



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: 13 March 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:** 13 March 2007

**PROSECUTOR**

v.

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

**DECISION ON PROSECUTION MOTION REQUESTING RECONSIDERATION OF  
TRIAL CHAMBER “DECISION ON EVIDENCE TENDERED THROUGH WITNESS  
K82,” ISSUED 3 OCTOBER 2006, AND LEAVE TO RE-CALL WITNESS K82  
AND  
FINAL DECISION ON EVIDENCE TENDERED THROUGH WITNESS K54**

**Office of the Prosecutor**

Mr. Thomas Hannis  
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**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 “Prosecution Motion Requesting Reconsideration of the Trial Chamber’s Decision on Evidence Tendered Through Witness K82 and Leave to Re-Call Witness K82,” filed on 27 February 2007 (“Motion”), and hereby renders its decision thereon. The Chamber also takes this opportunity to issue its final decision on the admission of the evidence of K54.

### **Brief procedural history**

1. On 18 September 2006, the Prosecution called witness K82 via video link to give evidence in this trial;<sup>1</sup> the Prosecution also intended to tender K82’s written statement in terms of Rule 89(F).<sup>2</sup>
2. Counsel for the Accused Lukić orally objected to the portion of the witness’s Rule 89(F) statement being admitted that referred to the MUP Special Police Unit (“PJP”).<sup>3</sup> The Chamber (a) 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 placed upon notice, (b) sustained the objection, and (c) excluded from consideration any reference to the PJP in paragraph 31 of the statement.<sup>4</sup>
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.<sup>5</sup> The Chamber immediately enquired of the Prosecution as to which paragraphs in the Indictment these events were relevant, and an extended colloquy among the Chamber and Prosecution ensued.<sup>6</sup>
3. Counsel for Accused Milutinović 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.<sup>7</sup> Counsel for Ojdanić argued that the Chamber should exercise its discretion to exclude the evidence under Rule 89(D), because its probative value was substantially outweighed

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<sup>1</sup> T. 3469–3512 (18 September 2006).

<sup>2</sup> P2315 (under seal).

<sup>3</sup> T. 3474–3476 (18 September 2006).

<sup>4</sup> T. 3476–3478 (18 September 2006).

<sup>5</sup> T. 3478 (18 September 2006); P2315, para. 11.

<sup>6</sup> T. 3478–3484 (18 September 2006).

<sup>7</sup> T. 3505–3507 (18 September 2006).

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.<sup>8</sup> Counsel for Pavković submitted that K82's evidence was essentially "extraneous" to the charges in the Indictment and thus should not be admitted and that, as a matter of judicial economy, the Chamber should exercise its discretion to exclude the evidence.<sup>9</sup>

4. The Prosecution argued that K82's evidence was admissible under Rules 89 and 93 because it was relevant to military operations in Kosovo that took place in early 1999 and to the existence of the joint criminal enterprise, despite the fact that the evidence related to events that were not specifically charged as underlying offences in paragraphs 72 and 75 of the Indictment.<sup>10</sup>

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.<sup>11</sup> Later that 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.<sup>12</sup> The Ojdanić Defence filed its respective submission on 19 September 2006, arguing that the Defence was not put on proper notice of K82's evidence and that the Chamber should exclude the evidence under Rule 89.<sup>13</sup>

6. On 19 September 2006, the Chamber issued a brief oral ruling in which it refused to admit the evidence of K82.<sup>14</sup> On 3 October 2006, the Chamber rendered its "Decision on Evidence Tendered Through Witness K82," in which it held that the evidence of K82 would not be admitted. The Chamber found that the Prosecution had failed to demonstrate why evidence of crimes not specifically charged in the Indictment should be allowed in this trial. Further, the Chamber noted,

<sup>8</sup> T. 3507–3510 (18 September 2006).

<sup>9</sup> T. 3510–3512 (18 September 2006).

<sup>10</sup> T. 3491–3505 (18 September 2006).

<sup>11</sup> T. 3485, 3491, 3512 (18 September 2006).

<sup>12</sup> Prosecution Additional Submissions on Admissibility of Testimony of K82, 18 September 2006 ("Prosecution Submissions").

<sup>13</sup> General Ojdanić's Submissions Concerning Admission of Testimony of Witness K82, 19 September 2006 ("Defence Submissions").

<sup>14</sup> T. 3513 (19 September 2006) ("JUDGE BONOMOY: 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....").

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 pre-trial brief.<sup>15</sup>

The Trial Chamber was anxious to ensure that, in view of the time available for presentation of the Prosecution case-in-chief, the Prosecution concentrate upon, so far as reasonable, the events specified in the Indictment.<sup>16</sup> Now that the proceedings have advanced to the end of the Prosecution case, these concerns are less significant.

7. On 9 February 2007, the Defence filed a confidential "Joint Defence Motion to Exclude Witness K54 From Giving Evidence in the Trial" ("K54 Motion"). On 12 February 2007, the Prosecution opposed the K54 Motion.<sup>17</sup> After considering the arguments of the parties, the Chamber on 15 February 2007 issued its "Decision on Joint Defence Motion To Exclude Witness K54 from Giving Evidence in Trial," in which it denied the K54 Motion and thus allowed K54 to give evidence.

8. On 26 February 2007, before K54 began his testimony in the instant trial, the Lazarević Defence raised further objection to the evidence of the witness. After hearing oral arguments from both parties, the Chamber then made the following oral ruling:

JUDGE BONOMOY: The first two incidents referred to by Mr. Bakrac seem to relate to matters that we have already decided the witness should be permitted to give evidence about. The third one, Trnje, is closely related and offered by the Prosecution as evidence of the general nature of the conduct of particular sections of the VJ and the police. As you all know, we have already decided that this evidence is, in principle -- this evidence of this type and in relation to these areas is in principle admissible. However, we intend to reserve the question of whether to admit the evidence until after we have heard it, and that applies to the evidence in relation to all three locations.

If admitted -- and there's a significant chance that that will happen subject, obviously, to developments as we listen carefully to it, but if that evidence is admitted, the decision to admit it is potentially inconsistent with the decision we took in relation to the evidence of K82.

We are obviously in an entirely different situation now and we have a much greater knowledge of the circumstances, not only of the events that are being -- that are the subject of this case but also much greater knowledge of how the case is to be or has been presented. We would, therefore, be willing to consider an application, if it were made to us, to reconsider our decision in relation to K82; however, if it was intended to make such an application, it would have to be done more or less instantly. Now, by that, I

<sup>15</sup> Decision on K82, para. 17.

<sup>16</sup> T. 3507-3509 (18 September 2006); Decision on K82, paras. 13-15.

<sup>17</sup> Prosecution Response to Joint Defence Motion to Exclude Witness K54 from Giving Evidence in the Trial with Annex A (Revised Witness Notification), 12 February 2007 ("K54 Response").

mean certainly sometime in the course of this week and I would have thought Wednesday was a reasonable deadline. That's a different decision, in fact, from deciding whether to admit the evidence of K54, but as I say, and bearing in mind the apparent inconsistency that would arise, then it would be of assistance to the Trial Chamber to have submissions on the question of whether we should reconsider that decision [] early, should the Prosecution have that in mind.<sup>18</sup>

8. Pursuant to the above oral ruling, the Chamber is now seised of that Motion by the Prosecution for reconsideration of its Decision on K82, which is discussed below.

### Arguments of parties

#### Arguments regarding evidence of K82

9. In the Motion, the Prosecution argues that K82 should be allowed to give evidence before the Trial Chamber because his testimony will offer links between the crimes alleged in the Indictment and the Accused through identifying forces and units which participated in operations in Kosovo in 1998 and 1999 in areas relevant to the Indictment.<sup>19</sup> Additionally, the Prosecution contends that the evidence directly goes to prove the existence of a joint criminal enterprise and is thus relevant to the individual criminal responsibility of the Accused pursuant to Articles 7(1) and 7(3).<sup>20</sup> Furthermore, it is asserted that the Chamber's decision to consider the evidence of K54, who offered similar evidence to the anticipated evidence of witness K82, is inconsistent with the Chamber's original decision to deny the evidence of K82.<sup>21</sup> The Prosecution further argues that the admission of K82 would not unfairly burden the Defence because the probative value of the testimony is not outweighed by the need to ensure a fair trial under Rule 89(D) of the Rules.<sup>22</sup> On this line, the Prosecution contends that the Ojdanić Defence was put on notice of K82's evidence on 21 November 2003 when his testimony in the *Milošević* trial was disclosed.<sup>23</sup> All of the Accused received the same disclosure on 30 June 2005.<sup>24</sup> Finally, it is argued that the unredacted statement and other relevant materials of K82 were disclosed to the Defence on 31 July 2006.<sup>25</sup>

10. In the joint Defence Response, it is submitted that K82 should be precluded from giving evidence in this trial because the evidence includes material facts that were not pleaded in the

<sup>18</sup> T. 10487–10489 (26 February 2007).

<sup>19</sup> Motion, paras. 5, 8. K82's statement indicates that he will testify about military operations in Ješkovo/Jeshkovë, Ljubižda Has/Lubizhë e Hasil, and Trnje/Tërm. P2315 (under seal), paras. 5–8, 28–32.

<sup>20</sup> Motion, para. 9.

<sup>21</sup> Response, paras. 2–8; T. 10477–10488 (26 February 2007).

<sup>22</sup> Response, paras. 11–12.

<sup>23</sup> Motion, para. 12.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

Indictment. Accordingly, it is asserted that the Prosecution failed to provide an adequate legal justification for the Chamber to accept the witness and that allowing the witness to give evidence would unfairly prejudice the Accused and deprive them of their right to a fair trial.<sup>26</sup> Second, the Defence submits that, because the admissibility of K54's evidence has yet to be determined by the Chamber, it is premature to assume that the Chamber has acted in an inconsistent manner with regard to witnesses K54 and K82.<sup>27</sup> Moreover, the Defence claims that "K82 cannot be used as a proof of the existence of a joint criminal enterprise comprising and embracing such tactics being employed by the VJ and the MUP and other forces operating in Kosovo during the relevant period."<sup>28</sup> Third, the Defence argues that calling K82 expands the case against the Accused beyond paragraphs 72 and 75 of the Indictment, which, at such a late stage in the proceeding, is in itself unfairly prejudicial and outweighs any potential probative value of his evidence.<sup>29</sup> Fourth, it is argued that the evidence of K82 relates to matters that were not specified in the Indictment and allowing the evidence makes the case against the Accused a "moving target".<sup>30</sup> Finally, the Defence argues that the Prosecution failed to demonstrate that the Chamber made an error of legal reasoning that would justify reconsideration of the Chamber's decision to exclude the evidence of K82.<sup>31</sup>

#### Arguments regarding evidence of K54

12. On 26 February 2007, the Lazarević Defence made an oral motion to exclude portions of K54's testimony in relation to three incidents in early 1999 in Kosovo. More specifically, the Defence requested

that the testimony of this witness should not include the three aforementioned incidents, the one from Ljubizda Has which is not to be found neither [sic] in the indictment nor [sic] in the pre-trial brief, then the second incident of Jeskovo and then the third one of Trnje for all the aforementioned reasons.

The Trnje incident, as treated in the supplemental information, is stated as Trnje/Suva Reka, but that incident has nothing to do with the incident in Suva Reka dated the 25th of March. These are two separate locations. The village of Trnje is halfway to Prizren when going from Suva Reka and has got nothing to do with the 25th of March Suva Reka incident.<sup>32</sup>

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<sup>26</sup> Response, paras. 7, 10–11, 18.

<sup>27</sup> Response, para. 8.

<sup>28</sup> *Ibid.*, paras. 13–14.

<sup>29</sup> Response, paras. 9, 15–17.

<sup>30</sup> Response, para. 17.

<sup>31</sup> *Ibid.*, para. 18.

<sup>32</sup> T. 10480 (26 February 2007).

After considering the submission, the Chamber issued its oral ruling on the admission of evidence by K54, postponing its final decision on whether to admit the evidence of K54.<sup>33</sup>

### Discussion

14. The Appeals Chamber recently has clarified that the definitive articulation of the legal standard for reconsideration of a decision is as follows: “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”<sup>34</sup>

15. Recognising that this Chamber has the authority to reconsider its decision to exclude the evidence of K82, it must first determine if the original decision included either an error of reasoning or would result in injustice to the parties. The Chamber has carefully considered both the arguments of the parties and the Chamber’s original Decision on this matter. The Prosecution’s Motion does not assert that an error in reasoning was made in the original Decision on K82. Lacking any arguments against its reasoning, this Chamber will not revisit the arguments and its holding in that Decision and notes its holding that the evidence of K82 was theoretically admissible pursuant to Rules 89 and 93,<sup>35</sup> but that, at that point in the case, the Prosecution had “not demonstrated an adequate reason why evidence of crimes not charged in the Indictment should be led in this trial”.<sup>36</sup>

16. In its Decision on K82, the Chamber held that K82’s evidence was theoretically admissible pursuant to Rules 89 and 93,<sup>37</sup> but exercised its discretion to exclude it, largely on the basis that, at that early point in the case, the arguments presented by the Prosecution on the matter went to alleged crimes that were not specified in the Indictment and it was necessary for the Chamber to ensure that the restricted time available to the Prosecution was spent on presenting evidence going directly to the core charges in the Indictment. Since the Chamber issued its Decision, circumstances have changed significantly. It is clear that the Prosecution has kept the presentation of the evidence on a very wide-ranging Indictment within reasonable bounds and has not sought to

<sup>33</sup> T. 10487–10489 (26 February 2007).

<sup>34</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle,” 14 June 2006, para. 2.

<sup>35</sup> Decision, paras. 9–12.

<sup>36</sup> Decision, para. 19.

<sup>37</sup> Decision, para. 15.

prove the general allegations therein by leading large numbers of witnesses who do not speak to the underlying offences libeled in the Indictment.

17. The proposed evidence is relevant to a number of important matters in the Indictment. First, the evidence that K82 is expected to give is relevant to, *inter alia*, the link between the alleged crimes and the Accused with regard to 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.<sup>38</sup> Second, K82 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 to give evidence relating to the averments that forces of the FRY and Serbia applied excessive and indiscriminate force in villages throughout the province of Kosovo as per paragraphs 95 and 96 of the Indictment and paragraphs 90 and 93 of the Pre-trial brief.<sup>39</sup>

18. Third, K82 is expected to give evidence relating to military operations in the villages of Ješkovo/Jeshkovë, Ljubižda Has/Lubizhë e Hasil, and Trnje/Tërm in support of these allegations.<sup>40</sup> While these specific incidents are not included in the Indictment,<sup>41</sup> the evidence pertaining to the military actions taken by the FRY and the Republic of Serbia from late February to mid-March 1999 is relevant to the charges in paragraph 99 of the Indictment.<sup>42</sup> Finally, and most importantly, the witness is to tell of his personal involvement in 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.<sup>43</sup>

19. In respect of whether the Defence has been placed on sufficient notice of the evidence of K82 (an issue that the chamber did not have to address in its original decision due to the fact that it did not allow K82 to give evidence), the unredacted statement and all other relevant witness material were disclosed to the Defence on 31 July 2006. An updated and consolidated Rule 89(F) statement was disclosed to the Defence on 15 September 2006. Neither the Ojdanić Defence nor any other Defence team objected to the admissibility of this evidence at any time before the issue was raised *ex officio* by the Trial Chamber on 18 September 2006. The Defence was prepared to

<sup>38</sup> Motion, paras. 6–10; T. 10477–10488 (26 February 2007), 3488–3491, 3494–3498, 3503–3504 (18 September 2006).

<sup>39</sup> Motion, paras. 8–10. The Chamber has also reexamined the initial oral submission of the Prosecution. T. 3497–3498, 3503–3504 (18 September 2006).

<sup>40</sup> Motion, para. 8; T. 10479–10491 (26 February 2006).

<sup>41</sup> T. 10480 (26 February 2006).

<sup>42</sup> T. 10479–10491 (26 February 2006).

<sup>43</sup> Motion, para. 8. The Chamber also reexamined the initial oral submission of the Prosecution. T. 3487–3491, 3495–3496 (18 September 2006).



cross-examine the witness on 18 September 2006 when K82 was originally scheduled to offer his testimony in the instant trial. The Chamber is therefore of the view that allowing K82 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.

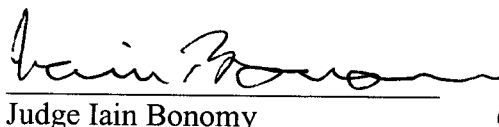
20. The Chamber, in these exceptional circumstances, has therefore decided to exercise its inherent discretionary power to reconsider its Decision on K82 because it is necessary to do so to prevent injustice to the Prosecution.

21. In its 15 February 2007 Decision, the Chamber held that the evidence of K54 was relevant and had probative value. However, after hearing oral submissions from the parties on 26 February 2007, the Chamber decided to delay admitting the evidence of K54 until it determined whether admitting this evidence would be inconsistent with its decision in relation to K82. Having now determined that the evidence of K82 should be heard, this is no longer a concern for the Chamber. As such, the Chamber rejects the oral arguments submitted by the Lazarević Defence prior to the commencement of K54's evidence on 26 February 2007 and finds the evidence of K54 appropriate for admission into evidence.

#### **Disposition**

22. For the foregoing reasons and pursuant to Rules 54, 89, and 93, the Chamber hereby GRANTS the Motion in relation to K82 and also decides to admit the evidence of K54.

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

  
Judge Iain Bonomy  
Presiding

Dated this thirteenth day of March 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**