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 No.: IT-05-87-T

Date: 3 October 2006

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **3 October 2006**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

DECISION ON EVIDENCE TENDERED THROUGH WITNESS K82

Office of the Prosecutor
Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller
Ms. Patricia Fikirini
Mr. Mathias Marcussen

Counsel for the Accused
Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Alekšić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 ("Tribunal"), after having heard the parties, issued on 19 September 2006 an oral ruling excluding witness K82 from giving evidence in the trial, and hereby renders the reasons therefor.

Procedural history and Arguments of parties

1. On 18 September 2006, the Prosecution called witness K82 via videolink[1] to give evidence in this trial; the Prosecution also tendered K82's written statement via Rule 89(F).[2] On the Prosecution's Rule 65 *ter* witness list, the evidence that K82 was to give was summarised as follows:

> The witness was posted to Kosovo, in the [military unit specified], stationed in [place specified].
>
> The witness was from time to time engaged in field operations. He states that he had been involved in an operation at Ljubižda and in February 1999 in a large scale operation in a village called Ješkovo, south of Prizren. Between 25–30 people were killed in this latter action.
>
> The witness will testify to the orders given by their superiors to shoot, burn and loot properties.
>
> The witness and the rest of the VJ and MUP forces withdrew from Kosovo on ... 10 June 1999.[3]

K82 is not mentioned in the Prosecution's pretrial brief.[4]

2. At the very beginning of the witness' evidence, the Lukić Defence objected to the portion of the witness' Rule 89(F) statement being admitted that referred to the MUP Special Police Unit ("PJP").[5] The Chamber rejected the Prosecution's argument that this was not new material, but rather a clarification or elaboration of the information upon which the Defence had already been

---

[1] *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T ("*Milutinović et al.*"), T. 3469–3512 (18 September 2006).

[2] Ex. P02315.

[3] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Prosecution's Submissions Pursuant to Rule 65 *ter* (E) with Confidential Annex A and Annexes B and C, 10 May 2006. The Rule 65 *ter* witness list also states that the witness' evidence related to counts 1–5 and paragraphs 23–32, 72(b), 72(d), 73, 75, 76, 77, and 100. *See also* T. 3479 (18 September 2006).

[4] In its reply, the Prosecution argues that more detail was omitted from the Rule 65 *ter* summary and that K82 was not included in its pretrial brief, intentionally and in accordance with protective measures of the Chamber. Prosecution Application for Leave to Reply and Reply to "General Ojdanić's Submissions Concerning Admission of Testimony of Witness K 82", filed 19 September 2006, para. 4.

[5] T. 3474–3476 (18 September 2006).

placed upon notice, sustained the objection, and excluded from consideration any reference to the PJP in paragraph 31 of the statement.[6]

3. The Prosecution then went on to begin to adduce evidence from the witness regarding events in March 1999 in the village of Trnje involving his particular unit.[7] The Chamber immediately enquired of the Prosecution to which paragraphs in the indictment these events were relevant, and an extended colloquy among the Chamber and Prosecution ensued.[8] In response to questions from the Chamber, the Prosecution informed the Chamber that the witness' evidence related to events in other places not specifically included in the indictment, including the villages of Ljubižda Has (para. 5), Ješkovo (para. 5), Mamusa (para. 27), and Rogovo (para. 34),[9] and that these events would go to prove the existence of a widespread and systematic course of conduct carried out by the forces of the FRY and Serbia at the time relevant to the indictment.[10] During the course of the discussion, the Prosecution represented to the Chamber that the indictment only charged—and the Prosecution only would be seeking convictions against—the accused for the crimes specifically alleged in paragraphs 72 and 75 of the indictment, and not for events not detailed therein or for a general campaign of forcible displacement of Kosovo Albanians from Kosovo, as is indicated from the following exchange:

> JUDGE BONOMY: Just before you go to that, are you therefore saying you would not in this case seek a conviction for murder in Trnje, that would never happen; all you would do is seek to invite the Chamber to draw an inference about behaviour in municipalities where charges do exist in the indictment from the way in which this brigade behaved in Trnje and the other places that we may yet come on to in this discussion?
>
> MR. STAMP: Yes, Your Honour, we would not submit and we do not submit that a conviction for these particular villages would be appropriate. However, the evidence in respect to these particular villages, for a variety of reasons, can support a conviction on those offences which involve the widespread and systematic nature of the charges.
>
> JUDGE BONOMY: Well, that's a very vague answer, if I may say so, because it can mean two separate things. Are you saying that the crimes on which you will seek convictions are limited to the specific ones set out in the subparagraphs of, for example, paragraph 72?
>
> MR. STAMP: Yes, Your Honour.
>
> JUDGE BONOMY: So that when you re-incorporate these general allegations in the various paragraphs you've been referring to earlier in the indictment, you re-incorporate them at paragraph 71. There you re-incorporate paragraphs 60 to 69. You will not seek

[6] T. 3476–3478 (18 September 2006).
[7] T. 3478 (18 September 2006); Ex. P02315, para. 11.
[8] T. 3478–3484 (18 September 2006).
[9] T. 3482–3483 (18 September 2006).
[10] T. 3489–3491, 3498, 3504 (18 September 2006).

> convictions in respect of these particular -- of any crimes based on the generality of the allegations in these paragraphs.
>
> MR. STAMP: That is correct, Your Honour.
>
> JUDGE BONOMY: Well, that does clarify something about which we have been extremely concerned for some time and it leaves an outstanding matter which I don't think we need to deal with at this particular stage.[11]

4. The Prosecution argued that K82's evidence was admissible under Rules 89 and 93 because it was relevant to several different issues in the indictment, despite the fact that the evidence related to events that were not specifically charged as underlying offences in paragraphs 72 and 75.[12] The Milutinović Defence argued against the admission of K82's evidence on the basis that it went to events not charged in the indictment and thus the Accused had not been put on sufficient notice.[13] The Ojdanić Defence argued that the Chamber should exercise its discretion to exclude the evidence under Rule 89(D), because its probative value was substantially outweighed by the need to ensure a fair trial, and because, by analogy to the Chamber's power to reduce the scope of an indictment pursuant to Rule 73 *bis* (D), the Chamber *a fortiori* could exclude evidence of crimes not charged in the indictment.[14] The Pavković Defence agued that K82's evidence was essentially "extraneous" to the charges in the indictment and thus should not be admitted; Pavković also argued that, as a matter of judicial economy, the Chamber should exercise its discretion to exclude the evidence.[15]

5. Following these oral arguments, the Chamber adjourned to further deliberate upon the matter, and the parties were given an opportunity to make further submissions in writing with regard to the admissibility of K82's evidence.[16] Later the same day, the Prosecution filed a written submission, wherein it reiterated its previous arguments and its position that the evidence contained within K82's Rule 89(F) statement should be admitted into evidence, either in whole or in part.[17] The Ojdanić Defence filed its respective submission on 19 September 2006, arguing that the

---

[11] T. 3490–3491 (18 September 2006). *See also* T. 3483–3484 (18 September 2006); T. 794–797 (13 July 2006) (Prosecution confirming that it would not seek conviction for events in Podujevo because they were not specifically alleged in indictment). The Pavković Defence cited this discussion during the hearing on the present matter. T. 3484 (18 September 2006).

[12] T. 3491–3505 (18 September 2006).

[13] T. 3505–3507 (18 September 2006).

[14] T. 3507–3510 (18 September 2006).

[15] T. 3510–3512 (18 September 2006).

[16] T. 3485, 3491, 3512 (18 September 2006).

[17] Prosecution Additional Submissions on Admissibility of Testimony of K82, 18 September 2006 ("Prosecution Submissions").

Defence was not put on proper notice of K82's evidence and that the Chamber should exclude the evidence under Rule 89.[18]

6. In addition to these oral arguments, the Prosecution maintained, in its written submission, that the evidence of the witness related directly to paragraphs contained in the indictment, as follows:

(a) "the creation of an atmosphere of fear and the burning of houses in different villages in the municipalities of Prizren and Suva Reka by a unit that was subordinated to the Priština Corps. Allegations of such behaviour by the Serb forces are contained, for instance, in paragraph 25";

(b) "paragraph 26 of the Indictment refers specifically to widespread destruction of Kosovo Albanian property by means of arson";

(c) "the widespread killing of civilian Kosovo Albanian[s] throughout Kosovo by 'forces of the FRY and Serbia going from village to village' as means of expulsion. The testimony of K 82 regarding the killings of civilians in Ješkovo and Trnje are examples proving the 'widespread or systematic' character of acts of brutality and violence and the frequent killing of Kosovo Albanians in public view as charged in paragraph 27";

(d) "[p]aragraph 72 of the Indictment, dealing with deportation, further clarifies that the means employed by the Serb forces in order to achieve the deportation of the civilian population were not only used with regard to the specific crime sites set out in this paragraph under (a.) to (m) but 'throughout the province'";

(e) "the killing of civilians in various villages in the municipalities of Prizren and Suva Reka. Paragraph 75 of the Indictment again clarifies that the incidents listed in paragraph 75 (a.) to (k.) are specific examples on which the Prosecution expects to obtain a conviction. Paragraph 75 however clearly envisages the presentation of further evidence on killings which would serve the purpose of establishing the allegation that such killings occurred 'throughout the province of Kosovo'";

(f) "incidents in the villages in Ljubiža Has in December 1998 and in Ješkovo in February 1999 ... crimes having been committed in 1998 but also with regard to paragraph 98 of the Indictment, as it demonstrates that the Serbian side did not comply with the terms and conditions of the October Agreements";

(g) "the secret burial of corpses near Zur relates directly to the Prosecution's allegation pursuant to Article 7 (3) [and] ... paragraph 75"; and

[18] General Ojdanić's Submissions Concerning Admission of Testimony of Witness K82, 19 September 2006 ("Defence Submissions").

(h) "the operation K 82 testifies about is the very same operation during which crimes that are specifically charged in the Indictment were committed. The VJ documents referred to in paragraphs 8 of the Rule 98 (F) [sic] statement ... demonstrate that the operation K 82 participated in as part of his sub-unit was part of the bigger operation in which the crimes explicitly charged in the Indictment regarding Prizren (deportation), Orahovac (murder and deportation) and Suva Reka (murder and deportation) occurred. The Prosecution submits that also for this very reason, his testimony is closely related to the Indictment and the evidence is admissible."[19]

The Defence, in response, argued the following:

(a) Evidence of K82 includes material facts that were not pled in the indictment, which is thus defective because the Accused were not put on adequate notice. This lack of notice was not cured by the Prosecution's pretrial brief, opening arguments, the Rule 65 *ter* summary, or the disclosure of witness statements and exhibits.[20]

(b) Admission of the evidence would undermine the purpose of Rule 73 *bis* (D) and the Chamber's decision under that Rule.[21]

(c) The purposes for which the Prosecution seek to have the evidence admitted are of such low probative value that the Chamber should exercise its discretion under Rule 89(D) to exclude the evidence.[22]

7. On 19 September 2006, the Chamber issued a brief oral ruling in which it refused to admit the evidence of K82.[23] Later that day, the Prosecution filed a joint application for leave to reply and a substantive reply.[24] The Chamber notes that this filing does not comply with the "Order on Procedure and Evidence", issued 11 July 2006, which provides at paragraph 11 that a "request for leave to file a reply should not include the substance of the reply, which should await the decision of the Chamber upon whether to grant such leave." The Prosecution submits in the reply that, due

[19] Prosecution Submissions, paras. 2–12.

[20] Defence Submissions, paras. 5–12.

[21] Defence Submissions, para. 14; *see Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Application of Rule 73 *bis*, 11 July 2006.

[22] Defence Submissions, paras. 15–19.

[23] T. 3513 (19 September 2006) ("JUDGE BONOMY: Yesterday we left to reflect on the issue which was debated before us and on which we subsequently received written submissions, and following lengthy deliberations on the matter, the Trial Chamber has decided unanimously to refuse to admit the evidence of the Witness K-82. The reasons for that determination will be explained in a written decision which will be published as soon as possible....").

[24] Prosecution Application for Leave to Reply and Reply to "General Ojdanić's Submissions Concerning Admission of Testimony of Witness K 82", filed 19 September 2006.

to the fact that the Chamber had indicated that it would render its decision on 19 September 2006, "extraordinary circumstances exist which justify such departure from the general rule established by the Trial Chamber in its Order". The decision to grant the Prosecution leave to file the reply is moot, because the Chamber had already deliberated and come to a decision prior to receiving the courtesy copy of the reply via email.

Discussion

8. The parties' arguments, which have all been considered by the Trial Chamber, are set out in detail in the transcripts and written submissions cited above. The Chamber notes that the general evidentiary provisions relevant to its decision whether or not to admit the evidence of K82 are as follows:

Rule 89
General Provisions

* * *

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

* * *

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

The Chamber also takes note of Rule 93, which provides as follows:

Rule 93
Evidence of Consistent Pattern of Conduct

(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.

(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66.

The Tribunal and its sister tribunal, the International Criminal Tribunal for Rwanda ("ICTR"), have applied these provisions in various decisions and judgements, which will be discussed below.

9. In support of its arguments, the Prosecution cites case law that holds, in general, that evidence going to various issues other than the actual events pled as underlying offences of the

crimes charged is admissible.[25] In *Prosecutor v. Strugar*, the Prosecution tendered evidence of events prior to the indictment in order to show that the accused knew or should have known that his subordinates would commit criminal acts charged in the indictment, based upon their prior conduct in similar circumstances.[26] The Trial Chamber held, pursuant to Rule 89(C), that the evidence was admissible, provided that it was used solely for the purpose of proving the accused's state of mind in connection with the acts charged in the indictment.[27] In *Prosecutor v. Kunarac et al.*, the Trial Chamber found that one of the accused knew of rapes that were being committed; however, because these rapes were not charged in the indictment, the Chamber did not consider them for conviction or sentencing purposes, but instead to show the accused's knowledge of and willing participation in the attack upon the Muslim civilians.[28] Moreover, the Chamber found that the evidence of the rapes was an important indicator of the accused's state of mind and knowledge of the circumstances existing during this period of time.[29]

10. In *Prosecutor v. Kupreškić et al.*, the Appeals Chamber considered the testimony of one of the witnesses as corroborating evidence for the determination of the involvement of one of the accused in an underlying offence charged in the indictment.[30] Pursuant to the fact that the evidence in question described an incident that was outside of the scope of the indictment, the Appeals Chamber cited Rule 93 in support of its conclusion, but stressed that the Prosecution is not at liberty to introduce similar fact evidence without proper notice to the accused.[31] The Chamber took the view that, even though the accused did not have sufficient notice of the charges pertaining to

---

[25] Prosecution Submissions, paras. 13–18.

[26] *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence ("*Strugar* Decision"), 22 January 2004, p. 2.

[27] *Strugar* Decision, p. 4. *Cf. Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Trial Judgement, 26 February 2001, paras. 453–498 (using evidence as background information and proof of wider campaign, although not referring to Rule 93, nor to words "consistent pattern of conduct"); *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, paras. 53–56, 58 (referring to evidence to give overview of events in Višegrad in 1992, although not referring to Rule 93, nor to words "consistent pattern of conduct"); *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac* Judgement"), paras. 570–592 (referring to mistreatment of Muslims in Foča prior to and during armed conflict, although no reference is made to Rule 93, nor to words "consistent pattern of conduct").

[28] *Kunarac* Judgement, para. 589.

[29] *Kunarac* Judgement, para. 591. *See Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 37 ("'Pattern of conduct' has generally not been used to introduce evidence of crimes not alleged in the indictment, but has rather been used as the basis for inferences of intent from actions which are alleged in the Indictment. Based on these precedents, there is reason to believe that Rule 93 has little to say about the general standard of relevance and probativeness set out as the basic test of admissibility in Rule 89 (C)".).

[30] *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Judgement"), para. 321.

[31] *Kupreškić* Judgement, para. 323. The notice requirements were different at the time of the *Kupreškić* Judgement; this did affect the Appeals Chamber's determination of the matter, but does not affect this Chamber's reading of this case for the purposes of the present decision.

the evidence at hand,[32] this evidence had nevertheless been timeously disclosed to him for the purposes of Rule 93 of the Rules.[33] Therefore, the Appeals Chamber held that the interests of justice would best be served in the circumstances of that case by permitting the evidence to remain on the record and to be used for the purpose of corroborating the evidence relating to the underlying offence that was in fact charged, stating that "such an approach would not be critically unfair" to the accused.[34] However, *Kupreškić* is of little assistance to the Prosecution[35] because the Appeals Chamber, although deciding not to exclude the witness' evidence from the record because it was disclosed in a timely manner,[36] ultimately accepted the accused's argument that the Trial Chamber erred in relying upon his participation in an attack not charged in the indictment as part of his persecution conviction.[37]

11. The Defence responds to the Prosecution's resort to the above cases by stating that there is counter jurisprudence holding that evidence of events not charged in an indictment is inadmissible, where the operative indictment identifies the specific underlying offences with which the accused is charged.[38] In *Prosecutor v. Bizimungu et al.*, the Trial Chamber had granted a Defence motion to exclude evidence of certain witnesses on the basis that the Prosecution, although having been given an opportunity to do so, had been "unable to identify any specific acts pleaded in the indictment" to which the evidence was relevant.[39] The Trial Chamber noted that its conclusion had to be

> considered in light of the Indictment as a whole, in which, although the Prosecution has in part used the phrase "throughout Rwanda"[,] it does plead with specificity the various geographical regions in which the accused is alleged to have [incurred] criminal responsibility. ... [T]o permit the Prosecutor to lead the evidence excluded would cause prejudice to Bizimungu's defence as he had not been given sufficient notice.[40]

---

[32] *Kupreškić* Judgement, para. 326.

[33] *Kupreškić* Judgement, para. 323.

[34] *Ibid.*

[35] Prosecution Submissions, paras. 14–16.

[36] *Kupreškić* Judgement, para. 323.

[37] *Kupreškić* Judgement, paras. 230, 361. The Appeals Chamber did state that the Trial Chamber erred in law when relying upon this particular evidence to prove the charge of persecution; but, as the evidence could be used as corroborating evidence for another event, which could ultimately serve as a valid basis for a conviction for persecution, the Appeals Chamber decided to keep it on the record, but only as corroborating evidence of this second event, which was relevant to the indictment.

[38] Defence Submissions, paras. 16–18.

[39] *See Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, 25 June 2004 ("*Bizimungu* Decision"), para. 18; *but see Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 12 (holding that "the failure to plead certain allegations in the Indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion under Rule 89(C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of other allegations specifically pleaded in the Indictment"). These two decisions from the Appeals Chamber, issued within three months of each other, demonstrate how issues of this nature are highly-dependent upon the specific facts of each case.

[40] *Bizimungu* Decision, para. 18.

On interlocutory appeal, the Appeals Chamber stated,

> The essential issue in both of the Trial Chamber's decisions—the decision to reject the proposed amended indictment and the decisions to exclude the evidence of the witnesses subject of these appeals—was the same, that is that the Defence had not had the opportunity to prepare to defend against what are essentially fresh allegations and thus would suffer prejudice during trial should the Prosecution be permitted to present those allegations during trial.[41]

The Appeals Chamber considered that this conclusion was within the permissible scope of the Trial Chamber's discretion and dismissed the Prosecution's appeal.[42]

12. *Bizimungu et al.* is therefore authority that, where an event is not heralded in an indictment, Rule 65 *ter* summary, or pretrial brief, it is open to a Trial Chamber not to admit such evidence, even if there are general averments in the indictment that may in some way encompass the unheralded event; however, whether a Chamber should admit or refuse the evidence depends upon the circumstances of a particular case. It is difficult to distil from any of these specific cases a general jurisprudential principle that can apply across the board to all other cases. When exercising its discretion regarding whether to admit or exclude evidence, the Chamber notes that

> [r]elevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment. The nature of this evaluation explains the discretion conferred on the Trial Chamber by Rule 89(C).[43]

In considering the particular circumstances of this case, the Chamber had that statement in mind.

13. The history of the amendment of the indictment in this case is relevant to the Chamber's exercise of its discretion herein. When asked by the Presiding Judge why the events described in K82's material had not been alleged in the indictment, the Prosecution replied,

> I asked a similar question and there were at times past opportunities when the indictment was being amended to include it. The evidence, I am told, came to attention sometime after the indictment was proffered, sometime -- just about the close of the Kosovo part in the Milosevic trial. And the opportunities to amend it, although they existed, there were different or varying considerations.[44]

---

[41] *Bizimungu* Decision, para. 19.

[42] *Bizimungu* Decision, paras. 19–21; *see also Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR73.3 and AR73.4, Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004, paras. 13–15, 21–23.

[43] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 18.

[44] T. 3479 (18 September 2006).

The Prosecution in this case has been aware of K82 for at least four years and has had as long a time to attempt to add K82's information to the indictment.[45] The Prosecution could have done so on its own initiative or in response to the Chamber's orders regarding amendment of the indictment. On 8 July 2005, for example, the Chamber granted the Prosecution's motion to join what had been two different proceedings against the Accused, and instructed the Prosecution to file a proposed consolidated indictment.[46] Also that day, the Chamber ruled that the indictments which had until then applied to the Accused were defective in certain respects,[47] and directed the Prosecution to cure the defects in the subsequent indictment.[48] Among other things, the Trial Chamber ordered the Prosecution to "[s]pecify the category of persons alleged to have committed the crimes charged by indicating which of the forces and units allegedly subordinated to the Accused were involved in the events in each municipality",[49] and "invited [the Prosecution] to undertake a general review of the Indictment in relation to all co-accused".[50]

14. The Prosecution filed a proposed "Amended Joinder Indictment" on 16 August 2005 that did not "indicat[e] which of the forces and units allegedly subordinated to the Accused were involved in the events in each municipality". Citing its witnesses' inability to identify particular units and the lack of comprehensive Serbian government records, the Prosecution stated that it was "unable to provide a complete list of all units present at individual crime sites"[51] and that it "could not compile complete lists of all the units because the information available is incomplete."[52] The Chamber decided on 22 March 2006 that the proposed indictment did not comply with its previous order to specify the forces that physically perpetrated the alleged crimes,[53] although it ruled that one assertion in the Prosecution's submissions—that "at least one MUP unit[] was present at each

---

[45] The details underlying this statement are not included in order to protect the anonymity of the witness.

[46] *See Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, Decision on Prosecution Motion for Joinder, 8 July 2005; *Prosecutor v. Pavković et al.*, Case No. IT-03-70-PT, Decision on Prosecution Motion for Joinder, 8 July 2005.

[47] *See Prosecutor v. Pavković et al.*, Case No. IT-03-70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005 ("Lazarević Decision"); Decision on Sreten Lukić's Preliminary Motion on Form of the Indictment, 8 July 2005.

[48] *See Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, Decision on Prosecution Motion for Joinder, p. 5 (ordering "the Prosecution to submit a consolidated indictment to the Trial Chamber by Monday 15 August 2005, taking into account such decision or order that the Trial Chamber may make in relation to the three separate Preliminary Motions filed by the Accused Lazarević, Lukić and Pavković").

[49] Lazarević Decision, p. 21.

[50] *Ibid.*, p. 22.

[51] Prosecution's Response to Lazarević's Defence Response to the Prosecution's Notice of Filing Amended Joinder Indictment and Motion to Amend the Indictment with Annexes & Defence Challenges to the Form of the Indictment, 17 October 2005 ("Prosecution Response to Lazarević"), para. 23.

[52] *Ibid.*, para. 25.

[53] *See Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006 ("Decision of 22 March 2006"), paras. 5, 10 (citations omitted).

of the crime sites"[54]—would adequately describe the alleged physical perpetrators in connection with the police forces, provided that the Prosecution amended the indictment to include this particular averment.[55]

15. The Chamber also found the proposed indictment defective with respect to its description of crimes allegedly committed in Kosovo in 1998. Although the Prosecution submitted that it was not charging the Accused with criminal responsibility for the crimes, which fell outside the indictment's period of 1 January to 20 June 1999, the Prosecution stated that it intended to rely upon them to prove that the Accused were members of the alleged joint criminal enterprise,[56] had the requisite state of mind to commit the charged crimes,[57] and "for other purposes as well, such as to show knowledge, intent, command ability, or just as part of the story that unfolded in Kosovo leading up to the crimes of the indictment period."[58] In light of those intended uses, the Chamber considered the 1998 crimes "material facts that must be pleaded sufficiently. If allegedly criminal acts, even those not charged in an indictment, are relied upon to establish responsibility for the crimes charged such that they amount to material allegations, they must be pleaded with sufficient specificity to enable the preparation of a defence."[59] Given that the proposed indictment "describe[d] the crimes with what appear[ed] to be the least possible detail, referring to them as 'crimes during 1998,' 'crimes committed in Kosovo in 1998' or 'crimes in Kosovo committed by the forces of the FRY and Serbia in 1998'",[60] the Trial Chamber concluded that the 1998 crimes had to be alleged with greater detail.[61]

16. The Prosecution responded by filing a proposed "Second Amended Joinder Indictment" on 5 April 2006. In its accompanying written submission, the Prosecution again stated that it was "not in a position to identify the particular units involved at each municipality separately."[62] The proposed indictment did allege, however, that "[a]t least one VJ and at least one MUP unit

---

[54] Prosecution Response to Lazarević, para. 23.

[55] *See* Decision of 22 March 2006, para. 9.

[56] The Prosecution stated that it "cites to the accused's participation in crimes of 1998 to prove that he was a participant in a Joint Criminal Enterprise that committed the crimes charged in the indictment after 1 January 1999." Prosecution's Response to Mr. Milutinović's Response to Prosecution Motion to Amend Indictment and Challenge to Amended Joinder Indictment, 17 October 2005 ("Prosecution Response to Milutinović"), para. 5.

[57] *See* Prosecution Response to Lazarević, para. 6.

[58] Prosecution Response to Milutinović, para. 5, n. 10.

[59] Decision of 22 March 2006, paras. 15–16.

[60] *Ibid.*, para. 16 (citations omitted).

[61] *See ibid.* ("[A]n adequate pleading of the alleged crimes of 1998 requires the Prosecution to identify, at minimum, the dates and locations of the crimes, along with the alleged connection to each Accused. And 'if the Prosecution is in a position to name the victims, it should do so.'") (citation omitted).

[62] Prosecution's Submission of Second Amended Joinder Indictment with Annexes A, B, D and Confidential Annex C and Motion to Amend the Indictment, 5 April 2006, para. 7.

participated in each of the crimes enumerated in Counts 1 to 5 of this Indictment."[63] Consonant with its earlier ruling—that an averment that "at least one MUP unit was present at each of the crime sites" was sufficiently detailed—the Chamber, on 11 May 2006, found the Prosecution's revision adequate.[64] Regarding the 1998 crimes, the proposed indictment described approximately 16 crimes allegedly committed in Kosovo during 1998 that the Chamber found detailed enough to enable the Accused to prepare a defence,[65] "particularly since the allegations in question do not give rise to separate charges against any of the Accused, but instead are relied upon for purposes of establishing certain elements of the crimes and forms of responsibility that *are* charged in the indictment."[66] The indictment was finalised on 21 June 2006.[67]

17. The principal purpose of the indictment-challenge and amendment process narrated above was to give notice of the locations of the criminal conduct upon which the Prosecution would rely, both within and without the indictment period, the nature of that conduct, and the alleged perpetrators. Now, the Prosecution seeks to lead evidence of K82 that is of a very specific nature, but of which no notice was given in the indictment, in spite of the opportunity to add that information during the amendment process and in spite of the fact that it had been by then in the possession of the Prosecution in excess of three years.[68] The plain scheme of the indictment, as emphasised by that process, is to set out in general averments the inferences and conclusions that the Prosecution claims should be drawn from the evidence led about specific incidents in 1998 (in paragraphs 94 and 95) and the underlying offences (in paragraphs 72 and 75). But these general averments do not entitle the Prosecution to lead very detailed evidence of crimes that are not charged in the indictment. The Accused were entitled to rely upon the fact that the underlying offences with which they have to deal are the ones specified in the indictment in paragraphs 72 and 75. The only reasonable conclusion to draw from the history of this matter is that the Prosecution did not seek to include the events in K82's evidence as underlying offences in the indictment; there can be no other reasonable explanation for the fact that these events are not in the indictment and that the witness is not mentioned in the pretrial brief.[69]

---

[63] Second Amended Joinder Indictment, 5 April 2006, para. 20.

[64] *See* Decision on Motion to Amend the Indictment, 11 May 2006, para. 6.

[65] *See ibid.*, para. 9.

[66] *Ibid.*, para. 11 (citation omitted; emphasis in original).

[67] *See* Redacted Third Amended Joinder Indictment, 21 June 2006.

[68] *Cf. Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (Rule 73 *bis* of the Rules of Procedure and Evidence), 30 September 2005, paras. 2, 15 (noting, in course of denying Prosecution motion to amend indictment by inclusion of further material facts without amending counts or charges, that Prosecution already had been granted leave to amend indictment twice and further leave to amend indictment to allow inclusion of new charges would affect rights of accused).

[69] The Trial Chamber finds the Prosecution's explanation for this, included in its reply, difficult to understand in light of the fact that it had intended to lead the evidence of K82 in open session. *See* Prosecution Application for Leave to

18. The Prosecution's Rule 65 *ter* summary of the evidence that he would give does not make reference to the majority of the events upon which the Prosecution now would like to adduce evidence, and none of the events are in the indictment. The witness was not mentioned in the Prosecution's pretrial brief.[70] There may indeed be a large volume of incidents not specified in the indictment, as stated by the Prosecution during oral argumentation on this matter;[71] this is a large case, and the Chamber, in accordance with its duty to ensure that the trial is both fair and expeditious, already has found it necessary to apply Rule 73 *bis* (by limiting the crime sites upon which the Prosecution can lead evidence) in order to focus the Prosecution's evidence upon the core of its case, *i.e.*, ethnic manipulation or modification of Kosovo's population through deportation, forcible transfer, and associated acts of persecution, including murder, of Kosovo Albanians.[72] The application of Rule 73 *bis* would effectively be unworkable if the Prosecution were permitted to lead extensive evidence not going directly to the underlying offences charged in an indictment.

19. As the Appeals Chamber has remarked, the accused

> must be found guilty [or not guilty] on the basis of evidence of the crimes charged, not the basis of evidence that he committed the offence on prior occasions and, therefore, had a propensity to commit them again. It is true that Chambers composed of professional judges may be less susceptible to distraction or prejudice by the admission of irrelevant or prejudicial evidence than juries. But hearing extensive examination and cross-examination on the evidence in question would distract the Chamber from the proper focus of the trial, namely, the events charged in the indictment, and lengthen the trial.[73]

The Prosecution has not demonstrated an adequate reason why evidence of crimes not charged in the indictment should be led in this trial; there are more than adequate, detailed averments in paragraphs 72 and 75 to support the inferences and conclusions the Prosecution invites the Chamber to make.

Reply and Reply to "General Ojdanić's Submissions Concerning Admission of Testimony of Witness K 82", filed 19 September 2006, para. 4.

[70] *See Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (Rule 73 *bis* of the Rules of Procedure and Evidence), 30 September 2005, para. 14 ("The Chamber finds that the alleged murders constitute new and precise material facts which should have been pleaded in the Indictment at least in such a way that they could be discerned by an attentive reader. That is not the case here. Failure to have done so cannot in the present case be cured by the disclosure even if it was made in a timely, clear and consistent manner. These facts are then irrelevant to existing charges.").

[71] T. 3498–3500 (18 September 2006).

[72] *See Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Application of Rule 73 *bis*, 11 July 2006, para. 7 (citing Transcript of Prosecution's Opening Statement, T. 415 (10 July 2006) ("The purpose of this joint criminal enterprise, this JCE, was to manipulate or modify the ethnic balance in Kosovo in order to maintain and continue Serbian control over the province of Kosovo.")).

[73] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 28.

Disposition

20. For all of the foregoing reasons and pursuant to Rules 54, 89, and 93, the Trial Chamber therefore has DECIDED, in the circumstances of this case, not to admit this evidence.

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

Judge Iain Bonomy
Presiding

Dated this third day of October 2006
At The Hague
The Netherlands

[Seal of the Tribunal]