

**UNITED  
NATIONS**

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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: 24 July 2008

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**IN TRIAL CHAMBER III**

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

**Registrar:** Mr. Hans Holthuis

**THE PROSECUTOR**

**v.**

**MILAN LUKIĆ &  
SREDOJE LUKIĆ**

*PUBLIC*

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**PROSECUTION REPLY TO DEFENCE RESPONSES TO  
PROSECUTION MOTION FOR CERTIFICATION TO APPEAL  
THE TRIAL CHAMBER'S "DECISION ON PROSECUTION  
MOTION SEEKING LEAVE TO AMEND THE SECOND  
AMENDED INDICTMENT"**

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**The Office of the Prosecutor:**

Mr. Dermot Groome

**Counsel for the Milan Lukić:**

Mr. Jason Alarid

**Counsel for the Sredoje Lukić:**

Mr. Djuro Đ. Čepić  
Mr. Jens Dieckmann

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**IT-98-32/1-T**

**THE PROSECUTOR  
v.  
MILAN LUKIĆ &  
SREDOJE LUKIĆ**

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**PROSECUTION REPLY TO DEFENCE RESPONSES TO PROSECUTION  
MOTION FOR CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S  
"DECISION ON PROSECUTION MOTION SEEKING LEAVE TO AMEND  
THE SECOND AMENDED INDICTMENT"**

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**I. Request for Leave to file a Reply**

1. Pursuant to Rule 126 *bis* of the Rules of Procedure and Evidence, the Prosecution seeks leave to reply to "Milan Lukić's Response to the Prosecution Motion Requesting Certification to Appeal the Decision Denying Leave to Amend" ("Milan Lukić's Response") and "Sredoje Lukić's Response to 'Prosecution Motion for Certification to Appeal the Trial Chamber's 'Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment'" ("Sredoje Lukić's Response"). There are a number of important points that warrant clarification, in particular where there is an incorrect characterisation of the Prosecution's argument or where the Accused has made a notable misinterpretation. These are issues of importance which will significantly affect the outcome of the trial and which an immediate resolution of the Appeals Chamber would materially advance the proceedings. The Prosecution respectfully seeks leave of the Trial Chamber to reply based upon this understanding.

## **II. Background**

2. The Prosecution filed its “Prosecution Motion for Certification to Appeal the Trial Chamber’s ‘Decision on Prosecution Motion Seeking to Leave to Amend the Second Amended Indictment’” (“Motion”) on 15 July 2008. In the Motion, the Prosecution requested, pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”), that the Trial Chamber certify for interlocutory appeal, its “Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment” of 8 July 2008.
3. On 22 July 2008, both Accused filed responses to the Motion raising certain concerns that require further clarification by the Prosecution.

## **III. Discussion**

4. In its Motion, the Prosecution has made a number of references to the *Halilović* case, in particular to the opinions of Judge Kwon and Judge Bonomy. Every reference to the said case has been openly presented in its faithful and entire context.
5. Sredoje Lukić’s Response incorrectly asserts that “[t]he Prosecution, however, omits to highlight the fact that Judge Kwon – while taking into consideration the particular circumstance of the case – ultimately concluded that the application should be denied by the Trial Chamber.”<sup>1</sup> The Prosecution draws attention to the discussion of Judge Kwon’s opinion in the Motion where it refers to “the denial of the Prosecutor’s application to amend the indictment”<sup>2</sup> in the *Halilović* case and further, where the Motion argues that the analysis invoked is instructive to the instant case despite the fact that “the decision [in *Halilović*] was ultimately *not* to grant the certification to appeal.”<sup>3</sup>

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<sup>1</sup> Sredoje Lukić’s Response, para. 18

<sup>2</sup> Motion, para. 8

<sup>3</sup> Motion, para. 14

6. Milan Lukić's Response makes a similar error suggesting that the Motion has failed to present an accurate picture of the *Halilović* opinion.<sup>4</sup> However, the Prosecution explicitly outlines the relevant jurisprudence from the *Halilović* case<sup>5</sup> and distinguishes the factors that existed, unique to that case as distinguished from the Lukić case, which lead to the denial of the request by the Trial Chamber.<sup>6</sup>
7. In the Motion, the Prosecution elucidates its grounds for filing a Motion for Certification in relation to the proposed amendments of the operative indictment regarding Joint Criminal Enterprise.<sup>7</sup> Sredoje Lukić's Response and Milan Lukić's Response equally fail to present relevant arguments to counter the Prosecution's assertions. Both simply repeat the Trial Chamber's finding that the inclusion of JCE would entail the insertion of a new mode of liability rather than a simple clarification.<sup>8</sup> These statements indicate a misinterpretation by both Accused of the rationale behind a motion under Rule 73(B). The Rule exists in order to allow a party to submit grounds for an issue to be reconsidered on appeal. The Motion sets out a clear explanation of the manner in which the issue would significantly affect the outcome of the Trial<sup>9</sup> and the reason that an immediate resolution by the Appeals Chamber is required.<sup>10</sup> The Prosecution's position, with which the Trial Chamber disagreed and upon which the Appeals Chamber would rule should the Trial Chamber grant the Motion for certification, is that the inclusion of JCE would not involve the creation of new charges but that it would undoubtedly affect the outcome of the Trial and that it requires immediate resolution. In merely reiterating the findings of the Trial Chamber, the Defence have not appropriately addressed these arguments.
8. With regard to the proposed sexual violence amendments, Sredoje Lukić's Response argues that the Prosecution's comments on the possible refusal to testify by alibi witnesses constitutes "pure speculations and imprecise

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<sup>4</sup> Milan Lukić's Response, para. 15

<sup>5</sup> Motion., paras. 17-18

<sup>6</sup> Ibid., para. 19

<sup>7</sup> Ibid., para. 10

<sup>8</sup> Sredoje Lukić's Response, para. 11; Milan Lukić's Response, para. 11

<sup>9</sup> Motion, paras. 9 and 10

<sup>10</sup> Motion, para. 15

allegations.”<sup>11</sup> For the benefit of the Trial Chamber, the Prosecution asserts that the assessment of these key witnesses cannot possibly be construed as speculative. These witnesses, have been reluctant to testify until very recently.<sup>12</sup> While the Prosecution in its communication with these witnesses has been very clear that sexual crimes are not presently part of the indictment, it is foreseeable these witnesses may harbour the natural expectation that should they testify against Milan and Sredoje Lukić about crimes committed against them there will be some adjudication of that crime. Now is the appropriate time for the Chamber to consider how the unique circumstances of this situation may impact the trial proceedings.

9. Further, the Prosecution stresses that *neither* of the Defence Responses contest the Prosecution’s central assertion: that to call rebuttal witnesses, while *not* charging the Accused with the atrocities committed during a time that the Accused maintain that they were not present, would result in a miscarriage of justice. Both Responses fail to address how justice can be brought to these victims without inclusion of these charges.
  
10. The Prosecution does not dispute that it had previously considered and decided against amending the indictment to include charges relating to sexual violence.<sup>13</sup> However, the Prosecution seeks to clarify that it was only subsequent to the much delayed alibi notification that it was forced to reconsider the position in light of the compelling revelations by the core alibi witnesses.
  
11. The Prosecution notes that both Milan Lukić’s Response and Sredoje Lukić’s Response fail to contest the fact that the Defence will nevertheless be required to conduct investigations for the purpose of testing the credibility of the alibi rebuttal witnesses. Neither Response asserts a view regarding any difference between the work required for cross-examining these witnesses on their alibi evidence and the work which would be required to prepare to challenge their evidence in relation to the proposed sexual violence charges. Milan Lukić’s

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<sup>11</sup> Sredoje Lukić’s Response, para. 13

<sup>12</sup> VG-063 agreed to testify in April 2008 and VG-035 and VG-094 agreed to testify in June 2008.

<sup>13</sup> Sredoje Lukić’s Response, para. 12

Response states that “the trial cannot be taken off track to lead evidence on charges of which the Defence had not been properly noticed.”<sup>14</sup> However, the Response provides no explanation for this conclusion. The Trial Chamber will necessarily assess the evidence of these witnesses and adjudicate the matter because the witnesses will provide evidence to refute the alibi defence. Such adjudication will not result in the trial being “taken off track” – rather it pertains to one of the core issues at trial.

12. Finally, on the subject of the OSJI application for leave to file a brief as an *amicus curiae*, Sredoje Lukić’s Response merely disagrees with the Prosecution and in turn, fails to offer any legal argument on the matter whatsoever.<sup>15</sup> Milan Lukić’s Response alleges that the Prosecution has failed to explain why the *amicus curiae* brief would have a significant impact on the trial.<sup>16</sup> The Prosecution’s Motion presented the OSJI as an “organisation of world renowned experts”<sup>17</sup> and submitted relevant jurisprudence that demonstrates the benefits that Trial Chambers have previously gained from *amici*, in particular OSJI. The Defence Responses do not contest this.

#### **IV. Relief Sought**

13. For these reasons and those stated in the Motion, the Prosecution respectfully requests that the Trial Chamber grant its motion for certification to appeal the decision.

Word Count: [1,569]

Respectfully Submitted,



Dermot Groome  
Senior Trial Attorney

Dated this 24 July 2008  
The Hague, The Netherlands

<sup>14</sup> Milan Lukić’s Response, para. 13

<sup>15</sup> Sredoje Lukić’s Response, para. 20

<sup>16</sup> Milan Lukić’s Response, para. 25

<sup>17</sup> Motion, para., 24