



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: 14 November 2003
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthius

Decision: 14 November 2003

PROSECUTOR

v.

**ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ**

**DECISION ON ŽELJKO MEJAKIĆ PRELIMINARY MOTION
ON THE FORM OF THE INDICTMENT**

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić, for Željko Mejačić
Ms. Sanja Turlakov, for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar
Ms. Slobodanka Nedić, for Duško Knežević

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 a “Defence Preliminary Motion” filed by the Defence for the accused Željko Mejačić (“Defence”) on 13 October 2003 (“Motion”),

NOTING the “Prosecution’s Response to ‘Defence Preliminary Motion’ filed by the Accused Željko Mejačić” filed by the Office of the Prosecutor (“Prosecution”) on 27 October 2003 (“Response”),

NOTING the arguments set out in the Motion (which, the Trial Chamber notes, exceeds the page limit for Motions – without leave being granted) and that, in particular, the Defence complains that the Consolidated Indictment dated 5 July 2002 (“Indictment”) does not contain sufficient information with respect to:

- (a) the position held by the accused Željko Mejačić (“Accused”) at the Omarska camp, including his powers and authority in respect of all activities within the camp, as well as in relation to the Crisis Staff chain of command;
- (b) the incidents and acts that took place at the Omarska camp, which the Accused is being charged with, including their geographical location, the identity of the victims, and whether the alleged criminal acts were committed by the Accused personally; and
- (c) the form and type of alleged joint criminal enterprise,

NOTING the Prosecution’s argument that the material facts with regard to the Accused responsibility pursuant to Articles 7 (1) and 7 (3) of the Statute are sufficiently pleaded in the Indictment, in particular:

- (a) in paragraphs 18 to 22 of the Indictment with respect to his Article 7 (1) liability, including notice that he participated in a joint criminal enterprise, which encompasses all three forms of the joint criminal enterprise;¹
- (b) in paragraphs 23 to 27 of the Indictment with respect to his Article 7 (3) liability, including the different modes of Article 7 (3) participation; the subordinates over whom he had effective control and for whose acts he is responsible, and the general nature of the authority he had in the

¹ Referring to the *Tadić* Appeal Decision: *Prosecutor v Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999.

Omarska camp; that assertions in relation to the Crisis Staff chain of command are matters of evidence;

- (c) geographically, the indictment specifies that all forms of criminal liability relate to the specific role that the Accused played within the Omarska camp; and
- (d) 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 pleaded within Schedules A, B and E attached to the Indictment which identify the criminal acts committed by each accused, as well as those acts for which the accused Mejakić is liable as an accomplice and participant within the joint criminal enterprise,

CONSIDERING Article 18 (4) of the Statute and Rule 47 (C) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), requiring the Prosecution to prepare a concise statement of the facts and the crimes or crimes with which the accused is charged; thus the extent prosecution’s obligation to give particulars upon which it intends to rely to establish the offences charged is to ensure that the accused has “a concise statement of the facts” upon which reliance is placed to established the offence charged;² however, this obligation must be construed in light of Article 21 (4) (a) and (b) of the Statute,³

CONSIDERING that an indictment is pleaded with sufficient particularity when it sets out the material facts of the Prosecution case with enough detail to clearly inform the defendant of the charges and the nature of the responsibility alleged against him so that he may prepare his defence,⁴

CONSIDERING that the materiality of a particular fact depends upon the nature of the Prosecution case⁵ and, in particular, the nature of the alleged criminal conduct charged to the accused, including the proximity of the accused to events for which he is alleged to be criminally responsible,⁶

² *Prosecutor v Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, 24 Feb. 1999 (“*Krnojelac* Decision”), para 12.

³ *Prosecutor v Kupreškić*, Appeal Judgement, 23 October 2001, Case No. IT-95-16-A (“*Kupreškić* Appeal Judgement”), para. 88. Article 21 (4) of the Statute provides: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing [...]”

⁴ *Kupreškić* Appeal Judgement, para. 88; *Krnojelac* Decision, para. 7.

⁵ *Kupreškić* Appeal Judgement, para. 89; *Prosecutor v Deronjić*, Decision on the Form of the Indictment, Case No. IT-02-61-PT, 25 October 2002, para. 6

⁶ *Prosecutor v Galić*, Decision on Application by Defence for Leave to Appeal, Case No. IT-98-29-AR72, 30 Nov. 2001, para. 15; *Kupreškić* Appeal Judgement, paras 88-89.

CONSIDERING that the Indictment charges the accused Mejakić with various offences that he is said to have committed personally, as an accomplice and as participant within the joint criminal enterprise in relation to the Omarska camp, and with criminal responsibility as the camp commander of the Omarska camp,

CONSIDERING that with respect to an allegation of individual criminal responsibility under Article 7 (1) of the Statute, the material facts pleaded must, so far as it is possible to do so, include the identity of the victim, the time and place of the events and the means by which the offences were committed,⁷

CONSIDERING that the material facts which must be pleaded with respect to an allegation that the accused participated in a joint criminal enterprise are (a) the purpose and period of the joint criminal enterprise, (b) the identity of the participants in the enterprise; and (c) the nature of the participation of the accused in that enterprise,⁸

CONSIDERING that in a case based upon superior responsibility, pursuant to Article 7 (3) of the Statute, the material facts that must be pleaded in the Indictment are (a) the relationship between the accused and the others who committed the acts for which he is alleged to be responsible; and (b) the conduct of the accused by which he may be found (i) to have known or had reason to know that the acts were about to be carried out, or had been carried out, by those others, and (ii) to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them,⁹

CONSIDERING that the Trial Chamber is satisfied that the material facts pleaded in the Indictment, including the relevant criminal acts for which the Accused is charged as pleaded within Schedules A, B and E attached to the Indictment, provide sufficient details as to the nature of the alleged criminal responsibility of the Accused, including his alleged participation in a joint criminal enterprise under the requirements set out above, and fulfils the requirements for pleading material facts with respect to each form of responsibility,

⁷ *Prosecutor v Krnojelac*, Decision on Preliminary Motion on Form of the Indictment, Case No. IT-97-25-PT, 11 Feb. 2000, para. 12; *Kupreškić Appeal Judgement*, para. 89-90.

⁸ *Prosecutor v. Krajišnik and Plavšić*, Decision on Prosecution's Motion for Leave to File a Corrected Amended Indictment, Case No. IT-00+39&40-PT, 4 March 2002, para. 13.

⁹ *Prosecutor v. Strugar, Jokić et al.*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002, Case No. IT-01-42-PT, para. 17 and references therein.

NOTING that the Defence additionally complains that there are inconsistencies in the Indictment, in particular, the Defence argues that paragraphs 11 and 16 of the Indictment, which claims that the Crisis Staff controlled the Omarska and Keraterm camps, are inconsistent with paragraph 26, which alleges that Mejakić had the authority to alter the conditions of confinement that existed at the Omarska camp; that, in fact, as the Accused was not a member of the Crisis Staff, nor a subordinate thereof, he had no authority to alter the conditions of confinement at the Omarska camp,

NOTING the Prosecution Response that the allegation in paragraph 11 of the Indictment that the camps were “established and operated under the direction of the Crisis Staff” is not inconsistent with the allegation in paragraph 26 that the Accused, a policeman who was the commander of the Omarska camp, was in charge of the day-to-day running of the camp and had the authority to alter the conditions of confinement in the Omarska camp, that the Defence assertions in relation to the Crisis Staff chain of command are matters of evidence,

CONSIDERING that it appears from the reading of the Indictment that the Prosecution alleges that the Omarska and Keraterm camps were established and operated under the direction of the Crisis Staff; however, such allegation is not inconsistent with the claim that the Accused was the commander of the Omarska camp; any relationship between the Accused and the Crisis Staff is indeed a matter to be addressed at trial,

NOTING the Defence argument that the Prosecution must “harmonise” the Indictment in accordance with the findings in the *Kvočka* Judgement¹⁰ so as to obviate the need to prove facts which were already determined by the Trial Chamber in that case, thereby increasing the undisputed facts between the parties,

NOTING the Prosecution submission that the issue of proposed undisputed facts are irrelevant to a Rule 72 Motion, but should be further discussed between the parties or raised by way of motion to the Trial Chamber,

CONSIDERING that the question of whether a factual allegation is not the subject of reasonable dispute between the parties, or whether it may be deemed ‘adjudicated fact’ is a matter that may be discussed by the parties with a view to reaching agreement and, ultimately, it may be submitted to the Trial Chamber for determination in due course; in any event, the issue does not arise for determination at this stage,

¹⁰ *Prosecutor v Kvočka et al.*, Judgement, Case No. IT-98-30/1, 2 Nov. 2001.

CONSIDERING that the other arguments raised by the Defence, such as whether the Accused exercised “effective control” as the camp commander, and whether there is sufficient evidence to support this allegation raise matters of evidence to be determined at trial,

NOTING the Defence submission that Schedule A, Item 1 of the Indictment is unclear as it charges the Accused with killings that occurred within the Omarska camp without specifying the alleged responsibility and general role played by the Accused,

NOTING the Prosecution response that Schedule A, Item 1 of the Indictment should be read in context with paragraphs 18-22 of the Indictment which allege that as the commander of the Omarska camp, the Accused is responsible pursuant to Article 7 (3) of the Statute for any killings committed by his subordinates and also as a participant of the joint criminal enterprise within Article 7 (1) of the Statute for any killing that occurred in the Omarska camp during the time period specified in the Indictment,

CONSIDERING that, with respect to the accused Mejakić, the Indictment includes material facts for charges pleaded pursuant to Articles 7 (1) and 7 (3) of the Statute; therefore, the allegation contained in Schedule A, Item 1 of the Indictment, combined with the specific allegations set out in the Indictment as well as the other Items under Schedules A, B and E sufficiently puts the Accused on notice of the nature of the case against him,

CONSIDERING that the Trial Chamber is satisfied that the parties have presented their arguments in full and, in the case of the Defence, beyond the authorised length of motions pursuant to the Practice Direction on the Length of Briefs and Motions;¹¹ therefore, the Trial Chamber is not of the view that an oral hearing – as requested by the Defence - will assist it further, and accordingly that request is denied,

¹¹ IT/184/Rev. 1.

PURSUANT TO Rule 72 of the Rules

HEREBY DISSMISSES THE MOTION

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



Richard May
Presiding

Dated this fourteenth day of November 2003
At The Hague,
The Netherlands

[Seal of the Tribunal]