



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: 7 May 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: 7 May 2009

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION ORAL REQUEST TO
REFER PUBLICLY TO MILAN LUKIĆ'S
CONFIDENTIAL ALIBI NOTICE AND RULE 65 TER
ALIBI WITNESS SUMMARIES**

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 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”);

BEING SEISED of the Prosecution oral request for “an order or decision that allows the parties to quote the substance of the alibi notices as well as the associated 65 *ter* summaries of the alibi witnesses” as long as all applicable protective measures are respected (“Request”);¹

NOTING the Prosecution submission that “the alibi notices filed in this case were filed confidentially [...] because Defence counsel intended to seek protective measures for some of the witnesses”,² but that “it is relevant and proper for [the Prosecution] to discuss the alibi notice itself”,³

NOTING the Defence of Milan Lukić’s (“Defence”) submission that at the time it prepared its Rule 65 *ter* witness list it “had not had contact with a large majority of the witnesses that were on the Defence list [...] to find out exactly or precisely [what] they had to offer as testimony”,⁴

NOTING the Defence submission that, in determining the innocence or guilt of the accused, the only part of the record that it is proper for the Trial Chamber to evaluate is “the testimony and the exhibits that have been provided [...] in these proceedings”,⁵

NOTING the Prosecution submission in reply that many of the Defence witness statements predate the Rule 65 *ter* summaries “so it’s in fact not accurate to say that they were before any interview by Defence team members”⁶ and that, while the Prosecution recognises “that the Chamber may decide to put little or no weight on the 65 *ter* summaries”,⁷ the Prosecution requests that the matter “be treated publicly rather than in a confidential annex” to the final trial brief;⁸

NOTING that some of the Notices⁹ filed contain identifying information relating to protected witnesses¹⁰ and some contain identifying information about persons who did not testify in this case;¹¹

¹ Hearing, 9 April 2009, T. 7090.

² Hearing, 9 April 2009, T. 7090.

³ Hearing, 9 April 2009, T. 7090.

⁴ Hearing, 9 April 2009, T. 7091.

⁵ Hearing, 9 April 2009, T. 7091-7092.

⁶ Hearing, 9 April 2009, T. 7092.

⁷ Hearing, 9 April 2009, T. 7092.

⁸ Hearing, 9 April 2009, T. 7092.

⁹ Milan Lukić’s further submissions in regard to defence of alibi, filed confidentially with confidential annex A on 18 July 2008; Milan Lukić’s further notice of alibi witnesses pursuant to ICTY Rule 67(B)(i)(a) and request for protective

CONSIDERING that Article 20(4) of the Tribunal's Statute ("Statute") requires hearings to be public "unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence";

CONSIDERING that pursuant to Rule 78 of the Rules of Evidence and Procedure ("Rules") all proceedings before a Trial Chamber, other than its deliberations, shall be in public unless otherwise provided, and that pursuant to Rule 81(B) of the Rules the Trial Chamber, after giving due consideration to any matters relating to witness protection, may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist;

CONSIDERING that Article 22 of the Statute provides for protection of victims and witnesses with protective measures, which include, but are not restricted to, "the conduct of in camera proceedings and the protection of the victim's identity";

CONSIDERING that Rule 75(A) of the Rules provides for "appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused";

CONSIDERING that, pursuant to Rule 79 of the Rules, the Trial Chamber may "order that the press and the public be excluded from all or part of the proceedings for reasons of [...] safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75";

CONSIDERING, therefore, that it is in the interest of justice that proceedings, to the greatest extent possible, are public but that this interest does not outweigh the interest to ensure the protection of witnesses who have been granted protective measures;

CONSIDERING however that it is in the interests of transparency and a public trial for the parties to be able to refer publicly to matters that form part of the proceedings in this case when there is no

measures", filed confidentially on 7 July 2008; Milan Lukic's further notice of alibi witnesses pursuant to ICTY Rule 67(B)(i)(a), filed confidentially on 30 June 2008; Milan Lukic's notice of compliance with disclosures and clarification of notice pursuant to rule 67(B)(i)(a) and motion for extension of time for filing the remainder, filed confidentially on 16 June 2008; Sredoje Lukic's clarification of defence notices under Rule 67(A)(i)(a), filed confidentially on 2 June 2008; Milan Lukic's defence notice under Rule 67(A)(i)(a), filed confidentially on 9 January 2008; Sredoje Lukic's additional defence notice under Rule 67(A)(i)(a), filed confidentially on 8 January 2008; Sredoje Lukic's defence notice under Rule 67(A)(i)(a) and request for extension of time, filed confidentially on 10 December 2007.

¹⁰ Milan Lukic's notice of compliance with disclosures and clarification of notice pursuant to rule 67(B)(i)(a) and motion for extension of time for filing the remainder, filed confidentially on 16 June 2008, para. 1; Milan Lukic's defence notice under Rule 67(A)(i)(a), filed confidentially on 9 January 2008, para. 21(E).

¹¹ Sredoje Lukic's clarification of defence notices under Rule 67(A)(i)(a), filed confidentially on 2 June 2008; Sredoje Lukic's defence notice under Rule 67(A)(i)(a) and request for extension of time, filed confidentially on 10 December 2007.

longer any reason to maintain confidentiality of the matter to which reference is made as mandated by Rule 81(B) of the Rules;

RECALLING the unambiguous obligation on all parties to respect the protection afforded to information that is protected by measures of confidentiality, such as by protective measures granted by a Trial Chamber;

CONSIDERING that it is not appropriate for summaries of witness testimony pursuant to Rule 65 *ter* to form part of the public record in view of the fact that they are mere summaries of what a witness may testify to in court, may contain information that identifies the witness, and are frequently filed before motions for protective measures have been filed or considered;

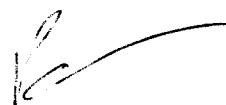
CONSIDERING that such summaries do not constitute evidence before the Trial Chamber and are not considered by the Trial Chamber in its assessment of the evidence on the trial record;

CONSIDERING, therefore, that as the Notices contain material that may identify protected witnesses and as the Rule 65 *ter* summaries contain information that does not form part of the trial record, it would not be appropriate to lift the confidential nature of these filings completely;

PURSUANT TO Articles 20(4) and 22 of the Statute and Rules 54, 75(A), 78, 79 and 81(B) of the Rules;

GRANTS the Request to the extent that each party may refer to the substance of, and quote from, the Notices, but not the Rule 65 *ter* summaries, having full regard to and respect for the confidential nature of the material contained therein.

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



Judge Patrick Robinson
Presiding

Dated this seventh day of May 2009

At The Hague

The Netherlands

[Seal of the Tribunal]