



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-99-36-PT
Date: 14 January 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Decision of: 14 January 2002

THE PROSECUTOR

v.

Radoslav BRĐANIN & Momir TALIĆ

**DECISION ON PROSECUTION RESPONSE TO “DEFENDANT BRĐANIN’S PRE-
TRIAL BRIEF”**

The Office of the Prosecutor:

**Ms Joanna Korner
Mr Andrew Cayley
Mr Nicolas Koumjian
Ms Anna Richterova
Ms Ann Sutherland**

Counsel for the Accused:

**Mr John Ackerman for Radoslav Brđanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talić**

I. INTRODUCTION

1. On 16 November 2001, the defendant Brdanin filed a short pre-trial brief, consisting of three pages.¹ Brdanin explains the brevity of his pre-trial brief by reference to the short time period available for its preparation.² The prosecution filed a written response (“Prosecution’s Response”)³ to Brdanin’s pre-trial brief in which it complained that the brief did not comply with the requirements of Rule 65 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”). The prosecution seeks an order that Brdanin’s pre-trial brief is in violation of Rule 65 *ter* and that he file another brief that “complies with the letter and spirit of Rule 65 *ter*.” Overall, the prosecution argues that Brdanin’s “manifestly inadequate” pre-trial brief is an attempt to conceal the nature of his defence from the prosecution.

II. DISCUSSION

Rule 65 ter (F)

2. The Rules impose different obligations upon the prosecution and the defence regarding the content of their pre-trial filings. The prosecution is required to file a more detailed pre-trial brief addressing factual and legal issues and to provide information about its witnesses and the evidence that will be given by those witnesses, as well as the exhibits the prosecution intends to use at trial.⁴

3. By contrast, Rule 65 *ter* (F) provides that

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.

4. Thus, the defence pre-trial brief is primarily intended to be a response to the prosecution’s pre-trial brief and should set some general boundaries for the trial prior to its commencement. In particular, it is a tool for identifying areas of possible agreement between

¹ Defendant Brdanin’s Pre-Trial Brief, 16 November 2001.

² *Ibid.*, para. 3.

³ Prosecution’s Response to “Defendant Brdanin’s Pre-Trial Brief”, 21 November 2001.

⁴ Rule 65 *ter* (E).

the parties so that the trial may be conducted as efficiently as possible. The defendant is required to file a more detailed document at the close of the prosecution case and prior to the commencement of the defence case, which gives the prosecution and the Trial Chamber more information about the defence case and the evidence the defendant intends to adduce.⁵

5. With these principles in mind, the Trial Chamber has considered the complaints raised in the Prosecution's Response.

Alleged deficiencies in Brdanin's pre-trial brief

6. The prosecution alleges four deficiencies in Brdanin's pre-trial brief:

that he has failed to set out the general terms of his defence;
that he has failed to identify the matters in the prosecution's pre-trial brief that he takes issue with;
that he has failed to adequately address factual issues; and
that he has failed to address any legal issues.

7. The Trial Chamber is unable to agree that Brdanin has failed to set out the general terms of his defence. On the contrary, Brdanin has set out the general terms of his defence very clearly and succinctly. The primary limb of his defence is that the prosecution cannot prove, beyond reasonable doubt, the allegations contained in the indictment. In this regard, he also states, *inter alia*, that the ARK Crisis Staff had no power or resources; that he personally had no power over anybody; and that, at meetings of the ARK Crisis Staff, he functioned merely as a "presiding officer". Thus, for the purposes of this particular requirement, Brdanin has done precisely what he is obliged to do under the Rules and the information in his pre-trial brief provides a clear basis upon which the trial can proceed.

8. Similarly, the Trial Chamber is not persuaded by the prosecution's arguments that Brdanin has failed to identify the matters in the prosecution's pre-trial brief that he takes issue with or that he has failed to adequately address factual issues in general. Brdanin makes it clear that he makes no admissions of any kind and then raises seven specific matters regarding the prosecution's pre-trial brief and provides short explanations as to why he

⁵ Rule 65 *ter* (G).

contests the prosecution's version of events. It is difficult to see how a defendant whose defence is based upon the argument that the prosecution cannot prove the allegations made against him or her could be required to give more information. This is particularly true if, as Brđanin claims, he was powerless within the ARK Crisis Staff, had no influence over what happened and therefore had no knowledge of the crimes that are the subject of the indictment. The Trial Chamber takes this opportunity to point out, however, that if Brđanin's line of defence is that he did not hold a position of power and was not involved in the alleged crimes, then the Trial Chamber expects him to seriously consider whether there are certain factual allegations made by the prosecution that he can agree to, such as the general conditions prevailing in the camps listed in the Fourth Amended Indictment and similar issues.

9. The prosecution maintains that, on a few occasions, Brđanin offers alternative versions of the facts without providing adequate details. The prosecution cites one example: that Brđanin claims the membership of the ARK Crisis Staff was not as set out in the prosecution's pre-trial brief but fails to state how it was different. The Trial Chamber does not consider that this renders Brđanin's pre-trial brief inadequate. Overall, the level of detail provided by Brđanin is sufficient for the purposes of Rule 65 *ter* (F). If the prosecution requires additional clarification of any particular matter, it is at liberty to raise it with the defence and, if necessary, the Trial Chamber.⁶

10. The prosecution also argues that Brđanin provides nothing to support his alternative version of events, except in one instance. However, the Rules do not require a defendant to provide such support. Rather, the Rules defer the requirement for Brđanin to provide more detailed information about the evidence forming part of his defence case until after the close of the prosecution's case-in-chief.

11. In addition, the prosecution complains that Brđanin has triggered reciprocal disclosure under Rule 66 (B) and Rule 67 (C), but has not indicated which documents, if any, he intends to introduce at trial. Issues regarding reciprocal disclosure were discussed at some length during the pre-trial conference held on 10 December 2001.⁷ Counsel for both defendants

⁶ For example, during the pre-trial conference held on 10 December 2001, the prosecution requested and received clarification regarding the statement in paragraph 2 (G) of Brđanin's pre-trial brief that "documents emanating from ARK containing the alleged signature of Radoslav Brđanin, with minimal exception, were not signed or approved by Brđanin nor issued with his permission." Transcript, pp 427-430.

⁷ Pre-trial conference, 10 December 2001, transcript pp. 415-424.

Brđanin and Talić informed the court that they have not yet formed an intention to use any particular item of evidence at trial so that no obligations under Rule 67 (C) yet arise.⁸ Defence counsel assured the Pre-Trial Judge that, as soon as they form the requisite intention, they will disclose the relevant material to the prosecution as required by Rule 67 (C). As noted by the Pre-Trial Judge, it would usually be the case that, by this stage of the proceedings, the defence would be in a position to disclose at least some material. However, the prosecution's argument that it is entitled to have notice, in the pre-trial brief, of the documents Brđanin intends to introduce at trial is unfounded. Rule 65 *ter* (F) does not compel a defendant to include any information about his or her intended exhibits in the pre-trial brief. Thus the issue of reciprocal disclosure must be kept separate from issues regarding Brđanin's pre-trial brief.

12. The final argument raised by the prosecution is that, in violation of Rule 65 *ter* (F), Brđanin's pre-trial brief does not make any attempt to address legal issues. As with factual issues, Rule 65 *ter* requires a defendant to "address... legal issues" in the pre-trial brief and to state what matters it takes issue with in the prosecution's pre-trial brief and the reasons why. Brđanin has simply indicated that he "disagrees with the Prosecutor's analysis of the law in many respects" but that he will reserve his argument until a later date. Thus, Brđanin has made no effort to assist the prosecution or the Trial Chamber to understand, even in the most general terms, what disputes exist between the parties regarding legal questions. If Brđanin is permitted to simply say that he disagrees with the prosecution's analysis of the law and that he will provide further details in a time-frame that suits him, it would effectively nullify the requirement in Rule 65 *ter* (F) that a defendant address legal issues in his or her pre-trial brief. This is even more so considering that Brđanin expressed disagreement with the prosecution's analysis of the law "in many respects". This is not to say, however, that it is particularly helpful for either of the parties to go into pages and pages of excessively detailed legal analysis in their pre-trial briefs. Undoubtedly, the jurisprudence of the Tribunal will develop during the course of the trial with the pronouncement of additional Appeals Chamber decisions and the parties will have an opportunity to make more comprehensive and up to date submissions at the end of the trial. Nonetheless, it is obvious that Brđanin has made no effort whatsoever to identify or explain those aspects of the prosecution's analysis of the law that he presently takes issue with. As a result, he has not complied with the terms of Rule 65

⁸ Rule 67 (C) provides that: "If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects which are within the custody or control of the defence and which it intends to use as evidence at the trial."

ter (F). Accordingly, the Trial Chamber will order that he file a short statement setting out his position on legal issues in this case. As already noted, it need not be lengthy or detailed, but it should be sufficient to provide the parties and the Trial Chamber with a general framework for understanding the disputed legal issues in this case at the present time.

III. DISPOSITION

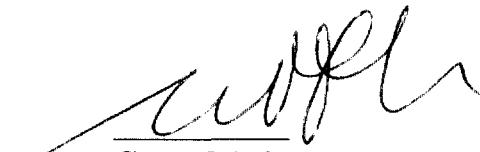
For the foregoing reasons,

TRIAL CHAMBER II HEREBY ORDERS that:

1. The defendant Brdanin is to file a statement setting out his views on the legal issues in this case. In particular, he must specify the aspects of the legal analysis in the prosecution's pre-trial brief that he takes issue with and the reasons why. This statement must be filed within fourteen days of the date that this Order is received by counsel for Brdanin.
2. The remainder of the Prosecution's Response be dismissed.

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

Dated this 14th day of January 2002,
At The Hague,
The Netherlands



Carmel Agius
Pre-Trial Judge

[Seal of the Tribunal]