

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No IT-05-88-PT

IN THE TRIAL CHAMBER

**Before: Judge Carmel A. Agius, Presiding
Judge O Gon Kwon
Judge Kimberley Prost**

Registrar: Mr Hans Holthuis

Date Filed: 12 July 2006

**THE PROSECUTOR
V.
VUJADIN POPOVIĆ
LJUBISA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN
RADIOVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

**DEFENCE PRE-TRIAL BRIEF ON BEHALF OF THE ACCUSED VINKO
PANDUREVIĆ**

For the Office of the Prosecutor

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Natacha Faveau-Ivanović for Radivoje Miletić

Dragan Krgović for Milan Gvero

Peter Haynes and Djordje Sarapa for Vinko Pandurević

Pursuant to Rule 65ter (F) of the Rules of Procedure and Evidence (hereinafter “Rules”) and this Trial Chamber’s oral Order of 4 April 2006, varied by further Order on 19 May 2006, Counsel for the defence of Vinko Pandurević submit this *Defence Pre-Trial Brief on behalf of the Accused Vinko Pandurević* in response to the *Prosecution’s Filing of Pre-Trial Brief*, filed on 28 April 2006, partially confidential and under seal.

I. INTRODUCTION

1. The Accused Vinko Pandurević faces an indictment which charges him with genocide (under Article 4(3)(a) of the Statute of the International Criminal Tribunal for the former Yugoslavia (“Statute”); conspiracy to commit genocide (under Article 4(3)(b) of the Statute); persecution as a crime against humanity (under Article 5(h) of the Statute), extermination, as a crime against humanity (under Article 5(b) of the Statute), forcible transfer, as a crime against humanity (under Article 5(i) of the Statute), deportation, as a crime against humanity (under Article 5(d) of the Statute), murder as a crime against humanity (under Article 5(a) of the Statute), and murder as a violation of the laws and customs of war (under Article 3 of the Statute). He is charged in each case as a principal offender (under Article 7(1) of the Statute), a participant in a Joint Criminal Enterprise (“JCE”), and with liability for the acts of his subordinates (under article 7(3) of the Statute). To this indictment he has pleaded Not Guilty and has maintained his pleas throughout successive amendments to the indictment.
2. This Pre-Trial Brief is intended to comply with the Accused’s obligations to disclose the general nature of his case under rule 65ter (F) of the Rules. It is not intended to be a precise indication of each and every challenge he intends to make to the evidence called by the Prosecution, nor of the evidence he may give or call in his defence. The assertions herein, such as they are, are subject to the Accused’s right to amend or supplement the same as a result of

improved or further recollection arising from new or further disclosure of material and/or the trial process itself.

3. The Accused respectfully reminds the Trial Chamber that the burden of proof in cases before the Tribunal is upon and remains with the Prosecution throughout the case, and that the standard of proof is satisfaction beyond reasonable doubt.¹
4. The Trial Chamber must be satisfied beyond reasonable doubt that each and every element of the crime and the forms of liability charged in the indictment is proven.²
5. In this, a joint trial of seven accused, the Trial Chamber must consider separately the evidence in relation to each count on the indictment and each accused.³

II. GENERAL NATURE OF THE ACCUSED'S CASE

6. The general nature of the Accused's case is that he did not commit any of the crimes alleged in the Indictment, nor was he criminally liable for the commission of such crimes as the Trial Chamber might find to have been committed by reason of his participation in any joint criminal enterprise, nor did he have effective control over those who may be found to have committed crimes by the Trial Chamber.
7. Save insofar as the same consists of admissions, the Accused herein joins issue with the Prosecution on each and every allegation of fact contained in

¹ Article 21(3) of the Statute; Rule 87(A) of the Rules; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No. IT-96-21-T, 16 November 1998 ("Čelebići Trial Judgment") para. 600 (citing with approval the dicta of Denning MR in the English case of *Miller v. Minister of Pensions*).

² *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, 25 May 2005 ("Limaj Trial Judgment") para. 10.

³ *Prosecutor v. Dario Kordić, Mario Čerkez*, Case No. IT-95-14/2,-T, 26 February 2001 ("Kordić Trial Judgment") para 16.

the indictment and the Prosecution Pre-Trial Brief. Moreover, save and except where the Accused specifically concurs with the Prosecution's assertions as to the law in either of those documents, he should be taken to reject each and every one of the Prosecution's legal assessments.

8. With greater particularity, the Accused Pandurević takes issue with the Prosecution's case in the following ways:

Count 1: Genocide

9. The Accused reserves the right to make further submissions as to the relevant and appropriate law hereunder, but for present purposes takes no issue with the Prosecution's assessment of the law on genocide. The Accused puts the Prosecution to strict proof of the allegation of genocide. He denies that the evidence in this case constitutes an offence of genocide. The said contention will or may be supported in due course by expert evidence.
10. The Accused takes issue with the Prosecution as to the number of people allegedly killed in the relevant municipalities and during the material time period.
11. The Accused accepts that killings did take place, but takes issue with the suggestion that any such killings were accompanied by the requisite intent under Article 4 of the Statute.
12. The Accused denies that he committed any of the acts set out in Article 4(2) of the Statute, or that he planned, instigated, ordered or otherwise aided or abetted the planning, preparation or execution of such acts.

Count 2: Conspiracy to Commit Genocide

13. The Accused reserves the right to make further submissions as to the relevant and appropriate law, but for present purposes takes no issue with the Prosecution's assessment of the law on conspiracy to commit genocide. The Accused denies that he was party to any agreement to commit genocide with the other Accused in this indictment or any other persons.

Counts 3 – 6: Extermination, Murder and Persecution

14. The Accused reserves the right to make further submissions as to the relevant, appropriate law hereunder, but for present purposes takes no issue with the Prosecution as to its assessment of the law as to crimes against humanity, murder, extermination or persecution. The Accused acknowledges that a state of war existed in Bosnia at the material times of this indictment. The Accused denies that he committed murder or that he planned, instigated, ordered or otherwise aided or abetted the preparation or execution of such an act or acts. The Accused denies committing an attack on a civilian population and/or carrying out a widespread or systematic attack. The Accused denies the ancillary intent necessary for the offences of persecution or extermination.

Counts 7 and 8

15. The Accused reserves the right to make further submissions as to the relevant appropriate law hereunder, but for present purposes takes no issue with the Prosecution's assessment as to the definitions of crimes against humanity, forcible transfer and deportation. The Accused denies that there was a forcible transfer and/or deportation of the civilian population of Srebrenica. In the event that forcible transfer and/or deportation of the civilian population is found to be proven, the Accused denies taking part in any such activity.

Liability for Crimes under Article 7(1) of the Statute

16. The Accused is charged with liability for each of the above crimes under Article 7(1) of the Statute. The Accused reserves the right to make further submissions as to the appropriate relevant law hereunder, but for present purposes has no particular issue with the Prosecution's analysis of the definitions of the terms "planned", "instigated", "ordered", or "aided and abetted".⁴

17. The Accused is also charged with "committing" crimes under Article 7(1), which concept the Prosecution correctly analyses as including both direct perpetration of a crime and participation in a joint criminal enterprise (discussed below). The Accused reserves the right to make further submissions as to the appropriate relevant law hereunder, but for present purposes takes issue with the Prosecution as to the suggestion that a crime may be "committed" (whether by direct perpetration or by participation in a joint criminal enterprise) by neglectful omission on the part of an accused.⁵

Joint Criminal Enterprise

18. The Accused Pandurević is also charged with criminal liability under Article 7(1) as part of a joint criminal enterprise. He reserves the right to make further submissions as to the appropriate relevant law hereunder but takes no particular issue with the Prosecution as to its definition of the *actus reus* of a JCE, and the differing *mens rea* according to the form of JCE set out in paragraphs 447 – 453 of the Prosecution Pre-Trial Brief.

⁴ Prosecution's Pre-Trial Brief, 28 April 2006, paras. 437-446.

⁵ This suggestion is explicit in paragraph 77(b)(ii) of the Second Consolidated Amended Indictment which paragraph has not at the time of drafting been confirmed. It is submitted without reference to authority that such a mode of liability exists at paragraph 433 of the Prosecution Pre-Trial Brief.

19. The Accused submits, however, that neither the second nor the third forms⁶ of JCE liability have any application to this case.

Article 7(3) Command Responsibility

20. The Accused Pandurević is charged with superior authority under Article 7(3) of the Statute. The elements of criminal responsibility under article 7(3) have been firmly established by the jurisprudence of the Tribunal. Three conditions must be met before the individual can be held responsible for the acts of his or her subordinates:

- (i) The existence of a superior-subordinate relationship;
- (ii) The superior knew or had reason to know the subordinate had committed criminal acts or was about to do so; and
- (iii) The superior failed to take such reasonable and necessary measures to prevent such acts or to punish the principle offenders thereof.⁷

20. The existence of a superior-subordinate relationship requires a hierarchical relationship between the superior and the subordinate. The relationship need not have been formalised and as not determined by formal status alone.⁸ A hierarchical relationship may exist by virtue of an accused's *de facto* as well as *de jure* position of superiority.⁹ The threshold to be reached for the purpose of establishing a superior-subordinate relationship within the meaning of article 7(3) is the *effective control* exercised by the superior over the subordinate in the sense of a material ability to prevent or punish.¹⁰

⁶ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, 22 March 2006 (“*Stakić Appeal Judgment*”) para. 64.

⁷ *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No. IT-96-21-A, 20 February 2001 (“*Čelebići Appeal Judgement*”) paras. 189-98, 225-6, 238-9, 256, and 263; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, 24 March 2000 (“*Aleksovski Appeal Judgment*”) para 72.

⁸ *Čelebići Appeal Judgement*, para. 205-6.

⁹ *Čelebići Appeal Judgement*, paras. 192-4, 266.

¹⁰ *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-A, 29 July 2004 (“*Blaskić Appeal Judgment*”) para. 375; *Čelebići Appeal Judgement*, para. 256.

21. It must be proven that the Accused had effective control over the persons committing the alleged offences. Effective control means the material ability to prevent offences or punish the principle offenders.¹¹ To establish that effective control existed at the time of the subordinates crime proof is required that the Accused was not only able to issue orders, but that the orders were actually followed. The indicators of effective control are more a matter of evidence than of substantive law,¹² and those indicators are limited to showing that the Accused had the power to prevent, punish or initiate measures against the alleged perpetrators where appropriate.¹³
22. In relation to the mental element Article 7(3) provides that it must be demonstrated that the Accused knew or had reason to know that his subordinates had committed or was about to commit a crime. It must be proved that:
- (i) the Accused had actual knowledge established through direct or circumstantial evidence that his subordinates were committing or were about to commit crimes within the jurisdiction of the Tribunal;¹⁴ or
 - (ii) he had in his possession information that at least would put him on notice of the risk of such offences, such information alerting him to the need for further investigation to determine whether such crimes were or were about to be committed by his subordinates.¹⁵
23. In relation to the standard to be applied in interpreting the phrase “had reason to know” a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him

¹¹ *Čelebići* Appeal Judgement, para. 256; *Blaskić* Appeal Judgment, para. 67.

¹² *Blaskić* Appeal Judgment, para. 69; *Aleksovski* Appeal Judgment, paras. 73-4; *Čelebići* Appeal Judgement, para. 206.

¹³ *Blaskić* Appeal Judgment, para. 69; *Aleksovski* Appeal Judgment, para. 76.

¹⁴ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, 31 January 2005 (“*Strugar* Trial Judgment”) para. 367; *Prosecutor v. Sefer Halilović*, Case No. IT-61-48-T, 16 November 2005 (“*Halilović* Trial Judgment”) para. 66.

¹⁵ *Celebici* *ibid* paras. 223-6.

on notice of offences committed by subordinates.¹⁶ A neglect of a duty to acquire such knowledge does not feature in the provisions of Article 7(3) as a separate offence, and a superior is not therefore liable under the provision for such failures, but only for failing to take necessary and reasonable measures to prevent and to punish.¹⁷

24. On the question of acquiescence, it must be shown that the Accused failed to take necessary and reasonable measures to prevent or punish the crimes of his subordinates. The measures required of the superior are limited to those which are feasible in all the circumstances and are within his power.¹⁸ A superior is not obliged to attempt the impossible. However a superior is obliged to exercise the powers he has within the confines of those limitations. What constitutes such measures is not a matter of substantive law but of evidence¹⁹
25. Pandurević asserts that he is not guilty as a superior under article 7(3) and he contests all factual allegations set out in the Indictment and the Prosecution's Pre-Trial Brief, and all legal assessments made of those factual allegations.
26. In particular he asserts that during three significant and material periods in the indictment command of the Zvornik Brigade was *de facto* and *de jure* assigned to the Brigade Chief of Staff/Deputy Commander, Dragan Obrenović. These periods were:
 - (i) 4 July to about midday on 15 July 1995 during which time the Accused was engaged in leading a Tactical Group as part of "Krivaja 95" operations;
 - (ii) From 7 August to 16 September 1995
 - (iii) From 18 September to 24 September 1995

¹⁶ *Blaskić* Appeal Judgment, para. 62; *Čelebići* Appeal Judgment, para. 241; *Krnjelać* Appeal Judgment para. 151.

¹⁷ *Blaskić* Appeal Judgment, para. 62; *Čelebići* Appeal Judgment, para. 226.

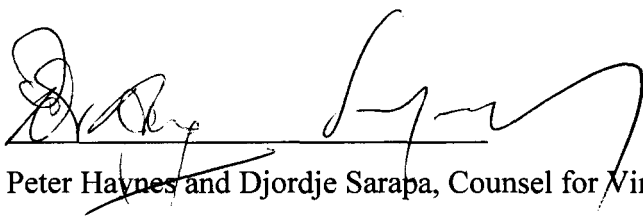
¹⁸ *Halilović* Trial Judgment, para. 73.

¹⁹ *Čelebići* Appeal Judgment, paras. 198, 226; *Blaskić* Appeal Judgment, para. 72.

27. Accordingly the Accused, Pandurević denies that he was in effective control of Brigade personnel during those periods. He moreover asserts that he did not know nor have reason to know that any member of the Zvornik Brigade had committed or was about to commit crimes within the jurisdiction of the Tribunal during those periods.
28. The Accused further maintains that, such crimes as this Trial Chamber may find to have been committed by individuals, were not committed by persons under his effective control. Moreover, the Accused Pandurević asserts that, if this Trial Chamber finds that crimes were committed by those in a *de jure* subordinate role to him, he neither knew or had reason to know that such criminal acts had been or were about to be committed.
29. The Accused takes issue with the suggestion that that he had responsibility for the safety or security of prisoners within the Municipality of Zvornik. The Accused denies that there is such a concept in military law or command structure as the “zone of responsibility” as defined by the Prosecution in the indictment or its pre-trial brief.
30. In the circumstances of this case, the Accused had no power to prevent crimes being committed, nor any feasible power to punish the principle offenders..

Filed , this the 12th day of July 2006

In the Hague, Netherlands.

A handwritten signature in black ink, appearing to be "Peter Haynes and Djordje Sarapa", written over a horizontal line.

Peter Haynes and Djordje Sarapa, Counsel for Vinko Pandurević

2,496 words.