

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

CASE NO. IT-04-84bis-PT

IN TRIAL CHAMBER II

Before: Judge Bakone Justice Moloto, Presiding
Judge Burton Hall
Judge Guy Delyoie

Registrar: Mr. John Hocking

Date filed: 19 July 2011

THE PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**SECOND NOTICE OF RE-CLASSIFICATION AND RE-FILING OF PUBLIC
VERSION OF HARADINAJ PRE-TRIAL BRIEF**

The Office of the Prosecutor:
Mr. Paul Rogers

Counsel for Ramush Haradinaj:
Mr. Ben Emmerson QC
Mr. Rodney Dixon

Counsel for Idriz Balaj:
Mr. Gregor Guy-Smith
Ms. Colleen M. Rohan

Counsel for Lahi Brahimaj:
Mr. Richard Harvey
Mr. Paul Troop

1. The Defence for Ramush Haradinaj hereby notifies the Registrar of the Tribunal that the Pre-Trial Brief on Behalf of Ramush Haradinaj for the Partial Re-Trial filed on 15 July 2011 should be reclassified as “confidential.”
2. On 11 July the Defence for Mr. Haradinaj filed its pre-trial brief publicly.
3. On 15 July the Defence filed its notice of re-classification of the 11 July brief as “confidential” and simultaneously re-filed the public version of its pre-trial brief.
4. On 18 July 2011, the Defence was notified of further information that required redaction. Accordingly, the Defence for Mr. Haradinaj now requests the Registry to change the status of the Defence’s 15 July 2011 brief to “confidential” and requests the parties to treat the Defence’s 15 July 2011 brief as if it had been filed confidentially.
5. The Defence hereby submits a new public version of the Pre-Trial Brief on Behalf of Ramush Haradinaj for the Partial Re-Trial.

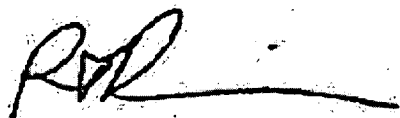
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Dated this day the 19th of July 2011

Counsel for Mr. Ramush Haradinaj,



Ben Emmerson QC



Rodney Dixon

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**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**PRE-TRIAL BRIEF ON BEHALF OF RAMUSH HARADINAJ FOR THE
PARTIAL RETRIAL**

The Office of the Prosecutor:
Mr. Paul Rogers

Counsel for Ramush Haradinaj:
Mr. Ben Emmerson QC
Mr. Rodney Dixon

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Mr. Richard Harvey
Mr. Paul Troop

1. The Defence for Ramush Haradinaj files this Pre-Trial Brief pursuant to Rule 65ter(F).

PART 1: OVERVIEW OF THE DEFENCE CASE

Introduction

2. The Prosecution alleges in the operative Indictment that Ramush Haradinaj and others planned and implemented a common criminal enterprise “*to consolidate the total control of the KLA over the Dukagjin Operational Zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with Serbian Forces or otherwise not supporting the KLA.*”¹
3. It is alleged that this campaign occurred between March 1998 (after Mr. Haradinaj’s family compound in Glllogjan/Glodane was attacked by the Serbian forces) and September 1998 (at which point the KLA was overrun by the Serbian forces in the Dukagjin area).
4. The Prosecution alleges that the joint criminal enterprise involved the mistreatment of detained persons “*at the KLA’s headquarters at Jablanica/Jabllanicë and Glodane/Gllodjan, and at the Black Eagles headquarters at Rznic*”.² The six counts that are the subject of the partial retrial only concern alleged incidents at Jabllanicë/Jablanica. These counts were included in the 37 counts that were the subject of the original trial.

¹ Revised Fourth Amended Indictment, 21 January 2011, para. 24.

² *Ibid*, para. 24.

5. These allegations are denied. None of the evidence that the Prosecution seeks to rely on at the partial retrial proves the existence of the alleged joint criminal enterprise or that Mr. Haradinaj directly participated in any of the crimes alleged at Jabllanicë/Jablanica or elsewhere.
6. Mr. Haradinaj was acquitted of all counts alleged under the same joint criminal enterprise at his original trial. The Trial Chamber held that the Prosecution's evidence did not establish that there was a joint criminal enterprise to mistreat Serb civilians and any other civilians who it was alleged were opponents of the KLA at Jabllanicë/Jablanica (which is the subject of six counts for the partial retrial) or at any other location. Mr. Haradinaj was also acquitted of all counts that alleged he directly participated in unlawful conduct including at Jabllanicë/Jablanica.
7. The Prosecution in its Pre-Trial Brief relies on much of the same evidence that was admitted at the original trial. The Prosecution also seeks to rely on "new" evidence that was not presented at the original trial.

"New" evidence

8. The Prosecution is seeking to call the two witnesses who were the subject of its appeal against the acquittals, Shefqet Kabashi and [REDACTED]
[REDACTED]
[REDACTED]
9. In addition, the Prosecution relies on the evidence of Witness 81, a "new" witness who was identified by the Prosecution for the first time on 26 October 2010.⁴

³ [REDACTED] Statement of Kabashi, 2 February 2011.

⁴ If Kabashi and [REDACTED] do not testify, the Haradinaj Defence will oppose the introduction of their statements into evidence. The Defence will also in these circumstances oppose the admission of the evidence of Witness 81 under Rule 89.

10. This evidence takes the Prosecution's case no further. It lacks any credibility and reliability. [REDACTED] account in his various statements is contradictory on key allegations. It has all the hallmarks of fabrication. Furthermore, Witness 81, who the Prosecution claim corroborates [REDACTED] account, has provided a statement which in fact has the opposite effect. It differs in material respects from [REDACTED] version of events, which is itself inconsistent. Moreover, in a subsequent statement, Witness 81 retracted crucial parts of his first statement and changed his account. In the Defence's submission this evidence should be rejected. It cannot be safely relied on in any way to seek to establish that Mr. Haradinaj is criminally responsible for any of the alleged crimes at Jabllanicë/Jablanica.

11. The focus of the partial retrial should be on the evidence of these "new" witnesses.

[REDACTED]

12. The Prosecution also seeks to call other "new" evidence, including Witnesses 75 and 76 who claim to have been present in Jabllanicë/Jablanica. Neither of them saw Mr. Haradinaj in Jabllanicë/Jablanica and their evidence adds nothing of any substance to the Prosecution's case against Mr. Haradinaj than already exists on the record from the original trial.

Evidence from the original trial

13. The rest of the evidence the Prosecution seeks to rely on is circumstantial and of a generalised character. This evidence is largely to be imported from the original trial by agreement between the parties.⁵

⁵ See Joint Motion for Admission of Agreed Evidence, 27 June 2011.

14. The Prosecution has selectively identified and “pieced together” aspects of this evidence in its Pre-Trial Brief in an attempt to re-litigate its case, ignoring the record as whole, including the cross-examination, the questions posed by the Judges, and the findings of the original Trial Chamber. Moreover, the Prosecution’s Pre-Trial Brief is replete with basic factual errors that suggest, at the very least, a lack of familiarity with the evidence called at the original trial.
15. None of this evidence permits any inference to be drawn of a joint criminal enterprise or of Mr. Haradinaj’s direct participation in any of the alleged Jabllanicë/Jablanica counts.

Exclusion of evidence

16. The Haradinaj Defence submits that parts of the evidence from the original trial should not be admitted. The Prosecution has sought to use evidence of alleged unlawful conduct outside of Jabllanicë/Jablanica which is wholly unrelated to the alleged incidents at Jabllanicë/Jablanica. This evidence is irrelevant to the six counts that are the subject of the partial retrial, and should be excluded before or during trial.
17. The Prosecution has “cherry-picked” evidence from the original trial irrespective of whether it has anything to do with Jabllanicë/Jablanica. For example, the Prosecution seeks to introduce evidence of a spontaneous attack by Albanian villagers on some members of a Serb family in Glllogjan/Glodane because they had been involved in the Serbian attack on Glllogjan/Glodane on 24 March 1998 in which Albanian civilians were killed. There is no reliable evidence that Mr. Haradinaj was even present when this incident occurred. This incident is completely unconnected to the alleged crimes in Jabllanicë/Jablanica. Merely because some civilians may have been attacked in Glllogjan/Glodane (or in any other villages) does not prove that the crimes alleged in the six

Jabllanicë/Jablanica counts were committed pursuant to a common criminal plan of which Haradinaj was a party.

18. The Haradinaj Defence's objections to the admission of this evidence are outlined in the responses to the Prosecution's motions to admit the evidence, which have been filed today. These objections are reiterated in the sections below that deal with the evidence relied on by the Prosecution. As explained below, the evidence is in any event of no probative value and no weight should be accorded it by the Trial Chamber.
19. The Prosecution also seeks to admit exhibits that were excluded during the original trial. The Appeals Chamber held that in principle the Prosecution could re-apply for the admission of such exhibits in the retrial as the "different contexts in which the two trials are held mean that evidentiary decisions proper in one case may not be proper in the other".⁶ However, the Prosecution have not shown how the context in which it seeks to introduce each of the particular documents excluded at the original trial has changed in the retrial. The same grounds for excluding this evidence at the original trial are applicable to the retrial, and the Trial Chamber is requested to refuse its admission. The Appeals Chamber directed that "the Trial Chamber should explicitly consider whether re-litigation of this same issue in the retrial would be unduly prejudicial. If such is the case, the evidence must be excluded".⁷

Disclosure

20. The Defence has filed its Pre-Trial Brief without sight of the de-redacted statements of certain of the "new" witnesses, in particular Witness 81.
21. The Defence has not received even a redacted statement for Witness 77, who according to the Prosecution's summary deals with an alleged unlawful incident

⁶ Decision on Haradinaj's Appeal on Scope of Partial Retrial, 31 May 2011, para. 25.

⁷ *Ibid*, para. 26.

involving FARK soldiers. This incident, as explained below, has nothing to do with any of the alleged incidents at Jabllanicë/Jablanica. The Prosecution should not be permitted to lead this evidence (or any other evidence about FARK) when it has no bearing at all on the six Jabllanicë/Jablanica counts and the JCE as alleged.⁸

22. The Prosecution has now informed the Defence that it will receive this disclosure on 19 July 2011. The Haradinaj Defence reserves the right to amend and supplement its Pre-Trial Brief, if necessary, in light of the disclosure of these de-redacted statements.

Armed conflict and military context

23. It must be taken into account that a vast amount of evidence was led at the original trial, and is available to the Trial Chamber in the partial retrial, about the military situation on the ground in the period covered by the operative Indictment. The Prosecution overlooks this evidence in its Brief, other than to allege that the KLA was dedicated to the “liberation” of Kosovo by armed force from what it considered to be an occupation by the armed forces of the FRY and the Republic of Serbia”.⁹
24. The Prosecution has in other cases before the ICTY charged Serbian commanders with conducting a systematic campaign of ethnic cleansing and persecution of the Albanian civilian population in the very area covered by operative Indictment. These commanders have been convicted by the ICTY of crimes against humanity and war crimes in which it was found that Albanian civilians were targeted, killed, mistreated and deported in a brutal and well-organised campaign.¹⁰

⁸ See paras. 75-79, below

⁹ Prosecution Brief, para. 24.

¹⁰ See *Prosecutor v Djordjević*, Trial Judgment, 23 February 2011; *Prosecutor v Milutinović*, Trial Judgment, 26 February 2009.

25. As was held in the Judgment of the trial of General Djordević:

“It is argued by the Defence that the Serbian military and police operations in the municipality, which are charged in the Indictment, were in response to KLA criminal and terrorist activities in the municipality of Orahovac/Rahovec; they were part of legitimate anti-terrorist activities ... The Chamber is of the view that what was done by the Serbian forces was not at all what would have been done during a genuine police action to flush out and arrest (or even kill) KLA fighters. On the contrary, the conduct of the MUP and VJ forces was directed at all Kosovo Albanians and was part of a policy of expelling Kosovo Albanians from the area and destroying their property. The actions of these forces ... belie any anti KLA operation.”¹¹

26. General Djordević was himself instrumental in the Serbian attacks on Jabllanicë/Jablanica. On 1 August 1998 he is recorded in the Joint Command minutes as discussing the preparation of a “third phase” of operations which was to include attacks on Rastavicë/Rastavica, Prelep/Prilep, Carrabreg/Crnobreg, Glllogjan/Glođane, and Jabllanicë/Jablanica.¹² On the same day General Pavković ordered the first of these attacks against Jabllanicë/Jablanica and Junik.¹³
27. The evidence shows that Jabllanicë/Jablanica was attacked or completely overrun by Serb forces on no less than three occasions during the period of the operative Indictment: in the second half of May 1998, in late July/early August 1998 (as per the above order), and in early September 1998.¹⁴ It is simply wrong for the Prosecution to claim that Jabllanicë/Jablanica was a “KLA stronghold in an area which had not been under Serbian control for several years”.¹⁵
28. There is also an extensive body of evidence that demonstrates that Mr. Haradinaj’s family compound in Glllogjan/Glođane (and the surrounding areas)

¹¹ *Djordević*, para. 548.

¹² D85, p. 35 (ET).

¹³ D80.

¹⁴ May: Fazliu T.7460-7461, Witness 3 T.7916-7918, P1048, P1046; August: Witness 17 T.7771, D85 (p. 35 ET); September: P1092

¹⁵ Prosecution Brief, para. 1.

were attacked and destroyed on various occasions by Serbian forces. It was first attacked on 24 March 1998 and thereafter targeted in the Serb offensives in May, June, July/August and September 1998.¹⁶

29. The targeted Albanian population in the Dukagjin area took steps to defend itself against these Serbian offensives. To the extent possible, they organised and armed themselves. They sought to defend their villages against Serb attacks and they mounted counter-attacks on Serb forces. It is thus agreed between the parties that an armed conflict existed at the times material to the six Jabllanicë/Jablanica counts.

30. There was *not*, however, any orchestrated retaliation by the KLA against either the Serb civilian population or against civilians from other ethnic groups. There has been no suggestion of such a campaign by the Trial Chambers or by the Prosecution in any of the Kosovo cases in which Serbian commanders have been tried. The Prosecution is no longer pursuing any charges of crimes against humanity in the partial retrial.

31. The evidence shows that the KLA were operating defensively during 1998, that it lacked any proper and centralised organisation, and that its military operations were conducted by poorly organised and ill-equipped volunteers fighting against the vastly superior firepower of the Serbian forces.¹⁷ This evidence does not in any way support an inference that there existed a common plan and policy to mistreat civilians in Jabllanicë/Jablanica in particular that was implemented through organised KLA structures under the authority of Mr. Haradinaj.

¹⁶ March: R. Tetaj T.3701-3704, P824, P1138; May: R.Tetaj, T.3716, P317 (paras. 13-16); June: D74, D75, D76; August: D80, C. Krasniqi T5709-5710 and T5818; September: P1092 and D84. There is extensive evidence of consistent daily shelling of the area by Serbian forces, for example, R. Tetaj T.3724, 3729-3730, 3646-3647, 3652; S. Cekaj T.4473-4476, J. Crosland T.3068, 3085-3086, 3088, 3117-3119; P10230.

¹⁷ See paras. 41-55, below.

Structure of the Defence Brief

32. The Haradinaj Defence's Pre-Trial Brief is divided into two main sections: (i) the JCE as alleged, which addresses the Prosecution's allegations of a common criminal plan; and (ii) the six Jabllanicë/Jablanica counts, which addresses the allegations contained in each of the counts of the Operative Indictment.

PART 2: THE ALLEGED JOINT CRIMINAL ENTERPRISE

Introduction

33. The Prosecution relies on various aspects of the evidence to claim that Mr. Haradinaj “significantly contributed” to the JCE as alleged.¹⁸ None of this evidence establishes that a JCE existed, let alone that Mr. Haradinaj was involved in any common criminal enterprise.
34. In its allegations about Mr. Haradinaj’s contribution to the JCE, the Prosecution places great emphasis on Mr. Haradinaj’s alleged active participation in the mistreatment at Jabllanicë/Jablanica of Ivan Zarić, Agron Berisha and Burim Bejta (Count 1) and of Witness 80 (Count 6).¹⁹ As noted above, these are the only two counts in which the Prosecution alleges that Mr. Haradinaj directly participated in the commission of alleged crimes at Jabllanicë/Jablanica. These allegations are based on the statements of Witness 80 and Witness 81. The Prosecution alleges on the basis of these statements that Mr. Haradinaj’s active participation in the crimes alleged in Counts 1 and 6 encouraged others to commit similar crimes at Jabllanicë/Jablanica.²⁰ These allegations are denied and will be shown at trial to be demonstrably false.
35. The rest of the evidence cited by the Prosecution in its Brief in support of the JCE is in reality a “re-hash” of the evidence that the Prosecution (unsuccessfully) relied on at the original trial. Many of the Prosecution’s submissions on the evidence are misleading. In its Pre-Trial Brief the Prosecution has repeatedly cited aspects of this evidence which either do not support the Prosecution’s contentions or which completely ignore conflicting evidence that undermines the point being made by the Prosecution. The Prosecution often cites only the name of a witness

¹⁸Prosecution Brief, para. 61.

¹⁹*Ibid*, paras 61-65.

²⁰*Ibid*, paras 64.

without providing any statement or transcript reference to verify the accuracy of the Prosecution's assertions. The Prosecution's submissions must be reviewed with the utmost caution. None of the evidence referred to by the Prosecution when considered in its fair and proper context is capable of proving the existence of the alleged JCE.

36. The Prosecution has based its case on three main allegations: (i) Mr. Haradinaj's alleged overall command of the KLA in the Dukagjin area; (ii) his alleged "close association" with Lahi Brahimaj and Idriz Balaj; and, (iii) alleged acts of violence that occurred in the Dukagjin area. None of these allegations were proved at the original trial or found to amount to a JCE as alleged. There is no new credible or reliable evidence for the retrial which proves these allegations or permits any conclusion to be drawn that crimes committed at Jabllanicë/Jablanica were part of a common criminal plan to which Mr. Haradinaj was a party. Each of these allegations is addressed below following an outline of the legal requirements for proving criminal responsibility under a JCE.

Legal requirements

37. The Prosecution rely on JCE I and JCE III. The legal elements of JCE are well-established. The Prosecution must prove beyond reasonable doubt that²¹:
- (i) The participants had a common state of mind to commit the crimes that constitute the criminal purpose of the JCE (or for JCE III that such offences were a natural and foreseeable consequence of the JCE and the Accused knowingly assumed the risk that they would occur).
 - (ii) The alleged members of the JCE acted together, or in concert with each other, in the implementation of the common purpose and objective.

²¹*Prosecutor v Brđanin*, Appeal Judgment, 3 April 2007, paras 428-431. Also see *Prosecutor v. Krajišnik* Trial Judgment, 27 September 2006, para. 883.

- (iii) The Accused shared the requisite criminal intent to commit the crimes forming part of the JCE. In order to prove this, the Prosecution must show that it is the “only reasonable inference on the evidence”.
- (iv) The Accused committed crimes forming part of the JCE, or made a significant contribution, either by procuring or by giving assistance to the execution of the crimes forming part of the common purpose and objective.
38. The Appeals Chamber has emphasised that JCE is “not an open-ended concept that permits convictions based on guilt by association”.²² The Accused must do “far more than merely associate with criminal persons”. He must possess “the intent to commit a crime”, have “joined with others to achieve this goal”, and make “a significant contribution to the crime’s commission”.²³
39. As noted by the original Trial Chamber, “it is the common objective that begins to transform a plurality of persons into a group, or enterprise, because what this plurality then has in common is the particular objective”. Such an objective is not sufficient as it is “the interaction or cooperation among persons – their joint action – in addition to their common objective, that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share criminal responsibility for crimes committed through the JCE.”²⁴
40. The evidence relied on by the Prosecution does not prove the existence of a common criminal purpose and objective, let alone that a plurality persons including Mr. Haradinaj acted together in the implementation of any common objective.

²² *Brđanin* Appeal Judgment, para 428.

²³ *Ibid*, para 431.

²⁴ Trial Judgment, para. 139, citing *Brđanin* Appeal Judgment, paras 410 and 430.

KLA organisation and command

Introduction

41. The Prosecution alleges that Mr. Haradinaj commanded and controlled KLA activities in Jabllanicë/Jablanica in a “hands on” way including by using the detention facilities there to detain and mistreat perceived opponents as part of joint criminal enterprise to suppress opposition with the aim of consolidating KLA control over the Dukagjin area.²⁵ This allegation is entirely unsupported by the evidence:

- The evidence of the formation of rudimentary KLA structures in the Dukagjin area in the course of 1998 shows that there was a lack of centralised command and control, and that Jabllanicë/Jablanica in particular operated as a separate and independent area of KLA activity that was not controlled on a day to day basis by Mr. Haradinaj.²⁶
- There is no credible evidence to show that Mr. Haradinaj participated in or knew of the establishment of any alleged detention facility at Jabllanicë/Jablanica.²⁷
- There is no credible evidence that Mr. Haradinaj participated in the mistreatment of persons in Jabllanicë/Jablanica or knew of persons being mistreated there, with the exception of Skender Kuqi to whom he provided assistance – an intervention that is entirely inconsistent with any alleged JCE to mistreat persons detained at Jabllanicë/Jablanica.²⁸

²⁵ Prosecution Brief, paras. 6, 7, 48, and 66.

²⁶ See paras 49-50.

²⁷ See para 55..

²⁸ See paras. 131-135.

- There is no credible evidence that Mr. Haradinaj ever visited the barracks in Jabllanicë/Jablanica in which Witness 6 and others were detained. The evidence accepted by the Trial Chamber at the original trial in fact shows that Mr. Haradinaj was only ever present in Jabllanicë/Jablanica on four occasions for reasons unrelated to any of the incidents alleged in the six Counts (other than the assistance he provided to Skender Kuqi).²⁹
- There is no evidence that Mr. Haradinaj failed to intervene and take appropriate action in respect of any unlawful behaviour at Jabllanicë/Jablanica.³⁰

42. The mere fact that crimes were committed in Jabllanicë/Jablanica does not prove that the perpetrators were acting under orders or pursuant to any common criminal purpose. The fragmentary, spontaneous and autonomous development of armed Albanian resistance during the period from early 1998 until the sustained Serbian military offensives in the Dukagjin area makes it impossible to draw any inferences of a common criminal purpose within the KLA.
43. The nature of this resistance calls for a close examination of the realities of command and control on the ground. The evidence shows that the KLA in the Dukagjin area was a rudimentary and fledgling organisation during the period of the operative Indictment, which lacked clear and effective, or vertical lines of command. It is not without reason that the Prosecution have always declined to charge Mr. Haradinaj with criminal responsibility under Article 7(3) of the Statute.
44. The mere fact that Mr. Haradinaj and others attempted to create organisational structures to defend their villages cannot support an inference that any crimes committed in Jabllanicë/Jablanica must have been part of a common criminal plan to which Mr. Haradinaj was a party.

²⁹See ftnt. 66.

³⁰See paras. 52-55.

45. The mere fact that Mr. Haradinaj was a highly respected commander does not mean that he had the ability to control and direct activities in every location of the Dukagjin area, including Jabllanicë/Jablanica. It cannot be inferred that he must have ordered, authorised, assisted in, or condoned the actions of any alleged perpetrators.

The development of the KLA in the Dukagjin area

Early 1998

46. The emergence of the KLA in the Dukagjin area was essentially a reaction to the Serb military actions in the early part of 1998. The evidence shows that as a result villagers took steps to organise defences for their villages in anticipation of Serb attacks. The activities of these emerging village defences were not centrally coordinated or commanded. Villagers appointed their own village commanders.³¹ None of these persons were appointed by Mr. Haradinaj and there is no evidence that Mr. Haradinaj issued orders to any village defences.
47. A village defence was established in Glllogjan/Glodane after the attack on 24 March 1998, as in many other villages. Groups of KLA fighters also existed in Jabllanicë/Jablanica. There is no evidence that Mr. Haradinaj was involved in any way with setting up structures in Jabllanicë/Jablanica or organising any activities there. In particular, the Prosecution has not cited to any evidence that suggests that Mr. Haradinaj was involved in establishing any detention facility at Jabllanicë/Jablanica – see para. 11 of the Prosecution Brief in which it is asserted that a detention facility was established without any reference being given as to when it was established or by whom.

³¹ R. Tetaj T.3707-3709; C. Krasniqi T.5793-5794; Z. Hasanaj T.8719-8720; S. Cekaj T4481.

48. The fact that Mr. Haradinaj was organising activities in Gllogjan/Glodane while activities were also being undertaken in Jabllanicë/Jablanica cannot support any inference of the emergence of a common plan to commit crimes in Jabllanicë/Jablanica.

Formation of Regional Staff: 26 May 1998

49. Indeed, when the first steps were taken to coordinate various village defences on 26 May 1998, Jabllanicë/Jablanica was not involved and did not participate in the creation of four sub-zones and a Regional Staff. Jabllanicë/Jablanica and its surrounding area (known as Dushkaja) were operating independently at this time. The evidence shows that there was only limited communication between Jabllanicë/Jablanica and the newly formed Regional Staff.

- Rustem Tetaj's evidence is that between 50 and 100 persons attended the meeting in 26 May 1998, representing about 24 villages.³² More than 80 percent of those present were in civilian clothes and did not have any weapons or military experience.³³ They "were elderly people or civilians who had led the village life for ages."³⁴ Shemsedin Çekaj testified that Ramush Haradinaj: "opened the meeting, but not as a commander of the area. If he was a commander at the time, he was a village commander."³⁵
- The meeting adopted Rustem Tetaj's proposal to create four sub-zones, which together would comprise a "Regional Staff"³⁶:
 - Zone 1 (Gllogjan/Glodane, Shaptej/Šaptelj, Dubravë/Dubrava, Baballoq/Babaloć, Prelep/Prilep, and Rastavicë/Rastavica) under the command of Ramush Haradinaj;

³²R. Tetaj, T.3631.

³³*Ibid*, T.3709:6-11.

³⁴*Ibid*, T.3709:8-9.

³⁵S. Çekaj, T.4481.

³⁶P266 (Map); R.Tetaj, T.3642-3644.

- Zone 2 (Irzniq/Rznić, Ratishë/Gornji Ratiš, Ratishë/Donji Ratiš, Beleg and Kodralija) under the command of Shemsedin Çekaj;
 - Zone 3 (Lluka e Epërme/Gornji Luka, Donja Luka/Lukë ë Ultë, Pozhar/Požar, Lumbardh/Ljumbarda, Dashinoc/Dašinovac, Vranoc e Madhe/Velika Vranovać) under the command of Rrustem Tetaj; and
 - Zone 4 (Prapaçan/Prapaçane, Isniq, Strelc/Streoc, Dubovik, Krushec/Kruševac and Rasiq/Rasić) under the command of Skender Rexhahmetaj and Gani Gjukaj.
- Neither Shemsedin Cekaj nor Rrustem Tetaj mentioned representatives from Jabllanicë/Jablanica being present at or taking part in the meeting. As was made clear in Tetaj's testimony and by the map he submitted, Jabllanicë/Jablanica was not part of any of the sub-zones formed at the 26 May meeting.³⁷ When asked specifically why Jabllanicë/Jablanica was not included in the sub-zones Mr. Tetaj explained, "*Jabllanicë/Jablanica was a separate zone so it was not included in these four subzones.*"³⁸
 - The Prosecution cites Skender Rexhahmetaj's evidence to support its claim that representatives from Jabllanicë/Jablanica did attend the meeting.³⁹ He is a new witness to be called by the Prosecution at the retrial. But his statement of 24 March 2006 states in terms that no one from Jabllanicë/Jablanica was represented at the 23 May 1998 meeting in Gllogjan/Gllođane.⁴⁰ In his subsequent witness statement he claims that Lahi Brahimaj was not at the 23 May meeting and he does not know if there was a representative from Jabllanicë/Jablanica there or not.⁴¹

³⁷R. Tetaj T.3720, P266.

³⁸*Ibid*, T.3720:17.

³⁹Prosecution's Motion for Admission of Evidence Pursuant to 92ter p. 16-17 27 June 2011 (Relevance and Summary of Evidence of Skender Rexhahmetaj)

⁴⁰ Witness Statement Skender Rexhahmetaj 24 March 2006 para. 38.

⁴¹*Ibid*, 24 September 2010 para. 13

- There is very little evidence at all connecting Jabllanicë/Jablanica to Glllogjan/Glođane - or the Regional Staff. In the minutes of all four meetings of the Regional Staff, the only reference to the Jabllanicë/Jablanica area (Dushkaja) is a single note from 8 June.⁴² The minute reads: "A new front has opened in Dushkaja. We have a request for assistance from there. The request for flour is approved, and the request for officers/commanders will be examined." There is no evidence that clarifies this note. On its face it suggests that cooperation between the Regional Staff and Jabllanicë/Jablanica was very rudimentary.
- There is no evidence that Mr. Haradinaj was present in Jabllanicë/Jablanica at any time prior to the meeting there on 23 June 1998 when the Operative Staff for the Dukagjin Plain was formed.⁴³

50. The Prosecution's assertion that "the Jabllanicë/Jablanica headquarters were represented at meetings of the Glllogjan/Glođane Regional Staff from its inception" is thus contradicted by the evidence.⁴⁴ The Regional Staff was not called the "Glllogjan/Glođane Regional Staff" – it was the staff for all four sub-zones. The only source the Prosecution cites for this allegation is a book that was authored by Bardh Hamzaj that purports to be a "dialogue" with Mr. Haradinaj. This document was tendered from the bar table and not admitted in the original trial for various reasons including that the content was of "low probative value" as the Chamber "knows little about the [hearsay] statements' context, when they were made, for which purpose and whether ... Ramush Haradinaj approved the text. They might have been given for propagandistic purposes, to mislead, or to tell the truth".⁴⁵

⁴² P126.

⁴³ See *ftnt.* 66.

⁴⁴ Prosecution Brief, para. 16.

⁴⁵ Decision on Prosecution's Motion to Tender Documents on its Rule 65*ter* Exhibit List, 30 November 2007, paras. 6-7.

51. The Prosecution intends again to tender the document from the bar table. No new evidence is being called by the Prosecution to establish the authenticity and reliability of this document. The context in which the Prosecution seeks to rely on this document has not changed. As in the original trial the Prosecution wishes to introduce the document in support of its claim that Mr. Haradinaj exercised authority over Jabllanicë/Jablanica. The reasons for its exclusion in the original trial are equally valid in the retrial. Applying the principles laid down by the Appeals Chamber in the present case, there is nothing contextually new in the retrial which could justify a different and contrary ruling from that made by the original Trial Chamber (a ruling which the Prosecution did not appeal at the time). The Haradinaj Defence will oppose the admission of this document. Even if it is accepted as an exhibit, it is of "low probative value" as it is not explained, authenticated or corroborated by any other evidence.
52. There is also no reliable evidence that shows that after the formation of the Regional Staff Mr. Haradinaj "oversaw the activities of the Jabllanicë/Jablanica headquarters".⁴⁶ The Prosecution cites the same book in support of this contention. The Prosecution also provides only one instance to illustrate this broad proposition: "on 9 June 1998, Haradinaj ensured that those who were hospitalised in Jabllanicë/Jablanica were transferred to other parts of Kosovo which had better medical facilities."⁴⁷ The document cited as the source for this apparently benign suggestion (00127) is a short hand-written note which is purportedly signed by Nazmi Brahimaj and is not addressed to anyone.⁴⁸ It states: "Today, 9 June 1998, Fazli is transferred from our dispensary facility upon the request of the /illegible/ friends, and pursuant to the request from the other zone, which has better medical facilities". There is nothing in this evidence that suggests that Mr. Haradinaj controlled or oversaw activities at Jabllanicë/Jablanica. The Prosecution is "clutching at straws" by using this

⁴⁶ Prosecution Brief, para. 16.

⁴⁷ *Ibid*, para. 16.

⁴⁸ *Ibid*, fnt. 76 and 77.

evidence to try to support its case that Mr. Haradinaj was controlling Jabllanicë/Jablanica in a “hands on” way.

53. The Prosecution also cite the evidence of Witness 3 to support this allegation.⁴⁹ They provide no reference to his statement or transcript. In fact, Witness 3 does not say anything about this hand-written note or Mr. Haradinaj’s activities in Jabllanicë/Jablanica. He testified that he did not know who Ramush Haradinaj was during the war.⁵⁰

Formation of Operative Staff for Dukagjini Plain: 23 June 1998

54. Jabllanicë/Jablanica was only incorporated into a rudimentary joint command structure as a result of the formation of the Dukagjini Operational Zone at meetings held between 21-24 June 1998. This initiative was not proposed by Mr. Haradinaj, but by Skender Rexhahmetaj.⁵¹ The Prosecution is calling Skender Rexhahmetaj as a new witness at the retrial. His evidence confirms that of Mr. Tetaj and Mr. Cekaj who were present when the Regional Staff was formed and when the Operational Zone was established:

- the purpose of the meeting of 23 June was to “co-ordinate activities, exchange experiences and arrange a single command.”⁵² For the first time the staffs of Reka, Jabllanicë/Jablanica, and Baran/Barane, together with the staffs from the sub-zones were represented in one meeting.
- It was unanimously agreed by all at the meeting to merge the separate staffs represented and to form the Operative Staff of the Dukagjin Plain.⁵³

⁴⁹*Ibid*, fnt. 77.

⁵⁰Witness 3 T.7965:5.

⁵¹Statement Skender Rexhahmetaj, 24 September 2010, para. 16.

⁵²P142, p. 1(ET).

⁵³P142, p. 2(ET).

- By a process of nomination and election, a staff structure was formed with Ramush Haradinaj as commander and Lahi Brahimaj as deputy commander.⁵⁴ Rrustem Tetaj nominated Mr. Haradinaj.⁵⁵
- Some of the titles given to persons on the staff were “fictitious” and aspirational.⁵⁶ For example, Skender Rexhajmetaj given responsibility for “anti-armoured unit combat” and Muhamet Berisha was to be in charge of “chemical and biological defence.”⁵⁷ Rrustem Tetaj testified, “[T]he titles are good on paper, but they are, indeed, a bit bloated.”⁵⁸

55. Despite the creation of Operative Staff, the KLA did not function as a regular army with a vertical command structure. The evidence does not establish that after this meeting Mr. Haradinaj exercised day-to-day operational command in Jabllanicë/Jablanica.

- Cufë Krasniqi testified that through June and July 1998 leading villages such as Glllogjan/Glođane, Jabllanicë/Jablanica, Prapaçan/Prapaçane, Bardhaniq/Bardnoniç and Baran/Barane each operated independently because the KLA had no means or possibility to communicate with each other.⁵⁹ Communication took place via courier and villages coordinated and helped each other where they could. He testified that during this time each village had its own leaders and its own command that led the village.⁶⁰ Villages would voluntarily help each other if they needed assistance but the witness's testimony is very clear that through July 1998 a horizontal command structure existed where leading villages such as Jabllanicë/Jablanica, Prapaçan/Prapaçane, Baran/Barane and

⁵⁴P142, pp 3-4(ET).

⁵⁵R. Tetaj, T.3743; P142, p. 3(ET).

⁵⁶*Ibid*, T.3745.

⁵⁷P141, p. 8; R. Tetaj, T.3744-3745.

⁵⁸R. Tetaj T.3745:11-12; R. Tetaj T.3650:13.

⁵⁹C. Krasniqi T.5733;T.5734; T.5807-T.5809.

⁶⁰*Id.* at T.5737:9.

Glllogjan/Glodane operated independently.⁶¹

- Similarly, Rrustem Tetaj testified that although part of the purpose for the 21 and 23 June meetings was to address the lack of coordination and communication between groups on the ground,⁶² the possibilities of consulting with Mr. Haradinaj thereafter concerning military operations were very few.⁶³
- Jakup Krasniqi commented: “The responsibility in the way we were organised was quite difficult to be taken upon by the commander of the zone, because every zone was divided in physical terms because the largest part of Kosova was occupied by the Serbian police and military forces. And in many zones, the units acted separately. So there wasn’t a proper organisation and regular communication, so the possibility to discipline in the entire space was impossible.”⁶⁴
- Mr. Krasniqi’s evidence is that until August 1998, the KLA had no rigid hierarchical structure, but a horizontal command structure, and communication between KLA groups was limited.⁶⁵
- There is no reliable evidence that Mr. Haradinaj frequently visited Jabllanicë/Jablanica. The evidence shows that he was only present in Jabllanicë/Jablanica on four occasions during the period of the Indictment⁶⁶ and that he never went to the barracks where persons allegedly were detained.⁶⁷

⁶¹C.Krasniqi, T.5808.

⁶²R. Tetaj, T.3738:7.

⁶³*Ibid*, T.3665:3.

⁶⁴J. Krasniqi, T.4970.

⁶⁵P340 (Jakup Krasniqi, Limaj et al. transcript, 10-12 February 2005), pp. 3350-3351, 3454-3455.

⁶⁶The dates were: (i) 23 June to attend the meeting at which the Operative Staff of the Dukagjini Plain was established, (ii) 1 July to attend a meeting of the newly formed Operative Staff, (iii) mid-July to attend a meeting with members of the General Staff including Bislim Zyrapi and Jakup Krasniqi, and (iv) mid to late July when he drove there with Rrustem Tetaj to intervene over the detention of Skender Kuqi.

⁶⁷See Defence Closing Brief in original trial, paras. 781-782.

- Haradinaj did issue an order to remove Lahi Brahimaj as Deputy Zone Commander and appointing Nazmi Brahimaj in his place.⁶⁸ Whilst this order reflects his authority over the appointments to the joint structure that had been created on 23 June, it does not imply close knowledge (or *de facto* control over) the activities of those based at Jabllanicë/Jablanica, and it certainly does not imply any knowledge of the detention and ill-treatment of any persons at Jabllanicë/Jablanica.
- There is no evidence that Mr. Haradinaj issued any orders or instructions in relation to Jabllanicë/Jablanica or authorised anyone to issue any such documents.
- The Trial Chamber found on the basis of this evidence that: “The Trial Chamber has received no evidence about who decided to establish the detention facility, when such a decision was taken, and for what purpose it was established. The Trial Chamber has received little evidence about the involvement of KLA soldiers from outside of Jabllanicë/Jablanica in the events that took place in the compound. A notable exception ... is the intervention of Ramush Haradinaj and Rustem Tetaj in order to have Skender Kuqi released from detention”⁶⁹ It held that the evidence is “insufficient to infer the existence of the common criminal objective, shared by the Accused, as alleged by the Prosecution”.⁷⁰

⁶⁸ P168.

⁶⁹ Trial Judgment, para. 476.

⁷⁰ *Ibid*, para. 476.

Military police and regulations

56. The Prosecution alleges that Mr. Haradinaj issued MP Regulations on 21 June 1998 which included taking measures against perceived KLA opponents.⁷¹ Once again, the Prosecution has misrepresented the evidence of its own witnesses. Rrustem Tetaj's evidence is that a military police unit was not in fact formed at this point.⁷² As the minutes of the meeting record, there was a preliminary discussion of this proposal.⁷³ There is no basis at all to conclude that individuals detained at Jabllanicë/Jablanica by individuals "in MP uniforms" bears any relation to these draft proposals.⁷⁴ It must also be taken into account that another of the Prosecution's witnesses, Pjeter Shala, testified that he joined a "so-called" police unit in Jabllanicë/Jablanica which was autonomous and reported to the local staff in Jabllanicë/Jablanica.⁷⁵

Checkpoints and travel authorisations

57. The Prosecution alleges that Mr. Haradinaj targeted perceived opponents by requiring travel authorisations.⁷⁶ This evidence does not prove that Mr. Haradinaj was involved in any way with the crimes alleged to have been committed at Jabllanicë/Jablanica. One of the sources cited by the Prosecution is Witness 17's evidence that he was stopped by "Toger" in early July in Irzniq/Rznić and asked whether he had permission to be there. He reacted by showing Toger a Kalashnikov and some hand grenades, saying that these weapons were all the permission he needed.⁷⁷ Witness 17 accepted in cross-examination that it was his own reaction that caused the incident.⁷⁸ He said that he told Toger that he was a commander, that he had permission to move around the area, and that nobody

⁷¹ Prosecution Brief, para. 68.

⁷² R. Tetaj, T.3740:3.

⁷³ P140, p. 3. The Regulations (P893) were not signed.

⁷⁴ Prosecution Brief, para. 68.

⁷⁵ P. Shala, T.9956-9963, and see P1187 (Regulations for military police).

⁷⁶ Prosecution Brief para. 67.

⁷⁷ P885, para. 40; Witness 17, T.7572:22-7573:16.

⁷⁸ Witness 17, T.7573:3.

could stop him.⁷⁹ Some days later Witness 17 reported this incident to Ramush Haradinaj and demanded that Toger be dismissed or disciplined for it.⁸⁰ According to Witness 17, Mr. Haradinaj responded by saying, “it wasn’t a good thing from your side to do, to show him your weapon”. Nonetheless, he agreed to speak to Toger about it.⁸¹

58. There is no basis for criticising Mr. Haradinaj’s response. Toger neither used nor threatened violence. It was Witness 17 who reacted in a confrontational manner by showing an automatic weapon in response to a request which he perceived to be a challenge to his authority. This evidence clearly does not show that Mr. Haradinaj condoned violent behaviour, yet the Prosecution repeatedly cites this incident to claim that Mr. Haradinaj ignored complaints about Mr. Balaj’s behaviour.⁸² The incident, harmless as it was, had nothing to do with any of the alleged incidents at Jabllanicë/Jablanica.
59. There is also no reliable evidence that village guards were given “blacklists”, let alone that Mr. Haradinaj had provided such lists or had any authority over such matters.⁸³
60. Other documents referred to by the Prosecution do not show that authorisations to travel were used as part of an organised plan to target civilians in Jabllanicë/Jablanica or elsewhere.⁸⁴

⁷⁹Witness 17, T.7573:4.

⁸⁰P885, para. 51.

⁸¹Witness 17, T.7576:8-10.

⁸²Prosecution Brief, paras. 15 and 65. See paras. 68-70 below on the Black Eagles.

⁸³Prosecution Brief, para. 67. See paras. 94-96 below.

⁸⁴*Ibid*, para. 67, fnt. 218.

Mobilisation order

61. The Prosecution also relies on the order of 24 June 1998 to prove that Mr. Haradinaj is responsible for crimes committed at Jabllanicë/Jablanica.⁸⁵ A similar order was excluded by the original Trial Chamber on the basis that it was a “propagandistic appeal to join the KLA’s cause” which lacked probative value.⁸⁶ Seen in its proper context, the order of 24 June was part of a call to arms addressed to the general population, aimed at creating the impression of a functioning army. One of the Prosecution’s witnesses, Witness 17, who issued similar mobilisation orders, stated that such orders were in reality designed to ensure that individuals responded to calls for mobilisation and that any threatening measures of arrest were empty threats which could not have been carried out.⁸⁷

Summary submission

62. The Prosecution’s contention that Mr. Haradinaj exercised authority over Jabllanicë/Jablanica from 23 June 1998, and that he had done so prior to this date is not supported by the evidence. No inference can be drawn from the evidence about organisation and command within the KLA that there was any common criminal plan to detain and mistreat persons at Jabllanicë/Jablanica to which Mr. Haradinaj was a party.

⁸⁵Prosecution Brief, para. 70.

⁸⁶Decision on Prosecution’s Motion to Tender Documents on its Rule 65ter Exhibit List, 30 November 2007, para. 22.

⁸⁷Witness 17, T.7680-7687.

The alleged “association” between the Accused

Introduction

63. The Prosecution alleges that the “close association” of the Accused is a basis upon which the Trial Chamber can conclude that they acted together as part of a common criminal enterprise to detain and mistreat persons at Jabllanicë/Jablanica. The evidence cited by the Prosecution does not support this contention. Merely because persons are related to one another or operate in the same organisation cannot be a basis to conclude that they acted together to commit crimes. The Prosecution has failed to prove that a common criminal plan and enterprise existed to which Mr. Haradinaj was a party.
64. The Prosecution relies heavily on the evidence of Witness 80, Witness 81 and Shefqet Kabashi to assert that Mr. Haradinaj was present and participating with Mr. Brahimaj and Mr. Balaj in allegedly mistreating detainees. The evidence of these witnesses will be shown to be false and unreliable.⁸⁸
65. There is no other evidence from which an inference can properly be drawn that Mr. Haradinaj was working closely with any other persons as part of a joint enterprise to commit crimes at Jabllanicë/Jablanica or elsewhere. The Prosecution, for example, relies on a Serbian intelligence report from after the 24 March attack on the Haradinaj family compound.⁸⁹ The report is unsourced and of dubious provenance. It merely notes that “terrorist” groups in Jabllanicë/Jablanica and Glllogjan/Glodane are connected without explaining the nature of this alleged relationship.⁹⁰ As was found by the original Trial Chamber, little if no weight can be accorded such reports which are unsubstantiated and when the identity of the sources are not known.⁹¹

⁸⁸See Part III, below.

⁸⁹Prosecution Brief, para. 12 fnt 42.

⁹⁰P975.

⁹¹See Decision on the Admission of Zoran Stijović’s 92^{ter} Statement and Annexes, 29 November 2007, para 11; See below paras. 101-102.

Importation of weapons

66. The Prosecution alleges that Mr. Haradinaj and Mr. Brahimaj cooperated in procuring and distributing weapons.⁹² This is not an accurate representation of the evidence. The Prosecution cites the testimony of Pjeter Shala, but provides no specific reference to any part of his testimony. There is in fact no part of his testimony which shows that Mr. Haradinaj cooperated in an organised way with Mr. Brahimaj to procure weapons from Albania. There is no evidence which shows that the importation and distribution of weapons was centrally organised and coordinated. Volunteers formed groups and independently travelled to Albania on behalf of their villages to obtain weapons to protect their villages from Serb attacks.⁹³

Military activities

67. The Prosecution alleges that the Glllogjan/Glođane and Jabllanicë/Jablanica headquarters cooperated during military actions.⁹⁴ There is, however, no evidence which shows that military activities were co-ordinated in an organised way at any time during the Indictment period. As noted above, the first reference to Jabllanicë/Jablanica in any of the documents of the Regional Staff was 8 June.⁹⁵ There is no credible evidence that Mr. Haradinaj was present in Jabllanicë/Jablanica before the meeting there on 23 June to establish the Operative Staff, and he only ever visited Jabllanicë/Jablanica on three occasions thereafter.⁹⁶

⁹²Prosecution Brief, para. 12.

⁹³For example, see the evidence of Ylber Haskaj (which is admitted by agreement), P1213, para. 6. Also see evidence of Cufë Krasniqi, T.5795.

⁹⁴Prosecution Brief, para. 14.

⁹⁵See para.49.

⁹⁶See fnt. 66.

Black Eagles

68. The Prosecution alleges that Mr. Haradinaj approved the creation of the Black Eagles, appointed Mr. Balaj as its commander, and used the Black Eagles to intimidate opponents.⁹⁷ The evidence does not support this allegation.
69. The Black Eagles were established as rapid reaction force which deployed in various locations.⁹⁸ As to command and deployment of the Black Eagles, Mr. Haskaj (who was a member of the unit) stated that he never saw Mr. Balaj receiving orders.⁹⁹ Witness 17's evidence is that Mr. Haradinaj did not appear to consult with Mr. Balaj on the occasions he saw them together.¹⁰⁰ Rustem Tetaj stated that Mr. Balaj was never present in the meetings he had with Mr. Haradinaj.¹⁰¹ Other witnesses were either uncertain as to who commanded and deployed the unit in reality, or had no knowledge.¹⁰²
70. The evidence does not support the allegation that the Black Eagles were engaged in any pattern of intimidation or crimes against civilians. Rustem Tetaj's evidence is that although there were rumours of the unit being involved in crimes, there was no information to substantiate them.¹⁰³

Formation of Operative Staff of the Dukagjini Plain

71. The Prosecution alleges that Mr. Haradinaj and Mr. Brahimaj nominated each other "to assume command over the Dukagjin zone".¹⁰⁴ This allegation is wrong. Rustem Tetaj's evidence is that he nominated Mr. Haradinaj as zone commander and that Mr. Selimi proposed that Mr. Brahimaj should be appointed as the

⁹⁷Prosecution Brief, para. 15.

⁹⁸See evidence of Ylber Haskaj who stated that the Black Eagles were established at a meeting in Irzniq/Rznic on 14 May 1998 (P1213, paras 10-13 and T.10334-10338).

⁹⁹P1213, para. 16.

¹⁰⁰Witness 17, T.7557.

¹⁰¹R. Tetaj, T.3669.

¹⁰²For example, B. Zyrapci T.3356-3357.

¹⁰³R. Tetaj, T.3670, T.3677-3678, T.3859.

¹⁰⁴Prosecution Brief, para. 17.

commander.¹⁰⁵ All those present then voted on the matter, electing Mr. Haradinaj as the commander and Lahi Brahimaj as Deputy Commander.

72. As submitted above, up until this meeting the KLA in Jabllanicë/Jablanica operated autonomously and independently.¹⁰⁶ Thereafter, the evidence does not demonstrate that Mr. Haradinaj controlled the day to day activities of the KLA in Jabllanicë/Jablanica. Indeed, he did not exercise effective command over the different zones that formed part of the Dukagjini Plain.¹⁰⁷ The organisation of the KLA remained de-centralised throughout the period of the Indictment. The operational realities on the ground do not support an inference of any close supervision by Mr. Haradinaj over activities in Jabllanicë/Jablanica.

Propensity to violence

73. The Prosecution alleges that Mr. Haradinaj and Mr. Balaj committed acts of violence together. The Prosecution refers to two incidents: (i) the mistreatment of four FARK soldiers on 4 July 1998 in Glllogjan/Glodane (referring to the evidence of Witness 29 and Witness 77 (a new witness whose statement is yet to be disclosed)) and (ii) ECMM monitors being taken to Glllogjan/Glodane on 11 August 1998 (referring to the evidence of Achilles Pappas).¹⁰⁸
74. The Haradinaj Defence submits that the evidence of both of these incidents should be excluded since it affords no support whatever for the allegations in the Indictment.

¹⁰⁵ R. Tetaj, T.3660, P141 and P142.

¹⁰⁶ See paras 54-55.

¹⁰⁷ See para. 55.

¹⁰⁸ Prosecution Brief, para. 21.

FARK

75. Paragraph 28(c) of the operative Indictment contains allegations about FARK forces in the Dukagjin Operational Zone and Mr. Haradinaj's alleged exclusion of such forces from the Zone in order to allow his soldiers "the ability to dominate the area and to persecute civilians". These allegations concern events far beyond the Jabllanicë/Jablanica area. On the Prosecution's own case these incidents had no relevance whatever to the alleged incidents in Jabllanicë/Jablanica. A vast amount of evidence was presented at the original trial about FARK which included its arrival as an independent armed force in Western Kosovo, its relationship to the KLA, various disputes and conflicts that occurred between the KLA and FARK, and the resolution of these conflicts. The evidence was wide-ranging and often inconsistent. None of this evidence has the slightest bearing on a JCE to commit the crimes alleged in the six Jabllanicë/Jablanica counts.
76. In its Pre-trial Brief the Prosecution seeks to rely on evidence on the record (Witness 29 and Witness 17), as well as new evidence (Witness 77), in respect of FARK. The particular FARK-related incident that the Prosecution has selected to rely on involves an alleged assault on FARK members during an early period of conflict between the two forces on 4 July 1998. The alleged victims were combatants and not civilians, and they were not detained in Jabllanicë/Jablanica or elsewhere in KLA custody when the alleged incident occurred. The Prosecution's attempt to relate this incident to the issues in the partial retrial is contrived and lacks any proper foundation. The original Trial Chamber made no reference to the evidence about this incident and made no findings of fact on it in the Trial Judgment. The Chamber clearly did not consider this evidence to be at all relevant, even as supporting evidence, to any of the crimes charged, which of course included those that are the subject of the retrial.
77. For these reasons, the original evidence concerning this incident, as well the evidence of the new witness, should be ruled inadmissible as falling outside the

scope of the counts for the retrial. It covers an alleged conflict between KLA soldiers and FARK soldiers on the opposite side of the Dukagjin Zone from Jabllanicë/Jablanica (FARK having had no involvement in the Jabllanicë/Jablanica area at all).

78. The evidence about this incident is in any event inconsistent, and the testimony of Witness 29 as to the precise involvement of Mr. Haradinaj is unreliable. The evidence shows that a confrontation occurred in Gllogjan/Glodane on 4 July 1998 when a group of FARK soldiers (including Witness 29) were stopped by KLA guards; a dispute arose because the FARK soldiers refused to take orders from the KLA; a fight broke out, shots were fired and Witness 29 received a gunshot injury to his upper arm. Mr. Haradinaj arrived after the fight had begun. The Defence denies that he drew his weapon or shot Witness 29. Mr. Haradinaj apologised for the incident at a meeting held the following day and by 10 July the differences between the two forces had been resolved, and they had been integrated into a combined force.¹⁰⁹
79. The Defence submits that this incident, regrettable though it was, does not establish or in any way support the existence of a criminal plan to mistreat civilians at Jabllanicë/Jablanica to which Mr. Haradinaj was a party. The specific nature of the incident, arising in wholly unrelated context, and in an entirely different location, does not permit any conclusion to be drawn that Mr. Haradinaj must have ordered, committed, or condoned any of the acts of violence alleged in the six Jabllanicë/Jablanica counts.

Evidence of Achilleas Pappas

80. The Haradinaj Defence opposes the admission of Mr. Pappas' evidence. He testified at the original trial about being detained at the Gllogjan/Glodane headquarters with his ECMM team members during the Serb offensive in August.

¹⁰⁹Witness 28, T.3558-3565, T.3572-3573, Witness 17 T.7626-7627.

They were driving directly into the Serbian offensive which was closing in on Gllogjan/Glodane when they were stopped by armed men. They were taken to the KLA headquarters where Mr. Pappas' interpreter was struck by these men. The interpreter told Mr. Pappas that the men suspected that they were spying for the Serbs. After about 25 minutes Mr. Haradinaj arrived and began to question them. Mr. Pappas emphasised, however, that "it was totally different, the way he was asking information or the way he was behaving."¹¹⁰ Once Mr. Haradinaj arrived, everything was "quite civilised."¹¹¹ When Mr. Pappas explained their mission, Mr. Haradinaj was "quite open" and understood.¹¹² He took them to their car, searched it for weapons, and then told them they were free to leave.¹¹³ He arranged for them to be escorted safely out of the area.¹¹⁴ Mr. Pappas confirmed that throughout this encounter Mr. Haradinaj was "absolutely calm and controlled" and that his manner was both "gentle" and "polite."¹¹⁵

81. It is obvious from the description of this particular incident that it is entirely irrelevant to the incidents alleged in Jabllanicë/Jablanica. It concerned international observers being stopped and questioned in the middle of a major Serbian offensive. The incident bears no similarity to any of the allegations about civilians being mistreated in Jabllanicë/Jablanica. There is also no reliable evidence that Mr. Balaj was present.¹¹⁶ The evidence should not be admitted in the retrial.
82. In any event, the evidence shows that Mr. Haradinaj acted entirely appropriately. His handling of the incident was exemplary. The ECMM monitors were questioned politely, permitted to leave the area, and given an escort to ensure their safety. There is no suggestion that Mr. Haradinaj was present during the alleged assault on the interpreter, or that he authorised it, condoned it, or even knew about

¹¹⁰A. Pappas, T.4132.

¹¹¹*Ibid.*, T.4132.

¹¹²*Ibid.*, T.4133.

¹¹³*Ibid.*, T.4133.

¹¹⁴*Ibid.*, T.4134.

¹¹⁵*Ibid.*, T.4303-4304.

¹¹⁶Prosecution Brief, para. 45. See A. Pappas T.4136-4150.

it. His own conduct towards the ECMM team suggests the opposite. Mr. Pappas confirmed that, despite the fact that Gllogjan/Glodane was under fire and Serb ground troops were "very close", Mr. Haradinaj behaved calmly and reasonably throughout.¹¹⁷ No inference can be drawn that Mr. Haradinaj's conduct demonstrates a propensity for violence.

Summary submission

83. None of the evidence about an alleged "close association" establishes that Mr. Haradinaj acted jointly with others as part of a common criminal enterprise to commit crimes in Jabllanicë/Jablanica as charged.

¹¹⁷A. Pappas, T.4305:1-10.

The alleged “context of violence”

Introduction

84. The Prosecution asserts that the alleged crimes at Jabllanicë/Jablanica occurred within a context of KLA violence and that evidence of violent conduct in locations other than Jabllanicë/Jablanica during the period of the Indictment is thus relevant and admissible.
85. The Haradinaj Defence opposes the admission of evidence about alleged incidents of violence in locations outside of Jabllanicë/Jablanica which have no bearing whatsoever on the alleged crimes that are the subject of the retrial.
86. In any event, the original Trial Chamber found that no KLA campaign of violence against the civilian population existed.¹¹⁸ The evidence does not show that particular incidents that took place at different times over an approximately six month period in different villages located in different parts of the Dukagjin area occurred as a result of a common criminal purpose, still less a common criminal purpose to which Mr. Haradinaj was a party.
87. The Prosecution makes the general assertion that various groupings were victimised by the KLA. It relies on a report by Colonel Crosland about the murder of six Albanians deemed Serb sympathisers, claiming that it shows that the KLA used violence against perceived opposition.¹¹⁹ However, when he was questioned about this report by the Prosecution during the *Limaj* trial, Colonel Crosland testified that although collaboration was a plausible explanation, “there was no conclusive evidence as to how they came there and who had shot them”¹²⁰.

¹¹⁸Trial Judgment, para. 478.

¹¹⁹Prosecution Brief, para. 25.

¹²⁰P69, p. 1882.

Furthermore, these bodies were found in a forest in Rahovec/Orahovac¹²¹ well outside the Indictment area.

88. In the same footnote, the Prosecution cites a situation report relating to the 24 March assault as evidence of the KLA's use of violence against perceived opposition.¹²² Yet, a substantial body of evidence shows that a fire-fight broke out around the Haradinaj compound between villagers in Glllogjan/Glodane and heavily armed Serbian Police and Military units which included the Serbian special police. Heavy weapons systems were employed by the Serb forces including the PRAGA air defence system and a BOV-3 armed personnel carrier with a triple-barrelled gun.¹²³ There is evidence that Serb military helicopters fired rockets into the village and that many houses in the village, including the Haradinaj family home were severely damaged, three Albanian teenagers were killed whilst trying to flee¹²⁴, and 130 school children were used as human shields.¹²⁵
89. The Prosecution rely on a number of other sources, none of which support the Prosecution's contention that the KLA had a policy to target civilians who were opposed to the KLA.¹²⁶ The finding of the original Trial Chamber that heard this evidence was that it "could not conclude from the direct and circumstantial evidence ... that the KLA had an objective to unlawfully remove and mistreat Serbian civilians or mistreat Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians who were, or were perceived to have been, collaborators with Serbian Forces or otherwise not supporting the KLA."¹²⁷

¹²¹P825.

¹²²00820.

¹²³00820.

¹²⁴R.Tetaj, T.3702-3703.

¹²⁵ P6 (HLC Spotlight Report No. 26), pp 14-15.

¹²⁶ Prosecution Brief, para. 26.

¹²⁷ Trial Chamber Decision para. 478.

90. As set out below, the evidence does not even show that most of the individuals allegedly detained in Jabllanicë/Jablanica were mistreated on account of being perceived as opponents of the KLA.¹²⁸
91. The Prosecution claim that the atmosphere of fear and intimidation is reflected in (i) KLA communiqués, (ii) “blacklists” of suspected persons, (iii) the use of the Military Police, (iv) contemporaneous Serb police and intelligence reports, and (iv) alleged incidents of violence.¹²⁹ Each of these allegations is addressed below. Much of this evidence is entirely irrelevant to the alleged crimes at Jabllanicë/Jablanica and the JCE as alleged to commit these crimes. The Defence will submit that this evidence should be excluded from the retrial. None of the evidence referred to by the Prosecution shows that there was a coordinated and common plan by the KLA to mistreat civilians.

KLA communiqués

92. The Prosecution refers to various KLA public statements and communiqués. None of these documents were authored by Mr. Haradinaj or issued on his authority. They do not reflect the policy of Mr. Haradinaj or the KLA in the Dukagjin area. None of the communiqués relates to any incident alleged on the Indictment in relation to Jabllanicë/Jablanica.
93. Evidence about the communiqués was given at trial which raises serious questions over their reliability and the accuracy of their contents.¹³⁰ The original Trial Chamber found that they were unreliable propaganda tools which often

¹²⁸ See, for example, Count 5 (Pal Krasniqi and Skender Kuqi) at paras. 128-140 below. See also Trial Judgement, paras. 421, 433-437.

¹²⁹ Prosecution Brief, para. 27.

¹³⁰ Jakup Krasniqi, who was the KLA spokesman of the General Staff from 11 June 1998, gave evidence and his testimony has been admitted by agreement in the retrial. There is no basis for imputing Mr. Krasniqi's opinions to Mr. Haradinaj, and he cannot be regarded as having spoken on behalf of Mr. Haradinaj. Mr. Krasniqi met Mr. Haradinaj only once during the Indictment period and there is no evidence that the communiqués was ever discussed between them (J. Krasniqi, T.5043, 5051).

exaggerated successes whereas setbacks and failures were minimised.¹³¹ The Chamber concluded that no policy of killing, kidnapping or mistreatment could be inferred from this evidence.¹³²

“Blacklists”

94. The Prosecution claims that there is reliable evidence that the KLA “blacklisted” those suspected of being disloyal. The evidence simply does not allow for such a conclusion to be drawn. Witness 17 clearly stated that he was not aware of the purpose of a list of persons (that included the name of Skender Kuqi) which had been given to him. He did not even know who had provided it to him. Witness 17’s evidence is that he did not consider the list to be evidence of any improper or criminal intentions¹³³ and confirmed that he did not inform Ramush Haradinaj that he had been given this list.¹³⁴

95. The original Trial Chamber found in relation to this list that:

“The Trial Chamber has received evidence about the eventual fate of three of the persons on the list [only Skender Kuqi is relevant to the counts for the retrial], although no evidence with regard to the remaining eight. Witness 17 did not know from whom he got the list. He could not remember whether he had received the list orally or in writing. The witness did understand that the persons were sought for but not by whom, or for what purpose, and he did not enquire. From this evidence, the Trial Chamber cannot draw conclusions about the purpose of this list, who issued the list and under what authority, about any link between the distribution of the list and the commission of crimes charged in the Indictment, or about any link between the list or any of the Accused.”¹³⁵

96. The Prosecution also allege that Rrustem Tetaj “knew of many people who had

¹³¹ Trial Judgment, para. 472.

¹³² *Ibid*, paras 472 and 478.

¹³³ Witness 17, T.7700:11-14.

¹³⁴ *Ibid*, T.7700:15-18.

¹³⁵ Trial Judgment, para. 473.

been blacklisted.”¹³⁶ This does not accurately reflect Mr. Tetaj’s testimony. Rrustem Tetaj described lists that were drawn up in villages for personal reasons and used to discredit individuals for political reasons.¹³⁷ He stated that Mr. Haradinaj was not involved in creating these lists.¹³⁸ Mr. Tetaj’s evidence is that his interactions with Mr. Haradinaj were constructive and encouraging.¹³⁹

Military Police

97. The Prosecution makes the general and unsubstantiated allegation that the “KLA MP pursued and located those opposed to the KLA.”¹⁴⁰ As to the evidence the Prosecution cites in support, the Defence repeats its submissions on the lack of any organised MP formation within the KLA in paragraph 56 above. There is no evidence that suggests that Mr. Haradinaj was authorising any MP formation to identify and locate opponents of the KLA.
98. In addition, the Prosecution has misrepresented the evidence about Rrustem Tetaj being questioned.¹⁴¹ Mr. Tetaj said that he was not mistreated in any way during his questioning.¹⁴² Mr. Tetaj did not testify that Faton Mehmetaj was a commander of the military police. He said that he did not know what position he held until 23 June and that subsequently he was in charge of contacts and information with the media.¹⁴³ It must also be taken into account that Mr. Tetaj was appointed as a sub-zone commander in the Regional Staff shortly after he was questioned.¹⁴⁴

¹³⁶ Prosecution Brief, para.31.

¹³⁷ R. Tetaj T.3671:15

¹³⁸ *Ibid*, T.3671:19

¹³⁹ *Ibid*, T.3621, T.3635-3636, T.3775-3778.

¹⁴⁰ Prosecution Brief, para. 34.

¹⁴¹ *Ibid*, para. 34.

¹⁴² As confirmed in the Trial Judgment, para. 474.

¹⁴³ R. Tetaj T.3630:7-15.

¹⁴⁴ See para. 49. above.

99. As to the allegation that Mr. Mehmetaj ordered Zenun Gashi to be brought to Glllogjan/Glodane¹⁴⁵, there is no evidence to support this assertion. The Prosecution have ignored the evidence from the original trial. There was no reliable evidence presented that Zenun Gashi was ever taken to Glllogjan/Glodane. Witness 17 only heard that a man he referred to as "Zenun LNU" had been arrested on the orders of Faton Mehmetaj. He provided no source for this information and was not able to verify it.¹⁴⁶
100. This is a prime example of the selective and piecemeal approach of the Prosecution to the evidence it cites in support of its case for the retrial. Moreover, the allegations in respect of Zenun Gashi (which formed the basis of Count 20 of the original Indictment) concern events in another part of the Dukagjin area, Barane, that are not the subject of the retrial and should thus not be admitted. Mr. Gashi's disappearance was associated with the FARK barracks at Barane, which were under the command of Witness 17, and had nothing at all to do with the KLA and which were not under the command of Mr. Haradinaj.¹⁴⁷ A substantial body of evidence was led at the original trial on the events, organisation, and personalities in Baran/Barane, all of which would have to be considered by the Trial Chamber if any part of the evidence concerning this area of activity was to be admitted at the Prosecution's request (which the Defence submits should be refused).

VJ and Serb police and intelligence reports

101. The Prosecution refers to a collection of Serb military, police and intelligence reports. The Defence submits that none of these documents can be given any weight. They include vague and unsourced allegations which do not provide any evidence in support of the generalised claims (such as "terrorist ... are ... increasing their activities aimed at frightening the Serb population"). The

¹⁴⁵ Prosecution Brief, para. 34.

¹⁴⁶ Witness 17, T.7604, T.7705, T.7707.

¹⁴⁷ See paras. 54-55 above. 14 January 2008, Final Trial Brief, paras. 80-91, 472-500, 662-663.

documents constitute anonymous hearsay and the reliability of the source cannot be tested or verified. They provide no information about who it is alleged may be involved in the unlawful activities.

102. Moreover, the MUP and intelligence reports relied on must be viewed with great caution. The original Trial Chamber heard evidence from Serb MUP and intelligence officers themselves that information was obtained for such reports by illegal methods which included bribery, blackmail, threats and beatings.¹⁴⁸ The Prosecution is seeking to introduce certain documents that were excluded from the original trial on these grounds. As set out in its Responses to the Prosecution's motions for the admission of such evidence (which have been filed today), the Defence opposes their admission. To the extent that the Prosecution seeks to admit any new documents of a similar character the Defence will object to their admission during the trial.¹⁴⁹

Alleged incidents of violence outside of Jabllanicë/Jablanica

103. The Prosecution relies on evidence of various alleged incidents that was led during the original trial which have nothing at all to do with the six Jabllanicë/Jablanica counts. The Defence's primary submission is that this evidence should be excluded on grounds of relevance.¹⁵⁰ None of this evidence in any event shows that Mr. Haradinaj participated in a JCE to commit crimes at Jabllanicë/Jablanica.
104. The Prosecution, for example, refers to the statements and testimony of members of the Stojanović family that concern their mistreatment on 18 April 1998 in Glllogjan/Glodane (charged in the original trial as Counts 3 and 4 of the Indictment). This evidence plainly cannot be relied upon in the retrial because:

¹⁴⁸ Trial Judgment, para. 19.

¹⁴⁹ The Prosecution has indicated that it will seek to introduce new documents through Zoran Stijović. See Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 27 June 2011, para. 14.

¹⁵⁰ See Defence Response to Prosecution's 92bis Motion filed today.

- The alleged incident occurred on a date before a state of armed conflict existed (on the findings of the Trial Chamber which the Prosecution accepts) and thus was not subject to International Humanitarian Law.
- The evidence relevant to Counts 3 and 4 of the original Indictment (and the considerable body of background evidence relating to the attack on 24 March 1998) has nothing whatever to do with the alleged mistreatment of civilians in Jabllanicë/Jablanica.
- The evidence is irrelevant to a JCE to commit crimes at Jabllanicë/Jablanica. The alleged attack on the Stojanović family was *sui generis*. It was common ground at the original trial that their house had been used by Serb forces (in effect, as a military facility) from which to attack the Haradinaj family compound, during the assault on the village of Gllogjan/Glođane on 24 March 1998. The beatings were alleged to be an act of opportunistic retaliation for the involvement of the Stojanović family in the Serb assault on 24 March 1998, which had resulted in the deaths of a number of young Kosovar Albanians, and the destruction of a great deal of property in the village. The incident was not alleged to have been pre-planned, and (on the original Trial Chamber's findings) it was not part of a general attack on the Serb civilian population in that area. There is no reliable evidence that Mr. Haradinaj was present at, or party to, the conduct alleged. The original Trial Chamber found on the basis of the identification evidence that it could not conclude that Mr. Haradinaj was personally involved in any way.¹⁵¹ Nor is there any allegation that Mr. Haradinaj ordered or was otherwise in command of the events which occurred.

105. The Prosecution also relies on the mistreatment of Novak Stijović and Staniša Radošević in Gllogjan/Glođane on 22 April 1998 (charged as Counts 5 and 6 at

¹⁵¹ Trial Judgment, para. 178-179.

the original trial). For the same reasons as the Stojanović allegations, the evidence of this incident should not be admitted. The evidence in any event suggests that the assaults were acts of disorganised, ill-disciplined and unauthorised mistreatment carried out by unidentified men under no clear command.¹⁵² There is no evidence that Mr. Haradinaj was present, involved in any way, or authorised any of these acts. No evidence supports a finding that these acts were committed pursuant to a common criminal plan or policy involving Mr. Haradinaj. There is no evidence that the mistreatment formed part of any general or authorised policy to attack Serb civilians.¹⁵³ Based on this evidence the original Trial Chamber found that it could not conclude that there was an objective to mistreat Serb civilians, nor that a JCE existed to do so in which Mr. Haradinaj participated.¹⁵⁴

106. As to the allegation that ECMM monitors were mistreated in Gllogjan/Glodane on 11 August 1998 the Defence repeats in its submissions above at paragraphs 80-82. The evidence is that Mr. Haradinaj treated them very politely and ensured that they were able safely to leave the area that was under a heavy attack from Serbian forces. The Prosecution's reference to Mr. Balaj being present is also not supported by reliable evidence.¹⁵⁵

Summary submission

107. The contextual evidence relied on by the Prosecution is entirely unconnected to the crimes as charged in Jabllanicë/Jablanica. To use a colloquialism, the Prosecution is seeking to "throw as much mud as it can, hoping that in the process at least some of it will stick". None of the evidence presented by the Prosecution

¹⁵²N. Stijović, T. 7172 – 7173, 7187–7188.

¹⁵³Staniša Radošević testified that he had in fact not left the area out of fear for the KLA (T.1025 and 1028). The Trial Chamber found that it could not conclude that there was any attack against the civilian population as civilians had fled "out of fear, grounded or not" of being attacked by the KLA but also because of a general fear of being caught up in a conflict between Serbian forces and the KLA (Trial Judgment, para. 477).

¹⁵⁴Trial Judgment, paras.477- 478.

¹⁵⁵Prosecution Brief, para. 45. See A. Pappas T.4136-4150.

proves that Mr. Haradinaj was acting in concert with others with the common objective of mistreating persons in Jabllanicë/Jablanica, or anywhere else.

108. The evidence taken as a whole does not support the Prosecution's central allegation that Mr. Haradinaj "significantly contributed" to a JCE to mistreat perceived collaborators and opponents of the KLA in Jabllanicë/Jablanica in order to consolidate KLA control over the Dukagjin area.

**PART 3: ALLEGATIONS IN EACH OF THE SIX
JABLLANICĚ/JABLANICA COUNTS**

COUNT 1: Ivan Zarić, Agron Berisha and Burim Bejta

109. Mr. Haradinaj is charged with the cruel treatment, torture, and killing of Ivan Zarić, Agron Berisha and Burim Bejta by virtue of acts or omissions committed as part of the JCE as alleged, or in the alternative by committing or aiding and abetting such acts.¹⁵⁶
110. As previously explained, the Prosecution seeks to call Witness 80 and Witness 81 in support of this count. The Prosecution also intends to rely on the witnesses called in the original trial, namely Witnesses 3, 31, 66, and Dragan Živanović. There is no forensic evidence in relation to this count as the remains of the three persons have never been found.
111. The Haradinaj Defence has agreed to the admission of the evidence from the original trial of the latter witnesses. The Prosecution proposes to recall Witness 3 to address one matter, a conversation he overheard about a man the Prosecution claim was Pal Krasniqi.¹⁵⁷ The Defence has received no statement from the Prosecution which details this account. The Defence reserves its position until such a statement is disclosed.
112. Based on this evidence the original Trial Chamber found that:

“... on or just before 19 May 1998, Ivan Zarić, Agron Berisha, and Burim Bejta, a Serbian and two Romas, left Dolac/Dolc on a horse-drawn cart, heading for Grabanica/Grabanicë. They were last seen in Grabanica/Grabanicë. Within days of their disappearance, relatives

¹⁵⁶Submission of Revised Fourth Amended Indictment, 21 January 2011, para. 49.

¹⁵⁷Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 27 June 2011, para. 14.

recovered the horse and cart in the possession of some children who had found the cart in Prlina/Përlinë. Their remains have not been found. Considering the fact that the men have never been seen again, the Trial Chamber accepts that they are, in all likelihood, dead. The Trial Chamber has not received any evidence about the young men being in KLA custody, or concerning the circumstances under which they died, or concerning perpetrators of the killing. The Trial Chamber has heard evidence that Grabanica/Grabanicë was under KLA control when the three young men entered the village, though it is not able to conclude whether or not they left the village again, and if so, how and when. There was ongoing military activity in the area during the time period when Ivan Zarić, Agron Berisha, and Burim Bejta allegedly disappeared. The Chamber has heard evidence of a KLA attack on Dolac/Dolc in the evening of 12 May 1998 and how Serbian forces began to shell Grabanica/Grabanicë on 19 May 1998 and eventually entered the village on 21 May 1998. Therefore, in view of the intense combat activities in the area and the lack of bodily remains, and thus a cause of death, the Trial Chamber cannot reasonably exclude the possibility that either the young men were caught up in combat activities, or that other forces or persons, unaffiliated with the KLA, were responsible for their disappearance. The Trial Chamber has heard no evidence about the alleged acts of the Accused in relation to this event, as alternatively charged. For these reasons, the Trial Chamber concludes that all three Accused should be acquitted of this count."¹⁵⁸

113. In the event that the evidence of Witness 80 and Witness 81 is heard, the issue for the retrial will be to determine the credibility and reliability of this evidence. The Haradinaj Defence's submission is that this evidence is neither credible nor reliable. The evidence of the two witnesses is wholly inconsistent and is not corroborative. There are serious reasons to doubt the truthfulness of both of these witnesses. Both have changed their accounts on key and material aspects of their evidence. Witness 81 indicated in his second statement that he had wrongly identified the perpetrator of the acts charged in Count 1 and that he had changed his account about who he claims he witnessed committing the acts.
114. There is no evidence on which the Trial Chamber can safely conclude that Mr. Haradinaj was involved in the commission of the acts as alleged in Count 1.

¹⁵⁸Trial Judgment, para. 376.

COUNT 2: Ukë Rexhepaj and Nesret Alijaj

115. Mr. Haradinaj is charged with the cruel treatment and murder of Ukë Rexhepaj and Nesret Alijaj pursuant to the JCE as alleged.
116. There is no reliable evidence that Ukë Rexhepaj and Nesret Alijaj were killed in KLA custody. The Prosecution intends to rely on Witness 54 who testified at the original trial. The Defence does not oppose the admission of testimony for the retrial. There is no forensic evidence as no remains have been found. The additional evidence that the Prosecution seeks to call at the retrial from Witnesses 78, 79, 80 and Shefqet Kabashi does not add anything to the evidence already on the record. It provides no information about what happened to these two men.
117. The original Trial Chamber concluded that:

“... on or about 20 May 1998, Ukë Rexhepaj and Nesret Alijah were taken by two armed and uniformed men, who spoke Albanian, somewhere between Grabanica/Grabanicë and Dolovo/Dollove. Ukë Rexhepaj and Nesret Alijah were never seen after this event, nor have their remains been recovered. The Trial Chamber finds that the evidence before it is insufficient to conclude that the persons who took Ukë Rexhepaj and Nesret Alijah were members of, or affiliated with, the KLA. Considering the fact that the two men have not been seen since that day, the Trial Chamber accepts that Ukë Rexhepaj and Nesret Alijah are, in all likelihood, dead. As their remains have not been recovered, expert evidence on their cause of death is absent. The Trial Chamber finds that the evidence does not allow for a conclusion beyond a reasonable doubt that Ukë Rexhepaj and Nesret Alijah have been murdered. The Trial Chamber has heard no evidence about the alleged ill-treatment and no evidence about the alleged acts of Lahi Brahimaj in relation to this event, as alternatively charged. For these reasons, the Trial Chamber concludes that all three Accused should be acquitted of this count.”¹⁵⁹

¹⁵⁹Trial Judgment, para. 379.

118. In the absence of any new evidence to be presented by the Prosecution at the retrial in relation to this count, the Defence submits that there is no basis at all to find Mr. Haradinaj criminally responsible for Count 2.

COUNT 3: Witness 6

119. The Prosecution alleges that Mr. Haradinaj is responsible for the mistreatment of Witness 6 in Jabllanicë/Jablanica pursuant to the JCE as alleged.
120. The Prosecution relies on the same evidence for this count as called at the original trial – Witnesses 6, 7, 16, and 23. The Defence does not oppose the admission of this evidence for the retrial. The Prosecution is not seeking to introduce any new evidence for this count.
121. The evidence on the record shows that Witness 6 was held at the barracks in Jabllanicë/Jablanica for a period of several weeks. There is no evidence that Mr. Haradinaj ever visited the barracks area where Witness 6 was detained, or that he knew of his detention. Witness 6 in his evidence stated that he did not recall seeing Ramush Haradinaj at the barracks at Jabllanicë/Jablanica at any time.¹⁶⁰
122. The original Trial Chamber found that Witness 6 had suffered cruel treatment and torture¹⁶¹, but acquitted Mr. Haradinaj of responsibility for these crimes.¹⁶²

¹⁶⁰Witness 6, T.5392:3-10.

¹⁶¹Trial Judgment, para. 391-92.

¹⁶²*Ibid*, para. 476.

COUNT 4: Nenad Remištar, one Bosnian and three Montenegrins

123. Mr. Haradinaj is charged with the murder, cruel treatment and torture of Nenad Remistar, an unknown individual of Bosnian ethnicity and three unknown individuals of Montenegrin ethnicity pursuant to the JCE as alleged.

Nenad Remištar

124. The Prosecution intends to rely on the same witnesses as at the original trial: Witness 73, Witness 6, and Zoran Stijović. The Defence does not oppose the admission of this evidence for the retrial.
125. The Trial Chamber held that KLA soldiers committed cruel treatment and torture against Nenad Remištar¹⁶³, but the evidence did not establish that he had died in KLA custody.¹⁶⁴

Bosnian and Montenegrins

126. The evidence in support of the crimes allegedly committed against these individuals comes entirely from Witness 6.¹⁶⁵ The Prosecution is not seeking to introduce any new evidence to prove these crimes.
127. The original Trial Chamber held that KLA soldiers committed cruel treatment against all four men.¹⁶⁶ The crime of torture was only proved in respect of the Bosnian man, where Witness 6 provided evidence that the beatings had to do with his employment in an electricity company that had interrupted power lines.¹⁶⁷ No evidence was offered as to why the others were mistreated.

¹⁶³*Ibid*, para. 402.

¹⁶⁴*Ibid*, para. 403.

¹⁶⁵ Witness 6, T.5217-5227.

¹⁶⁶ Trial Judgment, para.405.

¹⁶⁷*Ibid*, para. 406.

COUNT 5: Pal Krasniqi, Skender Kuqi, Witness 3

128. Mr. Haradinaj is charged pursuant to the alleged JCE with the cruel treatment and torture of Pal Krasniqi, Skender Kuqi and Witness 3 and for the murder of Pal Krasniqi and Skender Kuqi.¹⁶⁸ As explained above, there is no evidence of a JCE to mistreat persons at Jabllanicë/Jablanica of which Mr. Haradinaj was a party. In addition, the Defence submits that the evidence of Ramush Haradinaj's intervention to secure the release of Skender Kuqi, and the evidence of Witness 3's treatment on arrival at Gillogjan/Glođane in late July, are each inconsistent with the allegation that these men were ill-treated pursuant to a JCE in which Mr. Haradinaj participated.

Pal Krasniqi

129. The Prosecution intends to rely on the same witnesses as called at the original trial: Mahir Demaj, Witness 3, Witness 6, and Ded Krasniqi. The Defence does not oppose the admission of this evidence. In addition, the Defence makes the same admissions in respect of the forensic evidence relevant to Pal Krasniqi as at the original trial.¹⁶⁹
130. The original Trial Chamber held that Pal Krasniqi had been subjected to cruel treatment but found that torture had not been established, due to the absence of a clear discriminatory purpose for his beatings.¹⁷⁰

Skender Kuqi

131. The Prosecution intends to rely on the same witnesses as called at the original trial: Witness 3, Witness 6, Rrustem Tetaj, Cufë Krasniqi, Qerim Kuqi, and Witness 17. The Defence does not oppose the admission of this evidence.

¹⁶⁸Submission of Revised Fourth Amended Indictment, 21 January 2011, para. 63.

¹⁶⁹Joint Motion on Agreed Facts, 26 November 2007, No. 56.

¹⁷⁰Trial Judgment, para.421.

132. Rustem Tetaj's evidence is that when he heard that Skender Kuqi was being held at Jabllanicë/Jablanica, he went to Ramush Haradinaj to obtain his assistance in setting Skender Kuqi free.¹⁷¹ Mr. Haradinaj had no knowledge of the incident before this point but he accompanied Rustem Tetaj to Jabllanicë/Jablanica¹⁷² where they met with Nazmi Brahimaj.¹⁷³ Mr. Haradinaj demanded Skender Kuci's release,¹⁷⁴ saying that "no such thing should happen anymore because this is damaging our cause." This runs entirely counter to the Prosecution case that Mr. Haradinaj was party to a joint criminal enterprise to mistreat civilians detailed at Jabllanicë/Jablanica.
133. The Prosecution relies on Witness 17 to introduce a list of persons allegedly wanted by the KLA which appears to mention Skender Kuqi.¹⁷⁵ The evidence of this witness was that he did not know from whom he got the list and for what purpose persons were sought and by whom. It does not provide any support for the JCE alleged against Mr. Haradinaj. As the original Trial Chamber found, "Witness 17 did not know from whom he got the list. He could not remember whether he had received the list orally or in writing. The witness did understand that the persons were sought for but not by whom, or for what purpose, and he did not enquire."¹⁷⁶ Under the circumstances, the Trial Chamber found the list to be of limited evidentiary value.¹⁷⁷ Moreover there was (and is) no evidence whatsoever that the existence of this list was brought to Mr. Haradinaj's attention at any time.
134. The Trial Chamber held that although Skender Kuqi was ill-treated leading to his death while in KLA custody:

Ramush Haradinaj was unaware that Skender Kuqi was at the Jablanica/Jabllanicë compound until learning it from Rustem Tetaj, after which he requested that Skender Kuqi be released. Based on the

¹⁷¹ R. Tetaj, T. 3680:25-3681:1.

¹⁷² *Ibid.*, T. 3680:25-3681:1; 3682:2-3, 3778:12-16.

¹⁷³ *Ibid.*, T.3680:24-3682:14, T. 3778:19-22.

¹⁷⁴ *Ibid.*, T. 3682:3-4, 3852:9-20.

¹⁷⁵ OTP Pre-Trial Brief, para. 163.

¹⁷⁶ Trial Judgment, para. 473.

¹⁷⁷ *Ibid.*, para. 434.

evidence, the Trial Chamber cannot conclude that Ramush Haradinaj aided and abetted the cruel treatment, torture and murder of Skender Kuqi, and finds that he should be acquitted of aiding and abetting the cruel treatment, torture and murder of Skender Kuqi.¹⁷⁸

135. There is no new evidence that the Prosecution is seeking to call at the retrial that adds anything further to its case in respect of this count.

Witness 3

136. The allegations relevant to Witness 3 are largely supported by his own evidence.
137. In the original trial Mr. Haradinaj was charged with aiding and abetting the mistreatment of Witness 3 on account of Witness 3's evidence that he met a commander when taken to Glllogjan/Glođane. He was unable to say whether the commander he dealt with was Mr. Haradinaj. The Trial Chamber did not find that Mr. Haradinaj was criminally responsible for this count.¹⁷⁹ It noted that even if the commander had been Ramush Haradinaj, Witness 3 testified that in contrast to the treatment he had received at Jabllanicë/Jablanica he was treated well in Glllogjan/Glođane and was allowed to leave after a few hours. The Prosecution has removed the charge of aiding and abetting from the operative Indictment for the retrial. Mr. Haradinaj is only charged pursuant to the alleged JCE.
138. Witness 3's evidence is that when he was taken to Glllogjan/Glođane a man he described as "the commander" entered room where he was being held.¹⁸⁰ He asked Witness 3 whether he had eaten. Witness 3 replied that he was not hungry but the commander insisted that he should eat something, which he did.¹⁸¹ When Witness 3 told the commander that Lahi Brahimaj had brought him, the commander sighed and left the room.¹⁸² The commander took him into another

¹⁷⁸ *Ibid*, para. 437.

¹⁷⁹ Trial Judgment, para. 450.

¹⁸⁰ Witness 3, T.7965:5-20, T.7967:7-10.

¹⁸¹ *Ibid*, T.7965:22-7966:1.

¹⁸² *Ibid*, T.7966:5-9.

room to sleep as he did not have any relatives in Gllogjan/Glodane to stay with.¹⁸³ He was told he should not sleep close to the window because the Serbs were shelling intermittently.¹⁸⁴ The commander told Witness 3 that he would be returned to his family in Jabllanicë/Jablanica in the morning.¹⁸⁵

139. Later, he spoke to the commander in the courtyard who said to him that he would be returned to his family and he should “stay out of any dealings with the army.”¹⁸⁶ Naser and Myftar Brahimaj drove him back to Jabllanicë/Jablanica. On arrival, he spoke to Nazmi Brahimaj who repeated a similar warning and assured him “Nobody is ever going to touch you again.” The witness added that “in fact no one ever touched me again from that point onwards.”¹⁸⁷
140. Witness 3’s treatment in Gllogjan/Glodane is wholly inconsistent with the charge that he was ill-treated pursuant to a JCE involving Mr. Haradinaj.

COUNT 6: [REDACTED]

141. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Mr. Haradinaj is charged pursuant to the alleged JCE and in the alternative with ordering, instigating or aiding and abetting the commission of the crimes alleged.

142. There is no credible and reliable evidence to support any of these allegations. Witness 80 is the only main witness relied on by the Prosecution. The Prosecution has elected not to adduce the evidence from the original trial of [REDACTED]

¹⁸³ *Ibid*, T.7965:7-9.

¹⁸⁴ *Ibid*, T.7965:9-11.

¹⁸⁵ *Ibid*, T.7965:11-12.

¹⁸⁶ *Ibid*, T.7966:24-7967:12.

¹⁸⁷ *Ibid*, T.7967:20-21.

██████ Fadil Fazliu. He gave exculpatory evidence at the original trial. The Prosecution assert that even though Mr. Fazliu is still named in the Indictment as a victim, and even though he was called as a Prosecution witness at the original trial, he is not now to be regarded as a trustworthy witness. This is despite the fact that the original Trial Chamber, who heard his testimony, made no findings adverse to his credibility (see below). The reason the Prosecution is driven to take this extraordinary position in relation to one of its own witnesses is because Mr. Fazliu gave evidence directly contradicting the statement of witness 80, a witness upon whom the Prosecution now seeks to rely. Despite this, the Prosecution never applied at the original trial for him to be declared a hostile witness. The Defence submit that the Prosecution should not be permitted to present a distorted picture of the original trial record in this way, by cherry-picking a witness who makes allegations against the accused, whilst omitting a direct eyewitness upon whom they have previously relied. Moreover, it is frankly eccentric for the Prosecution to seek a conviction in respect of a crime allegedly committed against Mr. Fazliu whilst seeking at the same to prevent the Trial Chamber from admitting his evidence from the original trial record, in which he testified on oath that he was not the victim of the criminal conduct alleged. The Defence will therefore request the Trial Chamber to order that his evidence be tendered by the Prosecution as a witness who is directly relevant to Count 6 in which he is named as a victim, and in particular, who was with Witness 80 at the time of certain of the alleged incidents. Alternatively, the Defence will invite the Trial Chamber to admit the record of his testimony *ex proprio motu* prior to the conclusion of the Prosecution case.

143. Having heard his live testimony the original Trial Chamber made no finding adverse to Mr. Fazliu's credibility holding that:

The totality of the evidence points to Naser Lika and Fadil Fazliu being present both at Tal Zeka's house in Žabelj/Zhabel, and in Jablanica/Jabllanicë. However, Fadil Fazliu's evidence contradicts Witness 3's to the extent that while Fadil Fazliu confirms that the

two men did go to Jablanice/Jabllanicë in the company of KLA soldiers, he states that they went voluntarily and were at no point ill-treated or detained. Therefore, the evidence before the Trial Chamber does not allow for a conclusion beyond a reasonable doubt that in May 1998, Naser Lika and Fadil Fazliu were subjected to cruel treatment and torture.¹⁸⁸


CONCLUSION

144. The Haradinaj Defence submits that the evidence of Mr. Haradinaj's direct participation in crimes alleged on the operative Indictment is false and should be rejected. There is also no evidence that Ramush Haradinaj was party to the JCE as alleged.

Word count: 15, 123

Dated this the 19th day of July 2011,

Counsel for Mr. Ramush Haradinaj,



Ben Emmerson QC



Rodney Dixon

¹⁸⁸ Trial Judgment, para. 457.