



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-08-91-PT
Date: 23 July 2009
Original: English

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Ole Bjørn Støle
Judge Frederik Harhoff, Pre-Trial Judge

Registrar: Mr. John Hocking

Decision of: 23 July 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ & STOJAN ŽUPLJANIN

PUBLIC

**DECISION TO DENY THE JOINT DEFENCE MOTION FOR CERTIFICATION TO
APPEAL THE ORDER TO SUPPLEMENT THE PRE-TRIAL BRIEFS**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused:

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić for Stojan Župljanin

I. INTRODUCTION

1. This Trial Chamber ("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") is seized of the "Joint Motion for Certification to Appeal Order to Supplement Pre-Trial Briefs" ("Motion") filed publicly by the defence for Mićo Stanišić and Stojan Župljanin ("Defence") on 15 July 2009.
2. On 29 June 2009 the Defence filed their pre-trial briefs pursuant to Rule 65ter (F) of the Rules of Procedure and Evidence of the Tribunal ("Rules"). At the Rule 65ter conference held on 8 July 2009 the pre-trial Judge indicated to the parties the view of the Trial Chamber that the briefs did not fulfil the requirements of Rule 65ter (F), finding them to be deficient and not conducive to the conduct of a fair and expeditious trial. On 9 July 2009, the Trial Chamber issued its "Order to the Defence to Supplement their Pre-Trial Briefs Pursuant to Rule 65ter (F)" ("Order"), requiring the Defence to comply with the requirements of Rule 65ter (F) and granted them until 31 July 2009 to do so. On 15 July 2009, the Defence filed the Motion seeking certification to appeal the Order and on 16 July 2009, the Prosecution filed the "Prosecution's Response to Joint Defence Motion for certification to appeal order to supplement pre-trial briefs" ("Response").

II. SUBMISSIONS

3. The Defence submits that the Trial Chamber erred in its Order by interpreting Rule 65ter (F) in a manner that violates the rights of the accused as guaranteed by Article 21 of the Statute of the International Tribunal for the Former Yugoslavia ("Statute")¹ and if the matter is not certified for resolution by the Appeals Chamber at this stage of the proceedings, it could potentially taint the entire trial and open the final judgement to appeal.² With regard to the requirements of Rule 73(B), it is submitted in the Motion that the present stage of the proceedings and the imminent start of trial justify the certification to appeal.³
4. The Prosecution, in its Response, requests that the Trial Chamber denies the Motion on the ground that the requirements of Rule 73(B) are not met.⁴ The Prosecution states first, that the Order neither adversely affects the rights of the Accused nor the fairness of the proceeding and that it

¹ Motion, paras 8-11.

² *Id.* para 17.

³ *Id.* para. 18.

⁴ Response, para 1.

clearly assists in the expedition of the trial;⁵ and second, that referral of this matter to the Appeals Chamber cannot materially advance the proceedings and a request for certification at this time will only create delay.⁶

III. APPLICABLE LAW

5. Pursuant to Rule 73(B), two criteria need to be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (1) that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (2) an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.⁷

6. The Trial Chamber recalls that “even when an important point of law is raised ... the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied” and that “even where both requirements of the Rule are satisfied, certification remains in the discretion of the Chamber”.⁸

7. The Trial Chamber recalls that according to Rule 65ter (B), the pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial. The Trial Chamber recalls that “the timetable is a crucial element in the pre-trial management of the proceedings”.⁹ Further, in order to comply with the core requirements of Rule 65ter (F), it is sufficient for the Defence “to provide the parties and the Trial Chamber with a general framework for understanding” the disputed issues.¹⁰

⁵ *Id.*, para 11.

⁶ *Id.*, para 14.

⁷ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecution request for certification for interlocutory appeal of “Decision on Prosecutor’s motion seeking leave to amend the indictment”, 12 January 2005, p. 1.

⁸ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Motions For Extension Of Time: Rule 92bis and Response Schedule, 8 July 2009, para 11, citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Application for Certification to Appeal Decision on Languages, 22 April 2009, para 4, citing *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para 42; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Request for Certification of Appeal of Decision on Vladimir Lazarević and Sreten Lukić’s Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-03-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005, p. 1.

⁹ *Id.*, para 16.

¹⁰ *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on Prosecution’s Response to “Defendant Brđanin’s Pre-trial Brief”, 14 January 2002 (“*Brđanin Decision*”), para 12.

IV. DISCUSSION

8. The Defence asserts in the Motion that the Chamber, by ordering the Defence to comply with Rule 65ter (F), has encroached upon the right of the Accused to remain silent and thereby, violated Article 21 of the Statute.

9. The Trial Chamber agrees that the right to remain silent and against self-incrimination is a generally recognised international standard which lies at the heart of a fair procedure. However, this right is not absolute.¹¹ Neither the Statute nor other international human rights law treaties include any *direct* reference to a right to remain silent during trial.¹² The Chamber is of the view that this right cannot be adduced in support of refusal to comply with the provisions of Rule 65ter, other than for the purpose of avoiding self-incrimination. The Defence in its Motion advanced no arguable basis on which it could be decided that that right has been violated by the Chamber's Order.

10. The purpose of Rule 65ter (F) is to require the Defence to set out in general terms the nature of their case; to identify the matters with which they take issue in the Prosecution's Pre-Trial Brief; and to state the reasons why they do so. This enables the Trial Chamber, in the interest of justice, to better control the proceedings and focus the trial on disputed issues.¹⁴ Most significantly, substantive pre-trial briefs by all parties assist the Trial Chamber in exercising its powers pursuant to Rule 73bis. None of the above implies that the defence should, or is required to, disclose material that could be incriminatory, or any material with evidential value.

11. The Defence also submits that the Order of this Trial Chamber is in conflict with the *Brđanin* Decision.¹⁵ The Trial Chamber is of the opinion that no such conflict exists. The *Brđanin* Decision found the defence pre-trial brief, despite being of three pages, had substantively addressed the factual issues as required by Rule 65ter (F) by raising "*seven specific matters* regarding the prosecution's pre-trial brief and provided short explanations as to *why* he contests the prosecution's version of the events".¹⁶ However, it found the submissions lacking on legal objections and

¹¹ *Case of John Murray v. the United Kingdom*, Eur. Ct H R, 25 January 1996, paras 45, 49-50.

¹² Article 14 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, General Comment 13 to Article 14; and Article 6 of the European Convention on Human Rights.

¹⁴ Order, para. 2, citing *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, "Decision on Prosecution's Response and Motion for Clarification on Defence Pre-Trial Brief", 15 May 2008 ("*Lukić* Decision"), para 5.

¹⁵ Motion, para. 13.

¹⁶ *Brđanin* Decision, paras 1, 7 and 8.

therefore ordered the Defence of Brđanin to file a short supplement pertaining to the specific legal issues and reasons for these issues.¹⁷ More recently, in the *Lukić* case, a similar decision was issued requiring the defence in that case to file supplements to comply with the requirements of Rule 65ter(F).¹⁸ The Order is a necessary measure to prepare the case for a fair and expeditious trial.¹⁹

12. The Defence submits that the present stage of the proceedings and the imminent start of trial justify the certification to appeal, but fails to go any further in its reasoning.²² With the pre-trial stage nearing its conclusion and given that defence pre-trial briefs need to be filed no later than three weeks prior to the pre-trial conference, which has been scheduled for 25 August 2009,²³ the Trial Chamber is of the opinion that the grant of certification to appeal would not, in fact, materially advance the proceedings. On the contrary, certifying the issue for appeal will cause unfounded delay to the conclusion of the pre-trial stage and the commencement of the trial.

13. Accordingly, the Trial Chamber finds that the Defence extended no argument to show that the Order involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

V. DISPOSITION

14. For the foregoing reasons and pursuant to Rules 65ter (B) and (F), and Rule 73(B), the Trial Chamber **DENIES** the Motion in its entirety and **ORDERS** the Defence to comply with the Trial Chamber's Order of 9 July 2009.

¹⁷ *Id.*, para 12.

¹⁸ *Lukić* Decision, paras 7 and 9-11.

¹⁹ Rule 65ter (B).

²² Motion, para 18.

²³ Order Scheduling Pre-trial Conference, 8 July 2009.

A handwritten signature in black ink, appearing to read "Iain Bony", written over a horizontal line.

Judge Iain Bony

Presiding

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

Dated this twentieth day of July 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE HARHOFF

1. As explained in this Decision, there is a systematic and close link between the provision in Rule 65ter(F) of the Rules of Procedure and Evidence (“Rules”) and the provision in Rule 73bis(C) and (D) in that the Trial Chamber will be unable to fully appreciate the scope of the trial if it is uninformed of: (i) the general nature of the defence of the Accused; (ii) the matters with which the Accused takes issue in the Prosecution’s Pre-Trial Brief; and notably (iii) the reasons why the Accused takes issue with these matters.

2. If the Trial Chamber is not provided with this information, it will be unable to determine the number of the Prosecution’s witnesses and the time available to the Prosecution to present its evidence, and to reduce the number of counts, crime sites or incidents in the Indictment. The purpose of Rule 73bis(C) and (D), in turn, is to enable the Trial Chamber to focus the trial on disputed issues and thereby direct the proceedings to that which is necessary in order to assess whether the Prosecution has proven its case beyond reasonable doubt. This is clearly in the interest of justice, as well as in the interest of the Accused. In other words, the obligation on the Defence to file substantive Pre-Trial Briefs is there for very good reasons.

3. I am, therefore, of the opinion that the Defence is required to comply both in letter and in spirit with its duties laid down in Rule 65ter(F) and to submit a Pre-Trial Brief with as much substance and accuracy as possible without, of course, risking self-incrimination. Mere reiteration of a plea of innocence and an indication that the Accused takes issue with everything in the Indictment is clearly not, in my view, sufficient to fulfill the requirements of Rule 65ter(F).

4. Inasmuch as I would have preferred to have the Appeals Chamber’s confirmation of this position, which eventually would have clarified the extent of the obligations of the Defence under Rule 65ter(F), I concede that the arguments advanced in the Joint Defence Motion for certification to appeal the Chamber’s Order are insufficient, as set out in the present Decision, to support granting such certification.



Judge Frederik Harhoff