



**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: 23 November 2001
Original: English**

IN TRIAL CHAMBER II

**Before: Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun**

Registrar: Mr Hans Holthuis

Decision of: 23 November 2001

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIĆ

DECISION ON FORM OF FOURTH AMENDED INDICTMENT

The Office of the Prosecutor:

**Ms Joanna Korner
Mr Andrew Cayley
Mr Nicolas Koumjian
Ms Anna Richterova
Ms Ann Sutherland**

Counsel for the Accused:

**Mr John Ackerman for Radoslav Brđanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talić**

1. The prosecution filed the current indictment, the Fourth Amended Indictment, on 5 October last. In accordance with the suggestion by the Trial Chamber, made in its Decision on Form of Third Amended Indictment because the trial is fixed to commence in January 2002,¹ the accused Momir Talić ("Talić") did not wait the thirty days given him by Rules 50 and 72 of the Rules of Procedure and Evidence ("Rules") to challenge the form of the Fourth Amended Indictment.² The Trial Chamber is grateful that Talić has co-operated with the Trial Chamber in this regard.³

2. Enough has been said of the nature of these proceedings in previous decisions of the Trial Chamber that it is unnecessary to describe the proceedings yet again. The Third Decision required the prosecution to make three amendments to its indictment: (1) to plead as a material fact a statement of the basis or bases upon which it seeks to make Momir Talić criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina ("ARK") otherwise than by carrying out its decisions as the Commander of the 1st Krajina Corps; (2) to plead as a material fact that the accused had the relevant state of mind required for each crime alleged to fall within the object of the joint criminal enterprise, and to do so in terms; and (3) to make it clear that the case put in par 27.3 of the previous indictment was an alternative, not a cumulative, case.⁴

3. The principal challenge by Talić to the latest indictment concerns the basis upon which the prosecution alleges that he is criminally responsible as a member of the ARK Crisis Staff otherwise than by implementing its policies as the Commander of the 1st Krajina Corps. The Fourth Amended Indictment pleads the prosecution case in these terms:⁵

General **Momir TALIĆ** was publicly named as one of the members of the ARK Crisis Staff. This Crisis Staff, later renamed War Presidency, was one of the structures put in place by the leadership of the Bosnian Serbs in order to achieve the common purpose of the joint criminal enterprise further described in paragraph 27, *infra*. General **Momir TALIĆ** and other members of the ARK Crisis Staff were co-perpetrators in this joint criminal enterprise and, as such, their participation in the execution of the common purpose of the enterprise included activities of the Crisis Staff. The accused General **Momir TALIĆ** is criminally responsible for conduct of other participants in the joint criminal enterprise, including members of the ARK Crisis Staff and those implementing its decisions, when their conduct was within the common purpose of the enterprise or was a natural and foreseeable consequence of the execution of the common purpose.

¹ 21 Sept 2001 ("Third Decision"), par 25. The unhappy pleading history is recounted in Schedule 1 to this Decision.

² Preliminary Motion Based on the Defects in the Form of the Indictment of 5 October 2001, 22 Oct 2001 ("Motion").

³ The co-operation was, however, an unwilling one. See Schedule 2.

⁴ Third Decision, par 24.

⁵ Fourth Amended Indictment, par 20.1.

The joint criminal enterprise pleaded in par 27.1 is alleged to have had as its purpose the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian State by the commission of the crimes charged in the indictment.

4. Talić complains that this new formulation by the prosecution is unclear, and that it does not permit any deduction that he participated in the activities of the Crisis Staff in a way which could make him criminally responsible for the implementation of its policies otherwise than as Commander of the 1st Krajina Corps.⁶ He asserts that his mere membership of the Crisis Staff is not sufficient alone to establish his criminal responsibility, and that he had not been appointed to the Crisis Staff of his own will.⁷ Moreover, Talić says, the allegation is tautological, in that his participation as a member of the Crisis Staff is based upon his involvement in the criminal enterprise,⁸ and his participation as a member of the criminal enterprise is based upon his involvement in the Crisis Staff.⁹ Talić says that this “would make a member of an authority accountable for all of its decisions, when they are presumed criminal owing to the supposed purpose ascribed to them”. He points out that there is no allegation in the indictment that he had participated in making the Crisis Staff decisions. Talić also says that the prosecution has sought to invert the burden of proof by placing him in the situation where he has to prove his innocence in order to avoid the conclusion that he is presumed to be guilty simply because he participated in the Crisis Staff.¹⁰

5. The prosecution concedes that it cannot establish that Talić participated in making the Crisis Staff decisions. It distills its case as being that Talić was publicly announced as a member of the ARK Crisis Staff on 5 May 1992, that he publicly remained a member of it until its dissolution, that if he did not himself attend its meetings he on occasions sent a representative, that he shared the political intent of the members of the Crisis Staff and that he implemented its broader aims.¹¹ The asserted tautology is absent, the prosecution says, as the evidence will show that the decisions of the ARK Crisis Staff and the implementation of those decisions played a major role in the achievement of the goal of the joint criminal enterprise, as pleaded in par 27 of the indictment. It is alleged that the participation by Talić in the joint criminal enterprise included both his membership of the ARK Crisis Staff as well as his role as Commander of the 1st Krajina Corps.¹²

⁶ Motion, Section II, par 2.

⁷ *Ibid*, par 2.1.

⁸ Fourth Amended Indictment, par 20.1

⁹ *Ibid*, par 27.1.

¹⁰ Motion, Section II, par 3.

¹¹ Prosecution’s Response to “Preliminary Motion Based on the Defects in the Form of the Indictment of 5 October 2001” Filed by the Accused Momir Talić, 9 Nov 2001 (“Response”), par 1.

¹² Response, par 4.

6. In his Reply,¹³ Talić points out that, although the allegation was mentioned by the prosecution at an earlier Status Conference,¹⁴ the current indictment does *not* contain any statement that he on occasion sent a representative to meetings of the ARK Crisis Staff if he did not himself attend.¹⁵ In any event, Talić says, that statement is contradicted by another statement mentioned by the prosecution at the same Status Conference, that he was reluctant to attend the Crisis Staff meetings.¹⁶ Whether or not the two statements are contradictory, an issue upon which the Trial Chamber does not comment, the indictment certainly does not plead as a material fact the sending of a representative to meetings of the Crisis Staff if Talić himself did not attend. It is clear from the recent judgment of the Appeals Chamber in *Prosecutor v Kupreškić*,¹⁷ as indeed it was already clear beforehand,¹⁸ that the material facts identifying the basis of the criminal responsibility of the accused must be pleaded *in the indictment*. In the light of the concession by the prosecution that it is unable to establish that Talić participated in making the Crisis Staff decisions, the omission of this particular fact from the indictment is hardly surprising, and the Trial Chamber proceeds upon the basis that this is not a material fact which should have been pleaded.¹⁹ This Decision is given in relation to the case which *has* been pleaded.

7. As to the other point raised by Talić,²⁰ there is no allegation in the Fourth Amended Indictment that Talić was or was not appointed to the Crisis Staff of his own free will. The prosecution case depends upon the fact of his membership of the Crisis Staff, which necessarily assumes that, whatever the circumstances of his appointment, Talić (having a choice) chose to remain a member. Talić may challenge that assumption in evidence, but an objection to the *form* of the indictment is not an appropriate proceeding for contesting the accuracy of the facts upon which the prosecution case relies.²¹

¹³ Demande d'autorisation de réplique et réplique à la réponse du Procureur en date du 9 novembre 2001, 20 Nov 2001 ("Reply"), which the Trial Chamber grants leave to Talić to file.

¹⁴ Status Conference, 6 Sept 2001, Transcript p 361.

¹⁵ Reply, par 2.

¹⁶ Status Conference, 6 Sept 2001, Transcript p 364.

¹⁷ Case IT-95-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal Judgment"), pars 88-95.

¹⁸ Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb 2001 ("*First Decision*"), par 18.

¹⁹ The fact that, on occasion, Talić sent representatives to meetings of the ARK Crisis Staff if he did not himself attend, if it be the fact, may well be relevant to whether Talić chose to remain a member of the Crisis Staff (discussed in par 7, *infra*) – it is unnecessary for the Trial Chamber to decide – but, even if it were, it would not be a material fact in relation to that issue which needed to be pleaded.

²⁰ Motion, Section II, par 2.1.

²¹ *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("*Krnojelac* Decision"), par 20; Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Second Decision*"), par 80.

8. The concern of a Trial Chamber in determining a challenge to the *form* of the indictment is whether the indictment sufficiently identifies for the accused the nature of the case which he has to meet at the trial.²² Although previous formulations of the prosecution case in relation to the criminal responsibility of Talić as a member of the ARK Crisis Staff have been strongly criticised by the Trial Chamber,²³ the Trial Chamber does not accept the complaint by Talić that there is a lack of clarity in the present formulation as to the nature of the case he has to meet at the trial. The argument underpinning that case may involve a degree of tautology (or perhaps of circularity) – it is unnecessary for the Trial Chamber to decide whether that is so – but the nature of the case which Talić has to meet at the trial, as well as the possibly substantial limitations of that case, remain clear. As previously stated, whether or not such a case would be sufficient in law to establish Talić's criminal responsibility is not a suitable issue to be determined in a challenge to the *form* of the indictment.²⁴ The legal sufficiency of a prosecution case is an issue which usually arises at the trial, either at the conclusion of the prosecution case or at the conclusion of the trial. In some cases, relief other than a challenge to the form of the indictment might appropriately be sought prior to the trial, but such relief would not usually be granted where there is in any event a substantial case for trial against the accused upon a different basis of alleged responsibility. As there is a substantial case for trial pleaded against Talić as Commander of the 1st Krajina Corps, it would not be appropriate in this case to consider the legal sufficiency of the case against Talić as a member of the ARK Crisis Staff before the trial.

9. Nor does the Trial Chamber accept that the method of pleading this responsibility inverts either the onus or the burden of proof as Talić has asserted. If the prosecution succeeds in establishing the material facts pleaded in par 20.1 of the current indictment,²⁵ it remains open to Talić to argue that they do not establish his criminal responsibility as a member of the ARK Crisis Staff otherwise than by implementing its policies as the Commander of the 1st Krajina Corps. This complaint is rejected.

10. Talić also complains that the indictment does not identify which of the leaders of the Bosnian Serbs formed the ARK Crisis Staff, or that he had a role in its formation.²⁶ The prosecution says that the identity of the leaders of the Bosnian Serbs who formed the ARK Crisis Staff is a matter of evidence. The Trial Chamber agrees with the prosecution that, in the

²² *Krnojelac* Decision, par 12 and footnote 19; First Decision, par 48; *Kupreškić* Appeal Judgment, par 88.

²³ Second Decision, pars 20-21; Third Decision, pars 12-13.

²⁴ Third Decision, par 14.

²⁵ These are quoted in par 3, *supra*.

²⁶ Motion, Section II, par 2.2.

circumstances of this case, such identification is a matter of evidence. The prosecution specifies the evidence itself by reference to its recently filed Pre-Trial Brief.²⁷ This should avoid the need for any argument as to particulars.²⁸ Talić also says that there is no link of subordination between himself and the members of the Crisis Staff.²⁹ He has apparently interpreted the claim against him as one of superior authority in relation to the Crisis Staff. The Trial Chamber accepts that the current indictment does not allege that the Crisis Staff was subordinate to Talić, so as to provide a basis for any charge that Talić incurred a superior responsibility for the decisions of the Crisis Staff pursuant to Article 7.3 of the Tribunal's Statute, but it does not itself interpret the indictment as making such a charge. This apparent misinterpretation by Talić demonstrates once more the problem of the poor pleading style adopted by the prosecution despite constant criticisms of it.³⁰ However, the absence from the indictment of a material fact essential to such a case (if one were intended) does not exclude a case against Talić based upon Article 7.1. These complaints are also rejected.

11. The final challenge by Talić to the current indictment concerns what is said to be the addition to it of an allegation that he is responsible for events which are alleged to have been taken place in a military prison in Stara Gradiška, which is in Croatia.³¹ In fact, the challenge is in reality made to an amendment which the prosecution seeks leave *ex post facto* to make to the current indictment.³² In any event, this was not strictly an *addition*, in that the military prison had been referred to as far back as the Further Amended Indictment, although it was erroneously said to have been located in Bosanska Gradiška. The allegation had previously read:

- Bosanska Gradiška municipality (Stara Gradiška Military Prison)

The application is to amend that reference so that it reads:

- A military detention facility in Stara Gradiška, Croatia (Stara Gradiška Military Prison)

The effect of such an *alteration* is, however, to include for the first time an allegation relating to events in Croatia, rather than in Bosnia and Herzegovina.

12. Talić asserts that the relevant zone of Croatia was at that time one protected by United Nations forces, that the indictment does not allege that there was an armed conflict in that area at

²⁷ Pages 9-10; Schedule D.

²⁸ cf First Decision, par 50; Second Decision, par 19; Third Decision, par 8.

²⁹ Motion, Section II, par 2.4.

³⁰ *Prosecutor v Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 60; *Prosecutor v Aleksovski*, Case IT-14/1-A, Judgment, 24 Mar 2000, par 171, footnote 319; *Prosecutor v Delalić*, Case IT-96-21-A, Judgment, 20 Feb 2001, par 351; First Decision, par 28; Second Decision, par 6.

³¹ Motion, Section III.

³² Prosecutor's Fourth Amended Indictment and Request for Leave to Amend, 5 Oct 2001 ("Request"), par 7.

that time, and that it does not demonstrate his responsibility for events in Croatian territory or that his units operated there.³³ The prosecution responds that the evidence disclosed to the accused shows that the Stara Gradiška Military Prison was “administered” by the 1st Krajina Corps and was thus under the direct command of Talić, and that persons detained in the Autonomous Region of Krajina were kept in that prison.³⁴ However, if it be the fact (as the prosecution asserts in its Response) that the 1st Krajina Corps – of which Talić was the Commander – was involved in the administration of this particular detention facility in Croatia, that fact is a material one which should have been pleaded.³⁵ The issue here is whether it is alleged *in the indictment* that this particular facility was administered by the 1st Krajina Corps. In a further response by the prosecution filed recently in answer to a requisition by the Trial Chamber,³⁶ the prosecution concedes that there is no express allegation in the indictment which specifically states that the 1st Krajina Corps operated the Stara Gradiška Military Prison, but it asserts that the indictment read as a whole makes it abundantly clear that his command included that facility in Croatia. If such a material fact were *necessarily* implied in the indictment, it would be an unnecessary technicality to require it to be pleaded expressly, as the accused could never argue that he had not been made aware by the indictment of the case he had to meet.³⁷ But the issue here now becomes whether such a material fact is *necessarily* implied in the indictment.

13. The current indictment alleges that, in the execution of the campaign designed to destroy Bosnian Muslims and Bosnian Croats as a national, ethnical, racial or religious group within the ARK,³⁸ military camps were established by the Bosnian Serb *authorities*,³⁹ and Bosnian Serb *forces* rounded up Bosnian Muslim and Bosnian Croat non-combatants (within the ARK) and transferred them to the camps, where conditions are said to have been often brutal and inhumane.⁴⁰ The Bosnian Serb forces are also alleged to have killed Bosnian Muslim and Bosnian Croat non-combatants in the camps and detention facilities, but none of the killings specified relate to the Stara Gradiška Military Prison.⁴¹ Nor are the allegations of causing serious bodily or mental harm related to that facility.⁴² All of these allegations form the basis of the genocide charges (Counts 1 and 2),

³³ Motion, Section III.

³⁴ Response, par 5.

³⁵ *Kupreškić* Appeal Judgment, pars 88-95.

³⁶ Letter from Mr Andrew Cayley (Senior Trial Attorney) to the Trial Chamber’s Senior Legal Officer, dated 16 Nov 2001 (“Further Response”).

³⁷ *Krnjelac* Decision, par 12 (footnote 19); First Decision, par 48.

³⁸ Fourth Amended Indictment, par 36.

³⁹ *Ibid*, par 39.

⁴⁰ *Ibid*, par 39; see also par 43. The words “within the ARK” in parenthesis are necessarily implied by the context in which par 39 is to be found.

⁴¹ *Ibid*, par 41.

⁴² *Ibid*, par 42.

and they are then incorporated as the basis of the persecution charge as a crime against humanity (Count 3) and of the extermination and wilful killing charges as a crime against humanity (Count 4) and a grave breach of the Geneva Conventions (Count 5).

14. The camps, now including the Stara Gradiška Military Prison, are alleged to have been staffed and “operated” by military and police personnel under the direction of Crisis Staffs and the VRS (the Army of the Serbian Republic of Bosnia and Herzegovina).⁴³ (The Trial Chamber does not understand there to be any difference in substance between the word “operated” in the indictment and “administered” in the prosecution’s Response.) Talić is alleged to have been the Commander of the 5th Corps of the JNA (Yugoslav People’s Army), which was re-designated as the 1st Krajina Corps of the VRS.⁴⁴ The prosecution asserts that this is sufficient to establish that the Stara Gradiška Military Prison was administered by the 1st Krajina Corps, and that this is made abundantly clear in the indictment when it is read as a whole.⁴⁵

15. The defect in the prosecution’s assertion is that, whilst the 1st Krajina Corps is alleged in the indictment to be part of the VRS, which is said to have directed the staffing and the operation of *all* the camps, that allegation cannot reasonably be interpreted as asserting that the 1st Krajina Corps was the particular entity within the VRS which directed the staffing and operation of *all* the camps, or in particular the Stara Gradiška Military Prison in Croatia. It is certainly not a *necessary* implication in the indictment. In one part of the indictment, the expression “Bosnian Serb forces” is defined as including units of the 5th Corps/1st Krajina Corps but, contrary to the claim by the prosecution,⁴⁶ that definition is related only to the killing of the Bosnian Muslim and Bosnian Croat non-combatants,⁴⁷ and none of these is alleged to have taken place in this particular facility in Croatia. In any event, the current indictment cannot reasonably be interpreted as asserting that the Bosnian Serb forces as so defined were responsible for directing the operations of all the camps in general, or (more importantly) of the Stara Gradiška Military Prison in particular, in the face of the express allegation in the indictment that all the camps were staffed and operated by military and police personnel under the direction of Crisis Staffs and the VRS,⁴⁸ rather than all of the Bosnian Serb forces.

⁴³ *Ibid*, par 40.

⁴⁴ *Ibid*, par 15.

⁴⁵ Response, par 5; Further Response.

⁴⁶ Further Response.

⁴⁷ Fourth Amended Indictment, par 37(1).

⁴⁸ *Ibid*, par 40.

16. The current indictment does not, therefore, plead a material fact even by necessary implication which is essential to establish that Talić was criminally responsible for the events which occurred in Croatia. In these circumstances, it is unnecessary to resolve the not uncomplicated further issue raised by Talić, as to the extent to which the prosecution must plead and prove that the crimes against humanity and the grave breaches of the Geneva Conventions alleged to have been committed against the inmates of the military prison in Croatia took place during an armed conflict in Croatia, particularly where their incarceration in Croatia is associated with the initial crimes alleged to have been committed against them during the course of an armed conflict in Bosnia and Herzegovina. This issue received scant attention by either party in their submissions.

17. This is the fifth indictment filed by the prosecution in the present case. The trial is due to commence in January 2002. To permit the prosecution to file yet another indictment at this late stage to repair yet another error made by it, with the inevitable challenge which will be made to the form of any new indictment, will necessarily delay the commencement of the trial, and the two accused will necessarily be prejudiced. As previously stated,⁴⁹ in those circumstances a further chance to plead a proper indictment will be refused. Accordingly, the Trial Chamber refuses leave to the prosecution to amend par 40 of the indictment, and it strikes out the amendment which has already been made without leave to par 40.⁵⁰

18. In relation to the other amendments sought by the prosecution,⁵¹ all of the amendments sought have also already been made in the Fourth Indictment without leave, and leave is again sought *ex post facto*. Talić's co-accused, Radoslav Brđanin ("Brđanin") has stated that he has no objection to any of them, and Talić has objected only to the amendment to include the events which are alleged to have occurred in Croatia for which leave has already been refused.

19. The first amendments sought are said to have been merely typographical errors to be cured: (i) by substituting for the reference to the Ključ municipality in the fourth allegation of the killings listed in par 38 of the previous indictment a reference to the Sanski Most municipality; and (ii) by substituting for the reference to the football stadium in the twenty-first allegation of the killings listed in the same paragraph⁵² a reference to the Ljubija football stadium.⁵³ These are not objected to, and they cause no unfair prejudice.⁵⁴ The amendments are allowed.

⁴⁹ Third Decision, par 20.

⁵⁰ It is not thereby intended to re-instate the allegation as it first appeared in the Further Amended Indictment.

⁵¹ Request, pars 5, 6 and 8.

⁵² The Request wrongly identifies this as the twentieth allegation.

⁵³ Request, par 5.

⁵⁴ Second Decision, par 50.

20. The second amendments sought are said to have been omitted in error from the same allegations of killings listed in par 38 of the previous indictment,⁵⁵ and are two in number:

- The killing of a number of people near the Partisan cemetery in Sanski Most on or about 22 June 1992 – Sanski Most municipality
- The killing of a number of people in the market place and surrounding area in Bosanska Gradiška town on or about August 1992 – Bosanska Gradiška municipality

The prosecution has satisfied the Trial Chamber that there is material to support these omitted allegations. The amendments are not objected to, and they cause no unfair prejudice. They are allowed. The third amendment sought⁵⁶ has already been refused.

21. The fourth amendment sought is to add, to the list of religious buildings listed in par 47(3)(b) of the indictment as having been destroyed or wilfully damaged, six such buildings to those in the Kotor Varoš municipality and five such buildings to those in the Prijedor municipality.⁵⁷ The prosecution has, however, failed to produce any material in an official language of the Tribunal to support the destruction or wilful damage to these buildings alleged in the indictment. Although it is no longer necessary for an amended indictment to be “confirmed” after the case has been assigned to a Trial Chamber,⁵⁸ leave will not be granted to *add* new allegations to an indictment unless the prosecution is able to demonstrate that it has material to support those new allegations – unless, of course, the evidence has already been given and the indictment is being amended merely to accord with the case which has been presented. In relation to the allegations presently sought to be added, the prosecution has informed the Trial Chamber that it proposes to call a witness to establish them but that it has not yet taken a statement from that witness during the two years it has been preparing this case for trial. It nevertheless believes that the witness will be able to establish the allegations. That is not a sufficient basis for the application to amend, and it is refused. The references to additional buildings already added without leave are struck out.

⁵⁵ Request, at par 6.

⁵⁶ *Ibid*, at par 7.

⁵⁷ *Ibid*, at par 8.

⁵⁸ Rule 50(A)(ii).

Disposition

22. The Trial Chamber makes the following orders:
- (i) The complaint by Talić that the case pleaded in par 20.1 is defective in form is rejected.⁵⁹
 - (ii) The complaint by Talić that the form of the indictment is defective because it does not identify the leaders of the Bosnian Serbs who formed the ARK Crisis Staff is rejected.⁶⁰
 - (iii) The prosecution is refused leave to amend par 40 of the previous indictment, and the amendment which has already been made to par 40 of the current indictment is struck out.⁶¹
 - (iv) The prosecution is granted leave to make the amendments sought in pars 5 and 6 of the Request.⁶²
 - (v) The prosecution is refused leave to make the amendments sought in par 8 of the Request, and the amendments already made in the current indictment are struck out.⁶³

Schedule 1

There was some early confusion in the various indictments filed by the prosecution.⁶⁴ The prosecution sought leave to file an amended indictment based upon further material and adding further charges to the original indictment.⁶⁵ The Amended Indictment was submitted on 2 September 1999,⁶⁶ and lodged with the confirming judge on 16 November 1999.⁶⁷ That indictment was confirmed on 17 December 1999, and filed on 20 December 1999.⁶⁸ A preliminary motion by Talić challenging the form of the Amended Indictment was largely successful,⁶⁹ as was a preliminary motion filed by Brđanin,⁷⁰ and the prosecution was ordered to file a further amended

⁵⁹ Paragraph 9, *supra*.

⁶⁰ Paragraph 10, *supra*.

⁶¹ Paragraph 17, *supra*.

⁶² Paragraphs 19-20, *supra*.

⁶³ Paragraph 21, *supra*.

⁶⁴ *Prosecutor v Talić*, Decision Deferring Decision on Motion for Separate Trials, 4 Nov 1999, pars 4-6.

⁶⁵ *Ibid*, par 10.

⁶⁶ *Prosecutor v Brđanin*, Decision on Petition for a Writ of *Habeas Corpus* on Behalf of Radoslav Brđanin, 8 Dec 1999, par 11.

⁶⁷ *Prosecutor v Talić*, Decision on Motion for Release, 10 Dec 1999, par 2(9).

⁶⁸ *Prosecutor v Brđanin & 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, 1 Feb 2000, par 9.

⁶⁹ First Decision.

⁷⁰ Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 Feb 2001.

indictment which complied with the Tribunal's jurisprudence as identified in that decision. The Further Amended Indictment was filed on 12 March 2001, and another preliminary motion by Talić challenging its form was partially successful.⁷¹ The Third Amended Indictment was filed on 16 July 2001, and yet another preliminary motion by Talić challenging its form was again partially successful.⁷²

Schedule 2

1. In its Third Decision, and after ordering the prosecution to amend its indictment yet again, the Trial Chamber said this:⁷³

Rule 72 gives to an accused thirty days in which to file a preliminary motion challenging the form of the indictment. Because the trial is presently fixed to commence in January 2002, if either of the accused seek to challenge the form of the new indictment to be filed by the prosecution as a result of this present decision, it is suggested that he does so with some expedition, and that he does not wait until that thirty day period is about to expire. If he does wait, complaints about the lateness of the indictment being settled will not be sympathetically received.

2. The accused Momir Talić has filed a document in reply to that warning, which is expressed to be "neither an appeal nor a motion", and in which it is stated:⁷⁴

The Defence understands that it must either exercise its right to challenge the indictment within the legal time frame, that is thirty days after receiving a translation of the amended indictment, which then jeopardises its right to see the trial commence in January 2002, or continue to protect the right of the accused to be tried on this date and waive the full exercise of the right to challenge.

This description of the Trial Chamber's suggestion as requiring the defence to "waive the full exercise of the right to challenge" betrays a misconception as to the extent of this particular right.

3. The right of an accused person to challenge the form of an indictment is an important one which cannot be denied. Nothing which the Trial Chamber said in its Third Decision has interfered with the exercise of that right by Talić. The exercise of that right is governed initially by Rule 72, which provides that such a challenge must be brought not later than thirty days after disclosure by the prosecution pursuant to Rule 66(A)(i). When dealing with the challenge to an amended indictment, the exercise of that right is governed by Rule 50(C), which permits a further thirty days

⁷¹ Second Decision, par 81. This Decision was subsequently varied in a minor respect: Decision Varying Decision on Form of Further Amended Indictment, 2 July 2001, par 5.

⁷² Third Decision, par 24.

⁷³ *Ibid*, par 25.

⁷⁴ Memorandum on the Decision of the Chamber Dated 21 September 2001, 4 Oct 2001 ("Memorandum"), par 2.

from the date of the amended indictment in which to file such a challenge to it under Rule 72.⁷⁵ It is *not* the unrestricted right of the accused person to wait until those thirty days are about to expire before filing his challenge under Rule 72. The period of thirty days stated in both Rule 72 and Rule 50 is intended to cover the usual case, and it may always be enlarged or reduced by the Trial Chamber where good cause is shown, in accordance with Rule 127(A).

4. In the present case, the issues between the parties as to the form of the indictment were reduced by the Third Decision to three, of which only one could significantly relate to the nature of the case which the accused has to meet at the trial – namely, the basis or bases upon which the prosecution seeks to make Talić criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina otherwise than by carrying out its decisions as the Commander of the 1st Krajina Corps.⁷⁶ Because of the close proximity of the trial date, it was of vital importance that such a challenge should be disposed of as soon as was reasonably possible. It could not reasonably have been argued that the Defence needed the whole thirty days in order to make a challenge in relation to such a limited issue. Had the prosecution made an application under Rule 127 to reduce the time for a Rule 72 challenge in the circumstances outlined, the application must almost certainly have been granted.

5. Talić also alleges in his Memorandum that the delays in the production of an adequate indictment are essentially the result of the failings of the prosecution.⁷⁷ The Trial Chamber has already criticised the prosecution's conduct of the pre-trial proceedings, and it is unnecessary to say more.

6. Finally, Talić criticises the Trial Chamber itself. That is his right, but his complaints are also misconceived. They are twofold. The first complaint is that, at the same time as requesting the Defence to respond to the new indictment “before the legal time limit has expired” and “cautioning the defence that it will be held responsible for any delay in the proceedings”, the Trial Chamber granted an unrequested extension to the prosecution to file its response to the challenge by Talić to the form of the previous indictment.⁷⁸

⁷⁵ Incidentally, the period from which that time runs is not qualified by any reference to the language in which the amended indictment is expressed, as suggested by Talić in his Memorandum.

⁷⁶ Third Decision, par 24(1).

⁷⁷ Memorandum, par 3.

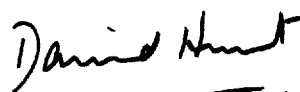
⁷⁸ *Ibid*, par 3.3.

7. There is no suggestion expressed or implied in the Third Decision that the Defence would be “held responsible for any delay in the proceedings”. What was said was that, if either of the accused waited until the thirty day period was about to expire, “complaints about the lateness of the indictment being settled will not be sympathetically received”.⁷⁹ The reminder to the prosecution to file a response to the challenge by Talić to the form of the indictment was given to ensure that there would be no delay in the resolution of that challenge. That is consistent with the request made to the Defence not to wait thirty days before challenging the form of the new indictment, but the two events cannot fairly be linked in the improper way implied by the Memorandum. Because a time slot available in the second half of this year could not be used to commence the trial of these two accused because of the parties’ lack of preparedness, and because another time slot was becoming available at the beginning of next year for the trial, the Trial Chamber had for many months been attempting to concentrate the minds of the parties upon their state of readiness for the start of the trial at that time.

8. The second complaint against the Trial Chamber is that the delay in this case is due in part to the time taken by the Chamber to give its decision on the challenge by Talić to the form of the Amended Indictment.⁸⁰ The reason for that delay is explained fully in the First Decision,⁸¹ and it is unnecessary to repeat all of what was said there. In view of this complaint, however, it is only fair to point out that the primary cause of the delay (indeed, its *sine qua non*) was the unsuccessful challenge made by Talić to the cumulative charges pleaded by the prosecution based upon the same facts, an issue which was then under consideration by the Appeals Chamber. If the Trial Chamber had followed its own view that such charging was permissible (as expressed in its First Decision),⁸² and had given its decision earlier than it did, there can be no doubt that, as in almost every case in which the relief Talić had sought has been refused, an application would have been made by him for leave to appeal, and the same delay would have occurred.

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

Dated this 23rd day of November 2001,
At The Hague,
The Netherlands.



Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

⁷⁹ Third Decision, par 25.

⁸⁰ Memorandum, par 4.

⁸¹ First Decision, pars 4-8.

⁸² Paragraphs 29-42.