

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: IT-98-29-AR72**  
**Date: 30 November 2001**  
**Original: English**

**BEFORE A BENCH OF THREE JUDGES OF THE APPEALS CHAMBER**

**Before: Judge David Hunt  
Judge Mehmet Güney  
Judge Theodor Meron**

**Registrar: Mr Hans Holthuis**

**Decision of: 30 November 2001**

**PROSECUTOR**

**v**

**Stanislav GALIĆ**

**DECISION ON APPLICATION BY DEFENCE FOR LEAVE TO APPEAL**

**Office of the Prosecutor:**

**Mr Mark Ierace, Senior Trial Attorney**

**Counsel for the Defence:**

**Ms Mara Pilipović**

1. Pursuant to Rule 72(B)(ii) of the Tribunal's Rules of Procedure and Evidence ("Rules"), Stanislav Galić ("Galić") seeks leave to appeal from a decision of Trial Chamber I.<sup>1</sup> The decision concerns what are described as "alterations" made to two schedules to the indictment, alterations which the Trial Chamber either permitted or accepted.<sup>2</sup>

2. Galić is charged with crimes against humanity and violations of the laws and customs of war arising out of what has often been referred to as the "siege" of Sarajevo. He is alleged to have been the Commander of the Sarajevo Romanija Corps, part of the Bosnian Serb Army.<sup>3</sup> The Sarajevo Romanija Corps is alleged to have implemented a military strategy over a period of forty-four months which used shelling and sniping to kill, maim, wound and terrorise the civilian inhabitants of Sarajevo, killing and wounding thousands of civilians of both sexes and all ages, including children and the elderly ("campaign").<sup>4</sup> Galić is charged with individual criminal responsibility pursuant to Article 7.1 of the Tribunal's Statute for "planning, instigating, ordering, committing, or otherwise aiding and abetting" in the execution of that campaign "and the acts set forth below by forces and persons under his command".<sup>5</sup> He is also charged with individual criminal responsibility as a superior pursuant to Article 7.3.<sup>6</sup>

3. The indictment states:<sup>7</sup>

All Counts in this indictment allege the totality of the campaigns of sniping and shelling against the civilian population but the scale was so great that the Schedules to the individual groups of counts in this indictment set forth only a small representative number of individual incidents for specificity of pleading.

Count 1 charges Galić with unlawfully inflicting terror upon civilians (as a violation of the laws and customs of war),<sup>8</sup> based upon the campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population. Both of the schedules to the indictment purport to relate to Count 1. Counts 2 to 4 charge Galić with murder and inhumane acts (as crimes against humanity),<sup>9</sup> and attacks on civilians (as a violation of the laws and customs of war),<sup>10</sup> based upon

<sup>1</sup> Defence's Request for Leave to File an Appeal, 24 Oct 2001 ("Motion").

<sup>2</sup> Decision on the Defence Motion for Indicating That the First and Second Schedule [*sic*] to the Indictment Dated 10<sup>th</sup> October 2001 Should be Considered as the Amended Indictment, 19 Oct 2001 ("Impugned Decision").

<sup>3</sup> Indictment, 26 Mar 1999, par 5.

<sup>4</sup> *Ibid*, par 4(a).

<sup>5</sup> *Ibid*, par 10.

<sup>6</sup> *Ibid*, par 11.

<sup>7</sup> *Ibid*, par 15.

<sup>8</sup> Tribunal's Statute, Article 3.

<sup>9</sup> *Ibid*, Articles 5(a) and 5 (i).

<sup>10</sup> *Ibid*, Article 3.

the sniper attacks during the campaign, such attacks “by their nature involving the deliberate targeting of civilians with direct fire weapons”. The indictment states in relation to Counts 2 to 4:

Specific instances of these attacks include, by way of representative allegations, those matters set forth in the First Schedule to this indictment.<sup>11</sup>

Counts 5 to 7 charge Galić with the same three offences charged in Counts 2 to 4, but based upon a “campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population”. The indictment states in relation to Counts 5 to 7:

Specific instances of this shelling include, by way of representative allegations, the matters set forth in the Second Schedule to this indictment.

4. The First Schedule to the indictment, which relates to Count 1 (terror) and Counts 2 to 4 (sniping), identifies thirty-two specific incidents by reference to the date of the incident, the name and age of the victim, the nature of the injury (or the cause of death) and the general area in which the incident occurred. The Second Schedule, which relates to Count 1 (terror) and Counts 5 to 7 (shelling), identifies six incidents by reference to the date of the incident, the nature of the shelling (by a description of the shells involved), the number (or the approximate number) of victims killed or wounded, the general area in which the victims were situated and the area from which the shelling originated.

5. On 10 October 2001, the prosecution filed two “revised” schedules.<sup>12</sup> A document attached to these schedules refers to the previously stated intention of the prosecution to review the evidence.<sup>13</sup> The prosecution had indicated at an earlier Status Conference its intention to withdraw some incidents and said that it was considering adding further incidents.<sup>14</sup> By its Revised Schedules, the prosecution purported to withdraw ten of the incidents, add five incidents and alter the details of four of the existing incidents in the First Schedule, and to withdraw one incident and alter the details of the remaining incidents in the Second Schedule. The document did not seek leave to make these alterations to the schedules. Nothing had been said at the Status Conference which suggested that the alterations would be permitted. Counsel for Galić had said

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<sup>11</sup> cf *Prosecution v Brđanin and Talić*, Decision on Form of the Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (“Second *Talić* Decision”), pars 60-63.

<sup>12</sup> Prosecutor’s Filing of Revised Schedule to the Indictment, 10 Oct 2001 (“Revised Schedules”).

<sup>13</sup> *Ibid*, par 2.

<sup>14</sup> Status Conference, 15 Mar 2001, Transcript pp 324-326.

that she would indicate her position when the proposed alterations were produced.<sup>15</sup> The then Pre-Trial Judge had stated that the Trial Chamber would wait to see how things developed.<sup>16</sup>

6. In response to the filing of the Revised Schedules, Galić requested the Trial Chamber to give rulings that the filing constituted an amendment to the indictment, and that the amendment had been unauthorised.<sup>17</sup> The Request argued that the schedules were an integral part of the indictment,<sup>18</sup> that the alterations constituted “new accusations”,<sup>19</sup> and that leave to amend was required.<sup>20</sup> The Request also stated that Galić had not filed a preliminary motion challenging the form of the indictment when it was originally filed within the time permitted by Rule 72(A),<sup>21</sup> and it sought a ruling that he should be permitted to file such a preliminary motion within the thirty days permitted by Rule 50(C).<sup>22</sup> Finally, the Request sought the postponement of the Scheduling Order for the filing of the pre-trial briefs and the pre-trial conference.<sup>23</sup> It should be noted that the trial has been fixed to commence on Monday next, 3 December.

7. The Trial Chamber agreed that the prosecution required leave to amend the schedules,<sup>24</sup> but it drew a distinction between the alteration of a material fact pleaded in the indictment (which constitutes an amendment to the indictment) and the addition or alteration of evidence stated in the indictment (which does not constitute an amendment).<sup>25</sup> It held that one of the new incidents added to the First Schedule was alleged to have occurred in a place not originally mentioned in that schedule, and therefore constituted a material fact which required leave to amend.<sup>26</sup> It refused leave because of the shortness of time before the trial commenced.<sup>27</sup> The Trial Chamber nevertheless held that evidence of the incident which it had rejected from the Revised Schedules remained admissible pursuant to Rule 93 as part of a consistent pattern of conduct relevant to the charges.<sup>28</sup> The Trial Chamber held that the remaining additions and

<sup>15</sup> *Ibid*, par 326.

<sup>16</sup> *Ibid*, par 326.

<sup>17</sup> The Defence’s Request for Indicating That the First and Second Schedule [*sic*] to the Indictment Dated 10<sup>th</sup> October 2001 Should be Considered as the Amended Indictment, 12 Oct 2001 (“Request”), par 13.

<sup>18</sup> *Ibid*, par 10.

<sup>19</sup> *Ibid*, par 13.

<sup>20</sup> *Ibid*, pars 11-12.

<sup>21</sup> *Ibid*, par 5.

<sup>22</sup> *Ibid*, par 13.

<sup>23</sup> *Ibid*, par 13.

<sup>24</sup> Impugned Decision, par 18.

<sup>25</sup> *Ibid*, pars 15, 18.

<sup>26</sup> *Ibid*, par 21.

<sup>27</sup> *Ibid*, par 22.

<sup>28</sup> *Ibid*, par 23.

alterations to the First Schedule referred to the same area and time frame as the original incidents in that schedule, and that they did “not alter the plea entered by the accused”; these were accordingly “admitted”.<sup>29</sup> Similarly, the Trial Chamber held that the alterations made to the Second Schedule did not constitute a change to the material facts charged, nor did they alter the plea entered by Galić or prejudice him in the preparation of his defence.<sup>30</sup>

8. In his Motion in support of his application for leave to appeal, Galić argues that the prosecution was obliged to identify in the indictment “the exact event, the exact incident, the exact place and time and the consequences of General Galić’s actions against civilian population [*sic*]”.<sup>31</sup> All of the details stated in the schedules which were altered or added to were accordingly material facts,<sup>32</sup> and constituted amendments to the indictment.<sup>33</sup> This, Galić says, gives him the right to file a preliminary motion challenging the form of the indictment.<sup>34</sup> Galić complains that his defence team was “uselessly” engaged in investigating the ten incidents deleted, and that it is now obliged to investigate the four new incidents “accepted” by the Trial Chamber.<sup>35</sup> He submits that it is contrary to the sound administration of justice for the trial to start shortly after the amendment of the indictment,<sup>36</sup> and before he had received the Revised Schedules in the B/C/S language in accordance with Article 21.4(a) of the Tribunal’s Statute.<sup>37</sup>

9. In its Response to the Motion, the prosecution disputes the claim by Galić to the grant of leave to appeal pursuant to Rule 72 (which is available from the decision of a Trial Chamber on a preliminary motion challenging the form of the indictment), and it suggests that leave could only be granted pursuant to Rule 73 (which is available from the decision of a Trial Chamber on any other motion which is not a preliminary motion).<sup>38</sup> Even if it were to be held that Rule 72 *is* the appropriate rule, the prosecution says, leave should still be refused.<sup>39</sup> The prosecution argues that the schedules contain only matters of evidence, and that there are no new material facts

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<sup>29</sup> *Ibid*, par 20.

<sup>30</sup> *Ibid*, par 19.

<sup>31</sup> Motion, par 13.

<sup>32</sup> *Ibid*, pars 15,17.

<sup>33</sup> *Ibid*, par 16.

<sup>34</sup> *Ibid*, par 17.

<sup>35</sup> *Ibid*, par 16.

<sup>36</sup> *Ibid*, par 23.

<sup>37</sup> *Ibid*, par 24.

<sup>38</sup> Prosecution’s Response to the Defence’s Request for Leave to File an Appeal, 5 Nov 2001 (“Response”), par 4.

<sup>39</sup> *Ibid*, par 5.

which require leave to amend.<sup>40</sup> The Trial Chamber was correct, the prosecution says, in permitting all the alterations but the one which “would create a new basis for liability and as such would constitute an amendment”.<sup>41</sup>

10. The first issue to be determined is whether the Request by Galić to the Trial Chamber was a preliminary motion challenging the form of the indictment pursuant to Rule 72, as he claims, or whether it was an ordinary motion pursuant to Rule 73, as the prosecution claims. The resolution of this issue is necessary in order to determine the relevant requirements for the grant of leave, as the requirements to be satisfied by an applicant for leave differ according to the rule which is applicable.

11. A preliminary motion challenging the form of the indictment pursuant to Rule 72 is one which seeks to demonstrate that the indictment does not sufficiently make the accused aware of the nature of the case which he has to meet.<sup>42</sup> The defect may lie in the clarity with which the prosecution case is stated or it may lie in the sufficiency of the information given in relation to that case. No such issue was taken by Galić in his Request. He did not suggest that the alterations made by the prosecution in its Revised Schedules failed to make him aware of the nature of the prosecution case. His complaints primarily related to the fact that the prosecution had presumed to make the alterations without authorisation. The relief sought was a ruling that the alterations made were unauthorised amendments, not for more clarity or more detail to be pleaded. In no sense could the Request be said to constitute a challenge to the form of the indictment. No other part of Rule 72 could be relevant. The subsidiary complaint made by Galić was, at best, that he was being denied the opportunity to make a challenge to the *form* of the indictment, but the existence of that complaint only underlines the fact that the Request was not itself intended to be such a challenge. The provisions of Rule 72 are therefore irrelevant.

12. The Request was an ordinary motion pursuant to Rule 73 by which Galić complained of the unauthorised alterations which were made. In order to obtain leave from the pre-trial decision which refused the relief sought pursuant to that rule, Galić must demonstrate that.<sup>43</sup>

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<sup>40</sup> *Ibid*, pars 6-7, 25.

<sup>41</sup> *Ibid*, pars 10-11.

<sup>42</sup> *Prosecution v Brđanin and Talić*, IT-99-36-PT, Decision on Objections by Momir Talić to the Form of Amended Indictment, 20 Feb 2001 (“First Talić Decision”), par 18.

<sup>43</sup> Rule 73(D).

- (i) the Impugned Decision would cause such prejudice to his case as could not be cured by the final disposal of the trial, including post judgment appeal; or
- (ii) the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.

The application for leave to appeal must be filed within seven days of the filing of the Impugned Decision.<sup>44</sup> The application was filed within that time.<sup>45</sup>

13. Galić has made no submissions directly related to the requirements of Rule 73(D). The issue as to whether his right to seek leave to appeal lay pursuant to Rule 72(B) or Rule 73(D) was nevertheless raised directly by the prosecution in its Response.<sup>46</sup> Galić had the right to file a reply to that Response,<sup>47</sup> but he did not do so. He would have suffered no embarrassment if he had done so as an alternative to his principal argument that Rule 72 was the relevant rule. The issues in any proposed appeal appear, however, to be the following:

- (1) Was the Trial Chamber correct to draw a distinction between the alteration of a material fact pleaded in the indictment (which constitutes an amendment to the indictment) and the addition or alteration of evidence stated in the indictment (which does not constitute an amendment)?
- (2) If that distinction was correct, did the whole of the altered contents of the two schedules to the indictment relate only to matters of evidence, and did none of the altered contents relate to material facts?
- (3) If there were in fact new incidents pleaded by the alterations, did the Trial Chamber correctly exercise its discretion to permit the alterations to be made in the circumstances?

14. As to the first of these issues, an indictment must necessarily, in the absence of a special order, consist of the one document. Its contents cannot properly or practicably be identified by reference to a number of documents in which statements made in one document are altered by statements made in another document. If statements in an indictment are to be altered, either a completely new document must be filed in which the alterations are incorporated or (with the leave of the Chamber) the indictment itself must be altered by some means, such as writing the alteration into the document or crossing out something in that document. No-one is permitted to

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<sup>44</sup> Rule 73(E).

<sup>45</sup> The Impugned Decision was given on 19 October, and the Request was filed on 25 October, 2001.

<sup>46</sup> Response, par 4.

<sup>47</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155, par 6.

alter a document filed in the Registry of the Tribunal (*a fortiori* an indictment) without leave being granted by the appropriate authority. Whatever the nature of the alteration made, it would therefore necessarily be an amendment to the indictment itself. The distinction drawn by the Trial Chamber was incorrect.

15. In any event, the argument by the prosecution that the whole of the altered contents of the two schedules related only to matters of evidence is not made out. An indictment is required to plead the material facts upon which the prosecution relies, but not the evidence by which those material facts are to be proved. Whether or not a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible.<sup>48</sup> If the accused person is alleged to have personally committed the acts giving rise to the charges against him, the material facts would include such details as the identity of the victim, the place and the approximate date of the events in question, and the means by which the offence was committed.<sup>49</sup> As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.<sup>50</sup>

16. In the present case, and despite the allegation in the indictment that Galić “committed” the basic crimes, the Impugned Decision proceeded upon the basis that it was no part of the prosecution case that Galić personally killed, maimed, wounded or terrorised anyone.<sup>51</sup> The prosecution has not sought to suggest that its case is otherwise, and its opposition to leave to appeal being granted also proceeds upon the same basis.<sup>52</sup> It was therefore unnecessary for *all* of the details given in the two schedules to be pleaded as material facts. But an indictment pleaded in the very general terms in the body of this indictment, without at least some of the details given in the two schedules, would not have given adequate notice to Galić of the nature of the case he had to meet. This is effectively conceded by the prosecution in the explanation given in par 15 of the indictment, that the purpose of the schedules was to provide “specificity of pleading”.<sup>53</sup>

<sup>48</sup> First *Talić* Decision, par 18; *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgment, 23 Oct 2001 (“*Kupreškić* Appeal Judgment”), at pars 88-90.

<sup>49</sup> First *Talić* Decision, par 22.

<sup>50</sup> *Ibid*, pars 19-20.

<sup>51</sup> Impugned Decision, pars 16-17.

<sup>52</sup> Response, pars 18-20, 25, 35.

<sup>53</sup> The passage is quoted in full in par 3, *supra*.



The body of the indictment itself does little more than recite the terms of the Statute where the jurisdiction of the Tribunal is defined by reference to various offences known to international humanitarian law. Essential material facts omitted from the body of the indictment are the areas where the sniping and shelling caused injuries to the civilian inhabitants of Sarajevo, the approximate dates upon which the relevant events occurred,<sup>54</sup> and also, in relation to the shelling, the areas from which the shelling originated.<sup>55</sup> The only place where those material facts can be found is in the two schedules. These material facts were altered. There can be no doubt that, as the Trial Chamber appears to have assumed, schedules to an indictment form an integral part of the indictment.<sup>56</sup> The ruling by the Trial Chamber that the alterations to those schedules were not amendments because they were not made to material facts was therefore incorrect in any event.

17. The third issue is whether the Trial Chamber correctly exercised its discretion to permit the alterations to be made in the circumstances. Galić has complained that, by accepting the alterations rather than requiring the prosecution to file an amended indictment, he was denied the opportunity to file a preliminary motion challenging the form of the indictment. This complaint is misconceived. Rule 50(C) extends the time in which to file a preliminary motion challenging the form of an amended indictment to thirty days after the amended pleading is filed only where “new charges” are made requiring the accused to plead to them. No such new charges were added in the present case. The Trial Chamber did consider whether the one new incident added by the prosecution to the First Schedule which was held to amount to an amendment would disrupt the Scheduling Order for pre-trial briefs and the pre-trial conference, and whether it would unduly postpone the start of the trial; having concluded that it would have such consequences, the Trial Chamber rejected the alteration made.<sup>57</sup> However, the Trial Chamber appears to have given no consideration as to whether the additional detail given in the four new incidents would similarly disrupt the proceedings. It therefore erred in the exercise of its discretion.

<sup>54</sup> Second *Talić* Decision, pars 56, 66, 73.

<sup>55</sup> The Trial Chamber’s refusal of leave in relation to the incident added to the First Schedule was based upon the fact that it had occurred in a place not originally mentioned in that schedule, which would appear to assume that the place where these events occurred was a material fact which had to be pleaded in this case.

<sup>56</sup> *Prosecution v Krnojelac*, IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 54.

<sup>57</sup> Impugned Decision, par 22.

18. Although the Trial Chamber has made several errors in the Impugned Decision, only the first (the distinction drawn between material facts and other facts in determining whether an alteration to the indictment constitutes an amendment to it) is a matter of any consequence to the general jurisprudence of the Tribunal. However, this Bench is not satisfied that the error made is of such general importance to proceedings before the Tribunal or in international law generally as to warrant its further consideration by five judges of the Appeals Chamber.

19. Galić has also failed to demonstrate any incurable prejudice in support of the alternative limb of Rule 73(D). As suggested by the prosecution,<sup>58</sup> it remains open to Galić to seek an adjournment if indeed he is prejudiced in his preparation to meet these four new incidents. The Trial Chamber which is to hear the case (it is differently constituted to the Trial Chamber which gave the Impugned Decision) is in the best position to determine whether the prosecution should be prevented from leading evidence in relation to these four new incidents until Galić has had an adequate opportunity to investigate the allegations.<sup>59</sup> An adjournment after the trial has started would be an appropriate remedy for the Trial Chamber to consider, but it is unnecessary to delay the start of the trial for that purpose.

20. The application by Galić for leave to appeal is refused.

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

Dated this 30<sup>th</sup> day of November 2001,  
At The Hague,  
The Netherlands.



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Judge David Hunt  
Presiding Judge

**[Seal of the Tribunal]**

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<sup>58</sup> Response, par 27.

<sup>59</sup> *Prosecution v Brđanin & Talić*, Decision on Application by Radoslav Brđanin to Exclude Evidence, 15 Nov 2001, par 5.