



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: 17 December 2004
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Order of: 17 December 2004

PROSECUTOR

v.

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

**DECISION ON PROSECUTION'S MOTION TO AMEND CONSOLIDATED
INDICTMENT SCHEDULES A THROUGH F, THE RULE 65 TER WITNESS
SUMMARIES, AND THE PRE-TRIAL BRIEF INCIDENT SUMMARIES**

The Office of the Prosecutor:

Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić, for Željko Mejačić
Mr. Branko Lukić, 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 (“the International Tribunal”),

BEING SEISED of a confidential “Prosecution’s Motion to Amend Consolidated Indictment Schedules A through F, the Rule 65 *ter* Witness Summaries, and the Pre-Trial Brief Incident Summaries”, filed by the Office of the Prosecutor (“Prosecution”) on 30 August 2004 (“the Motion”), seeking leave to amend (i) Schedules A through F to the Consolidated indictment dated 5 July 2002, and (ii) the witness summaries and the Pre-Trial Brief incident summaries filed on 3 October 2003 pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence of the International Tribunal (“the Rules”),

NOTING the Prosecution submission that, on further review of the evidence, and taking into account factors such as the availability of witnesses, limited resources and the desire to streamline its case, it proposes to amend the Schedules¹ to the Consolidated Indictment as follows: withdraw ten incidents from Schedules D (Banović)² and F (Knežević),³ and remove one incident from the amended schedule B (Gruban)⁴ and two incidents from Schedule D (Banović),⁵ already contained in Schedules A (Mejakić)⁶ and C (Fuštar)⁷ respectively (together, the “Request to Withdraw and Remove Items from the Schedules”),

¹ The Consolidated Indictment dated 5 July 2002 contains a number of Schedules: *Schedule A* is said to contain a description of murders, beatings, and sexual assaults which are alleged in general terms in paragraphs 21(a) and 29(a) of the Consolidated Indictment against the accused Mejakić; in addition, Mejakić is also charged with the acts alleged in Schedule B (Gruban) and Schedule E (Knežević) as a participant in the joint criminal enterprise within the Omarska Camp. *Amended Schedule B* is said to contain a description of murders, beatings, and sexual assaults which are alleged in general terms in paragraphs 21(a) and 29(a) of the Consolidated Indictment against the accused Gruban; in addition, Gruban is also charged with the acts alleged in Schedule A (Mejakić) and Schedule E (Knežević) as a participant in the joint criminal enterprise within the Omarska Camp. *Schedule C* is said to contain a description of murders and beatings which are alleged in general terms in paragraphs 21(b) and 29(a) of the Consolidated Indictment against the accused Fuštar; in addition, Fuštar is also charged with the acts alleged in Schedule D (Banović) and Schedule F (Knežević) as a participant in the joint criminal enterprise within the Keraterm Camp. *Schedule D* is said to contain a description of murders and beatings which were alleged in general terms in paragraphs 21(b) and 29(a) of the Consolidated Indictment against Banović - convicted and sentenced on a guilty plea; in addition, Banović was also charged with the acts alleged in Schedule C (Fuštar) and Schedule F (Knežević) as a participant in the joint criminal enterprise within the Keraterm Camp. *Schedule E* is said to contain a description of murders, beatings, and sexual assaults which are alleged in general terms in paragraphs 21(a) and 29(a) of the Consolidated Indictment against the accused Knežević; in addition, Knežević is also charged with the acts alleged in Schedule A (Mejakić) and Schedule B (Gruban) as a participant in the joint criminal enterprise within the Omarska Camp. *Schedule F* is said to contain a description of murders and beatings which are alleged in general terms in paragraphs 21(b) and 29(a) of the Consolidated Indictment against Knežević; in addition, Knežević is also charged with the acts alleged in Schedule C (Fuštar) and Schedule D (Banović) as a participant in the joint criminal enterprise within the Keraterm Camp.

² Incidents 7, 12, 13, 18, 19, 20, 21, 22 and 31.

³ Incident 12.

⁴ Item 6.

⁵ Incidents 24 and 30.

⁶ Item 4.

NOTING further that the Motion seeks to add the following four allegations already listed elsewhere: two allegations of murder to Schedule E (Knežević),⁸ both of which are already included in Schedule A (Mejakić);⁹ one allegation of murder to Schedule C (Fuštar)¹⁰ which is already contained in Schedule F (Knežević);¹¹ one allegation of beating to Schedule F (Knežević)¹² which is already included in Schedule D (Banović)¹³ (together, the “Request to Add Incidents to the Schedules”); the Prosecution also proposes various alterations to the Schedules, the Rule 65 *ter* witness summaries and the Pre-Trial Brief incident summaries that, it submits, are intended to clarify its pleadings (together, the “Request to Clarify the Schedules and Pre-Trial Submissions”); the proposed amendments are described as “administrative in nature” and intended to create a clearer picture of Knežević’s and Fuštar’s liability, streamline the case, as well as reduce the amount of evidence the Prosecution had planned to call at trial,

NOTING the “Dusko Knezevic’s Response to Prosecution’s Motion to Amend Consolidated Indictment Schedules A Through F, the Rule 65 *ter* Witness Summaries, and the Pre-Trial Brief Incident Summaries” filed by the Defence of Duško Knežević on 22 September 2004 (“the Knežević Response”),¹⁴ objecting to the Motion on the ground that new charges are raised against Knežević – two incidents of murder and one beating -, accordingly, asserts that the changes cannot be described as simply “administrative in nature”; the Defence also complains that the proposed amendments will cause further delays in pre-trial preparation in breach of the right of the accused to be tried without undue delay,

NOTING the Order of the Trial Chamber dated 26 October 2004 inviting the Prosecution to file additional submissions addressing the following matters: (i) whether the proposed amendments introduce new charges with regard to the case against the accused Knežević and Fuštar, and (ii) if,

⁷ Items 8 & 10.

⁸ Proposed items 1 *bis* and 1 *ter*, currently listed in Schedule A, items 19 and 31 respectively.

⁹ In Schedule A (Mejakić), item 19, it is alleged that in June 1992, “Dalija” Hrnić was beaten by other persons and died as a result thereof; in item 31, it is alleged that in June 1992, Slavko Ećimović was beaten by other persons and died as a result thereof.

¹⁰ Proposed item 2 *bis*, currently included in Schedule F, item 2.

¹¹ In Schedule F (Knežević), item 2, it is alleged that during June 1992, Emsud Bahonjić was beaten by Knežević and others on multiple occasions and died as a result thereof.

¹² Proposed item 17, currently listed in Schedule D, item 16.

¹³ In Schedule D, item 16, it is alleged that between June 1992 and 6 August 1992, Edin Ganić was beaten by Predrag Banović.

¹⁴ Accepted as timely filed by Order dated 29 September 2004; see *Prosecutor v Mejakić et al.*, Case No. IT-02-65-PT, “Order Granting Extension of Time to Respond”, 29 September 2004.

as it is submitted, the amendments are purely administrative in nature, whether they are required at this stage,¹⁵

NOTING the confidential “Prosecution’s Submissions pursuant to the Trial Chamber’s 26 October 2004 Order regarding Amendment to the Consolidated Indictment Schedules A Through F” filed on 11 November 2004 (“the Prosecution Further Submissions”) in which the Prosecution submits that the revisions do not introduce any new charges against either Knežević or Fuštar; that the Prosecution has made abundantly clear in the Consolidated Indictment that the various accused are criminally responsible for all acts that occurred in their respective camps (Željko Mejakić, Momčilo Gruban and Duško Knežević for Omarska; Dušan Fuštar, and Duško Knežević for Keraterm);¹⁶ that the accused were previously on notice, in terms of the applicable schedules, of their liability for crimes listed in other schedules included in the Consolidated Indictment,¹⁷ and more information on the scope of their liability was set out in the Prosecution Pre-Trial Brief, as revised to date; the Prosecution submits that, read together, the Consolidated Indictment and the Pre-Trial Brief make it clear that Knežević and Fuštar were already charged and fully informed of the incidents in question; as such, the amendments are not “strictly speaking” required at this stage; instead, the Prosecution asserts that they are offered for “organizational completeness”, making it “easier” for all parties to identify the more direct involvement of specific Accused for particular acts,

NOTING the confidential “Dusko Knezevic’s Response to Prosecution’s Submissions pursuant to the Trial Chamber’s 26 October 2004 Order regarding Amendment of the Consolidated Indictment Schedules A Through F” (“the Knežević Second Response”) filed on 16 November 2004, objecting to the Prosecution Further Submissions on the basis *inter alia* that since different criteria are

¹⁵ See *Prosecutor v Mejakić et al.*, Case No. IT-02-65-PT, “Order on Prosecution’s Motion to Amend Consolidated Indictment Schedules A through F, the Rule 65 *ter* Witness Summaries, and the Pre-Trial Brief Incident Summaries”, 26 October 2004.

¹⁶ It is submitted that paragraph 21 of the Consolidated Indictment makes it clear, the accused are already charged with the acts in question; this paragraph reads as follows: “Numerous individuals, including Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac, Dusko Sikirica, Damir Dosen and Dragan Kolundzija, participated in the joint criminal enterprise within the Omarska and Keraterm camps. These participants, with the knowledge and intention to further the system of ill-treatment and persecution and by the authority they exercised within the camps, contributed in sustaining and furthering the objective of the joint criminal enterprise. In particular; (a) Within the Omarska camp, Željko Mejakić, Momčilo Gruban and Duško Knežević are not only liable for the acts and/or omissions they committed, but are also liable for the acts and/or omissions of each other and other participants, more fully pleaded within Schedules A, B and E to the Indictment and Paragraphs 15, 16, 24 to 26, 29, 31 and 33 of the Indictment; (b) Within the Keraterm camp, Dušan Fuštar, Predrag Banovic and Duško Knežević are not only liable for the acts and/or omissions they committed, but are also liable for the acts and/or omissions of each other and other participants, more fully pleaded within Schedules C, D and F to the Indictment and Paragraphs 15, 16, 25, 26, 29, 31 and 33 of the Indictment.”

¹⁷ It is submitted that Fuštar’s Schedule C declares that “The acts pleaded in Schedule D (Predrag Banović) and Schedule F (Duško Knežević) are re-alleged within this part of the Schedule.” Knežević’s Schedule E states that “The acts pleaded in Schedule A (Željko Mejakić) and Schedule B (Momčilo Gruban) are re-alleged within this part of the Schedule.” Knežević’s Schedule F enumerates that “The acts pleaded in Schedule C (Dušan Fuštar) and Schedule D (Predrag Banović) are re-alleged within this part of the Schedule”.

required for imputing criminal responsibility to participants in a joint criminal enterprise as opposed to a direct participant in the alleged crimes, the proposed allegations that the accused personally committed the crimes constitute substantial amendments to the indictment that cannot be described as merely “administrative in nature”; furthermore, if, as the Prosecution acknowledges, the amendments are not strictly required, the Motion should not be allowed,

Amendments to Schedules A through F of the Consolidated Indictment

CONSIDERING that, while the Motion was filed pursuant to Rule 73(A) of the Rules, the Trial Chamber is satisfied that the relief sought falls properly within the ambit of Rule 50 of the Rules;¹⁸ in this instance, the Prosecution is seeking to amend the Schedules to the Consolidated Indictment which form an integral part of the indictment,¹⁹

CONSIDERING that the Trial Chamber is satisfied that no prejudice would flow nor any delay result from granting the Request to Withdraw and Remove Items from the Schedules,

CONSIDERING that, with regard to the Request to Add Incidents to the Schedules, while in the Consolidated Indictment Knežević is charged with the acts alleged both in Schedule A (Mejakić) and Schedule D (Banović), including two allegations of murder and one allegation of beating sought to be added to Schedule E (Knežević), as it stands, a plain reading of the Consolidated Indictment and accompanying Schedules demonstrates that the accused Knežević is charged with the incidents listed in Schedule A (Mejakić) and Schedule D (Banović) on the basis of his alleged participation in a joint criminal enterprise that operated within the Omarska and Keraterm Camps; through the proposed amendments,²⁰ the Prosecution seeks to charge Knežević with having *personally* participated in the alleged beatings that resulted in the death of the two victims; the Trial Chamber is unable to accept the Prosecution submission that the two forms of liability are essentially the same: while participation in a joint criminal enterprise is a form of “commission” under Article 7(1) of the Statute,²¹ where the Prosecution intends to suggest that an accused

¹⁸ In this case, Rule 50 (A)(i)(c) of the Rules provides that, after the assignment of a case to a Trial chamber, the Prosecution may amend an indictment with the leave of the Trial Chamber or a Judge of the Chamber, after having heard the parties.

¹⁹ *Prosecutor v Krnojelac*, Case No. IT-97-25-PT, “Decision on Preliminary Motion on Form of Amended Indictment”, 11 February 2000, para. 54.

²⁰ For example, in the proposed item 1 *bis*, it is alleged that in June 1992, “Dalija” Hrnić was beaten by Knežević and others and died as a result thereof.”

²¹ *Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-99-37-AR72, “Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise”, 21 May 2003, para. 20. As recognised by the Prosecution in its Pre-Trial Brief, “participation of the accused in the common design need not involve commission of a specific crime under the Statute, but may take the form of assistance in, or contribution to, the execution of the common plan or purpose”. Prosecution’s Pre-Trial Brief Submitted Pursuant to Rule 65 ter (E) (i) of the Rules, Case No. IT-02-65-

physically perpetrated a crime, it must expressly say so,²² and the nature of his alleged individual responsibility should be made clear to the accused,²³

CONSIDERING that, while a failure to specify in the indictment the particular form of “commission” alleged against the accused under Article 7(1) gives rise to ambiguity, the Appeals Chamber has held that “this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment – for instance in a pre-trial brief – the legal theory which it believes best demonstrates that crime or crimes alleged are imputable to the accused in law in the light of the facts alleged”; however, as stated by the Appeals Chamber, such form of pleading is “limited by the need to guarantee the accused a fair trial”,²⁴

CONSIDERING that the accused Knežević is charged in Schedule E with direct participation in one incident of murder and one incident of beating in support of the offences of persecutions (Count 1)²⁵ and murder (Counts 2 and 3)²⁶ charged against him and others, both item 1 *bis*²⁷ and item 1 *ter*,²⁸ to be added to Schedule E, further specify the form of his alleged participation in the “commission” of the alleged incident and are both described in the Prosecution’s Pre-Trial Brief,²⁹

PT, 3 October 2003, para. 102, citing *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, “Judgement”, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 345.

²² An indictment must set 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. See, e.g., *Prosecutor v Kupreškić*, Case No. IT-95-16-A, “Appeal Judgement”, 23 October 2001, para. 88 (“*Kupreškić* Appeal Judgement”). In *Krnjelac*, the Appeals Chamber held that “when the Prosecution charges the “commission” of one of the crime under the Statute within the meaning of Article 7(1), it *must specify* whether the term is to be understood as meaning *physical* commission by the accused *or* participation in a joint criminal enterprise, *or both*.” *Prosecutor v. Krnjelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnjelac* Appeal Judgement”), para. 138 (emphasis added).

²³ It has been repeatedly stated elsewhere that the materiality of a particular fact which must be pleaded in an indictment depends upon the nature of the Prosecution case; 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. See, e.g., *Kupreškić* Appeal Judgement, para. 89; *Prosecutor v Galić*, Case No. IT-98-29-AR72, “Decision on Application by Defence for Leave to Appeal”, 30 November 2001, para. 15; *Prosecutor v Deronjić*, Case No. IT-02-61-PT, “Decision on the Form of the Indictment”, 25 October 2002, para. 6.

²⁴ *Krnjelac* Appeal Judgement”, para. 138

²⁵ Article 5 (h) of the Statute.

²⁶ Article 5 (a) and Article 3 (1)(a) of the Statute.

²⁷ It is alleged that in June 1992, “Dalija” Hrnić was beaten by Duško Knežević and other persons and died as a result thereof”.

²⁸ It is alleged that on or about 1992, “Dalija” Hrnić was beaten by Duško Knežević and other persons and died as a result thereof”.

²⁹ See, for item 1 *bis*, Annex I to Prosecution’s Pre-Trial Brief, Schedule A (Mejakić), item 19 states: “[...] At the same time, Duško Knežević and the other men beat Dalija Hrnić. Dalija Hrnić died as a result of the beatings and his body was seen near the White House”. Annex I, to Prosecution’s Pre-Trial Brief pursuant to Rule 65 *ter* (E), Case No. IT-02-65-PT, 3 October 2003, (“Pre-Trial Brief incident summary”) p. 6; item 1 *ter*, Schedule A (Mejakić), Item 31 states: “On or around 10 June 1992, Slavko Ećimović was beaten severely in the White House by Zoran Žigić and Duško Knežević [...] subsequently, Emir Beganović found Slavko Ećimović lying on the floor and he died shortly after as a result of the injuries he had received”. Pre-Trial Brief incident summary, p. 10.

CONSIDERING that, in Schedule C, the accused Fuštar is charged with responsibility for two incidents involving the killing of several individuals during his shift (at the Keraterm camp), the proposed amendment purports to charge the accused with direct participation in one incident of beating that caused the death of one detainee, item 2 *bis*³⁰ proposed to be added to Schedule C further specify the form of his alleged participation in the “commission” of the alleged incident and is described in the Prosecution’s Pre-Trial Brief,³¹

CONSIDERING that Schedule F contains allegations of direct participation by Knežević in four murders and twelve beatings which are alleged against him in general terms in paragraphs 21(b) and 29(a) of the Consolidated Indictment, through the proposed amendments, the Prosecution seeks leave to add one incident of direct participation in the beating of one individual; the accused is already charged a co-perpetrator in relation to the proposed item 17,³² and the form of his alleged participation in the “commission” of the alleged incident is further specified in the Prosecution’s Pre-Trial Brief,³³

CONSIDERING that, in the circumstances of this case, on the basis of the current Consolidated Indictment, Schedules and Prosecution’s Pre-Trial Brief, the Trial Chamber is satisfied that sufficient notice has been given to the accused that evidence will be led in relation to the form of their alleged participation in the proposed additional incidents,

CONSIDERING that, in the view of the Trial Chamber, no alteration to the basis of the alleged individual responsibility of the accused in this case has been made and no prejudice would flow from allowing the Request to Add Incidents to the Schedules,

CONSIDERING that the proposed revised Schedule E (Knežević) contains two additional incidents of “beatings”³⁴ that the Prosecution has not sought leave to add, and such alterations to the indictment are impermissible,

³⁰ It is alleged that during June 1992, Emsud Bahonjić was beaten by Knežević and Fuštar, and other persons on multiple occasions.

³¹ Pre-Trial Brief incident summary, Schedule F (Knežević), item 2 alleges that while detained at the Keraterm camp during the month of June 1992, Emsud Bahonjić was repeatedly beaten by Knežević, Fuštar and others and died on or about 19 June 1992 as a result of these repeated beatings. Pre-Trial Brief incident summary, p. 37.

³² It is alleged that between 9 June and 5 August 1992, Edin Ganić was beaten by Knežević and others.

³³ Pre-Trial Brief incident summary, Schedule D (Banović), item 16 alleges that while detained at the Keraterm camp in late June 1992, Edin Ganić was called out of room 1 and was beaten by Knežević and others, his knee was smashed with a baseball bat and severely injured. Pre-Trial Brief incident summary, p. 31.

³⁴ See, Confidential Annex 1 to the Motion, proposed amended Schedule E, Items 3 & 4.

Clarification of information contained in the Schedules, the Witness Summaries and Pre-Trial Incident Summaries

CONSIDERING that, since the accused are entitled to information to enable them to know the case they have to meet, and that they have not opposed the Request to Clarify the Schedules and Pre-Trial Submissions, it is appropriate to grant the relief sought,

PURSUANT TO Rules 50, 54, and 65 *ter* of the Rules,

HEREBY GRANTS the Motion and **ORDERS** the Prosecution to file, by Friday, 14 January 2005, the Amended Indictment Schedules A through F, the Amended Pre-Trial Brief Incident Summaries, and the Amended Rule 65 *ter* Witness Summaries in accordance with this Decision.

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



Patrick Robinson
Presiding

Dated this seventeenth day of December 2004
At The Hague
The Netherlands

[Seal of the Tribunal]