

**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-02-65-AR11bis.1

Date: 16 November 2005

Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Andréia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 16 November 2005

PROSECUTOR

v.

**Željko MEJAKIĆ
Momčilo GRUBAN
Dušan FUŠTAR
Duško KNEŽEVIĆ**

**DECISION ON JOINT DEFENSE MOTION FOR LEAVE TO FILE SUPPLEMENTED
APPEALS BRIEF**

Counsel for the Prosecution:

Mr. Mark J. McKeon
Ms. Susan L. Somers
Ms. Ann Sutherland

Counsel for the Appellants:

Mr. Jovan Simić and Mr. Zoran Živanović for Željko Mejakić
Mr. Branko Lukić for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar
Mrs. Slobodanka Nedić for Duško Knežević

THE APPEALS 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 (“International Tribunal”),

NOTING the “Joint Defence Notice of Appeal” filed by Željko Mejačić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević (“Appellants”) on 4 August 2005, against the “Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis” rendered by the Referral Bench on 20 July 2005 (“Referral Decision”);

NOTING the “Joint Defense Motion for Enlargement of Time to File Appellants’ Brief” filed on 18 August 2005 (“Motion for Extension of Time”) by the Appellants, in which they requested an extension of time to file their consolidated Appellants’ Brief pursuant to Rule 127 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) on the basis of several reasons;

NOTING the “Joint Defense Appellants’ Brief in Support of Notice of Appeal” filed on 19 August 2005 (“First Defence Brief”);

NOTING the “Decision on Joint Defense Motion for Enlargement of Time to File Appellants’ Brief” rendered on 30 August 2005 (“Decision on Motion for Extension of Time”), in which the Appeals Chamber dismissed the Motion for Extension of Time as moot, and advised the Appellants that they might, if necessary, file a substantive supplement to the First Defence Brief pursuant to Rule 127(A)(ii) and (B) of the Rules on condition that they provided the Appeals Chamber with sufficient reasons constituting good cause for it to recognize the late filing as validly filed;¹

BEING SEIZED of the “Joint Defense Motion for Leave to File Supplemented Appeals Brief” filed by the Appellants on 14 September 2005 (“Motion”), in which they request the Appeals Chamber to recognise the “Joint Defense Appellant’s Brief in Support of Notice of Appeal (Supplemented)” (“Defence Supplemented Brief”) — attached as Exhibit “A” to the Motion— as validly filed pursuant to Rule 127(A)(ii) of the Rules;²

NOTING the “Prosecution Response in Opposition to the ‘Joint Defense Motion for Leave to File Supplemented Appeals Brief’” filed on 26 September 2005 (“Prosecution’s Response”) in which

¹ Decision on Motion for Extension of Time, pp. 3-4.

² Motion, para. 6.

the Prosecution submits that none of the circumstances set forth in the Motion constitute good cause under Rule 127 of the Rules and that, accordingly, the Motion should be dismissed;³

NOTING that no reply to the Prosecution's Response was filed by the Appellants;

NOTING that the Motion requests leave to file *instanter* the Defence Supplemented Brief, *inter alia*, on the grounds that: (i) since the Referral Decision had not been fully translated into the Bosnian/Croat/Serb ("BCS") language, the Appellants "ha[d] not been properly advised of the exact nature of the findings and rulings"⁴ for filing a comprehensive Appellants' Brief; (ii) the Referral Decision is more akin to a judgement than to an interlocutory decision, since it is "a final adjudication of the proceedings before the [International] Tribunal as they relate to [the Appellants]";⁵ (iii) Counsel for Mr. Fuštar and Mr. Mejakić were only able to "obtain partial input from their clients to explore additional areas of the appeal" when they met with them between 22 and 26 August 2005;⁶ (iv) Counsel for the Appellants had not been able to finalize the Appellants' Brief due to their domestic caseloads, professional obligations, travel schedules, holidays of support staff, and family commitments;⁷ and (v) the Appellants' right to fairness and due process require the submission of additional evidence on appeal;⁸

CONSIDERING that Rule 127(A)(ii) and (B) of the Rules provides that "on good cause being shown by motion", the Appeals Chamber may "recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired";⁹

NOTING that the Motion asserts that the Referral Decision has not been translated into the BCS language and states that "until [the Appellants] can review a copy of the Referral Decision in their native language, they are ill-prepared and unable to specify precisely what the grounds and specifics of their [a]ppeal would be";¹⁰

NOTING the Prosecution's argument to the effect that the assertion that the Referral Decision has not been translated into the BCS language indicates that the Defence Supplemented Brief was

³ Prosecution's Response, paras 3, 21.

⁴ Motion, para. 7.

⁵ *Ibid.*, paras 8, 17.

⁶ *Ibid.*, para. 7.

⁷ *Ibid.*, paras 10-15.

⁸ *Ibid.*, para. 18.

⁹ IT /32/Rev.36, 8 August 2005.

¹⁰ Motion, para. 7.

prepared without reliance on the translation into the BCS language, and thus none of the additional arguments are dependent on such translation;¹¹

CONSIDERING that on appeal, the main burden lies on counsel in preparing the submissions as they have the legal expertise to advise the Appellants whether there exist any potential errors of law and fact;¹²

CONSIDERING that each of the Appellants is represented by Counsel who is accepted by the International Tribunal as being competent in the English language and thus were in a position to work on the preparation of the First Defence Brief before the BCS translation of the Referral Decision was available;¹³

NOTING that the BCS translation of the Referral Decision was filed on 5 September 2005, and that the Registry advised the Appeals Chamber that it was made available to the Defence on that same day;

CONSIDERING that the Appeals Chamber has held that an appeal pursuant to Rule 11bis of the Rules is more akin to an interlocutory appeal than to an appeal from a final judgement and that appeals under Rule 11bis of the Rules do not trigger operation of Rules 109 to 114 of the Rules;¹⁴

FINDING that the argument that the relief sought should be granted because it was necessary for Defence Counsel to meet with the Appellants to go over the Referral Decision,¹⁵ does not constitute good cause within the meaning of Rule 127(A) of the Rules;

FINDING that the fact that Counsel for Mr. Fuštar and Mr. Mejakić decided to meet with their clients in order “to explore additional areas of the appeal,”¹⁶ more than a month after the Referral Decision was rendered, does not constitute good cause within the meaning of Rule 127(A) of the Rules;

FINDING that the fact that support staff was on holidays does not itself constitute “good cause”;¹⁷

¹¹ Prosecution’s Response, para. 9.

¹² *Prosecutor v. Radoslav Brđanin*, Case No.: IT-99-36-A, Decision on Motions for Extension of Time, 9 December 2004, p. 3 (“*Brđanin* Decision of 9 December 2004”).

¹³ See *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No.: IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant’s Briefs, 11 May 2001, para. 18; *Brđanin* Decision of 9 December 2004, pp 3-4.

¹⁴ *Prosecutor v. Radovan Stanković*, Case No.: IT-96-23/2-AR11bis.1., Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, para. 14.

¹⁵ Motion, para. 8.

¹⁶ *Ibid.*, para. 7.

¹⁷ See *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Decision on Prosecution’s Request for Extension of Time to File Respondent’s Brief, 28 July 2004, p. 2; *Prosecutor v. Radoslav Brđanin*, Case No.: IT-99-36-A, Decision on Motion for Extension of Time for the Filing of Prosecution Response Brief, 20 July 2005, p. 3 (“*Brđanin* Decision of 20 July 2005”).

FINDING that other professional commitments of Counsel for the Appellants should not have any bearing on the responsibilities of Counsel towards their clients and the International Tribunal;¹⁸

FINDING further that the fact that Counsel for Mr. Fuštar and Counsel for Mr. Gruban had other work commitments concerning the representation of other clients in cases before the International Tribunal, does not in itself constitute “good cause”, as they are expected to balance the work requirements involved in other cases;¹⁹

NOTING the Appellants’ submission that “[a] review of the [Defence Supplemented Brief] will illustrate that much of the discussion that was supplemented relates to materials that are from other proceedings, or sources that were not discussed by the Referral Chamber, and thus were not available to the defense previously”;²⁰

NOTING the Prosecution’s observation that an analysis of the Defence Supplemented Brief illustrates that the latter “frequently cited legal materials which were previously relied on in the [First Defence Brief], and were therefore already reviewed or could have been reviewed by the Defence at the time of the filing of the [First Defence Brief]”;²¹

CONSIDERING that no explanation has been provided to substantiate the assertion that the sources and materials relied upon were previously unavailable to the Defence;²²

FINDING that references to these sources and materials could have been made in the First Defence Brief and are clearly not dependent upon the translation of the Referral Decision into the BCS language;²³

NOTING the Appellants’ additional argument that since the Referral Decision was based on material and information which: (i) was not adduced by the parties or disclosed to them, and (ii) contradicts the facts and documentation presented by the parties, the Defence has had to file a

¹⁸ *Prosecutor v. Momir Nikolić*, Case No.: IT-02-60/1-A, Decision on Second Defence Motion to Enlarge Time for Filing Replies, 1 April 2005, p. 4; *see also Emmanuel Ndindabahizi v. Prosecutor*, Case No.: ICTR-01-71-A, Decision on ‘Requête urgente aux fins de prorogation de délai pour le dépôt du mémoire en appel’, 5 April 2005, p.3.

¹⁹ *Cf Brđanin* Decision of 20 July 2005, p. 4.

²⁰ Motion, para. 17.

²¹ Prosecution’s Response, para. 18.

²² Motion, para. 17.

²³ The submissions are for the most part references to sources or materials that appear to have been available before, e.g., the Code of Criminal Procedure of Bosnia and Herzegovina (“BiH”); a book published by the Humanitarian Law Foundation in 2001; the VIII United Nations Congress; the BiH Law on Transfer; the “photo packages” that the Prosecution has allegedly failed to disclose to Mr. Knežević since 2004; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Court of Human Rights; the Human Rights Committee of the United Nations; the Inter-American Commission on Human Rights; the Constitutional Court in Columbia. *See generally* Defence’s Supplemented Brief, paras 106- 106.27, 114.2-114.10, 120.2-120.9, 123.1-123.30, 123.36-123.39.

motion under Rule 115 of the Rules to address this issue, and thus additional time was required to file the Defence Supplemented Brief;²⁴

NOTING the Prosecution's submission that this allegation is not relevant to the determination of good cause for the delay in the filing of the Defence Supplemented Brief;²⁵

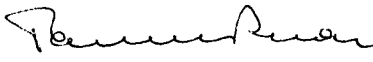
FINDING that the fact that the Appellants have filed a motion under Rule 115 of the Rules does not constitute good cause within the meaning of Rule 127(A);²⁶

FOR THE FOREGOING REASONS,

HEREBY DIMISSES the Motion.

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

Done this sixteenth day of November 2005,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

²⁴*Ibid.*, para. 18.

²⁵ Prosecution's Response, paras 19, 20.

²⁶ *Cf Brdanin* Decision of 9 December 2004, p. 4.