

IN TRIAL CHAMBER II**Declassified to Public
06 September 2012****Before:****Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun****Registrar:****Mr Hans Holthuis****Decision of:****23 February 2001****PROSECUTOR****v****Radoslav BRDANIN & Momir TALIC**

**DECISION ON OBJECTIONS BY RADOSLAV BRDANIN
TO THE FORM OF THE AMENDED INDICTMENT**

The Office of the Prosecutor:**Ms Joanna Korner
Mr Nicolas Koumjian
Mr Andrew Cayley
Ms Anna Richterova
Ms Ann Sutherland****Counsel for Accused:****Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic****1 The application**

1. The accused Radoslav Brdanin ("Brdanin") has filed a preliminary motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"), in which he alleges that the form of the amended indictment is defective.¹ He complains that the indictment fails to provide sufficient information, and he seeks an order that the prosecution provide certain specific information which he says should have been pleaded,² and to which reference is made later.

2 The amended indictment

2. The allegations made in the amended indictment are sufficiently described in the decision given on 20 February 2001 upon a similar preliminary motion in accordance with Rule 72 filed by Momir

Talic ("Talic"),³ who has also been charged in the same indictment.

3 Preliminary point by prosecution

3. In its Response to the Motion,⁴ the prosecution asserts that the Motion is "technically" out of time.⁵ That is not correct. Rule 72 permits such a preliminary motion relating to the form of the indictment "not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i)". Because the prosecution has taken a long and protracted course seeking protective measures which would prevent the identity of certain witnesses being made known to the accused at this stage,⁶ it has not yet complied with the requirements of Rule 66 (A)(i).⁷

4. The preliminary point taken by the prosecution is rejected.

4 The information sought by Brdanin

5. It is not entirely clear from the Motion whether the specific information sought by Brdanin is to be pleaded in the further amended indictment which the Trial Chamber has already indicated will be required or supplied by way of particulars.⁸ As there was no request made of the prosecution for particulars before the Motion was filed, as there should have been if the Motion were seeking the supply of particulars, the Trial Chamber has interpreted the Motion as seeking a more detailed indictment.⁹

6. The information sought is principally an identification of "the role allegedly played by Defendant Brdanin" in each of the incidents pleaded, together with some detail as to the date and place of each incident. The request for information proceeds upon the assumption that Brdanin has been charged, *inter alia*, with having personally committed the killings, infliction of serious bodily or mental harm, detention, torture, physical violence, rapes and sexual assaults, humiliation and degradation, destruction, looting, forcible transfers and other denials of fundamental rights pleaded.

7. The prosecution submits that, because the required degree of precision in pleading the material facts depends upon the nature of the case and the proximity of the accused to the relevant events, Brdanin is seeking an "unreasonable" degree of specificity, "given the particular facts of this case".¹⁰ That submission, together with the references in the Response to Brdanin's high office¹¹ and to superior responsibility only,¹² appears to assume that Brdanin is charged only with superior responsibility. For the reasons given in the *Talic* Decision,¹³ that is manifestly not so. If it were indeed the prosecution's intention to charge Brdanin with superior responsibility only, it was obliged to make that intention unambiguously clear. At the present time, and until the ambiguity is removed, Brdanin must proceed upon the basis that the prosecution is charging him with having, *inter alia*, personally committed each of the crimes charged.

8. The prosecution then says:¹⁴

The Prosecution recognises (as stated in the *Krajisnik* Decision, para 13) that it is required to provide in its pre-trial brief details of the offences allegedly committed and the precise role the accused is said to have played, pursuant to Article 7(1) and 7(3). Thus, the pre-trial brief will show, with respect to each crime, what is the nature of the alleged individual criminal responsibility of the accused and how the Prosecution intends to make out its case. The Prosecution submits that this procedure provides adequate notice to the Defence of details of the Prosecution's allegations. No purpose would be served in requiring this same degree of specificity in the indictment.

This was not a submission made by the prosecution in answer to the similar preliminary motion filed by Talic which led to the *Talic* Decision.

9. On its face, this passage clearly appears to be asserting that the prosecution is not obliged to identify either "the precise role the accused is said to have played, pursuant to Article 7(1) and 7(3)" or "the nature of the alleged individual criminal responsibility of the accused" *until* it files its Pre-Trial Brief. If that was indeed intended to be asserted by the prosecution, it would be contrary to what has been held in the decisions discussed in the *Talic* Decision.

10. The reference to the "*Krajisnik* Decision" is to *Prosecutor v Krajisnik*.¹⁵ That Trial Chamber decision does not reveal the generality or otherwise of the allegations in the indictment to which objection was taken, although it is difficult to imagine that the indictment in that case could have been less helpful than that in the present case. The allegations in question there appear to have related mainly to the acts of those persons for which the accused was alleged to be responsible, rather than the acts of the accused himself. This Trial Chamber has made it clear that the precise details to be pleaded as material facts are of the acts of the accused, not the acts of those persons for whose acts he is made responsible, a distinction which the Trial Chamber in that case also expressly recognised.¹⁶ This Trial Chamber finds no support from that decision for the assertion apparently made by the prosecution in its Response. The Trial Chamber is satisfied that such an approach would *not* be in compliance with the obligations imposed by the Statute and the Rules upon the prosecution.

11. Article 21.4(a) of the Tribunal's Statute ("Rights of the accused") requires the accused to be "informed *promptly* and in detail [...] of the nature and cause of the charge against him".¹⁷

Article 20.3 requires the Trial Chamber, before which the accused must be brought without delay after being transferred to The Hague,¹⁸ to read the indictment and to "satisfy itself that the *rights* of the accused are respected".¹⁹ Rule 47 requires the indictment to set forth "a concise statement of the facts of the case and of the crime with which the suspect is charged". The right of the accused to be informed *promptly* of the *nature* of the charge against him does not permit any suggestion that this need not be revealed until the Pre-Trial Brief is filed.

12. The Pre-Trial Brief is not delivered until preparation for the trial is well under way. Rule 65ter (E) contemplates that this will not occur until after disclosure pursuant to Rules 66 and 68 has taken place *and after all Preliminary Motions pursuant to Rule 72 have been disposed of*. If the Defence is denied information as to the nature of the accused's criminal responsibility for the events pleaded until the Pre-Trial Brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation in preparation for trial until then. Some of the bases of responsibility pleaded in the indictment may not be identified in the Pre-Trial Brief when it is filed months later. It would be extraordinary that the accused should be expected to waste time beforehand investigating every basis for his responsibility referred to in Articles 7.1 and 7.3 (as pleaded here).

13. An indictment must fairly apprise the accused of the nature of the case against him, and place him in possession of its broad outlines and the facts which constitute his responsibility. These are the "material facts" which must be pleaded.²⁰ How broadly the outlines may be given depends, as this Trial Chamber has said, upon the proximity of the accused to the particular events pleaded.²¹ But it is *essential* for the accused to know from the indictment just what that alleged proximity is. The Trial Chamber cannot determine whether the form of the *indictment* is sufficient in answer to a preliminary motion if the issue of proximity is not to be revealed until the Pre-Trial Brief is filed, after the preliminary motion is disposed of.

14. The Trial Chamber rejects any such approach. The true nature of the responsibility of the accused for the events pleaded is an essential material fact to be pleaded in the indictment. It has not been pleaded as such in the amended indictment in this case (at least not without ambiguity), and it must

be made unambiguously clear in the indictment.

15. In his Reply, Brdanin has suggested, somewhat intemperately, that the Response of the prosecution "can only be read as a specific defiance of the oral orders" (to prepare an amended indictment), said to have been made during the Status Conferences in November 2000 and earlier this month,²² and to display an "attitude of open contempt for the Chamber".²³ No such "oral orders" were made. All that happened during those Status Conferences was that the Pre-Trial Judge drew the attention of the prosecution to the very apparent lack of particularity in the amended indictment, and warned it to start work – in advance of the decision on the motion by Talic objecting to the form of the indictment²⁴ – on the further amendments which will be necessary to the amended indictment for it to comply with the principles discussed in the Trial Chamber's earlier decisions in *Prosecutor v Krnojelac*.²⁵ It was made clear that the further amended indictment would have to be filed within a short time *after* that decision was given.²⁶

16. The references to "specific defiance" and "open contempt" by the prosecution were therefore unfair, and they should not have been made. Brdanin was nevertheless justified in expressing concern that, despite the assurances given by its Senior Trial Attorney that the prosecution will comply with the pleading principles discussed in the *Krnojelac* cases, it now appeared to be placing an interpretation upon the Tribunal's jurisprudence in relation to pleading which is directly contrary to that discussion.

17. The prosecution has sought to explain its statement in these terms:²⁷

The Prosecution, being aware that a ruling was about to be made, in its response was doing no more than referring the Trial Chamber to a recent decision on the point of the form of the Indictment and using the language of that decision to submit that the detail requested by Counsel for Brdanin was excessive and unreasonable.

This passage may explain the prosecution's rejection of its obligation to plead as material facts the precise details of Brdanin's actions in personally committing the killings, the infliction of

serious bodily or mental harm and the other acts alleged in the indictment, although only if it be assumed that, despite the terms of the indictment, the prosecution did *not* intend to charge Brdanin with having personally committed those crimes. But it does not even come close to explaining the clear suggestion in the Response that the prosecution does not have to identify either "the precise role the accused is said to have played, pursuant to Article 7(1) and 7(3)" or "the nature of the alleged individual criminal responsibility of the accused" *until* it files its Pre-Trial Brief.

18. In the *Talic* Decision, the Trial Chamber has already ordered the prosecution to file, on or before 13 March 2001, a further amended indictment which complies with the pleading principles discussed in Sections 4 and 5 of that Decision.²⁸ Proper compliance with that order will necessarily ensure that sufficient information is given to Brdanin as well as to Talic. The disposition of the present Motion is intended to reflect such a result.

5. Disposition

18. For the foregoing reasons, and for the reasons expressed in the *Talic* Decision, **the Trial Chamber determines** as follows:

- (i) The complaint by Radoslav Brdanin that the amended indictment fails to provide sufficient information is upheld.
- (ii) The prosecution is to file on or before 13 March 2001 a further amended indictment

which:

(a) complies with the pleading principles discussed in Sections 4 and 5 of the *Talic* Decision; and

(b) pleads, as material facts, the precise role of the accused and the nature of the accused's alleged individual criminal responsibility.

(iii) In the event that some *unforeseen* problem arises in relation to the ability of the prosecution to comply with this order in the time allowed, an application may be made to the Pre-Trial Judge for an extension of time.

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

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

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1. Motion Objecting to the Form of the Amended Indictment, 5 Feb 2001 ("Motion").
2. Motion, pars 3-9, 12.
3. Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("*Talic* Decision").
4. Prosecution's Response to "Motion Objecting to the Form of the Amended Indictment" Filed by the Accused Brdanin on 5 February 2001, 6 Feb 2001 ("Response").
5. Response, par 2.
6. Decision on Motion by Prosecution for Protective Measures, 3 July 2000, pars 5-21.
7. *Ibid*, par 21.
8. *Prosecution v Naletilic & Martinovic*, Case IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000, par 17; *Talic* Decision, par 27.
9. This is also suggested by the comments in par 14 of the Motion.
10. Response, pars 4-5.
11. *Ibid*, par 5.
12. *Ibid*, par 3.
13. *Talic* Decision, pars 9-11.
14. Response, par 6.
15. Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000.
16. Paragraph 9.
17. The emphasis has been added.
18. Rule 62.
19. The emphasis has been added.
20. *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("First *Krnojelac* Decision"), par 12 and footnote 19.
21. *Talic* Decision, par 18.
22. Reply to Prosecution's Response to "Motion Objecting to the Form of the Amended Indictment" Filed by the Accused Brdanin on 5 February 2001, 12 Feb 2001 ("Reply"), par 3.
23. *Ibid*, par 4.
24. The *Talic* Decision had been delayed awaiting an appellate decision directly relevant to the resolution of one of the points taken: see pars 7-8, 42 of that Decision.
25. Status Conference, 17 Nov 2000, Transcript, pp 220-222; Status Conference, 2 Feb 2001, Transcript, p 262. The relevant decisions in *Prosecutor v Krnojelac*, Case IT-97-25-PT, are the First *Krnojelac* Decision already referred to;

Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000; and Decision on Form of Second Amended Indictment, 11 May 2000. They are discussed in Sections 4 and 5 of the *Talic* Decision.

26. Status Conferences, 17 Nov 2000, Transcript, pp 220-222; 2 Feb 2001, Transcript, p 262.

27. Response to Pleading Entitled "Reply to Prosecution's Response to 'Motion Objecting to the Form of the Amended Indictment' Filed by the Accused Brdanin on 5 February 2001" Filed by the Accused Radoslav Brdanin on 13 February 2001, 16 Feb 2001, par 10.

28. Paragraph 55(iv).