

**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-PT

Date: 15 May 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Krister Thelin, pre-trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 15 May 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION
FOR AN ORDER REQUIRING THE ACCUSED
SREDOJE LUKIĆ TO CLARIFY ALIBI NOTICE
SERVED UNDER RULE 67(A)(I)(A)**

The Office of the Prosecutor

Mr. Dermot Groome
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Mr. Bojan Sulejčić and Mr. Jason Alarid for Milan Lukić
Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

1. Introduction

1. This 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 “Prosecution’s motion for an order requiring the Accused Sredoje Lukić to clarify alibi notice served under Rule 67(A)(i)(a)”, filed confidentially on 22 January 2008 (“Motion”). The Prosecution requests that the Trial Chamber find “that the Accused Sredoje Lukić has not complied with Rule 67(A)(i)(a) unless within a time set down by the Court, the Defence for Sredoje Lukić conforms to the requirements [of that Rule] and provides precise information regarding the alibis” of which the Defence of Sredoje Lukić (“Defence”) gave notice on 10 December 2007 and 8 January 2008 (respectively, “10 December 2007 Notice” and “8 January 2008 Notice”).¹

2. Relevant procedural history

2. According to the workplan adopted on 4 September 2007, the time-limit of 15 November 2007 was set for any Defence notice to be provided pursuant to Rule 67(A)(i)(a).² On 14 November 2007, the Defence informed the Trial Chamber of its intent to offer the defence of alibi with regard to two incidents alleged in the Second Amended Indictment (“Indictment”): the Pionirska Street incident (Counts 8, 9, 10, 11, and 12) and the Bikavac incident (Counts 13, 14, 15, 16, and 17).³ However, the Defence requested that the time-limit be extended in order to enable the Defence to gather further information and obtain guidance from the Accused.⁴ The Trial Chamber granted this request on 20 November 2007, extending the time-limit to 10 December 2007.⁵ In its 10 December 2007 Notice, the Defence supplied information in relation to the Pionirska Street incident and requested a further extension of the time-limit in respect of the Bikavac incident.⁶ On 14 December 2007, that request was granted and the Defence was ordered to file its notice no later than 8 January 2008.⁷ On 8 January 2008, the Defence filed its notice in respect of the Bikavac incident. As noted

¹ Motion, para. 24, referring to “Sredoje Lukić’s defence notice under Rule 67(A)(i)(a) and request for extension of time”, filed confidentially on 10 December 2007, and “Sredoje Lukić’s additional defence notice under Rule 67(A)(i)(a)”, filed confidentially on 8 January 2008.

² Status Conference, 4 September 2007, T. 124.

³ “Defence notice under Rule 67(A)(i)(a) and request for extension of time”, filed confidentially on 14 November 2007 (“Initial notice”).

⁴ Initial notice, para. 12.

⁵ “Decision on defence motion for extension of time under Rule 67(A)(i)(a)”, filed publicly on 20 November 2007.

⁶ 10 December 2007 Notice, para. 20.

⁷ “Decision on Sredoje Lukić’s defence motion for extension of time under Rule 67(A)(i)(a)”, filed publicly on 14 December 2007.

above, on 22 January 2008 the Prosecution filed its Motion. On 28 January 2008, the Defence filed its response.⁸

3. Submissions

3. The Prosecution submits that the information submitted by the Defence in the two Notices is deficient and that the Defence has not complied with Rule 67(A)(i)(a).⁹ The Prosecution argues that “the Accused has had ample time to instruct his counsel to file alibi notice which fully complies with all the requirements of Rule 67(A)(i)(a)” and that “a reasonable time for filing a full alibi notice has now been afforded to the Defence”.¹⁰ Acknowledging that, according to Rule 67(B), failure to provide notice under Rule 67(A)(i)(a) does not limit the Accused’s right to testify on, for example, an alibi defence, the Prosecution submits that nevertheless “Rule 67(B) does not authorise an accused to put forward witnesses in support of a defence of alibi when the Prosecution has not been notified within a time frame stipulated in Rule 67(A).”¹¹ In this respect, the Prosecution submits that “Rule 67(B) could effectively render Rule 67(A)(i)(a) unenforceable.”¹² In the Prosecution’s view, in order for the Defence “to properly and adequately meet the requirements of Rule 67(A)(i)(a)”, the Defence would have to answer a number of questions which the Prosecution poses.¹³

4. The Defence submits that it has met the requirements of Rule 67(A)(i)(a) by providing the Prosecution with “the places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses upon which the accused intends to rely to establish the alibi.”¹⁴ The Defence draws attention to its 10 December 2007 Notice, wherein it supplied the names and addresses of two witnesses upon whom the Defence seeks to rely to establish alibi in relation to the Pionirska Street incident.¹⁵ Moreover, the Defence also notes that it provided the Prosecution with a CD-ROM containing statements of the two witnesses.¹⁶ The Defence further argues that its 8 January 2008 Notice provided the Prosecution with the name and

⁸ “Response of defence counsel for Sredoje Lukić to ‘Prosecution’s motion for an order requiring the Accused Sredoje Lukić to clarify alibi notice served under Rule 67(A)(i)(a)’ from 22 January 2008”, filed confidentially on 28 January 2008 (“Response”).

⁹ Motion, para. 21. The Prosecution submits that it informed the Defence by letter on 11 January 2008 that it considered the notices to be deficient. The Prosecution requested the Defence “to supply further particulars as to witnesses, times and events in respect of the alibis”, *id.* para. 12. The Trial Chamber notes that the letter attached as confidential Annex A to the Motion is dated 14 January 2008.

¹⁰ Motion, para. 18, footnote removed.

¹¹ Motion, para. 20, referring to *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Decision on the defence of alibi for the Accused Žigić, 21 July 2000, p. 2.

¹² Motion, para. 20.

¹³ Motion, para. 21. The questions are set out in paras 22(a)-(d) (Pionirska Street incident) and 23(a)-(f) (Bikavac incident).

¹⁴ Response, para. 24.

¹⁵ Response, para. 12.

¹⁶ Response, para. 13.

address of one alibi witness concerning the Bikavac incident.¹⁷ On the same day, the Defence provided the Prosecution with a CD-ROM containing a statement of that witness.¹⁸ The Defence takes issue with the clarifications sought by the Prosecution submitting that they “go far beyond the legal obligations of the Defence under Rule 67(A)(i)(a).”¹⁹

4. Discussion

5. Rule 67 provides in the relevant parts:²⁰

(B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:

(i) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and

(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.

(C) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

6. The Trial Chamber recalls that it has dealt with the Prosecution’s submission that the Defence has had “ample time” to submit notice pursuant to Rule 67(A)(i)(a) in a previous decision concerning the notice filed by the Accused Milan Lukić.²¹ In that decision, the Trial Chamber held that “Rule 67(A) does not include any requirement that the Defence must provide notice of a defence of alibi as early as possible.”²² Moreover, the Trial Chamber dealt in detail with the Prosecution’s argument that Rule 67(B) does not permit an accused to put forward witnesses in

¹⁷ Response, para. 16.

¹⁸ Response, para. 17. The Defence also states that on 13 January 2008 it responded to the Prosecution’s letter of 11 January 2008, informing the Prosecution that it would require two to three weeks to attend to the Prosecution’s questions.

¹⁹ Response, para. 26, wherein the Defence notes that the Prosecution “cannot offer any reference to ICTY or ICTR jurisprudence supporting its broad interpretation of Rule 67(A)(i)(a).”

²⁰ As amended on 28 February 2008, IT/32/Rev. 41. The cited provision corresponds to Rule 67(A) to (C) as prior to this amendment.

²¹ Decision on the Prosecution’s motion for an order requiring the Accused Milan Lukić to clarify alibi notice served under Rule 67(A)(i)(a) and on the defence of Milan Lukić’s second motion concerning protective measures for alibi witnesses”, filed confidentially on 8 May 2008.

²² *Id.* para. 9.

support of a defence of alibi when the requirements of subparagraph (A)(i)(a) have not been met.²³ These submissions will therefore not be further considered.

(a) Proposed alibi in relation to the Pionirska Street incident (Counts 8, 9, 10, 11 and 12)

7. In its 10 December 2007 Notice, the Defence submits in respect of the Pionirska Street incident that “the Accused [...] was not present in Višegrad on 14 June 1992. Instead, he was present in Obrenovac at this day.”²⁴ The Defence provides the name, birth date and current address of two witnesses upon whom it intends to rely to establish the alibi.²⁵

8. The Prosecution submits that the primary events relating to this incident commenced on the morning on 14 June 1992 and continue into the early morning hours on 15 June 1992 and therefore requests the Defence to clarify where precisely the Accused was during this period, including specific postal addresses or other locations.²⁶ Moreover, the Prosecution requests the Defence to clarify if the addresses of the two witnesses were the same on 14 and 15 June 1992.²⁷ The Prosecution also notes that other persons are referred to in the two statements provided to it and requests the Defence to provide “the full names and current postal addresses of any other witnesses” on whom the Defence intends to rely.²⁸ Lastly, the Prosecution requests the Defence to clarify what other physical or documentary evidence, if any, it intends to rely upon to establish alibi.²⁹

9. Initially, the Trial Chamber notes that while the Indictment provides that the victims of the Pionirska Street incident were told on 14 June 1992 that they would spend the night in a house, it does not contain specific information that the crimes alleged were committed in the early morning hours of 15 June 1992.³⁰ Nor does the Prosecution pre-trial brief contain specific information to this

²³ *Id.* paras 16-18.

²⁴ 10 December 2007 Notice, para. 18.

²⁵ *Ibid.*

²⁶ Motion, para. 22(a).

²⁷ *Id.* para. 22(b).

²⁸ *Id.* para. 22(c).

²⁹ *Id.* para. 22(d).

³⁰ Indictment, paras 7-10, which read:

7. On or about 14 June 1992, approximately 70 Bosnian Muslim women, children and elderly men were instructed to spend the night in vacated houses in the Mahala neighbourhood of the town of Višegrad. The group moved to the house of Jusuf Memić on Pionirska street in Nova Mahala in Višegrad town. A group of armed men, including Milan Lukić, Sredoje Lukić and Milan Sušnjar (also known as "Laco") arrived at the Memić house, ordered the people in the group to hand over their money and valuables, subjected them to a strip search and then left the house, instructing the group to remain in the Memić house overnight.

8. Later on the same day, Milan Lukić, Sredoje Lukić, Milan Sušnjar and other unknown individuals arrived at the house and forcibly moved the group to the nearby house of Adem Omeragić, also on Pionirska street.

effect; rather it is alleged that the crimes were committed in the late evening of 14 June 1992.³¹ Thus, the Defence does not have to clarify its notice in respect of 15 June 1992 as it has provided notice that the Accused claims to have been present in Obrenovac on 14 June 1992.

10. With regard to the Prosecution's request that the Defence must state "precisely where the Accused was", the Trial Chamber considers that it is relevant for the Defence to explain with further specificity where in Obrenovac the Accused claims to have been on 14 June 1992.

11. With regard to the clarification sought of whether the two witnesses provided resided on their current addresses on 14 and 15 June 1992, the Trial Chamber considers that the Defence is not required by the Rule to clarify this. The Defence is to give notice to the Prosecution of the names and addresses of witnesses upon whom it intends to rely in order that the Prosecution be able to perform its own investigation. The Defence is not required to carry out that investigation for the Prosecution.

12. With regard to the Prosecution's question as to whether the Defence intends to rely on also other witnesses, the Trial Chamber considers the Defence has given notice in accordance with Rule 67 and informed the Prosecution of the witnesses upon which it intends to rely. No further clarification is necessary in this respect.

13. With regard to the fourth question, the Trial Chamber finds that the Defence must clarify whether any other such evidence remains to be provided, as far as the Defence is able to assess at this point in time.

(b) Proposed alibi in relation to the Bikavac incident (Counts 13, 14, 15, 16, and 17)

14. In its 8 January 2008 Notice, the Defence submits that the Accused "was not present in Bicavac [*sic*] on 27 June 1992. Instead, he was present in Obrenovac on this day."³² The Defence

9. Milan Lukić, Sredoje Lukić and others, acting in concert, then barricaded the people in one room of the house of Adem Omeragić and placed an incendiary device in the room, engulfing both them and the house in flames.

10. Further, Milan Lukić and Sredoje Lukić fired upon people who tried to escape through the windows of the house of Adem Omeragić with automatic weapons causing the death of some and the injury of others. By these actions Milan Lukić and Sredoje Lukić caused the death of 70 people, named in Annex A to this indictment, and serious injury to several people who survived the fire.

³¹ "Prosecution's pre-trial brief pursuant to Rule 65 ter (E) (I)", filed publicly on 14 March 2008, paras 71-82.

³² 8 January 2008 Notice, para. 20.

provides the name, birth date and current address of one witness upon whom it intends to rely to establish the alibi.³³

15. The Prosecution argues that, in view of the fact that the “primary events relating to this fire occurred over the course of the evening hours of 27 June 1992”, the notice given is “somewhat ambiguous as to alibi particulars.”³⁴ The Prosecution, therefore, seeks clarification from the Defence of where precisely the Accused was, if he was in Obrenovac itself or if he was travelling between Obrenovac and Višegrad.³⁵ The Prosecution also asks the Defence to clarify at which precise locations, with whom and at what specific times the Accused was in Obrenovac.³⁶ With reference to the statement of the witness provided in which two other persons are mentioned, the Prosecution requests the Defence to provide the full names and current postal addresses of these persons.³⁷ Moreover, the Prosecution requests the current address of another, named person.³⁸ Further, the Prosecution requests the Defence to clarify whether the witness identified in the 8 January 2008 Notice was already living at his current address on 27 June 1992.³⁹ Lastly, the Prosecution requests the Defence to clarify what other physical or documentary evidence, if any, it intends to rely upon to establish alibi.⁴⁰

16. The Trial Chamber considers that the Defence’s notice in relation to the Bikavac incident is not ambiguous as to alibi particulars. However, it is relevant for the Defence to explain where in Obrenovac the Accused claims to have been on 27 June 1992, including clarifying whether he was travelling on that date between Obrenovac and Višegrad and at which locations and at what times he claims to have been present in Obrenovac. The Prosecution also requests the Defence to clarify with whom the Accused was on 27 June 1992. However, the Trial Chamber holds that this part of the request goes beyond that which the Defence is required to provide pursuant to Rule 67(A)(i)(a) in view of what the Defence has already provided.

17. With regard to the Prosecution’s request that the Defence provide the full names and addresses of three persons, the Trial Chamber notes that the Defence has not put forth these persons as witnesses under Rule 67(A)(i)(a). Should the Defence wish to rely upon these witnesses to establish alibi, then the Defence is under an obligation to provide notice of them and to include the required information. However, the Defence is not required to do so at present .

³³ *Ibid.*

³⁴ Motion, para. 23(a).

³⁵ *Ibid.*

³⁶ *Id.* para. 23(b).

³⁷ *Id.* para. 23(c).

³⁸ *Id.* para. 23(e).

³⁹ *Id.* para. 23(d).

⁴⁰ *Id.* para. 23(f).

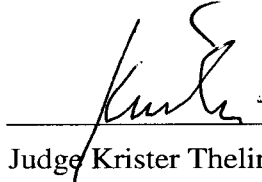
18. The Prosecution requests the Defence to clarify whether the witness identified in the 8 January 2008 Notice resided at his current address on 27 June 1992. The Trial Chamber's finding in paragraph 11 remains valid also for this request. The same holds true for the Trial Chamber's finding in paragraph 13 concerning the request that the Defence clarify what other physical or documentary evidence it intends to rely upon to establish alibi.

5. Disposition

19. For the above reasons, the Trial Chamber, acting pursuant to Rule 67 and 69 of the Rules **GRANTS** the Motion in part, and **ORDERS** the Defence to clarify its Notices by Thursday 22 May 2008 with regard to:

1. the Pionirska Street incident, 14 June 1992: 10 December 2007 Notice, paragraph 18, as requested in paragraph 22(a) of the Motion, restricted to the Accused's whereabouts on 14 June 1992, and in paragraph 22(d) of the Motion;
2. the Bikavac incident, 27 June 1992: 8 January 2008 Notice, paragraph 20, as requested in paragraph 23(a), paragraph 23(b), restricted to the specific times and locations at which the Accused was in Obrenovac on 27 June 1992, and paragraph 23(f) of the Motion.

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



Judge Krister Thelin
Pre-trial Judge

Dated this fifteenth day of May 2008

At The Hague

The Netherlands

[Seal of the Tribunal]