042 and VG-064 "are not new to the Prosecution or such that they could not have been discovered when preparing the case and submitting the witness disclosures as ordered by the Pre-Trial Bench".<sup>20</sup> Moreover, the Defence argues that the Chamber considered the quality of the evidence and its relevance in the decision of 8 July 2008, but nevertheless found that "the lack of notice caused an overwhelming cause for exclusion in that the Defence did not have adequate notice based on the guidelines set forth by the Pre-Trial Bench".<sup>21</sup>

## 3. Defence of Sredoje Lukić

8. The Defence of Sredoje Lukić argues that allowing the inclusion on the Prosecution's witness list of VG-042 at this point in time "would result in grave prejudice to the rights of the Accused" as the Defence of Sredoje Lukić would not have adequate time and facilities for the preparation of a defence as required by Article 21(4)(b) of the Statute.<sup>22</sup> Furthermore, the Defence submits that VG-042 implicates Sredoje Lukić in the Varda Factory incident, and notes that "none of the other Prosecution witnesses mention Sredoje Lukić regarding this incident and he has not been named on the indictment in relation to these counts".<sup>23</sup> It is submitted that while the Defence has been in possession of VG-042's statement for six months, in view of the Chamber's denial of the Prosecution's prior request to add this witness to its witness list, the Defence was not aware that it would have to answer to the allegations contained in the statement and so has not conducted any investigations relating to counts 6 and 7.<sup>24</sup>

9. The Defence also submits that the Prosecution seeks to add VG-042 in order to rebut the alibi of Milan Lukić, however it is argued that the evidence "is likely to be such that it will not be

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<sup>17</sup> Milan Lukić Response, para. 8.

<sup>18</sup> Milan Lukić Response, paras 8-9.

<sup>19</sup> Milan Lukić Response, para. 9.

<sup>20</sup> Milan Lukić Response, para. 12.

<sup>21</sup> Milan Lukić Response, para. 13.

<sup>22</sup> Sredoje Lukić Response, para. 9.

<sup>23</sup> Sredoje Lukić Response, para. 17.

<sup>24</sup> Sredoje Lukić Response, para. 17.

possible to restrict the testimony [to] evidence in rebuttal of the Co-Accused's alibi defences". As a result, the Defence submits that it would need to conduct new and extensive investigations.<sup>25</sup>

10. It is noted that the Chamber has previously found that the evidence of VG-042 is cumulative with that of other witnesses on the Prosecution's witness list.<sup>26</sup> The Defence claims that the fact that the Prosecution's now seeks to re-insert VG-042 by excluding other witnesses "does not in any way cure the fact that the Prosecution failed to insert their names in the original filing by the due date provided in the Chamber's decision dated 22 April 2008".<sup>27</sup> The Defence concludes that the Prosecution has not shown good cause for its request "nor has it exercised by any means due diligence in identifying the proposed witnesses at the earliest possible moment in time".<sup>28</sup>

### C. Discussion

11. As a preliminary matter, the Chamber notes that in the Prosecution's notice of Thursday 18 September 2008 of witnesses to be called in the week of 22 to 26 September 2008, the Prosecution scheduled VG-042 to testify on Monday 22 September, that is today.<sup>29</sup> In other words, the Prosecution has attempted to schedule the testimony of a person who has yet to be granted the status of a witness in this case. The Chamber notes that it had not rendered its decision on the Motion at that time, nor had the time period for Defence responses expired when the Prosecution took this step. The Chamber further notes that on 19 September 2008 the Prosecution circulated a list of exhibits to be used during the Prosecution's examination-in-chief of VG-042 and that on 21 September 2008 the Prosecution circulated notes of a proofing session held with this person.<sup>30</sup> While the Prosecution's actions have little practical importance, as, clearly, the Chamber would not have heard anybody who is not on the witness list of a party, the Chamber considers that this behaviour is unacceptable.

12. Turning now to the Prosecution's request to substitute VG-042 for VG-085 and VG-064 for VG-071, the Chamber recalls that during the pre-trial proceedings, the Prosecution sought to add several witnesses to its witness list, including VG-042 and VG-064. In its decision of 8 July 2008, which concerned all these witnesses, the Chamber held that the witnesses were prima facie relevant to the case.<sup>31</sup> The Chamber noted the very late stage of the pre-trial proceedings at which the

<sup>25</sup> Sredoje Lukić Response, para. 9.

<sup>26</sup> Sredoje Lukić Response, para. 13, referring to the Chamber's "Decision in relation to Prosecution proposed witnesses", filed confidentially on 8 July 2008, p. 6.

<sup>27</sup> Sredoje Lukić Response, para. 14.

<sup>28</sup> Sredoje Lukić Response, para. 15.

<sup>29</sup> List provided pursuant to the "Decision on provision of documents and scheduling of witnesses", 9 July 2008, p. 3.

<sup>30</sup> Emails from the Prosecution to the Defence, the Registry and the Chamber dated, respectively, 19 September 2008 and 21 September 2008.

<sup>31</sup> 8 July 2008 Decision, p. 3.

Prosecution had disclosed the relevant statements to the Defence, but held that this significant delay could in theory be cured by calling the witnesses at a late stage of the trial proceedings.<sup>32</sup> Nevertheless, the Chamber concluded that the number of proposed witnesses would not support such a course of action.<sup>33</sup> Before denying the motion with regard to inter alia VG-042 and VG-064, the Chamber found that the evidence of the witnesses was cumulative with evidence of witnesses already on the Prosecution's witness list.<sup>34</sup> In a decision of 23 July 2008, the Chamber denied the Prosecution's request for certification to appeal the 8 July decision in relation to VG-042 and VG-064.<sup>35</sup>

13. The Chamber recalls that it may grant a request to amend a witness list if it is satisfied that it is in the interests of justice to do so.<sup>36</sup> The Chamber recalls that it must also be mindful of the Prosecution's duty to present the available evidence to prove its case.<sup>37</sup> However, in view of the rights of the Accused pursuant to Articles 20(1) and 21(4)(b) of the Statute to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence, the Chamber must also ensure that the Accused will not be prejudiced as a result of the addition of witnesses.<sup>38</sup> The Chamber recalls that it has previously set out factors which the Chamber may take into account when considering a motion to amend the witness list.<sup>39</sup> The Chamber also notes that it may grant a motion to amend the witness list at the trial stage.<sup>40</sup> It should be noted that there is technically nothing preventing a request to add witnesses in respect of whom a previous motion to amend the witness list failed.

14. At the pre-trial proceedings in this case, the Chamber held that it was not persuaded that it would be necessary to call VG-042 or VG-064.<sup>41</sup> However, the Chamber recalls the reductions of the Prosecution's case which have been carried out and considers that in respect of the Varda Factory incident the Prosecution cannot now be considered to be leading excessive evidence.

<sup>32</sup> 8 July 2008 Decision, p. 4.

<sup>33</sup> 8 July 2008 Decision, p. 4.

<sup>34</sup> 8 July 2008 Decision, p. 5.

<sup>35</sup> See *supra* para. 2.

<sup>36</sup> Decision on motion for leave to amend Prosecution's list of witnesses, filed confidentially on 29 August 2008 ("29 August 2008 Decision"), paras 23-25, with further references.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> 22 April 2008 Decision, para. 9, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's second motion for leave to amend its Rule 65ter 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, p. 6.

<sup>41</sup> 8 July 2008 Decision, p. 5.

15. The Chamber has evaluated the expected evidence of VG-042 and VG-064 in great detail. It considers, in view of the evidence so far on the trial record with respect to the charges concerning which the witnesses may offer evidence, that the Prosecution has established that the evidence of these witnesses will be of a significantly higher probative value than that of VG-085 and VG-071. However, even though this is so, the Chamber is sensitive to the Defence concerns regarding the very late stage of the proceedings that the Prosecution now seeks to introduce, in fact re-introduce, these witnesses. The Chamber is also sensitive to the Defence submissions that they have relied upon the Chamber's prior decisions denying the Prosecution's prior request in respect of these witnesses. The Chamber is also notes the arguments of the Defence of Sredoje Lukic that VG-042 appears to implicate Sredoje Lukic in the Varda Factory incident, an incident with which the Prosecution is not charging him in counts 6 and 7.

16. In balancing the considerations outlined above, the Chamber nevertheless concludes that it is in the interest of justice to grant the Prosecution's motion. However, the Chamber notes that this does not affect the previous findings of this Chamber and of the pre-trial Judge in respect of the disclosure of the relevant statements. In the Chamber's view, the Prosecution failed to properly disclose the statements of these, and other, witnesses at the pre-trial stage.

17. However, at this point, and even considering the Defence's submissions that they have relied upon the Chamber's decisions denying the Prosecution's previous motion to add these witnesses, the Chamber notes that it cannot be considered prejudicial to the Defence to call these witnesses, under condition that they are called after some delay. Relevant in this respect is also that the Prosecution seeks to substitute VG-042 and VG-064 for two other witnesses, rather than to extend the witness list with two further witnesses whose evidence is largely cumulative. Furthermore, and specifically with regard to the submissions of the Defence of Sredoje Lukic, the Chamber considers that the Prosecution has not sought to amend the indictment in respect of counts 6 and 7 so as to expand those counts to Sredoje Lukić.

**D. Disposition**

18. For the above reasons, the Chamber by majority, Judge Robinson dissenting:

**GRANTS** the Motion insofar as it pertains to the substitution of VG-042 for VG-085 and the substitution of VG-064 for VG-071,

**ORDERS** that VG-042 and VG-064 may be called to testify at the earliest on Monday 27 October 2008, and

**REMAINS SEIZED** of the Motion.

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



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Judge Patrick Robinson  
Presiding

Dated this twenty-second day of September 2008

At The Hague

The Netherlands

**[Seal of the Tribunal]**