



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: 15 February 2007

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: 15 February 2007

PROSECUTOR

v.

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

**DECISION ON JOINT DEFENCE MOTION TO EXCLUDE
WITNESS K54 FROM GIVING EVIDENCE IN TRIAL**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller
Ms. Patricia Neema
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. Aleksandar Aleksić 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”) is seised of the confidential “Joint Defence Motion to Exclude Witness K54 From Giving Evidence in the Trial,” filed on 9 February 2007 (“Motion”), and the confidential “Prosecution Response to Joint Defence Motion to Exclude Witness K54 From Giving Evidence in the Trial with Annex A (Revised Witness Notification),” filed on 12 February 2007 (“Response”), and hereby renders its decision thereon.

Arguments of the parties

1. In the Motion, the Defence argues that witness K54 should be precluded from giving evidence in this trial for the following reasons because his evidence includes material facts which were not pleaded in the Indictment. Accordingly, it is said that the Accused was not put on adequate notice and that this lack of notice was not cured by the Prosecution’s Pre-trial brief.¹ Second, the Defence submits that K54’s evidence is of such low probative value that the Chamber should exclude it.² Third, the Defence argues that calling K54 expands the case against the Accused, which, at such a late stage in the proceeding, is in itself unfairly prejudicial and outweighs any potential probative value.³ Fourth, it is alleged that, if the evidence of K54 was important enough, it should have been specified in the Indictment.⁴ Finally, the Defence argues that the evidence of K54 covers the same issues as the evidence of K82 which was excluded by the Trial Chamber in an earlier decision.⁵

2. In the Response, the Prosecution argues that witness K54 should be allowed to give evidence before the Trial Chamber because his evidence is relevant and has probative value in accordance with Rule 89(C). Furthermore, this probative value is not outweighed by the need to ensure a fair trial pursuant to Rule 89(D).⁶ The Prosecution further argues that, when it earlier made its request to the Chamber to add K54 to its witness list, the Defence did not object.⁷

¹ Motion, para. 6.

² Motion, para. 7.

³ Motion, para. 8.

⁴ Motion, para. 9.

⁵ Motion, para. 10; see Decision on Evidence Tendered Through Witness K82, 3 October 2006.

⁶ Response, para. 4.

⁷ Response, para. 6; see Confidential Prosecution Motion to Call Witness K54 and for Protective Measures With Confidential Annex A, 22 August 2006. The Prosecution finally notes that it maintains the arguments it submitted in this earlier motion. Response, para. 8.

Discussion

3. The Chamber has carefully considered the arguments of the parties relating to the evidence of witness K54. It is notable that witness K54 was added to the Prosecution's witness list on 8 September 2006, pursuant to this Chamber's "Decision on Prosecution's Motion for Leave to Call Witness K54 and for Protective Measures." This would have been the time for the Defence to object to the evidence of the witness, but instead it chose not to. Moreover, because the witness was added to the witness list after the trial had already begun, the Prosecution could not have referred to the evidence of K54 in the Indictment, the Pre-trial brief, and other Rule 65 *ter* submissions.

4. The Chamber acknowledges its "Decision on Evidence Tendered Through Witness K82," issued on 3 October 2006, where, having observed that witness K82's evidence was theoretically admissible pursuant to Rules 89 and 93, it exercised its discretion to exclude it, largely on the basis that the evidence went to alleged crimes committed in Kosovo not specified in the Indictment. However, the Chamber does not accept the Defence's argument that this decision mandates exclusion of K54's evidence. As was the case with the evidence of K82, the Chamber is of the view that the evidence of witness K54 is admissible in theory. Moreover, there are a number of factors that distinguish the evidence of witness K54 from that of witness K82. First, the evidence that K54 is expected to give is relevant to, *inter alia*, the operations in Kosovo which took place in 1998 and which pertain to the existence of the joint criminal enterprise as charged in the Indictment and the Pre-trial brief. Furthermore, witness K54 is expected to identify forces that were operating in Kosovo as alleged in paragraph 95 of the Indictment and paragraph 90 of the Pre-trial brief, and give evidence relating to the allegations that forces of the FRY and Serbia applied excessive and indiscriminate force in villages throughout the province of Kosovo as per paragraph 95 and 96 of the Indictment and paragraphs 90 and 93 of the Pre-trial brief. K54 is also expected to give evidence relating to operations in late February and mid-March of 1999, which pertain to the allegations contained in paragraph 99 of the Indictment.⁸ Finally, and most importantly, the witness is to tell of his personal involvement in the operations in Suva Reka/Suharekë and Prizren, the municipalities which, according to paragraph 72(b) and (d) of the Indictment, were allegedly ethnically cleansed by the FRY and Serbian forces.

5. Having reviewed the anticipated content of his testimony, the Chamber considers that the evidence of K54 is relevant and has probative value. As ever, the weight to be given to this

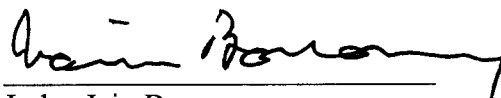
⁸ Motion, para. 14.

evidence is a matter reserved for final deliberation. The Chamber is also of the view that allowing witness K54 to give evidence would not cause unfair prejudice to the Accused as they have had sufficient notice of his testimony and the relevant disclosure has been made.

Disposition

6. For the foregoing reasons and pursuant to Rules 54, 89, and 93, the Chamber hereby DENIES the Motion.

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



Judge Iain Bonomy
Presiding

Dated this fifteenth day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]