



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-02-65-PT  
Date: 4 April 2003  
Original: ENGLISH

**IN THE TRIAL CHAMBER**

**Before:** Judge May, Presiding  
Judge Kwon  
Judge Patrick Robinson

**Registrar:** Mr. Hans Holthuis

**Decision of:** 4 April 2003

**PROSECUTOR**  
v.  
**ŽELJKO MEAKIĆ**  
**MOMČILO GRUBAN**  
**DUŠAN FUŠTAR**  
**PREDRAG BANOVIĆ**  
**DUŠKO KNEŽEVIĆ**

**DECISION ON DUŠAN FUŠTAR'S PRELIMINARY MOTION**  
**ON THE FORM OF THE INDICTMENT**

**The Office of the Prosecutor:**

Ms. Joanna Korner

**Counsel for the Accused:**

Ms. Sanja Turkalov, for Momčilo Gruban  
Ms. Slobodanka Nedić, for Duško Knežević  
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar  
Mr. Jovan Babić, for Predrag Banović

**THIS TRIAL CHAMBER** of the 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 (“International Tribunal”),

**BEING SEISED OF** “Defendant Dušan Fuštar’s Preliminary Motion, Pursuant to Rule 72, Objecting to Defects in the Form of the Consolidated Indictment” filed by the Defence for the accused Dušan Fuštar (“Defence”) on 24 December 2002 (“Motion”),

**NOTING** the “Prosecution’s Consolidated Response to Defence Preliminary Motions Alleging Defects in the Form of the Consolidated Indictment and Seeking a Separate Trial, Filed by the Accused Momčilo Gruban, Dušan Fuštar, Predrag Banović and Duško Knežević”, filed on 24 January 2003 (“Response”),

### ***Form of the Indictment***

**NOTING** the Defence argument that the indictment as a whole is too vague, using phrases that have no substantial content and that the indictment should outline when the events happened, the identity of the victims and the means by which the crimes occurred,

**NOTING** the Prosecution’s argument that the material facts, including the identity of the victims, the time and place of the event and the means by which the acts were committed, are sufficiently pleaded within the Schedules A to F of the Indictment, and that the Defence has copies of the witness statements on which the allegations are based,

**CONSIDERING** Article 18(4) of the Statute, requiring the Prosecutor to prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged, but that the indictment need not specify the precise elements of each crime, since all that is required is a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute,<sup>1</sup>

<sup>1</sup> *Prosecution v. Kordic*, Decision on Defence Application for Bill of Particulars, Case IT-95-14/2-PT, 2 March 1999, para.8, referred to in *Prosecutor v. Brdanin and Talić*, Decision on Form of Future Amended Indictment and Prosecution Application to Amend, Case IT-99-36-PT, 26 June 2001 (“Brdanin Decision”), para. 33.

**CONSIDERING** that this obligation must be interpreted in the light of the rights of the accused under Article 21(4)(a) and (b) of the Statute,<sup>2</sup>

**NOTING** Rule 47(C) of the Rules, which provides that “the indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged”,

**CONSIDERING** that the pleading of an indictment will be sufficiently particular when the material facts of the Prosecution case are concisely set out with sufficient detail to inform the accused clearly of the nature and cause of the charges against them, such that he is in a position to prepare a defence,<sup>3</sup>

**CONSIDERING** that the materiality of a particular fact cannot be decided in the abstract, it being dependent on the nature of the Prosecution case and that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case is the nature of the alleged criminal conduct charged, which includes the proximity of the accused to the relevant events,<sup>4</sup>

**CONSIDERING** that:

- (a) the indictment lists the victims in the attached Schedules and which accused is alleged to have been personally responsible for them; and
- (b) the crimes alleged to have been committed against these victims are also present as are the dates when the crimes are alleged to have occurred, and also the specific date or date range when the alleged crime took place,

**CONSIDERING THEREFORE** that the Trial Chamber is satisfied that, having regard to the scale of the case alleged in the Indictment, to the extent possible the identity of the victims, the alleged crimes and the dates of the crimes have been sufficiently pleaded so that the accused is sufficiently informed of the nature and cause of the charges against them, such that he is in a position to prepare a defence,

<sup>2</sup> Brdanin Decision, para.33

<sup>3</sup> *Prosecutor v. Kupreškić*, Case No.IT-95-16-A, Appeal Judgement, 23 October 2001 (“Kupreškić Appeal Judgement”), para. 88, referred to in *Prosecutor v. Krajišnik & Plavsić*, Decision on Prosecution’s motion for leave to amend the Consolidated Indictment, Case No IT-00-39 & 40–PT, 4 March 2002 (“Krajišnik and Plavsić Decision of 4 March 2002”), para.9 (fn3).

<sup>4</sup> *Prosecutor v. Deronjić*, Decision on Form of the Indictment, Case IT-02-61-PT, 25 October 2002 (“Deronjić decision”), para.5 and cases referred to in footnotes 8 and 9.

***Joint Criminal Enterprise***

**NOTING** the Defence argument that the Indictment must detail the allegations against the accused, clearly differentiating between acts alleged in Omarska, where he was not present, and Keraterm where he was present, or in the alternative the Trial Chamber should reconsider its Decision to join the indictments,<sup>5</sup>

**NOTING** the Prosecution response that the Consolidated Indictment specifies which of the two camps pertains to which of the accused, as follows:

- a) Paragraph 21 of the Indictment informs Dušan Fuštar of the general role he played within the camps; and
- b) Paragraphs 21(a) and (b) of the Indictment informs Dušan Fuštar of the specific role he played as a shift commander within the Keraterm camp and the related Schedules C, D and F inform him of the acts he committed as an accomplice and as a participant within the joint criminal enterprise,

**CONSIDERING** that what must be pleaded with respect to an allegation that the accused participated in a joint criminal enterprise is:

- a) the nature or purpose of the joint criminal enterprise;
- b) the time at which or the period over which the enterprise is said to have existed;
- c) the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group; and
- d) the nature of the participation by the accused in that enterprise, and the nature of the participation of the accused in the enterprise,<sup>6</sup>

**CONSIDERING** that the Trial Chamber is persuaded that these requirements are satisfactorily pleaded in the Indictment with respect to the accused's involvement in a joint criminal enterprise, and that no justification is offered for the Chamber to reconsider its Joinder Decision,<sup>7</sup>

<sup>5</sup> *Prosecutor v Meakić et al*, Decision on Prosecution's Motion for Joinder of Accused Case Nos. IT-95-4-PT & IT-95-8/1-PT, 17 September 2002.

<sup>6</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT Decision on Form of Second Amended Indictment, 11 May 2000, para.16.

***Same facts for charges under Articles 7(1) and 7(3)***

**NOTING** the Defence submission that the Prosecution uses the same facts to allege different forms of liability under Articles 7(1) and 7(3) of the Statute,

**NOTING** the response of the Prosecution that with respect to Article 7(1), the Indictment outlines the modes of Article 7(1) participation, the required mens rea, the identity of participants and the natural and foreseeable consequences of the joint criminal enterprise which the accused is alleged to have participated in,

**NOTING** the response of the Prosecution that with respect to Article 7(3), the indictment outlines the different modes of Article 7(3) participation, the subordinates over whom the accused had control and the nature of the authority over these subordinates,

**CONSIDERING** that in an Indictment alleging responsibility under Article 7(1), the “identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail”,<sup>8</sup>

**CONSIDERING** that in a case based upon superior responsibility, pursuant to Article 7(3), the following are the minimum material facts that must be pleaded in the Indictment:

- (a) (i) that the accused is the superior, (ii) of subordinates who are sufficiently identified, (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible;
- (b) (i) the accused knew or had reason to know that the crimes were about to be or had been committed by those others, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others will usually be stated with less precision, the reason being that the details of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue; and
- (c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them,<sup>9</sup>

<sup>7</sup> *Prosecutor v Meakić et al*, Decision on Prosecution’s Motion for Joinder of Accused Case Nos. IT-95-4-PT & IT-95-8/1-PT, 17 September 2002.

<sup>8</sup> Kupreškić Appeal Judgment, para. 89.

<sup>9</sup> Deronjic Decision, para. 7.

**CONSIDERING** that the Indictment includes different material facts for charges pleaded pursuant to Articles 7(1) and 7(3), and fulfils the requirements for pleading material facts with respect to each form of responsibility,

***Content of Previous Judgements***

**NOTING** the Defence submission that the Indictment includes allegations that are contrary to the Judgement in the *Sikirica* case,<sup>10</sup> where plea agreements were entered into and ratified by the Trial Chamber, concluding that the individuals in that case had very limited authority within Keraterm, and did not have the power to punish anyone, had no role in the administration of the camp and were not responsible for the administration of supplies in the camp, and that therefore the Indictment is defective,

**NOTING** the Prosecution response that this objection should be dismissed as it is not relevant at this stage because the key question is not whether the evidence will warrant a conviction under Article 7(3) but whether or not the material facts informed the accused sufficiently about the nature and cause of the case against him, such that he is in a position to prepare his defence,

**CONSIDERING** that the question of whether the evidence is sufficient to warrant a conviction is a matter for trial and not a question concerning the form of the indictment,

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<sup>10</sup> *Prosecutor v. Sikirica et al*, Sentencing Judgment, Case No. IT-95-8-S, 13 November 2001.

**PURSUANT TO RULE 72 OF THE RULES**

**HEREBY REJECTS THE MOTION.**

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



Judge May  
Presiding

Dated this fourth day of April 2003  
At The Hague  
The Netherlands