UNITED
NATIONS

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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:	IT-99-36-PT
	Date:	1 February 2000
	Original:	English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Pre-Trial Judge

Registrar: Dorothee de Sampayo Garrido-Nijgh

Decision of: 1 February 2000

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIĆ

DECISION ON MOTIONS BY MOMIR TALIĆ (1) TO DISMISS THE INDICTMENT, (2) FOR RELEASE, AND (3) FOR LEAVE TO REPLY TO RESPONSE OF PROSECUTION TO MOTION FOR RELEASE

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
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. Momir Talić ("Talić") has filed three motions which may conveniently be dealt with together –

(i) Motion to Dismiss the Indictment, dated 14 October 1999 ("First Motion");

(ii) Motion For Release, dated 18 January 2000 ("Second Motion");[1] and

(iii) Motion for Leave to Reply and the Reply to the Response of the Prosecutor Dated 21 January 2000, dated 25 January 2000 ("Third Motion").

A consideration of the relief sought by Talić in the first and second of these motions requires some reference to applications made by his co-accused which have already been determined.

II History of the applications by co-accused

2. Talić was originally charged with Radoslav Brđanin ("Brđanin") in a sealed indictment with a single count alleging a crime against humanity, based upon persecutions on political, racial or religious grounds.[2] Tadić was not arrested until some time after Brđanin had been arrested and transferred to The Hague and had made his initial appearance. Each had been served with a redacted copy of the original indictment which named only him and which deleted all references to any other accused, in accordance with an order made by Judge Rodrigues when confirming the indictment. Both of the served indictments were similar in form and content.[3]

3. On 31 August 1999, Brđanin filed a Motion pursuant to Rule 72 of the Tribunal's Rules of Procedure and Evidence ("Rules") to dismiss the indictment served upon him, arguing that:

(1) the confirmation procedure is jurisdictional, and there can be no jurisdiction if that procedure is not properly followed,[4] and

(2) the Tribunal has jurisdiction to try him upon any one count in an indictment only when the supporting material supports the existence of that count,[5]

and that the Tribunal therefore had no jurisdiction to try him.

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1 The Second Motion should not be confused with an identically entitled motion by Talić and dated 1 December, which was dismissed on 10 December 1999.

2 Tribunal's Statute, Article 5.

3 See, generally, *Prosecutor v Talić*, Decision Deferring Decision on Motion for Separate Trials, 4 Nov 1999, par 5.

4 Reply of Radoslav Brđanin to Prosecution's Response to Motion to Dismiss Indictment, 15 Sept 1999, par 7.

5 *Ibid*, par 5.

4. This Motion by Brđanin was dismissed by the Trial Chamber in its decision dated 5 October ("Brđanin Decision").[6] The Trial Chamber held that the jurisdiction of the Tribunal depends upon whether the indictment has pleaded sufficient material facts to establish a *prima facie* case against the accused in relation to the charge or charges against him.[7] It does not depend upon whether the supporting material provided by the Prosecutor to the confirming judge supports that charge.[8] A challenge to the jurisdiction of the Tribunal upon the basis that the supporting material did not support that charge must therefore fail.[9] The Trial Chamber also held that there is no provision in the Rules which permits a Trial Chamber to review the actual decision made by the confirming judge by way of appeal or in any other way.[10]

5. Brđanin filed an interlocutory appeal against that decision,[11] although he accepted as correct the identification made by the Trial Chamber of the issues argued.[12] The Appeals Chamber rejected the interlocutory appeal as improperly filed, considering, *inter alia*, that any substantive error by the confirming judge as to the *prima facie* assessment of the material before him did not go to the jurisdiction of the Tribunal, and that the Interlocutory Appeal itself did not involve a challenge to the jurisdiction of the Tribunal.[13]

6. Brđanin then filed a Petition for a *Writ of Habeas Corpus*, in which he sought to challenge the lawfulness of his detention[14] and, in support of that challenge, he applied for an order that the Prosecutor present to the Trial Chamber "the evidence in its [sic] possession, if any, which supports a *prima facie* case against the Petitioner".[15] The Trial Chamber held that the procedure of a petition seeking a *Writ of Habeas Corpus* was not available within the Tribunal, but it proceeded to treat the Petition as an application challenging the lawfulness of Brđanin's detention.[16] It held that the material which Brđanin sought from the prosecution was irrelevant to the issue of the lawfulness of his detention, and that it had not been shown that his detention was unlawful.[17]

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6 Decision on Motion to Dismiss Indictment, 5 Oct 1999.
7 Brđanin Decision, pars 15, 20.
8 *Ibid*, par 20.
9 *Ibid*, par 20.
10 *Ibid*, par 23.
11 Interlocutory Appeal from Decision on Motion to Dismiss Indictment, 12 Oct 1999.
12 *Ibid*, par 11.
13 Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999, p 3.
14 Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 30 Nov 1999, par 8.
15 *Ibid*, p 4.
16 Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 8 Dec 1999, pars 5-7
17 *Ibid*, par 16.

7. Brđanin next sought leave to appeal against that decision and he applied for the issue of a *Writ of Mandamus* directing the Trial Chamber to issue the *Writ of Habeas Corpus* and to hear him in support of his application.[18] A Bench of the Appeals Chamber refused leave to appeal, and held that it had no jurisdiction to issue a *Writ of Mandamus*.[19]

III First Motion

8. In the meantime, Talić filed his First Motion (to dismiss the redacted indictment served upon him) in which he, too, argued that the Tribunal has no jurisdiction to try him. The First Motion conceded that the argument in support of it was "substantially the same" as that rejected by the Trial Chamber in its Brđanin Decision. That this is so is clear from the arguments put forward in the First Motion. In its Response to the First Motion, the prosecution relied upon the Brđanin Decision. The prosecution also gave notice of its intention to seek from Judge Rodrigues (as the confirming judge) leave to amend the redacted indictment to add further charges. As a result of that notice, the Trial Chamber deferred its decision on the First Motion until the result of the prosecution's application to amend was known.[20] That Order also granted Talić leave to file an addendum to the First Motion within fourteen days of being informed of the result of the application to amend and receipt of any amended indictment.[21]

9. On 17 December, Judge Rodrigues confirmed an amended indictment and ordered the prosecution to serve it on each of these accused. The amended indictment was filed on 20 December. It adds charges of genocide,[22] grave breaches of the Geneva Conventions,[23] violations of the laws or customs of war[24] and other crimes against humanity to the single charge in the redacted indictment served on the accused ("original redacted indictment"). When nothing had been done by Talić to file any addendum to his First Motion, an order was made requiring him to state whether he intended to proceed with that Motion.[25] The response was a Memorandum from

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[18] Application for Leave to Appeal From Decision on Petition for a Writ of Habeas Corpus Filed on Behalf of Radoslav Brđanin or Petition for a Writ of Mandamus to Trial Chamber II, 15 Dec 1999.
[19] Decision on Application for Leave to Appeal, 23 Dec 1999, p 3.
[20] Order Deferring Decision on Motion to Dismiss Indictment, 4 Nov 1999, p 2.
[21] *Ibid*, p 2.
[22] Tribunal's Statute, Article 4.
[23] *Ibid*, Article 2.
[24] *Ibid*, Article 3.
[25] Scheduling Order, 5 Jan 2000, p 2.

his co-counsel noting that the First Motion "is no longer applicable". Reference will have to be made again to the terms of that Memorandum later in connection with the Second Motion.

10. It is unsatisfactory to leave a motion in the file without a determination, even where the motion is said by the moving party to be no longer applicable, or moot, or for any other reason is no longer being pursued. Whatever may have been intended by the Memorandum from counsel for Talić – or by the context in which the concession was made that the First Motion "is no longer applicable" – there is clearly no argument available to Talić in support of the relief which he sought in his First Motion challenging the jurisdiction of the Tribunal to try him, in the light of the decisions given upon the various applications by Brđanin to which reference has been made. In those circumstances, and for the reasons given in the Brđanin Decision, the First Motion will be dismissed.

IV Second and Third Motions

11. Talić's Second Motion seeks his release upon the basis that he is presently unlawfully detained. This relief is stated to be sought pursuant to Rule 73(A) of the Rules. He argues that:

(1) prior to the amendment of the indictment, he was being detained pursuant to an order of the Trial Chamber made on 31 August, following his initial appearance;

(2) that order, however, was "grounded on the indictment confirmed on 14 March 1999"; and

(3) following the filing of the amended indictment, and in the absence of any fresh order for detention, the order made on 31 August has been "deprived of any judicial value along with [the original redacted] indictment".

12. The argument put by Talić is misconceived. The origin of the misconception may perhaps be found in what appears to be a misleading translation into French of something which was said in English during the Status Conference held on 11 January. Co-counsel appearing for Talić raised three issues in relation to whether the First Motion would be pursued. The second was raised in these terms (as translated into English):

> I am in a bit of an embarrassing position because now I really do not know whether the amended indictment fully annuls and replaces the previous indictment, or is it simply an addition to the previous indictment? Of course, depending on that, that is to say, whether the first indictment should be taken into account or not, my position will have to be based on that.

The context of the question is not unimportant. The issue was whether Talić would proceed with the application to dismiss the original redacted indictment served upon him. My reply was as follows (as said in English):

> As to your second point, the amended indictment does indeed replace the original indictment. The original indictment is no longer relevant to the trial.

This was translated into French in these terms:

> En ce qui concerne la deuxième partie de votre intervention, en effet, l'acte d'accusation modifié remplace l'acte d'accusation original. L'acte d'accusation original n'est plus valable.

13. Apart from the absence of any translation of the words "to the trial" which qualified the word "relevant" which I had used, the translation of "relevant" as "*valable*" appears to have been misunderstood by the translator in the sense of "valid". That this is how it was understood is apparent both from the Second Motion, which (when translated into English) asserts that –

> Indeed, as Judge Hunt explicitly said at the hearing of 11 January 2000, the original indictment is no longer valid.

and from the Memorandum of co-counsel for Talić in relation to the First Motion, in which (as translated into English) he asserts that I had –

> [...] stated that the amended indictment would replace the original indictment and that the initial indictment was no longer valid [...].

14. I am unable to comment upon the accuracy of translations from English to French and from French to English. There always exists different nuances in any language, sometimes depending upon the context which may not be immediately apparent to the instantaneous translator. The shift in meaning from "relevant" to "*valable*" to "valid" may well be explained in that way in this case. It has been suggested that "relevant", in the context in which I used it, may have been more appropriately translated as "*pertinent*". Be that as it may, what I am able to say is that my use of the words "The original indictment is no longer relevant to the trial" were not intended – and, in the context in which they were used, could not reasonably be understood – as suggesting in any way that the original redacted indictment became invalid as a consequence of an amended indictment being filed.

15. What I did say meant simply that the original redacted indictment has been replaced by an amended indictment, so that the charges to be tried, and the facts upon which those charges are based, are now those stated in the amended indictment, and not those stated in the original redacted indictment. That is why I went on to suggest to counsel for Talić that, so different was the amended indictment to the original redacted indictment, it would be preferable if he were to file a fresh

motion to dismiss the amended indictment rather than to pursue his motion to dismiss the original redacted indictment. That suggestion – and it was emphasised that it was only a suggestion – was based upon an assumption that the basis of the motion would be the same as that in the First Motion. In fact, as has become apparent, the Second Motion has proceeded upon a completely different basis.

16. The prosecution's response to the Second Motion[26] has been to point out the misinterpretation of what was said at the Status Conference and to rely upon the provisions of Rule 65(A), which provides:

> Once detained, an accused may not be released except upon an order of a Trial Chamber.

Talić has sought leave to reply to that Response in his Third Motion.

17. A reply is permitted only to permit the moving party to answer issues raised by the respondent to the motion which go beyond the issues raised by the motion itself.[27] As required, the Third Motion sets out the matter sought to be raised in reply. Of the two matters identified in the Third Motion, only one is even arguably a matter in reply, and that concerns the effect of Rule 65(A). There was not any reference to that rule in the Second Motion, as there should have been. As co-counsel for Talić appears to be unfamiliar with the procedures of the Tribunal, some leniency should be accorded to him on that point by granting leave to reply in relation to Rule 65(A), but I do urge co-counsel to make himself more familiar with those procedures; leniency will not be accorded to him every time he overlooks matters of basic procedure. The other matter identified in the Third Motion seeks only to elaborate the issues raised in the Second Motion. If there had not been the problem with the translation to which reference has already been made, I would have refused Talić leave to reply in relation to the status of the original redacted indictment. However, in all the circumstances, leave is granted to Tadić to rely upon the Reply incorporated in the Third Motion. As the matter raised in that Reply does not convince me that the Second Motion should be granted, there is no need for the prosecution to respond further to it.

18. Talić now argues that, whether the original redacted indictment is no longer valid or no longer relevant, the same legal outcome for the Second Motion is incontrovertible. He relies upon Article 9.1 of the International Covenant on Civil and Political Rights, which provides:

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[26] Prosecution's Response to "Motion for Release" Filed by Counsel for the Accused Momir Talić, 21 January 2000, p 3.

[27] *Prosecutor v Brđanin*, Further Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 9 Dec 1999, p 2.

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except upon such grounds and in accordance with such procedures as are established by law.

The amended indictment, Talić says, remains the only legal basis for the proceedings against him, and it does not provide any basis for his continued detention.

19. There can be no quarrel with the terms of Article 9.1 of the International Covenant, and it is true that the amended indictment remains the only legal basis for the proceedings against Talić – in the sense that it (and it alone) contains the statement of the charges against him. But it requires a very large (and impermissible) leap in logic to accept that there is presently no basis in the Tribunal's "procedures [...] established by law" for his present detention.

20. The procedures which are so established are that the judge who confirms an indictment may issue a warrant for the arrest of the accused.[28] Service of the indictment is to be effected personally on the accused at the time when he is taken into custody,[29] which occurs when he is arrested pursuant to the warrant, and the accused is then to be transferred to the Tribunal.[30] Upon transfer of the accused to the seat of the Tribunal, he "shall be detained",[31] and, once detained, he may not be released except upon an order of a Trial Chamber.[32]

21. According to the Tribunal's "procedures [...] established by law", therefore, the only actions *by the Tribunal* which are necessary to justify the detention of the accused are the review and the confirmation of the indictment and the issue of the arrest warrant. Article 19.2 of the Tribunal's Statute makes it clear that it is the review and confirmation of the indictment which justifies the issue of the arrest warrant.[33] Thereafter, the train of events which has been identified from the Rules is put in motion and, once the accused is arrested, he remains in custody and then detention until released by an order of a Trial Chamber, as Rule 65(A) provides. Accordingly, the order for detention made by the Trial Chamber on 31 August was, strictly, otiose. It was made purely for administrative purposes, so that there is a formal document which accompanies the accused back to the United Nations Detention Unit. In any event, the order was based upon the operation of the Tribunal's "procedures [...] established by law", and not upon either the existence or the continued operation of the original redacted indictment. The replacement of that original redacted indictment

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[28] Tribunal's Statute, Article 19.2; Rule 47(H)(i).
[29] Rule 53*bis*(A).
[30] Rules 55(A), 57 and 59*bis*(A).
[31] Rule 64.
[32] Rule 65(A).
[33] Brđanin Decision, par 14 (Interlocutory Appeal dismissed).

with an amended indictment has had no effect upon the operation of either the Tribunal's "procedures [...] established by law" or upon that order for detention.

22. Talić has argued in his Reply that Rule 65(A) applies only to persons who have been detained lawfully "on the basis of a lawful court Decision". In its context, the reference in the Reply to a lawful court decision appears to be to an order for detention such as was made on 31 August last. It has not been suggested that the order made on 31 August was not a lawful decision. Nor could it be. That order remains effective, notwithstanding the subsequent filing of an amended indictment, for the reasons already given. If the reference in the Reply to a lawful court decision is not restricted to a specific order for detention, the confirmation of the original redacted indictment and the issue of the arrest warrant also remain effective, notwithstanding the subsequent filing of an amended indictment, for the reasons already given.

23. But the Rules make it clear that no order for detention of an accused is required following his lawful arrest and transfer to the seat of the Tribunal for that detention to be lawful. That detention remains lawful, with or without a formal order for detention, by virtue of the Rules until an order for the release of the accused is made by a Trial Chamber.

24. The Second Motion must therefore be dismissed also.

V Disposition

25. For the reasons given –

1. The First Motion is dismissed.
2. The Second Motion is dismissed.
3. The leave to reply to the Prosecutor sought in the Third Motion is granted.

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

Dated this 1st day of February 2000,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt
Pre-Trial Judge

[Seal of the Tribunal]