IT-99-36-PT
D7750-D7739
22 JANUARY 2002

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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-99-36-PT
Date: 22 January 2002
Original: English

IN TRIAL CHAMBER II

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Decision of: **22 January 2002**

THE PROSECUTOR

v.

Radoslav BRĐANIN & Momir TALIĆ

DECISION ON "REQUEST FOR DISMISSAL" FILED BY MOMIR TALIĆ ON 29 NOVEMBER 2001

The Office of the Prosecutor:
Ms Joanna Korner
Mr Andrew Cayley

Counsel for the Accused Radoslav Brđanin:
Mr John Ackerman
Ms. Milka Maglov

Counsel for the Accused Momir Talić
Mr. Xavier de Roux
Mr. Michel Pitron

I. INTRODUCTION

1. On 29 November 2001, the defendant Talić filed his "Request for Dismissal" ("the Motion") in which he seeks an order that the entire pre-trial phase of this case is null and void, that all charges against him be dismissed and that he be released forthwith. The "Prosecution's Response to "Request for Dismissal" Filed by the Accused Momir Talić" ("Prosecution Response"), opposing the Motion, was filed on 18 December 2001.

II. DISCUSSION

2. The defendant Talić alleges violations of the following rights guaranteed to him under the Statute of the Tribunal (Statute):

-a fair trial (Article 20);
-to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (Article 21 (4) (a)); and
-to have adequate time and facilities for the preparation of his defence (Article 21 (4) (b)).

3. At the outset, the Trial Chamber notes that many of the complaints raised by Talić in the Motion merely repeat complaints that have already been raised by him and determined by the Trial Chamber earlier in the pre-trial phase of this case. Under normal circumstances, if a party is dissatisfied with a decision made by the Trial Chamber, that party's remedy is to follow the procedure for appeal set out in the Statute and the Rules of Procedure and Evidence of the Tribunal ("Rules"). The parties should not continue to file motions raising issues that have already been determined by the Trial Chamber. The Trial Chamber will only agree to review a prior decision in exceptional circumstances. These will usually include situations where the moving party is able to point to a new factor that, for good reason, was not originally raised before, or considered by, the Trial Chamber or where the moving party has re-framed the relief sought in a material way.

(A) Article 21 (4) (a): right of the accused to be promptly informed of the charges in a language he understands

4. As a general point, the Trial Chamber emphasises that, although Talić has categorised the complaints made under this section as violations of Article 21(4) (a) of the Statute, the points he raises do not relate to the right of the accused to be promptly informed of the

charges against him in a language he understands. As stated by the Appeals Chamber in the case of *Prosecutor* v *Kovačević*, human rights jurisprudence establishes that this right is violated if there has been a failure to charge a person with any crime at all at the time of the their arrest.[1] In his separate opinion in the *Kovačević* Appeal, Judge Shahabuddeen emphasised that the rationale for this right is to enable the accused to challenge the lawfulness of the arrest. Therefore, "[i]f the original charge was sufficient to justify the arrest, then (barring other considerations) that is an end to any challenge to the lawfulness of the arrest."[2] Arguments regarding the form of the indictment are, therefore, irrelevant to the question of whether the accused has been promptly informed of the charges against him in accordance with Article 21 (4) (a) of the Statute.

5. Talić argues that there is "no indictment" against him and points to the lengthy evolution of the present indictment (the Prosecutor's Corrected Version of the Fourth Amended Indictment ("Indictment")) in this case. He refers to the fact that he appealed the Trial Chamber's decision on the form of the Fourth Amended Indictment, rendered on 23 November 2001 ("November Decision"). He claims that, on the eve of his trial and 27 months after his arrest, the indictment against him has still not been "produced".

6. The prosecution responds that the Trial Chamber has accepted the Indictment as valid and Talić's appeal against the decision of the Trial Chamber to do so, does not render the Indictment non-existent.

7. Between the filing of the Motion and the present Decision, Talić's application for leave to appeal against the November Decision has been determined and rejected.[3] Consequently, the Indictment stands and Talić's argument that it has not yet been finalised cannot be sustained.

8. It is true that the prosecution has been required to make numerous amendments to the indictment in this case so as to clarify the nature of its case against each of the accused and to ensure that the Indictment conforms with the pleading practices of this Chamber and the

[1] *See Prosecutor* v *Kovačević*, Case No.: IT-97-24-PT, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998, paras 35-36.
[2] *Prosecutor* v *Kovačević*, Case No.: IT-97-24-PT, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", Separate Opinion of Judge Mohamed Shahabuddeen, 2 July 1998.
[3] Decision on Application for Leave to Appeal, 18 January 2002.

Tribunal more generally. Far from infringing the rights of the accused, the Trial Chamber has rigorously upheld his right to know and understand the case that he must meet at trial.

9. The second argument raised by Talić is that the Indictment is vague. As rightly pointed out in the Prosecution Response, Talić's complaints about the vagueness of the Indictment have already been extensively litigated before the Trial Chamber. The Trial Chamber will not re-open those debates.

10. Talić argues that it is not clear whether the prosecution is in a position to establish his responsibility as a member of the ARK Crisis Staff and complains that the pre-trial brief does not clarify matters. In its November Decision, the Trial Chamber clearly stated that Talić's responsibility as a member of the ARK Crisis Staff is a matter to be determined at trial. In particular, the Trial Chamber said:

> 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, 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 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. The legal sufficiency of a prosecution case is an issue which usually arises at the trial...[4]

11. The Trial Chamber subsequently reiterated this position in its decision on a motion filed by Talić to dismiss the charges against him based on his membership of the ARK Crisis Staff.[5] Talić also sought leave to appeal the Trial Chamber's November decision on this point and, as noted above, leave to appeal was refused.[6] Thus, Talić's argument has already been extensively considered and rejected.

12. Talić also maintains that the Indictment alleges his responsibility as a commander but that the direct perpetrators of the crimes are not identified, either in the Indictment or in the prosecution's pre-trial brief. The Trial Chamber does not consider it appropriate to revisit the adequacy of the Indictment. All challenges made by the defence to the Indictment were finally determined in the November Decision. Moreover, Talić has raised the issue of identification of the direct perpetrators of the crimes and the prosecution's use of terms such

[4] November Decision para. 8 (footnotes omitted).
[5] Decision on "Request to Dismiss Charges" Filed by Momir Talić on 29 November 2001, 18 January 2002.
[6] *See* the discussion, *supra* para. 7.

as "Serbian forces" and "Bosnian Serbs" on several previous occasions.[7] In its Decision on Form of Third Amended Indictment, of 21 September 2001, the Trial Chamber specifically stated that the question of whether the prosecution can establish Talić's responsibility for the acts of "other" Bosnian Serb forces is a matter for trial. Furthermore:

> If the information which Talić seeks is not apparent from the witness statements made available by the prosecution to the accused in accordance with Rule 66 (A), his remedy is to request the prosecution to supply particulars of the statements upon which it relies to prove the specific material facts in question. If the prosecution's response to that request is unsatisfactory, then and only then, he may seek an order from the Trial Chamber that such particulars be supplied.[8]

Thus, the Trial Chamber has already made it clear to Talić what his remedy was for the complaint he raises.

13. The third argument raised by Talić concerns the translation of certain prosecution documents and materials into the language of the accused. As a general point, the Trial Chamber certainly does not put into question the right of the accused to be informed of the charges against him in a language he understands. However, it is also the duty of the accused to demonstrate that there is an actual shortcoming that has resulted in prejudice to him. Unfortunately, according to the various statements made in the course of the pre-trial stage of this case it appears that the Tribunal's Conference and Language Services Section ("CLSS") is presently under resourced and has a large backlog resulting in translation delays. In such circumstances, the Trial Chamber expects all of the parties to work co-operatively to overcome these difficulties to the maximum extent possible, while always ensuring that the accused are not unfairly prejudiced in the preparation of their defence. In accordance with Article 21 (4) (c) of the Statute, the Trial Chamber must also bear in mind the right of the accused to an expeditious trial.

14. The Trial Chamber now turns to the specific complaints raised by Talić regarding translation. First, he states that the Trial Chamber asked him to file his preliminary motion to the Fourth Amended Indictment prior to the expiration of the time limit set out in Rule 50 (C) (and prior to the Fourth Amended Indictment being translated into Bosnian/Croatian/Serbian ("B/C/S")). The first issue has already been addressed by the Trial Chamber in detail in Schedule 2 to the November Decision and it is not appropriate to enter into that debate again

[7] *See e.g.*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 14; and Decision on Form of Third Amended Indictment, 21 September 2001, para. 7.
[8] Decision on Form of Third Amended Indictment, 21 September 2001, para. 8

here. Furthermore, Talić has not identified any challenge to the Fourth Amended Indictment that he omitted to make due to lack of time to consider the amendments in question or due to the fact that he had not read that indictment in B/C/S at the time that his preliminary motion was filed. In these circumstances, he has not demonstrated any prejudice.

15. Second, Talić complains that he has no indication of when the prosecution's pre-trial brief will be translated into B/C/S so that he can read it. Pursuant to Article 33 of the Statute, and Rule 3, the official working languages of the Tribunal are English and French. However, the Rules specify that the accused has the right to have certain documents translated into a language that he or she understands. For example, pursuant to Rule 66, the supporting material accompanying the indictment and statements of all witnesses the Prosecutor intends to call at trial fall into this category. The *Čelebići* Trial Chamber further clarified the right of the accused to receive documents in his or her own language.[9] According to that Trial Chamber, all items of evidence and all Orders and Decisions issued by the Tribunal fall within the category of documents that must be translated into the language of the accused.

16. Rule 65 *ter* (E), which regulates the filing of the prosecution's pre-trial brief, contains no express right for the accused to have the pre-trial brief translated into B/C/S, nor is this required pursuant to the jurisprudence of this Tribunal. Defence counsel must take responsibility for discussing matters raised in the pre-trial brief with their clients, taking appropriate instructions and, if desired, getting the document translated into B/C/S. Indeed, as already noted by the Pre-Trial Judge during a pre-trial conference held in this case on 21 January 2002, counsel for Talić has filed a reply to the prosecution's pre-trial brief, demonstrating that Talić's counsel has taken instructions from him on the pre-trial brief.

17. Third, Talić maintains that the prosecution has disclosed some witness statements to the defence in only the English language, although he does not specify which ones. The prosecution counters this by arguing that all the statements it intends to rely upon have been disclosed to the accused in the B/C/S language, with the exception of some transcripts of testimony given by the witnesses in previous trials before this Tribunal. In order to alleviate the translation backlog, the prosecution has offered to provide defence counsel with audio tapes of the prior testimony, an offer that counsel for Talić has apparently declined. It is unfortunate that Talić has failed to specify what the alleged shortcomings in the prosecution's

disclosure are and this necessarily works against him. Disclosure and translation of prior statements of prosecution witnesses is, of course, an issue that has been discussed in length at recent status and pre-trial conferences in this case. Similar issues have been raised by the defendant Brđanin and will be the subject of oral decisions in the near future.[10] Suffice to say that the Trial Chamber will ensure that all relevant material is disclosed to the defence in adequate time for the defence to prepare for cross-examination of the witnesses in question. If necessary, the Trial Chamber will consider delaying the testimony, or cross-examination of certain witnesses. If, during the trial, despite the Trial Chamber's best endeavours, the defence is able to clearly demonstrate that it has been prejudiced in its cross-examination of a prosecution witness by the timing of the prosecution's disclosure of material, the Trial Chamber will consider appropriate measures. However, the Trial Chamber also expects the defence to co-operate to the maximum extent possible in over-coming translation difficulties. If audio tapes of prior evidence given by prosecution witnesses are available, the defence should use these to commence their preparations while waiting for the written translations to follow. Also, the defence should not expect remedies when it fails to demonstrate which documents its complaint refers to.

(B) Article 21 (4)(b): right to have adequate time and facilities for the preparation of a defence

18. Talić raises two arguments under this heading: disclosure of documents by the prosecution and the time limits allotted to the parties.

19. As to disclosure, Talić first argues that, in violation of Rule 66 (A) (i), he did not receive copies of the supporting materials accompanying the indictment during confirmation in B/C/S within the thirty day time limit. The prosecution concedes that this was the case, but points out that the delay was caused by CLSS. In any event, the Trial Chamber notes that, according to the information provided by the prosecution, disclosure of the translated material was made to the defence on 11 January 2000 and 25 February 2000. Consequently, two years have elapsed between that disclosure and the commencement of the trial, which is scheduled for 23 January 2002. In the circumstances, it is difficult to see how the right of the accused to have adequate time and facilities for the preparation of his defence has been

[9] *Prosecutor* v *Delalić et.al.*, Case No.: IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996.
[10] Pre-Trial Conference 16 January 2001, Transcript, pp. 512-547, 573-585.

infringed. Indeed, Talić points to no specific prejudice. As the Trial Chamber stated in the Čelebići case

> Article 21 (4) (b) of the Statute is designed to ensure a fair trial for the accused. The provision is not intended as a vehicle to delay trial but to guard against hasty trials where the Defence is unprepared. The operative phrase in the Article, "adequate time", is flexible and begs of a fixed definition outside the particular situation of each case. It is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors, including the complexity of the case, and the competing forces and claims at play, such as consideration of the interest of other accused persons.[11]

20. Talić also complains generally about the manner in which the prosecution has disclosed material to the defence in this case (unfortunately without demonstrating *in concreto* how and to what extent this has prejudiced him). He raises a large number of complaints, many of which are immediately rejected. For example, he complains that the prosecution has disclosed numerous documents that appear to have no bearing on the case at hand. However, as the prosecution points out, Talić asked the prosecution for copies of all documents seised from Banja Luka and it is highly likely that many irrelevant documents were amongst them.

21. Similarly, Talić complains that, until 2 October 2001, the prosecution did not identify which documents were being disclosed as potentially exculpatory material under Rule 68. However, the Rules do not specifically require the prosecution to do so. The OTP is only duty bound to disclose the information it considers as falling within the ambit of Rule 68. At the status conference held on 6 September 2001, the Pre-Trial Judge asked the prosecution to assist the defence by identifying the potentially exculpatory material and the Trial Chamber understands that the prosecution subsequently complied. Although it would be highly desirable for the prosecution to adopt a practice of clearly identifying the material that is disclosed to the defence under Rule 68, its failure to do so is not a violation of the Rules, contrary to Talić's claim. However, the Trial Chamber reiterates it is desirable for the OTP to adopt such a practice in the future.

22. Talić also points out that, since February 2000, the prosecution has disclosed more than 150,000 documents of which over 100,000 were disclosed within the last six months. He complains, therefore, that the prosecution has been "late" with its disclosure. While the prosecution is required to make every effort to disclose documents to the defence as soon as

[11] *Prosecutor* v *Delalić et. al.*, Case No.: IT-96-21-T, Decision on the Applications for Adjournment of the Trial Date, 3 February 1997, para. 19.

possible and in accordance with the requirements of the Rules, to some extent it is, unavoidably, an ongoing exercise. This is particularly the case with statements for witnesses the prosecution adds to its list of witnesses at a late stage as well as with the disclosure of exculpatory material pursuant to Rule 68. However, as noted by this Trial Chamber previously,

> Whether the disclosure was "timely"...must be judged by reference to the trial date. It is the duty of the prosecution to disclose this type of material in sufficient time to enable the accused to be ready for trial...[12]

23. As noted earlier, if the defence presents the Trial Chamber with clear and specific information as to how and why it has been prejudiced in the preparation of its case as a result of untimely disclosure by the prosecution, the Trial Chamber will not hesitate to order an appropriate remedy. These may include delaying the testimony or cross-examination of a witness or other similar measures. However, to date, Talić has not presented any such information to the Trial Chamber.

24. As to the time limits allotted to the parties, Talić complains that the prosecution was three days late in filing its pre-trial brief. However, as pointed out in the Prosecution Response, on the day that its pre-trial brief was due, the prosecution successfully requested, through the Senior Legal Officer of Trial Chamber II, an extension of time from the Pre-Trial Judge. On 29 October 2001, the Pre-Trial Judge confirmed that the pre-trial brief, filed on that day, was recognised as validly filed.[13] Thus, the violation of the Rules alleged by Talić is not made out. The Trial Chamber notes that, like all parties throughout the course of the pre-trial proceedings in this case, Talić has also had the benefit of extensions of time for filing documents.[14]

25. Talić also argues that, as a result of the orders made by the Pre-Trial Judge, the defence had only 15 days to respond to the Prosecutor's lengthy pre-trial brief. However, as

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[12] Decision on Application by Radoslav Brđanin to Exclude Evidence, 15 November 2001, para. 4.
[13] Order, 29 October 2001.
[14] *See e.g.* Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 7 (stating that "After an unexplained delay, Talić sought leave to File a Reply to the prosecution's Response. Although some of the matters which he wished to raise in Reply were not, strictly, matters in reply and should have been raised in the Motion, the Trial Chamber has granted leave for the Reply to be filed" (footnotes omitted)). *See* also Decision on Filing of Replies, 7 June 2001 para. 7 (granting Talić an extension of time to raise a challenge to the form of the indictment). Talić was also granted permission to exceed the length of motions prescribed in the Practice Direction on the Length of Briefs and Motions (IT/184, 19 Jan 2001), despite the fact that he did not seek such permission. *See* Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001.

noted in the Trial Chamber's Decision on Prosecution Response to "Defendant Brđanin's Pre-Trial Brief", of 14 January 2002, the defence response to the prosecution's pre-trial brief is limited in nature. The defence is required to file a more detailed pre-trial brief prior to the commencement of the defence case. Once again, the Trial Chamber is unable to see any prejudice to Talić as a result of the timetable imposed by the Pre-Trial Judge for the filing of the prosecution's pre-trial brief and the defence responses thereto.

(C) Article 20: the right to a fair trial

26. Talić complains that his right to a fair trial pursuant to Article 20 of the Statute of the Tribunal has been violated. He raises three issues in support of this argument.

27. First, Talić refers to a decision issued by this Trial Chamber on 26 September 2001, in which the Trial Chamber suggested that the defendants make an effort to file any challenges to the form of the indictment expeditiously, rather than waiting for the 30 day time period, allotted under Rule 72(A) to expire. This argument has already been considered and rejected by the Trial Chamber.[15]

28. Second, Talić argues that his right to a fair trial has been infringed due to the principles the Trial Chamber put in place regulating the translation of documents and the commencement of time-limits in this case. In particular, Talić argues that on 26 October 1999, the Trial Chamber ordered that time limits for the prosecution do not commence running until the prosecution has received the document in question in the English language.[16] On 16 December 1999, the defence was, at its request, made the beneficiary of a similar rule specifying that time-limits for the filing of responses to motions do not commence running until the party has received a translation of the motion into its working language. However, Talić argues, this only relates to responses to motions and not to other categories of documents to be filed by the defence, such as appeals or preliminary motions (and the Indictment and decisions of the Trial Chamber are always filed in English first).[17]

[15] *See* the discussion *supra* para.14.
[16] Further Order for Filing of Motions, 26 October 1999. The Trial Chamber emphasises that this Order was prompted by the fact that the CLSS of the Tribunal was experiencing considerable delays in translating filings from French into English, but that filings could be translated from English into French expeditiously. Consequently, there was a valid and logical reason for distinguishing between the prosecution and the defence in this instance, as explained more fully by the Trial Chamber in its Decision on Motion to Translate Procedural Documents into French, 16 December 1999.
[17] Decision on Motion to Translate Procedural Documents into French, 16 December 1999.

Consequently, Talić asserts, "the Defence is sometimes called to respond to documents in English without being able to wait for the French translation..." and that the prosecution has an unfair advantage because of the Trial Chamber's orders on the filing of documents.

29. In reply, the prosecution cites paragraph 2 of the "Memorandum of the Decision of the Chamber Dated 21 September 2001" filed by Talić on 4 October 2001. From this document, the prosecution argues, it is clear that Talić interprets the Trial Chamber's orders regarding the filing of motions to extend also to other documents such as preliminary motions. In any event, if Talić believed he was disadvantaged by the orders the Trial Chamber made for filing documents, his remedy was to point this out in a timely manner to the Trial Chamber (or the Appeals Chamber, as the case may be) and seek an extension of time. Indeed, on at least one occasion, Talić was permitted to raise an objection to the form of the indictment out of time.[18] Certainly, Talić's remedy is not to wait until the conclusion of the pre-trial phase and then claim the proceedings against him are unfair and, therefore, null and void.

30. The third argument made by Talić in support of his claim that his right to a fair trial under Article 20 of the Statute has been violated is that the Prosecutor has, on two occasions since September 2001, exceeded time limits without any sanction by the Trial Chamber. Talić repeats his complaint that the prosecution was three days late filing its pre-trial brief and adds that on another occasion, the prosecution was five days late filing a response to a preliminary motion. The first of these complaints has been dealt with above.[19] The second has already been addressed by the Trial Chamber in Schedule 2 to the November Decision.

[18] Decision on Filing of Replies, 7 June 2001 para. 7 (granting Talić an extension of time for Talić to raise a challenge to the form of the indictment).
[19] *See* the discussion *supra* para. 24.

III. DISPOSITION

For the foregoing reasons,

TRIAL CHAMBER II HEREBY dismisses the Motion.

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

Dated this 22nd day of January 2002,
At The Hague,
The Netherlands

Judge Carmel Agius
Pre-Trial Judge
(At the request of the Presiding Judge)

[Seal of the Tribunal]