



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: 3 November 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: 3 November 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION TO AMEND
PROSECUTION'S WITNESS LIST (DR. FAGEL)**

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 (“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”);

BEING SEISED of the Prosecution’s “Motion for Leave to Amend Prosecution’s List of Witnesses to Add Witness Dr. Wil Fagel and Submission of Expert Report of Dr. Wil Fagel with Confidential Annexes A and B”, filed on 13 October 2008 (“Motion”) and the “Confidential Prosecution Submission of Documents Analyzed in Expert Report of Dr. Wil Fagel with Confidential Annexes A, B, and C”, filed on 22 October 2008;

NOTING that the Prosecution submits that Dr. Wil Fagel, a handwriting expert, has undertaken a forensic analysis of five documents, four of which bear the signature of “Risto Perišić” and one of which is signed “for Dragan Tomic” (“Defence documents”) together with a number of “control documents” from the Prosecution’s collection that are also signed by “Risto Perišić”;

NOTING that the Defence documents were provided to the Prosecution by the Defence as “supplemental documentation” relating to the defence of alibi;¹

NOTING that, in the Motion, the Prosecution requests the Trial Chamber to (1) grant the Prosecution leave to add Dr. Fagel to the Prosecution’s witness list for the purposes of alibi rebuttal, and (2) accept the submission of Dr. Fagel’s report, and that, in the Submission, the Prosecution requests the Chamber to admit into evidence the Defence documents that have not yet been admitted and the control documents;

NOTING that the Prosecution submits that its request to amend its witness list is justified because the Prosecution exercised due diligence in identifying Dr. Fagel and in obtaining his expert report after it was provided with the Defence documents, and that, “[a]s a result, the Defence will have adequate time to prepare its cross-examination of this witness”;²

NOTING that the Prosecution further submits that the “evidence of Dr. Fagel is also critically important to the rebuttal of Milan Lukić’s alibi defence” and that as “Dr. Fagel’s report casts serious doubts on the authenticity of [the Defence documents], his evidence and report are highly relevant to the rebuttal of Milan Lukić’s alibi defence”;³

¹ Motion, para. 1.

² Motion, para. 12.

³ Motion, para. 13.

NOTING, with regard to the submission of Dr. Fagel’s expert report, that the Prosecution submits that: (1) Dr. Fagel is an expert, as demonstrated through his curriculum vitae; (2) Dr. Fagel’s report is reliable; (3) Dr. Fagel’s report “casts serious doubt on the authenticity of [the Defence documents]” and is, therefore, “highly relevant and of probative value to the case”; (4) the content of the report “falls squarely in the field of expertise of Dr. Fagel;”⁴

NOTING that the time for filing of responses to the Motion expired on 27 October 2008 and that neither Defence team filed a response to the Motion;

CONSIDERING that the 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, and that the factors to be taken into account when assessing if it would be in the interests of justice 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, the complexity of the case, on-going investigations, and translation of documents and other materials, and whether the moving party has exercised due diligence in identifying proposed witnesses at the earliest possible moment in time;⁵

CONSIDERING that the Trial Chamber must ensure that the Accused will not be prejudiced as a result of the addition of a witness, but that the Trial Chamber must also be mindful of the Prosecution’s duty to present the available evidence to prove its case ;⁶

CONSIDERING, in particular, that Dr. Fagel is to be called to rebut alibi evidence expected to be led by the Accused, Milan Lukić, and that the Prosecution has shown good cause for its request and has exercised due diligence in identifying Dr. Fagel and requesting the examination of the signatures on the Defence documents;

CONSIDERING that no objection has been raised by either of the Defence teams to the addition of Dr. Fagel to the Prosecution’s witness list and that the Defence will not be prejudiced as a result of the addition;

⁴ Motion, paras 15 – 18.

⁵ See for example *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Confidential Decision on Prosecution motion to amend its Rule 65 *ter* witness list, 21 December 2006 (“D. Milošević Decision”), paras 8, 10, with further references; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Confidential Decision on motion for leave to amend the Prosecution’s witness and exhibit lists, 9 July 2007 (“Delić Decision”), p. 6.

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

CONSIDERING, therefore, that the Trial Chamber is satisfied that it is in the interests of justice to grant the Prosecution's request to add Dr. Fagel to its witness list;

CONSIDERING, further, that Dr. Fagel's testimony will only become relevant if and when the Defence documents are introduced by the Defence in support of its defence of alibi;

CONSIDERING, therefore, that at this stage of the proceedings it is premature to admit into evidence Dr. Fagel's expert report, the Defence documents and the control documents, and that it would be preferable to address their admission at a later date;

CONSIDERING that the Prosecution has indicated that Dr. Fagel will testify on the last day of the Prosecution's case, namely, 6 November 2008, but that it would also be preferable for Dr. Fagel to testify if and when the Defence introduce the Defence documents into evidence;

FOR THE FOREGOING REASONS

PURSUANT TO Rules 65 *ter*, 89(C), and 94 *bis* of the Rules;

HEREBY:

1. Grants the Prosecution Motion to amend its Rule 65 *ter* witness list by adding Dr. Fagel;
2. Directs the Prosecution not to call Dr. Fagel until after the Defence for Milan Lukić has presented its case, without prejudice to the Prosecution to call Dr. Fagel earlier;
3. Orders the Defence for Milan Lukić to indicate within 30 days from the disclosure of Dr. Fagel's expert report whether it accepts the expert report, or whether it wishes to cross-examine Dr. Fagel and challenge his qualifications as an expert, or the relevance of all or parts of his report.

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

Judge Patrick Robinson
Presiding

Dated this third day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]