



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-13/1-PT
Date: 10 October 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr. Hans Holthuis

Decision: 10 October 2005

PROSECUTOR

v.

**MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN**

**DECISION ON PROSECUTION'S MOTION FOR RELIEF
PURSUANT TO RULE 65 TER(F)**

The Office of the Prosecutor:

Mr. Marks Moore

Counsel for the Accused:

Mr. Miroslav Vasić for Mile Mrkšić
Mr. Borivoje Borović and Ms. Mira Tapušević for Miroslav Radić
Mr. Novak Lukić and Mr. Momčilo Bulatović for Veselin Šljivančanin

I. BACKGROUND

1. This decision is in respect of the “Prosecution’s Motion for Relief Pursuant to Rule 65ter(F)”, filed on 28 September 2005 (“Motion”). By this Motion, the Prosecution submits that the pre-trial briefs filed by the Defence of the three Accused in the present case do not comply with Rule 65ter(F) of the Rules of Procedure and Evidence (“Rules”) and requests an order from the Chamber requiring the filing of supplementary briefs. On 5 October 2005, the Defence filed a “Joint Defence Response: Prosecution’s Motion for Relief Pursuant to Rule 65ter(F)” (“Joint Response”), requesting that the Chamber dismisses the Motion or, should the Chamber decline to do so, that the Prosecution be ordered to submit a specific list of factual and legal issues allegedly not in compliance with Rule 65ter(F), and that the Defence be granted sufficient time to comply with any order of the Chamber.

2. The Prosecution filed its pre-trial brief pursuant to Rule 65ter(E) on 29 August 2005. On 23 September 2005, the Defence for the Accused Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin filed their respective pre-trial briefs pursuant to Rule 65ter(F). The Chamber notes that it appears from the submissions of the parties that on 2 September 2005, the Defence for the three Accused submitted a list of 67 proposed agreed facts, to which, at the date of this decision, the Prosecution has not yet responded. The proposed list is not available to the Chamber, as a result of which no further inference can be drawn as to the nature of the Defence cases of each of the Accused.

II. DISCUSSION

3. Rule 65ter of the Rules imposes different obligations upon the Prosecution and the Defence with respect to pre-trial filings. Under Rule 65ter(E), the Prosecution is required to file a detailed pre-trial brief, “including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused...”. By contrast, Rule 65ter(F) only requires the Defence to file a pre-trial brief addressing the factual and legal issues and 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”. Another Trial Chamber has observed that the Defence pre-trial brief is primarily intended as a tool to set some general boundaries for the trial prior to its commencement and to identify potential areas of agreement between the parties.¹ The Defence is not required to produce at this stage details as to

¹ See *Prosecutor v. Brđanin and Talić*, Decision on Prosecution Response to “Defendant Brđanin’s Pre-trial Brief”, Case No IT-99-36-PT, 14 January 2002, para 2.

the evidence it intends to adduce in the course of its case. Rather, pursuant to Rule 65ter(G), such information is required to be provided after the conclusion of the Prosecution case and before the commencement of the Defence case.

4. In support of its Motion for relief, the Prosecution first submits that, with respect to legal issues relevant to this case, the Defence have merely repeated and simply denied the application of the articles of the Statute forming the basis of the charges against the Accused. A review of each of the three Defence pre-trial briefs reveals, however, that the position of each Defence as to the elements of each crime and each form of liability is set out, and where relevant, the basis for such position. This is, in the view of the Chamber, sufficient for the present purposes.

5. The Prosecution further submits that the factual issues set forth in each of the Defence pre-trial briefs relate to peripheral issues and remain thoroughly unclear and inadequate. The Prosecution does not further specify its submissions in this respect.

6. The Defence for the Accused Mrkšić essentially sets out in its pre-trial brief that it contests all allegations put forward by the Prosecution, and more specifically the military and political context in which the events are alleged to have taken place and the role the Accused Mrkšić is said to have played in these events. With respect to the context of the events, the Defence for the Accused Mrkšić contends that the events charged in the Indictment were not part of an attack against the civilian population.² However, while the Defence for the Accused Mrkšić provides a relatively detailed description of what it characterised as the context of the events, including a discussion of some of the activities of the Croatian forces at the time, the Defence's position as to whether there was an armed conflict at the time relevant to this Indictment remains unclear. The Defence will be ordered to supplement its pre-trial brief in this respect. Concerning the role and responsibility of the Accused Mrkšić, the Defence's position appears to be that the Accused did not order the transfer of individuals from the Vukovar hospital on 20 November 1991 and had no knowledge of this event or of the events occurring subsequently.³ On the basis of the pre-trial brief, the case of the Defence for the Accused Mrkšić appears to be that the Vukovar hospital, as well as the Ovčara farm, were under the responsibility of the 80th Motorised Brigade rather than the Guards Motorised Brigade.⁴ Further, throughout the time relevant to the charges in the Indictment, the Accused Mrkšić was "present at the command post of his unit in Negoslavci".⁵ For the purposes of Rule 65ter(F), while the general nature of the Defence of the Accused Mrkšić with respect to his

² Mrkšić Pre-trial Brief, para 64.

³ Mrkšić Pre-trial Brief, paras 40-42.

⁴ Mrkšić Pre-trial Brief, para 41.

⁵ Mrkšić Pre-trial Brief, para 41.

role in the events charged, as described above, is not fully set out, it cannot be said that there has been a failure to comply with the Rule.

7. That being so, the Chamber observes that there is no discussion in the pre-trial brief filed on behalf of the Accused Mrkšić concerning the position of the Defence as to the events underlying the charges in the Indictment, events which are often colloquially referred to as the “crime base”. In principle, the Chamber would be inclined in such circumstances to order the Defence for the Accused Mrkšić to file a supplementary brief dealing with this particular aspect of its case. Other matters currently before the Chamber are, however, of relevance to this determination. In particular, by decision of the pre-trial Judge, the Defence has been ordered to file, by 19 October 2005 and pursuant to Rule 94bis(B) of the Rules, a notice indicating whether it accepted the reports of several expert witnesses whom the Prosecution intends to call at trial, including the reports of two forensic pathologists concerning the autopsy of the individuals exhumed from the Ovčara grave.⁶ The consideration of the Defence as to whether it can accept one or more of the expert reports, and whether it should cross-examine or challenge the qualifications of one or more of the expert witnesses, will be of material relevance to the issue whether the Defence contests the events forming the crime base of this case. In the view of the Chamber, it is therefore premature, at this stage, to order the Defence for the Accused Mrkšić to file a supplementary brief on these particular matters.

8. In its pre-trial brief, the Defence for the Accused Radić first submits that the events charged in the Indictment did not occur in the context of an widespread or systematic attack against the civilian population, as required for Article 5 of the Statute to be applicable.⁷ It is unclear from the brief, however, whether the Defence for the Accused Radić contests the existence of an armed conflict at the time relevant to the Indictment. The pre-trial brief merely refers to activities by the “Corps of National Guards” and the “defenders of the city of Vukovar” preventing the JNA from lifting the blockade imposed on JNA barracks in the city.⁸ No clear conclusion, however, as to the position of the Defence on the existence of an armed conflict, can be drawn from this reference. The Defence of the Accused Radić will be ordered to supplement its pre-trial brief in this respect. Concerning the role of the Accused Radić, the Defence submits in its pre-trial brief that the Accused was not involved in the commission of any of the crimes charged in the Indictment. The position of the Defence appears to be that the Accused Radić was not a member of any joint criminal enterprise in relation to the events charged and that he had no knowledge of any such enterprise.⁹ The Defence provides a more detailed position with respect to the offences of torture and extermination

⁶ See Decision on Notice Pursuant to Rule 94bis, filed confidentially on 5 October 2005.

⁷ Radić Pre-trial Brief, para 58.

⁸ Radić Pre-trial Brief, para 9.

⁹ Radić Pre-trial Brief, para 20.

by stating that the Accused did not have the requisite *mens rea*.¹⁰ Finally, while it appears that the Defence may contend at trial that the Accused Radić was not the superior of the alleged perpetrators,¹¹ this is in apparent conflict with the Defence's acceptance of paragraph 158 of the Prosecution's pre-trial brief.¹² This should be clarified by the Defence of the Accused Radić. Subject to these matters and the comment to follow concerning the crime base, for the purposes of Rule 65ter(F), the Chamber is satisfied that the general nature of the Defence and the contested factual issues relating to the role of the Accused Radić have been adequately set out in the pre-trial brief. However, the considerations detailed above in relation to the position of the Defence for the Accused Mrkšić as to the crime base apply equally with respect to the Defence for the Accused Radić.

9. The Defence for the Accused Šljivančanin essentially advances in its pre-trial brief that the Accused was not involved in any way in the commission of the crimes charged in the Indictment. It is the Defence's case that the Accused Šljivančanin did not have knowledge of the existence of, or participate in, any joint criminal enterprise at the time relevant to the Indictment, nor was he aware of any plan to commit any of the alleged crimes.¹³ A further contention in relation to the role of the Accused Šljivančanin is that he did not issue any order connected in any way with the commission of the crimes charged.¹⁴ Finally, the Defence submits that at the time relevant to the Indictment, the Accused Šljivančanin did not exercise command or authority over any of members of the Serbian forces.¹⁵ More specifically, it is submitted that the Accused Šljivančanin was not the *de jure* or *de facto* commander of the units allegedly involved in the commission of the crimes, namely the Territorial Defence of the Serbian Autonomous District and of the Republic of Serbia, and other volunteer and paramilitary units.¹⁶ On the basis of the pre-trial brief, the position of the Defence appears to be that on 19 and 20 November 1991, the Accused Šljivančanin was not present at the Ovčara farm¹⁷ and was performing his regular duties as security officer of the Guards Motorised Brigade.¹⁸ Subject to what follows, the general nature of the Defence of the Accused Šljivančanin is generally but adequately set out for the purpose of Rule 65ter(F). However, the considerations detailed above in relation to the position of the Defence for the Accused Mrkšić as to the crime base apply equally with respect to the Defence for the Accused Šljivančanin. Further, the position of the Defence for the Accused Šljivančanin remains unclear as to the alleged existence of an armed conflict and/or of an alleged attack directed against the civilian population at the time relevant to

¹⁰ Radić Pre-trial Brief, paras 38 and 67 respectively.

¹¹ Radić Pre-trial Brief, para 23.

¹² Radić Pre-trial Brief, para 16.

¹³ Šljivančanin Pre-trial Brief, paras 33 and 67.

¹⁴ Šljivančanin Pre-trial Brief, para 83.

¹⁵ Šljivančanin Pre-trial Brief, paras 80.

¹⁶ Šljivančanin Pre-trial Brief, para 109, referring to paras 7 and 17 of the Indictment.

¹⁷ Šljivančanin Pre-trial Brief, para 118.

these proceedings. The Defence for the Accused Šljivančanin will be ordered to supplement its pre-trial brief in this regard.

III. CONCLUSION

FOR THE FOREGOING REASONS and PURSUANT TO Rules 54 and 65ter of the Rules,

HEREBY PARTLY GRANTS THE MOTION and ORDERS that:

- (i) the Defence for each of the Accused Mrkšić and Radić file a supplement to their pre-trial brief stating adequately their respective positions as to the alleged existence of an armed conflict at the time relevant to the Indictment;
 - (ii) the Defence for the Accused Radić will also clarify in its supplement its position with respect to paragraph 158 of the Prosecution pre-trial brief and whether the Accused was the superior of the alleged perpetrators;
 - (iii) the Defence for the Accused Šljivančanin file a supplement to its pre-trial brief stating its position as to the alleged existence of an armed conflict and of an attack against the civilian population at the time relevant to the Indictment;
 - (iv) with respect to the cases of each of the three Accused as to the alleged crime base, the Chamber reserves its position pending further oral submissions after the Defence has completed its consideration of the expert reports now provided by the Prosecution;
- (iii) all three supplements be filed by 20 October 2005.

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



Judge Kevin Parker
Presiding

Dated this tenth day of October 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ Šljivančanin Pre-trial Brief, paras 113-114.