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UNITED  
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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: 12 March 2009

Original: English

**IN TRIAL CHAMBER III**

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

**Acting Registrar:** Mr. John Hocking

**Decision of:** 12 March 2009

**PROSECUTOR**

**v.**

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

***PUBLIC***

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**DECISION ON MILAN LUKIĆ'S NOTICE OF  
VERIFICATION OF ALLEGED VICTIM SURVIVORS  
AND APPLICATION FOR STAY OF PROCEEDINGS  
WITH EXHIBITS A THROUGH H**

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**The Office of the Prosecutor**

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**Counsel for the Accused**

Mr. Jason Alarid and Mr. Dragan Ivetić 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”) is seised of “Milan Lukić’s notice of verification of alleged victim survivors and application for stay of proceedings with exhibits A through H”, initially filed publicly with public and confidential Annexes on 3 March 2009, withdrawn on 6 March 2009 and re-filed publicly with public and confidential Annexes on 9 March 2009 (“Motion”),<sup>1</sup> in which the Defence of Milan Lukić (“Defence”) makes the following requests:

- 1) stay the proceedings indefinitely to “allow for a full investigation and confirmation by all parties of the list of victims” as enumerated in the indictment (“First Request”);
- 2) allow the amendment of the Defence Rule 65 *ter* list to include Latifa and Leijla Kurspahić and any other surviving alleged victims as verified by the parties (“Second Request”);
- 3) allow the amendment of the Defence Rule 65 *ter* list to include Ewa Tabeau and all Prosecution investigators “who may have had the ability and opportunity to investigate the possibility of actual survivors from the list of alleged victims” regarding their role and efforts during the investigation and/or verification of the dead by cross-referencing and interviewing (“Third Request”);
- 4) order the appointment of an independent law enforcement agency, such as Europol, who has the ability to utilise law enforcement resources to further investigate the possibility of additional survivors, and who “would assist the trier of fact without the appearance of conflict of interest” (“Fourth Request”);
- 5) order an independent forensic investigation and exhumation of the crime scenes of the Pionirska Street and Bikavac incidents “by competent and qualified investigative and/or scientific personnel”, and (“Fifth Request”); and
- 6) consider “all appropriate remedies in the interests of justice and a fair determination of the facts, including, but not limited to further investigations, mistrial, dismissal of the Indictment or dismissal of counts in the Indictment” (“Sixth Request”).<sup>2</sup>

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<sup>1</sup> Milan Lukić’s notice of withdrawal of recent filing regarding Milan Lukić’s notice of verification of alleged victim survivors and application for stay of proceedings with exhibits A through H, filed confidentially on 6 March 2009; Milan Lukić’s notice of verification of alleged victim survivors and application for stay of proceedings with exhibits A through H, filed publicly with public and confidential annexes on 9 March 2009.

<sup>2</sup> Motion, pp. 15-16.

## A. Submissions

### 1. Defence

1. The Defence submits that it filed requests for assistance with the Višegrad police and the Bosnian government authorities requesting any information available regarding the names of the alleged victims of the Pionirska Street and Bikavac fires, which are listed in Annexes A and B to the indictment, and that the Višegrad police and the Bosnian government authorities could not verify any identifying information for 46 of the 86 alleged victims.<sup>3</sup> The Defence further argues that 18 of the alleged victims of the Pionirska Street and Bikavac fires are alive, or were alive subsequent to 14 June and 27 June 1992 when the alleged incidents, respectively, took place.<sup>4</sup>

2. The Defence also submits that it personally met with Latifa Kurspahić and her daughters, Leijla Kurspahić and Hasiba Kurspahić, thus verifying that these three women who are listed as victims of the Pionirska Street fire are alive.<sup>5</sup>

3. In the Defence submission, the “discovery of several named victims on both fire allegations brings into question the credibility of the Prosecution’s witnesses as well as ordinary competence and due diligence of the formal investigation and follow-through to actually verify alleged victims were in fact deceased.”<sup>6</sup> The Defence claims that the Prosecution witnesses, many of whom had previously testified in the *Vasiljević* case, were “actively misrepresenting the facts surrounding the Pionirska and Bikavac allegations, and essentially manufacturing facts”, in particular when they gave evidence in relation to the death of the alleged victims.<sup>7</sup> The Defence further claims that many of those witnesses are “biased and interested member(s) of the alleged victims’ family”.<sup>8</sup>

4. In addition to the testimony of those “biased” and “interested” witnesses, the Prosecution only proffered, in the Defence submission, the statistical report by Ewa Tabeau and Exhibit P119, which comprises “incomplete” lists “full of errors and inconsistencies.”<sup>9</sup> The Defence avers that the Prosecution has not offered “concrete or regular proof of identity of victims and/or actual proof of death, such as death certificates”,<sup>10</sup> and that no bodies have been exhumed or identified.<sup>11</sup> It further submits that the Prosecution has not introduced “any reports or other specific documentation of a

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<sup>3</sup> Motion, paras 21-22, 28. Annex E to the Motion contains a list of those persons who are or have been registered as residents in Višegrad municipality.

<sup>4</sup> Motion, paras 24-45.

<sup>5</sup> Motion, paras 30-40.

<sup>6</sup> Motion, para. 55.

<sup>7</sup> Motion, paras 12-15.

<sup>8</sup> Motion, para. 15.

<sup>9</sup> Motion, paras 17-18.

<sup>10</sup> Motion, para. 16.

<sup>11</sup> Motion, para. 54.

competent forensic examination” of the Pionirska Street and Bikavac crime scenes, and that Defence experts did not find evidence that fires occurred at the locations.<sup>12</sup>

2. Prosecution

5. In its response, filed confidentially on 5 March 2009,<sup>13</sup> the Prosecution requests that the Trial Chamber:

1) deny the First Request, as a stay of proceedings is unwarranted by the information provided and would cause an unnecessary delay;<sup>14</sup>

2) grant the Second Request in relation to Latifa Kurspahić, and deny it in relation to Leijla Kurspahić, given her young age at the time of the fire;<sup>15</sup>

3) grant the Third Request in relation to Ewa Tabeau, as she can provide evidence relevant to the proof of death of the victims, but deny the request to call all Prosecution investigators who may have had the ability and opportunity to investigate these issues, as they cannot give any relevant evidence;<sup>16</sup>

4) deny the Fourth Request, as the Defence has not demonstrated any need for an independent investigation and it would cause a significant delay in the proceedings;<sup>17</sup> and

5) deny the Sixth Request, as the remedies sought are completely inappropriate and raise, at most, evidentiary issues as to whether the Prosecution has carried its burden of proof with respect to the victims in the indictment.<sup>18</sup>

6. The Prosecution takes no position on the Fifth Request, “but observes that the Defence’s experts indicate that such an investigation might not be useful,”<sup>19</sup> and notes that an attempt to exhume the bodies of the victims of the Pionirska Street and Bikavac fires is likely to be “impractical” and “impossible” given the fact that neither party knows where the bodies of the victims were buried.<sup>20</sup>

<sup>12</sup> Motion, paras 19-20.

<sup>13</sup> Prosecution response to Milan Lukić’s notice of verification of alleged victim survivors and application for stay of proceedings with exhibits A through H”, filed confidentially on 5 March 2009 (“Response”); Order for expedited response, filed confidentially on 3 March 2009.

<sup>14</sup> Motion, paras 72-74.

<sup>15</sup> Motion, para. 76.

<sup>16</sup> Motion, para. 78.

<sup>17</sup> Motion, paras 79-80.

<sup>18</sup> Motion, para. 84.

<sup>19</sup> Response, para. 3.

<sup>20</sup> Response, paras 81-83.

7. The Prosecution submits that the Defence is mistaken in its claims that most of the victims are alive.<sup>21</sup> It notes that its own evidence has already demonstrated that Latifa Kurspahić may still be alive, and further submits that Exhibit P119 indicates that a few persons, including Latifa Kurspahić, were either registered to vote in 1997-1998 and/or 2000, or were listed as internally displaced persons by the Bosnian Government as of 2000.<sup>22</sup>

8. The Prosecution submits that upon interview and/or testimony of Latifa Kurspahić and verification that the information in the Defence Motion is correct regarding Latifa Kurspahić and her two daughters, the Prosecution will move to amend the indictment on its own motion to remove the names of these three survivors.<sup>23</sup>

9. With regard to the Defence allegation of other surviving victims, the Prosecution submits that given the common nature of last names of many victims, coincidence between the names of victims and the surnames found in phone listings does not undermine the evidence led during the Prosecution case establishing the death of the listed victims.<sup>24</sup> It also submits that ten persons identified by the Defence as possible survivors cannot be the persons listed as victims in the indictment because of huge discrepancies in age and/or place of birth.<sup>25</sup> The Prosecution states that it is continuing to investigate the veracity of the Defence claims regarding ten of the victims alleged to be alive and that it will inform the Trial Chamber and both Defence teams of any results.<sup>26</sup>

10. The Prosecution rejects the Defence allegations that the Prosecution has not adequately discharged its duties, and it submits that it is for the Trial Chamber to determine, following the final submissions of both the parties, whether the Prosecution has proven beyond reasonable doubt that the alleged victims died.<sup>27</sup>

11. The Prosecution further submits that there is “a fundamental difference between the nature of war crime trials and domestic homicide prosecution” and argues that the issue is not “whether the homicide was investigated in the way it would have been investigated by the FBI or Scotland Yard in a time of peace”.<sup>28</sup> It also argues that “next of kin are regularly relied upon to establish the death of a relative despite their being ‘biased and interested member(s) of the alleged victims’ family’.”<sup>29</sup>

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<sup>21</sup> Response, paras 8, 18,20, 28, 31, 40, 43, 45,47, 51.

<sup>22</sup> Response, paras 71, 73.

<sup>23</sup> Response, para. 13.

<sup>24</sup> Response, para. 58.

<sup>25</sup> Response, paras 17-56.

<sup>26</sup> Response, paras 17-57.

<sup>27</sup> Response, paras 9, 74.

<sup>28</sup> Response, paras 9-11.

<sup>29</sup> Response, para. 63.

## **B. Applicable law**

12. A stay of proceedings is an exceptional measure. When seised of a motion to stay the proceedings, the Trial Chamber must consider whether the continuation of the trial would have an impact on the conduct of a fair and expeditious trial as guaranteed in Articles 20 (1) and 21 (4)(c) of the Statute of the Tribunal (“Statute”).<sup>30</sup>

13. With regard to an amendment of the Defence Rule 65 *ter* list, pursuant to Rule 73 *ter*(D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), the Defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called. In making a determination under Rule 73 *ter*(D), “the Trial Chamber should balance the accused’s right to present the available evidence during its defence case with the right of the Prosecution and the co-accused to have adequate time and facilities to prepare their case”.<sup>31</sup> Furthermore, “the Trial Chamber may also take into account additional criteria, including whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment, and whether good cause for amending the witness list [...] has been shown”.<sup>32</sup> Good cause may exist where the witness has only recently become available to give evidence, or where the relevance of the evidence has only recently become apparent.<sup>33</sup>

## **C. Discussion**

14. Both parties seek leave to exceed the word limit in their filings, as their submissions in relation to the allegation of surviving victims require a detailed description of the information collected in that regard. Leave is hereby granted.

15. Whether an indefinite stay of the proceedings is warranted, as requested by the Defence in its First Request, largely depends on what the Trial Chamber decides with regard to the other requests made by the Defence. The Trial Chamber will, therefore, first deal with the other requests before giving a decision on the First Request.

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<sup>30</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.8, Decision on Prosecution appeal against the Trial Chamber’s order regarding the resumption of the proceedings, filed publicly on 16 September 2008, paras 8, 9; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Defence motion to stay proceedings, filed publicly on 28 September 2005, p. 2.

<sup>31</sup> Decision on Defence motions to amend the witness list, filed confidentially on 3 February 2009, para. 15 with further references.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s submission of additional information concerning witness B-235, B-1254 and B-1799, filed publicly on 17 December 2003, p. 2; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution’s motion to add a witness to its Rule 65 *ter* witness list and to add three associated documents to its Rule 65 *ter* exhibit list, filed publicly on 16 June 2008, para. 3.

1. Amendments of the Defence Rule 65 *ter* witness list (Second and Third Requests)

(a) Latifa and Leijla Kurspahić and any other surviving victims

16. The Trial Chamber granted the Defence leave to amend the Defence witness list to include Latifa Kurspahić on 4 and 6 March 2009.<sup>34</sup> In the following, the reasons for this decision are set out.

17. Latifa, Leijla and Hasiba Kurspahić are listed as victims of the Pionirska Street incident in Annex A of the indictment (nos. 27, 36, and 37). The Trial Chamber notes the Defence submission that the Defence met with Latifa, Leijla and Hasiba Kurspahić, and that during that meeting Latifa Kurspahić stated, *inter alia*, that she left Višegrad on 29 May 1992 together with her daughter Leijla, who was four years old, and with her daughter Hasiba, who was approximately six months old, at that time.<sup>35</sup>

18. The Trial Chamber also notes that Prosecution witness VG-013 testified in this case that after the Pionirska Street incident she had contact with a person by the name of Latifa and that Latifa and her two little girls, one of which was only 40 days old, managed to leave Višegrad in 1992.<sup>36</sup> It further notes that the Prosecution acknowledges the possibility that Latifa, Leijla and Hasiba Kurspahić were erroneously listed in Annex A of the indictment and that the Prosecution does not object to the addition of Latifa Kurspahić to the Defence witness list, but objects to the addition of Leijla Kurspahić.<sup>37</sup>

19. As Leijla Kurspahić was only four years old in 1992 and is, therefore, unlikely to have a clear recollection of events in 1992, the Trial Chamber is not convinced that Leijla Kurspahić should be added to the Defence witness list. However, the Trial Chamber is satisfied that the Defence has shown good cause to amend the witness list to include Latifa Kurspahić. It is also satisfied that the Prosecution will have adequate time and facilities to prepare its case, and that there will be no undue delay in the proceedings.

20. The Chamber considers that the evidence presented by the Defence to support its conclusion that other victims named in Annexes A and B of the indictment are alive is very limited. In particular, it notes the Prosecution submission that the years of the births of several alleged survivors do not match the approximate age of the victims in 1992 indicated in Annex A of the indictment, and that there is also information that those persons do not hail from or have any links

<sup>34</sup> Hearing, 4 March 2009, T. 4996-4998; 6 March 2009, T. 5234-5235.

<sup>35</sup> Motion, paras 34-37.

<sup>36</sup> Hearing, 3 September 2008, T. 1106-1107.

<sup>37</sup> Prosecution Response, paras 36, 76.

with Višegrad. Given the common nature of the last names of the victims in the Annexes, it is insufficient to point to persons bearing identical or similar names as a basis for the allegation of surviving victims. On the basis of the information provided in the Motion, the Trial Chamber is, therefore, not convinced that the Defence has shown good cause for amending the witness list to include other persons who allegedly survived the Pionirska Street and Bikavac incidents.

(b) Ewa Tabeau and Prosecution investigators

21. The Trial Chamber notes that the Prosecution objects to the addition of Prosecution investigators to the Defence witness list, but does not object to the addition of Ewa Tabeau.

22. Ewa Tabeau is the head of the Prosecution's demographical unit and testified as a Prosecution witness in this case. Together with staff members of the demographical unit, she prepared a table including statistical information relating to the victims listed in Annexes A and B of the indictment, which was admitted as Exhibit P119 ("Victim Table").<sup>38</sup> As noted by the Trial Chamber in a previous decision, the Victim Table provides little or no information in relation to a number of victims listed in Annexes A and B of the indictment.<sup>39</sup>

23. The Trial Chamber considers that the Defence had ample opportunity to challenge the evidence provided through Ewa Tabeau through cross-examination. It notes that the Defence used that opportunity by cross-examining Ewa Tabeau on the methodology as well as the reliability of the sources used in preparation of her report and the Victim Table.<sup>40</sup>

24. Further, as found above, the Defence has not submitted sufficient information about alleged other survivors, apart from Latifa, Leijla and Hasiba Kurspahić.<sup>41</sup> The Trial Chamber is not satisfied that Ewa Tabeau, a demographer, could provide any more information to the Trial Chamber on this matter than what she already has.

25. The Trial Chamber is also not convinced that there is a basis for the Defence request to add all Prosecution investigators "who may have had the ability and opportunity to investigate the possibility of actual survivors from the list of alleged victims as to their role and efforts during the investigation, and/or verify the dead by cross referencing and interviewing as well as under the totality of the circumstances".<sup>42</sup> The request is not only overly broad, but the Defence also fails to establish the *prima facie* relevance of the evidence. The Trial Chamber rejects the Defence

<sup>38</sup> Hearing, 22 September 2008, T. 2092.

<sup>39</sup> Decision on Milan Lukić's emergency motion to compel production from the Prosecution of victim information, filed confidentially on 23 February 2009.

<sup>40</sup> Hearing, 24 September 2008, T. 2208 *et seq.*

<sup>41</sup> *Supra* para. 20.



argument that the discovery of a number of victims being alive *per se* brings into question the competence and due diligence of the investigations carried out in this case. It also takes note of the Prosecution submission that an urgent investigation into the allegations of surviving victims is underway and that the Trial Chamber and both Defence teams will be immediately informed of the outcome.

26. The Trial Chamber is therefore not convinced that, on the basis of the information provided in the Motion, the Defence has shown good cause to recall Ewa Tabeau or all Prosecution investigators as Defence witnesses at this stage of the proceedings.

2. Appointment of independent law enforcement agency to further investigate the possibility of additional survivors and an independent forensic investigation (Fourth and Fifth Requests)

27. The Trial Chamber does not consider it necessary to appoint an independent law enforcement agency to further investigate the possibility of additional survivors of the Pionirska Street and Bikavac incidents or an independent forensic investigation and exhumation of the locations of those two incidents. The Trial Chamber is not satisfied that the Defence has demonstrated a serious flaw in the Prosecution investigation in this case.

28. The Trial Chamber also notes that on 4 March 2008 it granted the Defence request to call three experts who have assessed the structural remains of the houses involved in both the Pionirska Street and Bikavac incidents.<sup>43</sup> These expert witnesses have not yet given testimony in court.

29. The Trial Chamber further considers that, ultimately, it is for the Prosecution to establish the facts alleged in the indictment, including the death of the victims, to the full satisfaction of the Trial Chamber and beyond reasonable doubt. It is settled case-law of this Tribunal that proof beyond reasonable doubt does not necessarily require the recovery or production of a body and that a victim's death can be inferred from circumstantial evidence.<sup>44</sup> The Trial Chamber emphasises that any discussion about whether the death of the victims alleged in the indictment has been proven beyond reasonable doubt is premature, and that the issue will be assessed by the Trial Chamber following the final submissions of both parties.

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<sup>42</sup> Motion, p. 15.

<sup>43</sup> Decision on Prosecution notices filed pursuant to Rule 94 *bis*, filed confidentially on 4 March 2009.

<sup>44</sup> *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Appeal Judgement, filed publicly on 28 February 2005, para. 260; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, filed publicly on 15 March 2002, paras 326-327; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement, filed publicly on 7 May 1997, para. 240; *Prosecutor v. Ngeze*, Case No. ICTR-97-27, Oral Decision, 21 June 2001; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, filed publicly on 31 July 2003, para. 939.

3. Indefinite stay of proceedings or other appropriate remedies (First and Sixth Requests)

30. Having dismissed the Third, Fourth and Fifth Requests, the Trial Chamber considers that an indefinite stay of proceedings, as sought by the Defence in the First Request, is not warranted. The Trial Chamber further fails to see the need for taking any other measures or remedies at this stage (Sixth Request). The Trial Chamber, however, takes note of the Prosecution submission that it will move for an amendment of the indictment, in the event that the information in the Defence Motion regarding the alleged victims is verified upon interview and/or testimony of Latifa Kurspahić, and request removal of the names of Latifa Kurspahić and her two daughters from the indictment.<sup>45</sup>

**D. Disposition**

31. For the foregoing reasons, pursuant to Rules 54 and 73 *ter*(D) of the Rules, the Trial Chamber:

**GRANTS** both parties leave to exceed the word limit;

**RECALLS** its oral order to add Latifa Kurspahić to the Defence Rule 65 *ter* witness list;

**DISMISSES** the request to add to the Defence Rule 65 *ter* witness list other alleged survivors who are listed as victims in Annexes A and B to the indictment without prejudice to the Defence submitting additional information substantiating the allegation that they are alive; and

**DENIES** the Motion in all other aspects.

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<sup>45</sup> Response, para. 13.

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



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Judge Patrick Robinson  
Presiding

Dated this twelfth day of March 2009

At The Hague

The Netherlands

**[Seal of the Tribunal]**