



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 RESPONSE AND MOTION
FOR CLARIFICATION OF DEFENCE PRE-TRIAL BRIEFS**

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. Bojan Sulejić and Mr. Jason Alarid for Milan Lukić
Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

1. Background and submissions

1. On 25 April 2008, the Defence of Milan Lukić and the Defence of Sredoje Lukić filed their pre-trial briefs (respectively, “Milan Lukić’s pre-trial brief” and “Sredoje Lukić’s pre-trial brief”).¹ Milan Lukić pre-trial brief is called a preliminary brief and the Defence, asserting that “it is not presently in a sufficient position to file complete work product”, requests permission to file a “final pre-trial brief in the future after a reasonable time to regroup and adequately prepare for trial.”² While the Defence of Sredoje Lukić does not call its pre-trial brief ‘preliminary’, it “reserves the right to make further submissions with respect to the law and the Prosecution’s proposal as to its application to the facts.”³

2. On 9 May 2008, the Prosecution filed its “Response and motion for clarification of Defence pre-trial briefs” (“Motion”), whereby the Prosecution requests the Trial Chamber “to find both Accused in violation of the provisions of Rule 65ter(F)” and “to order the Accused to provide clarifications through Pre-Trial Briefs in conformity with the letter and spirit of Rule 65ter(F)”.⁴ The Prosecution argues that the Defence pre-trial briefs:

- 1) do not provide sufficient notice to the Prosecution or the Trial Chamber of any of the contents of the Defence case (“First allegation”),⁵ and
- 2) do not address either factual or legal issues presented by the Prosecution or make any arguments which would assist the Prosecution or the Trial Chamber in understanding the disputes between the parties in relation to such issues (“Second allegation”).⁶

3. On 15 May 2008, the Defence of Sredoje Lukić filed a “Motion for leave to reply to ‘Prosecution response and motion for clarification of Defence pre-trial briefs’ and reply”, wherein it contests the Prosecution’s assertions that the pre-trial brief is deficient.⁷

¹ “Milan Lukić’s preliminary pre trial brief pursuant to Rule 65ter (F) and continued request for extention [sic] of time”, filed confidentially on 25 April 2008; “Sredoje Lukić’s Defence pre-trial brief pursuant to Rule 65ter (F)”, filed publicly on 25 April 2008.

² Milan Lukić’s pre-trial brief, para. 3. The Defence also “reserves the right to make additional submissions of law and fact either during further pre trial proceedings or during trial, pursuant to equity of justice and statutory and decisional authority”, *id.* para. 4.

³ Sredoje Lukić’s pre-trial brief, para. 20.

⁴ Motion, para. 11. The Trial Chamber notes in this respect that this is the same request as the Prosecution submitted in *Prosecutor v. Radoslav Brdanin and Momir Talić*, “Prosecution’s response to ‘Defendant Brdanin’s Pre-Trial Brief’”, filed on 21 November 2001.

⁵ Motion, para. 8.

⁶ Motion, para. 8.

⁷ “Sredoje Lukić’s motion for leave to reply to ‘Prosecution response and motion for clarification of Defence pre-trial briefs’ and reply”, filed publicly on 15 May 2008 (“Sredoje Lukić’s reply”), para. 3.

2. Discussion

4. As a preliminary point, the Trial Chamber notes that Milan Lukić has not responded to the Motion. Nevertheless, in view of the submissions in the respective Defence pre-trial briefs, and in the interest of expeditious proceedings, the Trial Chamber is of the view that it may render this decision now.

5. Rule 65 *ter* (F) of the Rules of Procedure and Evidence provides:

(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

- (i) in general terms, the nature of the accused's defence;
- (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and
- (iii) in the case of each such matter, the reason why the accused takes issue with it.

The purpose of this provision is to enable the Trial Chamber and the Prosecution to have sufficient notice of the content of the Defence case before the presentation of evidence at trial begins.⁸ The Trial Chamber considers this provision to be wide and open-ended, requiring the Defence to address "the factual and legal issues" of the case. At the very least, the Defence is to 1) describe in general terms, the nature of the accused's defence, and 2) identify the specific matters raised in the Prosecution's pre-trial brief with which the Defence takes issue, and the reasons for the Defence's disagreement on each such matter. The above is required information in a Defence pre-trial brief, though, as noted, the Defence may provide more information.

(a) First allegation

6. With regard to the Prosecution's first allegation, the Trial Chamber considers that the Defence is not required to provide "notice [...] of the contents of the Defence case". What is required is to set out the nature of the accused's defence. This may include stating that the Prosecution cannot prove beyond reasonable doubt the indictment's allegations, as further supplemented by general information concerning the accused's alleged position or role.⁹

7. Milan Lukić states that he "denies all factual allegations in the Second Amended Indictment".¹⁰ Moreover, Milan Lukić states that he intends to present the defence of alibi in

⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Reasons for decision on the Accused's request to file a pre-trial brief", filed publicly on 22 November 2006, para. 8.

⁹ *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, "Decision on Prosecution's response to 'Defendant Brdanin's pre-trial brief'", filed publicly on 16 January 2002, para. 7.

¹⁰ Milan Lukić's pre-trial brief, para. 16. Moreover, it is stated that "all other allegations in the Second Amended Indictment with regard to Milan Lukić are without merit", *id.* para. 19.

relation to counts 8 to 17. The Trial Chamber considers that while an accused may present alternative defences, for the purposes of Rule 65 *ter* (F) it is sufficient to state an intention to present the defence of alibi. In this case, the Trial Chamber recalls the notice of alibi filed by Milan Lukić.¹¹ Milan Lukić has, therefore, discharged his duty in this respect. However, with regard to the remaining counts, the Trial Chamber finds that Milan Lukić has not done so. While Milan Lukić denies the factual allegations in the indictment, his pre-trial brief is devoid of even the most general information on the nature of his defence. The Trial Chamber is aware of the fact that Milan Lukić's Defence team was relatively recently appointed and notes its request to make further submissions pursuant to Rule 65 *ter* (F).

8. The above finding concerning the defence of alibi is valid also for Sredoje Lukić's pre-trial brief, which states that Sredoje Lukić intends to present the defence of alibi in relation to counts 8 to 17. In this respect, the Trial Chamber recalls the notices of alibi filed by Sredoje Lukić.¹² Sredoje Lukić further states that "all other allegations contained in the Second Amended Indictment with regard to the Accused are equally incorrect, unfounded and disputable" and that in "the course of further trial proceedings, the Defence will demonstrate the factual deficiencies of the OTP case."¹³ In his reply, Sredoje Lukić submits that the "essential problem [...] is that it is not yet clear with which individual witnesses the Prosecution intends to support its case."¹⁴ Based on this, he concludes that "it is neither possible nor obligatory under Rule 65*ter*(F) to specify the nature of the Defence in greater detail than was done in the Defence brief in paras. 16 to 25."¹⁵

9. The Trial Chamber cannot agree with this conclusion. The indictment, the supporting material, the Prosecution's pre-trial brief and disclosed materials provide the necessary information to allow the Defence to form an opinion concerning the nature of the Accused's defence. The fact that there are pending matters concerning the Prosecution's witness list is no excuse not to be able to give the required notice in this respect. The Trial Chamber therefore finds that Sredoje Lukić's pre-trial brief does not meet the requirements of Rule 65 *ter* (F).

(b) Second allegation

10. Milan Lukić's pre-trial brief does not address any of the factual and legal matters raised in the Prosecution's pre-trial brief or identify those with which he takes issue. The Trial Chamber

¹¹ "Milan Lukić's Defence notice under Rule 67(A)(i)(a)", filed confidentially on 10 January 2008, and related submissions.

¹² "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, and related submissions.

¹³ Sredoje Lukić's pre-trial brief, para. 19.

¹⁴ Sredoje Lukić's reply, para. 5.

therefore finds that Milan Lukić has not discharged his duty pursuant to Rule 65 *ter* (F) and that he is required to address the relevant factual and legal issues of the case stating which are the matters raised by the Prosecution in its pre-trial brief with which he takes issue and why he does so.

11. Sredoje Lukić's pre-trial brief includes the statement that he:

categorically rejects and contests the truth and the accuracy of the factual allegations and the legal assessment of those factual allegations as made by the Prosecution in the Second Amended Indictment and the Prosecution Pre-Trial Brief and demands strict proof of the same by the Prosecution.¹⁶

Sredoje Lukić does not make any further submissions in his pre-trial brief this respect, except to state that he “will not challenge issues of applicable substantive law at this stage of the proceedings”¹⁷ and, as noted above, that he “reserves the right to make further submissions with respect to the law and the Prosecution’s proposal as to its application to the facts”.¹⁸ Seemingly to the contrary, in his reply, Sredoje Lukić submits that he “will not challenge any legal issues at trial”.¹⁹ The Trial Chamber takes this as a clarification and concludes that Sredoje Lukić does not take issue with legal issues raised by the Prosecution in its pre-trial brief. Nevertheless, Sredoje Lukić does not address the factual issues of the case, nor does he address any other matters which the Prosecution raises in its pre-trial brief with which he takes issue. The Trial Chamber considers that this is not in accordance with Rule 65 *ter* (F) and finds that Sredoje Lukić is required to address the factual issues of the case and to state which are the other matters raised by the Prosecution in its pre-trial brief with which he takes issue and why he does so.

¹⁵ Sredoje Lukić's reply, para. 5.

¹⁶ Sredoje Lukić's pre-trial brief, para. 25.

¹⁷ Sredoje Lukić's pre-trial brief, para. 20.

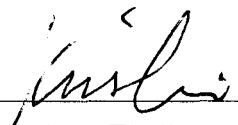
¹⁸ Sredoje Lukić's pre-trial brief, para. 20.

¹⁹ Sredoje Lukić's reply, para. 4. See also Sredoje Lukić's reply, para. 9, where it is stated that “it does not intend to raise any legal issues.”

3. Disposition

12. For the reasons given above, the Trial Chamber **GRANTS** the Motion and **ORDERS** the Defence of Milan Lukić and the Defence of Sredoje Lukić to file, by 29 May 2008, further submissions pursuant to Rule 65 *ter* (F) which comply fully with the requirements thereof. This Order also disposes of Milan Lukić's request for extension of time included with the filing of his pre-trial brief.

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]