

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-04-84bis-PT

Date: 22 July 2011

Original: English

IN TRIAL CHAMBER II**Before: Judge Bakone Justice Moloto, Presiding****Judge Burton Hall****Judge Guy Delvoie****Registrar: Mr. John Hocking****Decision: 22 July 2011****PROSECUTOR**

v.

RAMUSH HARADINAJ**IDRIZ BALAJ****LAHI BRAHIMAJ*****PUBLIC***

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF TRANSCRIPTS OF EVIDENCE IN LIEU OF VIVA VOCE
TESTIMONY PURSUANT TO 92BIS**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Accused:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj

Mr. Gregor Guy-Smith and Ms. Colleen Rohan for Idriz Balaj

Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* with Confidential Annex A” filed on 27 June 2011 (“Motion”).

I. PROCEDURAL BACKGROUND

1. On 27 June 2011 the Prosecution filed the present Motion. The Prosecution moves for the admission in written form of the evidence of 14 witnesses pursuant to Rules 54, 89(C), and 92*bis* of the Rules of Procedure and Evidence (“Rules”).¹ The Prosecution seeks to admit the transcripts of these witnesses’ prior testimonies, their statements, and associated exhibits as listed in the Motion’s confidential Annex A,² without the opportunity for cross-examination by Haradinaj, Balaj, and Brahimaj (“Defence” or “Accused”).³

2. On 11 July 2011 Ramush Haradinaj (“Haradinaj”) filed a “Response on Behalf of Ramush Haradinaj to Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis*” (“Haradinaj Response”) opposing the Motion. Also on 11 July 2011, Idriz Balaj (“Balaj”) filed “Idriz Balaj’s Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis* with Public Annex A” (“Balaj Response”) opposing the Motion on various grounds. The same day, Lahi Brahimaj (“Brahimaj”) filed confidentially the “Response to Prosecution 92*bis* Motion” (“Brahimaj Response”) adopting the submissions set out in Balaj Response.

3. On 15 July 2011 the Prosecution filed “Prosecution Request for leave to Reply and Consolidated Reply to Responses to Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis* with Confidential Annex A” (“Reply”) seeking leave to reply to Haradinaj Response and Balaj Response and making submissions in relation to three issues.

¹ Motion, para. 1.

² Motion, para. 26.

³ Motion, paras 18, 26.

II. SUBMISSIONS

A. Motion

4. The Prosecution submits that the evidence proffered meets the admissibility requirements of Rule 89(C), as it is relevant to the case, has probative value, and is reliable.⁴ It is submitted further that the evidence tendered meets the requirements for admission under Rule 92*bis*, because it does not go to prove acts and conduct of the Accused as charged in the Indictment, including their participation in the alleged joint criminal enterprise (“JCE”), their state of mind, or their intent.⁵ The Prosecution submits that the proposed transcripts, statements, and associated exhibits contain, rather, crime-base evidence.⁶

5. The Prosecution contends that the Chamber should exercise its discretion in favour of admission of the evidence tendered.⁷ It further submits that the fact that the evidence of some of the proposed Rule 92*bis* witnesses is not corroborative of other evidence should go to the weight to be attributed to the proposed evidence.⁸ The Prosecution contends that none of the factors that weigh against admission, listed in Rule 92*bis*(A)(ii), apply to the evidence.⁹ It submits that there is no “overriding public interest” in the oral presentation of the evidence, because all but two of the witnesses proposed have already testified in the original trial on the same issues forming the subject matter of the partial retrial.¹⁰ It further argues in this regard that the purpose of Rule 92*bis*(A), to avoid unnecessary expense and reduce the length of trials in situations where this will not infringe on the rights of the accused, applies to an even greater degree in the retrial context.¹¹

6. The Prosecution submits that the Chamber should not require the witnesses to appear for cross-examination.¹² It submits that several Trial Chambers have recognized that the right to cross-examination in the context of Rule 92*bis* is not absolute,¹³ and that it should be balanced against the interest in “efficient and expeditious trial proceedings.”¹⁴ It further contends that the factors which are relevant to determining whether a witness should appear for cross-examination are not present

⁴ Motion, para. 9, referring to *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to have Written Statements Admitted under Rule 92*bis*, 21 March 2002, para. 6.

⁵ Motion, para. 6.

⁶ Motion, para. 6.

⁷ Motion, para. 14.

⁸ Motion, para. 14, referring to *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92*quater*, 16 February 2007, para. 11.

⁹ Motion, para. 15.

¹⁰ Motion, para. 16.

¹¹ Motion, para. 17.

¹² Motion, para. 18.

¹³ Motion, para. 18, referring to *Prosecutor v. Blagojević*, Case No. IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003 (“*Blagojević* Decision”), para. 14.

in this case,¹⁵ and that all but two of the witnesses have already been subject to cross-examination and thus the Accused have had the opportunity to challenge their credibility.¹⁶

7. The Prosecution submits that, when testimony is admitted pursuant to Rule 92*bis*, associated exhibits should be admitted as well where they form an inseparable and indispensable part of the evidence.¹⁷ The Prosecution submits that it has only included exhibits it deems relevant and probative to the retrial, and states that the Defence is at liberty to propose the inclusion of further exhibits.¹⁸

B. Haradinaj Response

8. Haradinaj requests that the Chamber deny the Motion with respect to all proposed witnesses.¹⁹

9. Haradinaj submits that the evidence of Dragoslav Stojanović, Mijat Stojanović, Veselin Stijović, Marijana Anđelković, Vesel Dizdari, Staniša Radošević, Novak Stijović, and Witness 52 is not relevant to the charges concerning Jablanica/Jabllanicë that are the subject of the retrial, that the original Trial Chamber found none of that evidence to prove the existence of a common criminal purpose, and that “the Prosecution has not demonstrated that the evidence should be admitted as relevant to establishing the JCE as alleged in the retrial”.²⁰ With respect to the evidence of Dragoslav Stojanović, Mijat Stojanović, and Veselin Stijović Haradinaj also submits that the proposed evidence goes to the acts and conduct of the Accused.²¹ It is submitted that the forensic evidence of Branimir Aleksandrić, Nebojša Avramović, Dušan Dunjić, and Harjit Sandhu will be unnecessary as Haradinaj will make the same admissions in respect of this evidence as was agreed in the original trial for the counts in the retrial;²² and that the evidence of Witnesses 78 and 79 was not admitted to the original trial because of a lack of probative value, and that the Prosecution has not established any proper basis for its admission at the retrial.²³

10. Haradinaj requests that he be permitted to further address the Chamber in writing and/or orally on the admissibility of the evidence in light of disclosure of new evidence and any other

¹⁴ Motion, para. 23.

¹⁵ Motion, paras 19, 20, 22.

¹⁶ Motion, para. 22.

¹⁷ Motion, para. 23, referring to *Prosecutor v. Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis*, 13 November 2007, para. 15.

¹⁸ Motion, para. 25.

¹⁹ Haradinaj Response, paras 3, 15.

²⁰ Haradinaj Response, para. 3.

²¹ Haradinaj Response, para. 9.

²² Haradinaj Response, para. 3.

²³ Haradinaj Response, para. 3.

evidence presented at trial before the Chamber makes a final determination.²⁴ Haradinaj also submits that in the event that any of the evidence is admitted and in light of any new disclosure or evidence, he reserves the right to request permission to cross-examine the witnesses.²⁵

11. In the event that any of the witnesses is ruled admissible Haradinaj submits that he will notify the Prosecution of several associated exhibits not listed in the Motion's confidential Annex A for inclusion by agreement.²⁶

C. Balaj Response

12. Balaj, joined by Brahimaj, requests that the Chamber deny the Motion in its entirety.²⁷ Balaj submits that the majority of the proposed evidence is not relevant to this retrial.²⁸ It is submitted that as the JCE does not include the entirety of the KLA, neither evidence relating to the actions of KLA members outside Jablanica/Jabllanicë nor evidence relating to the "KLA's targeting and mistreatment of perceived opponents" (Balaj's emphasis) is relevant.²⁹ He further submits that the Appeals Chamber envisioned a "narrower participation" limited to Jablanica/Jabllanicë in the retrial,³⁰ and that the Prosecution must "demonstrate a nexus between any evidence about events outside Jablanica/Jabllanicë and the implementation of the JCE at Jablanica/Jabllanicë before such outside evidence is admitted".³¹ Balaj contends that admitting evidence without this nexus would "manifestly prejudice" him,³² and notes the Appeals Chamber's holding that "any potential for undue prejudice [...] should be addressed through both the Appeals Chamber's careful delineation of a retrial's parameters and the Trial Chamber's continuing duty to apply fair trial principles."³³ Balaj argues that on this basis, the evidence of all proposed Rule 92bis witnesses, with the exception of the forensic evidence related to Pal Krasniqi, is not relevant to the partial retrial.³⁴

13. Further, Balaj requests that the Chamber defer its decision on admission of the proposed evidence of four witnesses, Branimir Aleksandrić, Dušan Dunjić, Harjit Sandhu, and Nebojša Avramović. Balaj submits that the Prosecution and the Defence have been in negotiations to reach

²⁴ Haradinaj Response, para. 4.

²⁵ Haradinaj Response, para. 4.

²⁶ Haradinaj Responses, para. 14.

²⁷ Balaj Response, paras 2, 34.

²⁸ Balaj Response, para 12.

²⁹ Balaj Response, paras 15-17.

³⁰ Balaj Response, para. 24, referring to *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-AR73.1, Decision on Haradinaj's Appeal on the Scope of the Partial Retrial, 31 May 2011 ("Appeals Decision").

³¹ Balaj Response, para. 26.

³² Balaj Response, para. 26.

³³ Balaj Response, para. 25, referring to Appeals Decision, para. 26.

³⁴ Balaj Response, paras 29-33.

an agreement on some forensic evidence, including Pal Krasniqi, and requests that the Chamber's decision is deferred until these negotiations are completed.³⁵

14. In the event the Chamber admits, in whole or in part, any of the evidence proposed for admission by the Prosecution, Balaj submits that he reserves his right to re-call any of the witnesses whose evidence had been admitted in written form if necessary to preserve his right to fair trial, based on "other evidence presented, new disclosure, or any other matter arising that necessitates further questioning," and with regard to Witnesses 78 and 79, examination for the first time.³⁶ It is submitted that while the right to cross-examination is not an absolute right, it is a fundamental right and that curtailing it based on efficiency concerns is inappropriate.³⁷ If the Chamber also admits, in whole or in part, any of the evidence proposed, Balaj also moves for admission into evidence of the accompanying audio/video evidence of the admitted witnesses, in order for the Chamber to be able to fully assess their candour, demeanour, and responsiveness or unresponsiveness to questioning by the parties and the original Trial Chamber,³⁸ as well as any associated exhibits listed in Annex A to Balaj Response.³⁹ He further contends that, if the Chamber admits the evidence of a witness, the Prosecution must redact portions of the testimony referring to evidence not tendered.⁴⁰

D. Reply

15. The Prosecution submits that, contrary to the Accused's submissions, all evidence proposed pursuant to Rule 92bis is relevant to the partial retrial.⁴¹ Specifically, it submits that the evidence of Witness 52, Vesel Dizdari, Marijana Anđelković, Novak Stijović, Staniša Radošević, Mijat Stojanović, Dragoslav Stojanović and Veselin Stijović is relevant and probative to proving the existence of a common criminal purpose,⁴² and contends that because the JCE is broader than the Jablanica/Jabllanicë counts of the partial retrial, it is not necessary for the Prosecution to establish a "nexus" between all evidence and the crimes at Jablanica/Jabllanicë.⁴³ The Prosecution further submits in this regard that it does not intend to "rely upon any alleged personal involvement of Haradinaj" in relation to the incidents about which these witnesses testify,⁴⁴ and that the fact that the original Trial Chamber did not rely on some of this evidence to find a common criminal purpose

³⁵ Balaj Response, paras 31, 34.

³⁶ Balaj Response, paras 11, 35.

³⁷ Balaj Response, paras 7-9, referring to *Blagojević* Decision, para. 14; International Covenant on Civil and Political Rights, Article 14(2); European Convention on Human Rights, Article 6(2).

³⁸ Balaj Response, paras 3, 5, 36.

³⁹ Balaj Response, paras 3, 27, 36, Annex A.

⁴⁰ Balaj Response, para. 28.

⁴¹ Reply, paras 2-10.

⁴² Reply, para. 2.

⁴³ Reply, paras 2-3, referring to Appeals Decision, paras 31-32, 39; *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-PT, Decision on Shortened Form of the Fourth Amended Indictment, 14 January 2011, para. 30.

⁴⁴ Reply, para. 5, referring to Haradinaj Response, paras 9, 11-12.

in the initial trial does not make that evidence irrelevant to the retrial.⁴⁵ The Prosecution submits that the “crime-base” evidence of Witnesses 78 and 79 should be admitted despite the original Trial Chamber’s decision to exclude it,⁴⁶ and that the forensic evidence (to be provided by Branimir Aleksandrić, Dušan Dunjić, Harjit Sandhu, and Nebojša Avramović) should also be admitted, as no agreement between the parties regarding this evidence has been established and the parties are not currently engaged in negotiations to agree.⁴⁷

16. The Prosecution submits that none of the proposed witnesses should be required to appear for cross-examination, emphasizing that the right to cross-examine is not absolute,⁴⁸ and noting in particular the circumstance of a retrial in which nearly all witnesses have been previously cross-examined by the Accused.⁴⁹ It contends that, in order for a Rule 92*bis* witness to be called for cross-examination, the Accused must provide concrete reasons as to why cross-examination is appropriate.⁵⁰

17. The Prosecution submits with regard to additional associated exhibits that Balaj is at liberty to propose the inclusion of any exhibit he considers appropriate.⁵¹ It does not oppose the admission of the exhibits listed in Annex A of Balaj’s Response, with the exception of Exhibit D22, which the Prosecution submits does not appear to have been admitted in the initial trial.⁵² The Prosecution does not oppose the admission of audio/visual materials of witnesses whose evidence is admitted.⁵³

III. APPLICABLE LAW

18. The admissibility of evidence, whether in written or oral form, is governed by Rule 89, which provides that the proposed evidence must fulfil the general requirements of admissibility pursuant to Rule 89, so it must be relevant and have probative value which is not substantially outweighed by the need to ensure a fair trial.⁵⁴

19. Rule 92*bis* of the Rules governs the procedure for the admission in whole or in part of a written statement or transcript of evidence of a witness in lieu of oral testimony. Rule 92*bis* was

⁴⁵ Reply, para. 6.

⁴⁶ Reply, para. 7, referring to *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Decision on the Prosecution’s Motion to Add Two Witnesses to its Witness List and to Substitute one Witness for Another, 1 November 2007, paras 7-8.

⁴⁷ Reply, paras 9-10.

⁴⁸ Reply, para. 11, referring to *Blagojević* Decision, para. 14.

⁴⁹ Reply, para. 11.

⁵⁰ Reply, para. 11.

⁵¹ Reply, para. 12.

⁵² Reply, para. 12.

⁵³ Reply, para. 13.

⁵⁴ *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 (“*Galić* Appeal Decision”), para. 31; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution for Admission of Evidence Pursuant to Rule 92*bis*, 2 October 2008, para. 10.

intended to be used to establish what has become known as “crime-base” evidence;⁵⁵ it allows statements or transcripts to be admitted in lieu of oral testimony provided that they go to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

20. “Acts and conduct of the accused” is understood as a “plain expression” that “should be given its ordinary meaning: deeds and behaviour of the accused,”⁵⁶ including in appropriate cases omissions.⁵⁷ Rule 92*bis* cannot be used to admit written statements and testimony that go to proof of acts or conduct of the accused upon which the Prosecution relies to establish that the accused, *inter alia*, himself committed any of the crimes charged; planned, instigated or ordered the crimes charged; or otherwise aided and abetted the alleged perpetrators in the planning, preparation or execution of their crimes.⁵⁸ Where the Prosecution case is that the accused participated in a joint criminal enterprise, Rule 92*bis* excludes any written statement which goes to the proof of any act or conduct of the accused upon which the Prosecution relies to establish that the accused had participated in that joint criminal enterprise, or shared with the person who actually did commit the crimes charged the requisite intent for those crimes.⁵⁹ “Conduct” necessarily includes the relevant state of mind of the accused.⁶⁰ Therefore, written statements that go to proof of acts and conduct of the accused, upon which the Prosecution relies to prove the accused’s state of mind, are not admissible under Rule 92*bis*.⁶¹ Statements which go to proof of the acts and conduct of *others* who committed the crimes which the indictment alleges that the accused is individually responsible for (*e.g.* by aiding and abetting, ordering, or instigating the others) are admissible under Rule 92*bis*.⁶²

21. Even if it determines that a written statement or transcript is not inadmissible *per se*, the Chamber may decide, as a matter of discretion, that it should not be admitted.⁶³ Where the evidence is pivotal to the Prosecution case, or where the person whose acts and conduct the written statement describes is closely proximate to the accused, it may not be fair to the accused to permit the evidence to be given in written form.⁶⁴

⁵⁵ *Galić* Appeal Decision, paras 16, 18.

⁵⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002 (“*Milošević* Trial Decision”), para. 22.

⁵⁷ *Galić* Appeal Decision, para. 11.

⁵⁸ *Galić* Appeal Decision, para. 10.

⁵⁹ *Galić* Appeal Decision, para. 10.

⁶⁰ *Galić* Appeal Decision, para. 11.

⁶¹ *Ibid.*; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Prosecution Request to Admit Written Witness Statements Pursuant to Rule 92*bis*, 22 January 2004 (“*Strugar* Decision”), para. 7.

⁶² *Galić* Appeal Decision, para. 9.

⁶³ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 11 February, 2009 (“*Đorđević* Decision”), para. 5.

⁶⁴ *Galić* Appeal Decision, para. 13; *Đorđević* Decision, para. 6.

22. Under Rule 92bis(C) the Chamber also has discretion to require a witness whose written statement or transcript is admitted under Rule 92bis(A) to nevertheless appear in court for cross-examination. This discretion is to be exercised bearing in mind the overriding obligation of the Chamber to ensure a fair trial under Articles 20 and 21 of the Statute.⁶⁵ There are several other relevant factors to be considered with regard to whether to compel appearance for cross-examination,⁶⁶ including: (i) whether, if the witness was cross-examined in previous proceedings, the cross-examination in those proceedings dealt adequately with the issues relevant to the defence in the current proceedings;⁶⁷ (ii) whether the witness was extensively cross-examined by an accused with a common interest;⁶⁸ and (iii) whether the evidence in question relates to “a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.”⁶⁹

IV. DISCUSSION

A. Preliminary issues

23. Haradinaj and Balaj submit that evidence proposed for admission by the Prosecution to establish KLA violence against perceived opponents is not relevant to the charges in the present Indictment and should not be admitted.⁷⁰ It is submitted, in particular, that KLA actions outside Jablanica/Jabllanicë are not relevant to the acts alleged to have taken place in Jablanica/Jabllanicë,⁷¹ nor to the joint criminal enterprise (“JCE”) alleged in the Indictment.⁷² Balaj submits further that based on the JCE in the Indictment, evidence that goes to proof of events beyond Jablanica/Jabllanicë must be connected to the implementation of the JCE at Jablanica/Jabllanicë to be relevant and that the Prosecution must demonstrate a nexus between any evidence about events outside Jablanica/Jabllanicë and the implementation of the JCE at Jablanica/Jabllanicë before such outside evidence is admitted.⁷³

⁶⁵ *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Decision on Prosecution’s Application to Admit Transcripts Under Rule 92bis, 23 May 2001, para. 4 (“*Sikirica* Decision”); *Strugar* Decision, para. 9.

⁶⁶ *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motions for the Admission of Written Evidence Pursuant to Rule 92bis of the Rules, 16 January 2006 (“*Martić* Decision”), para. 15.

⁶⁷ *Sikirica* Decision, para. 4; *Martić* Decision, para. 15.

⁶⁸ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92bis(D) – Foča Transcripts, 30 June 2003, para. 38; *Martić* Decision, para. 15.

⁶⁹ *Milošević* Trial Decision, paras 24-25.

⁷⁰ Haradinaj Response, para 3(a); Balaj Response, paras 12-26.

⁷¹ Haradinaj Response, para 3(a).

⁷² Balaj Response, paras 15, 16.

⁷³ Balaj Response, paras 21, 26.

24. The Chamber is not persuaded by these submissions of Haradinaj and Balaj. The Indictment⁷⁴ charges Haradinaj and Balaj with six counts of violations of the laws or customs of war allegedly committed at the Kosovo Liberation Army (“KLA”) headquarters and prison in Jablanica/Jabllanicë. The Indictment alleges that the two Accused are individually responsible for each of these acts on the basis of their alleged participation in a JCE. Brahimaj is charged with four of these counts on the basis of his participation in the JCE. The Indictment alleges that the common criminal purpose of the JCE was “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 the Serbian forces or otherwise not supporting the KLA.”⁷⁵ The Indictment further alleges that the JCE existed between on or around March 1998 and September 1998 and that its membership comprised the three Accused and other KLA soldiers who shared the intent to commit the crimes that were within the common criminal purpose of the JCE, including a number of specifically named individuals.⁷⁶ Therefore, acts and omissions relevant to establishing unlawful removal and mistreatment of Serb civilians and mistreatment of Kosovo Albanian and Roma civilians, perceived or actual collaborators or otherwise not supporting the KLA, alleged to have taken place in the Dukagjin Operational Zone of the KLA in Kosovo, between March and September 1998, are directly relevant to establishing the common criminal purpose of the alleged JCE, and are thus relevant to establishing the JCE alleged in the Indictment and to the Indictment.

25. The Chamber rejects Balaj’s argument that the Prosecution’s attempts to introduce evidence outside Jablanica/Jabllanicë contorts this Chamber’s and the Appeals Chamber’s decisions on the scope of the Indictment.⁷⁷ The Appeals Chamber recently confirmed that by ordering the partial retrial and limiting the charges on which the Accused were to be retried it did not intend to alter the scope of the alleged JCE.⁷⁸ While the Chamber can make findings on the guilt or innocence of the Accused only in respect of the six counts charged in the Indictment, the Chamber may and indeed should consider evidence going beyond the specific crime base allegations charged in counts 1 to 6 of the Indictment. The Chamber also rejects Haradinaj’s submission that since the original Trial Chamber found that none of the evidence in question proved the existence of a common criminal purpose, the Prosecution has not demonstrated the relevance of the proposed evidence.⁷⁹ Important

⁷⁴ *Prosecutor v Haradinaj et al*, Case No. IT-04-84bis-PT, Revised Fourth Amended Indictment, 21 January 2011 (“Indictment”).

⁷⁵ Indictment, para 24.

⁷⁶ Indictment, para 25.

⁷⁷ See Balaj Response, para 19.

⁷⁸ Appeals Decision, para 32.

⁷⁹ See Haradinaj Response, para 3(a).

to determining the relevance of evidence proposed for admission are the elements of the Indictment with respect to which the evidence is tendered and not whether this evidence alone can or cannot prove this allegation.

26. Finally, the Chamber notes that Rule 92*bis* protects the rights of the accused when evidence is admitted in written form, including the possibility for cross-examination where necessary to avoid prejudice to the accused. None of the Accused in their responses to the Motion makes any specific submissions regarding prejudice that may be caused in this retrial by the admission in written form without cross-examination of any of the evidence proposed by the Prosecution.

B. Evidence proposed for admission pursuant to Rule 92*bis*

1. Branimir Aleksandrić, Dušan Dunjić, Nebojša Avramović and Harjit Sandhu

27. The Prosecution seeks to tender pursuant to Rule 92*bis* the transcript of Branimir Aleksandrić in the original *Haradinaj* trial⁸⁰ and his written witness statement. It also seeks to have admitted as associated exhibits the witness's curriculum vitae, two pieces of correspondence, site reports dated 15 and 16 September 1998, two aerial photographs, and a video showing the locations of the various bodies along the Lake Radonjić/Radoniq Canal.

28. Branimir Aleksandrić, professor of forensic medicine at University of Belgrade and Director of Forensic Medicine at the Institute of Forensic Medicine in Belgrade, describes his participation as a member of the team which conducted the forensic recovery, post mortem examination, and identification of mortal remains of victims recovered from the area of Lake Radonjić/Radoniq, Đakovica/Gjakovë municipality in Kosovo, in September 1998. The remains included those of Pal Krasniqi. He describes the finding and recovery of the remains of victims, along with details of where they were found, their appearance, level of decomposition, nearby items, and other similar details.

29. The Prosecution seeks to introduce in evidence the public redacted and under seal transcripts of Dušan Dunjić's testimony in the original *Haradinaj* trial and his public redacted and under seal witness statements, pursuant to Rule 92*bis*. The Prosecution also seeks to tender the following associated exhibits: the witness's CV, an aerial view of the canal, police photographs of the canal, crime technicians' photographs of the bodies at the canal, the record of the first site visit, the report on autopsies conducted on the bodies found on 23 September 1998, and photographs of exhumations at the canal. The Prosecution seeks to tender the forensics report for body R-4 and

⁸⁰ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84-T.

photographs attached to the forensic report and the forensic report for body R-9, the original hand-written forensic report, and photographs of the body.

30. The witness, a professor at the Institute for Forensic Medicine at the University of Belgrade, testifies that in September 1998 he led the investigative forensic team that carried out the exhumations, autopsies, and identification process for a total of 39 bodies found at the Lake Radonjić/Radoniq Canal, the Ekonomija farm, and on the side of the road near Dašinovać/Dasinoc. The witness's role in the investigation was mainly related to autopsies and body identification at the Hotel Paštrik, Đakovica/Gjakovë.

31. The Prosecution further proposes for admission the public redacted and the under seal transcripts of the testimony of Nebojša Avramović in the original *Haradinaj* trial, as well as the witness's written statement, two addenda, and several of the annexes associated with it, pursuant to Rule 92bis. The witness, a Serb crime technician for the SUP in Đakovica/Gjakovë, testifies about his participation in the crime-scene investigation team working at the Lake Radonjić/Radoniq and Ekonomija farm crime scenes. Throughout the exhumation process the witness assisted the crime scene investigation team by taking photographs of human remains and evidence. He testifies that the SUP team was led to the crime scene on 9 September 1998 by Bekim Kalamashi and Zenal Aliaj, two KLA members arrested following an attack on the police. The initial examination of the scene revealed approximately 10 bodies near the canal, and another body near the Ekonomija farm. He also testifies about attacks on Serb civilians travelling the Đakovica/Gjakovë-Peć/Pejë road at night in January and February 1998, and says that by late March or early April 1998, there were no Serbs remaining in the nearby area (marked on a map) who had not been kidnapped. He further testifies that Kosovo Albanians who did not want to take up arms against the state had also been kidnapped, and that he recalled reading a report about the disappearance of policeman Nenad Remistar. The associated exhibits proposed for admission with the evidence of this witness include a map of the witness's area of responsibility, a map of the Đakovica/Gjakovë-Peć/Pejë road, an activity report from near Kodralija/Kodrali signed by Ramush Haradinaj and containing the names of KLA members arrested by the police on 3 September 1998, a diagram of the Ekonomija farm and the canal area, a written record of the site visit to Lake Radonjić/Radoniq, and photographs taken near the canal at Lake Radonjić/Radoniq. The Prosecution also seeks to tender another map of the area, two videos of the first day of the investigation of the Lake Radonjić/Radoniq crime scene and a video of the excavation of the crime scene.

32. The Prosecution also seeks to tender pursuant to Rule 92bis the transcript of Harjit Sandhu's testimony in the original *Haradinaj* trial, as well as his witness statement. The witness is an investigator for the ICTY Office of the Prosecutor and in March 2004 he coordinated with the

UNMIK Office of Missing Persons and Forensics (OMPF) and Genc Kuqi, son of Skender Kuqi, the exhumation of the remains of Skender Kuqi. On 9 March 2004 the witness, OMPF officials and a UNMIK police team were guided by Genc Kuqi to a cemetery near Dubovik village, Dečani/Deçan municipality where Genc Kuqi pointed out his father's grave, and the OMPF officials labelled it "SSA 01" and photographed the grave and the area around it. Subsequently OMPF officials handed the witness a file containing the District Court Peć/Pejë order authorizing the exhumation, a log of photos taken, the photographs as listed in the log and the autopsy report. The Prosecution seeks to tender as associated exhibits the autopsy report of Skender Kuqi and the photo log from OMPF case SSA 01.

33. The Defence raise several objections to the admissibility of the proposed evidence of these four witnesses. Haradinaj submits that he will make the same admissions in respect of this evidence as in the original trial and in light of these admissions opposes the admission of this evidence.⁸¹ Similarly, Balaj submits that the Defence and the Prosecution have been in negotiations to reach an agreement in respect of some forensic evidence and requests that a decision on the admission of this evidence is deferred until those negotiations are completed.⁸² The Chamber recalls the Prosecution's submission in its Reply that despite past efforts, the Parties have been unable to reach an agreement that will negate the need for the Prosecution to tender this evidence and at present are not engaged in negotiations to agree to this evidence.⁸³ In light of this submission the Chamber cannot deny admission of this evidence on the grounds proposed by the Defence.

34. Haradinaj and Balaj further submit that in so far as the proposed evidence relates to bodies of victims not alleged in the counts of the Indictment this evidence is inadmissible.⁸⁴ With respect to the evidence related to the remains of Zenun Gashi, Balaj also submits that he was specifically acquitted of this count in the original trial.⁸⁵ The Chamber has addressed the argument about lack of relevance of evidence going to proof of matters beyond the six counts charged in the Indictment earlier in this Decision. It reiterates that for reasons given it is unable to accept this submission.

35. In the Chamber's view the proposed transcripts of testimonies and written statements of Branimir Aleksandrić, Dušan Dunjić, Nebojša Avramović and Harjit Sandhu meet the requirements for admission pursuant to Rule 92*bis*. The evidence of Harjit Sandhu relates to the exhumation and description of the body of Skender Kuqi, one of the victims alleged in Count 5 of the Indictment. The evidence of Branimir Aleksandrić, Dušan Dunjić and Nebojša Avramović relates to the

⁸¹ Haradinaj Response, para 3(b).

⁸² Balaj Response, para 31.

⁸³ Reply, para 10.

⁸⁴ Haradinaj Response, para 3(b); Balaj Response, para 32.

⁸⁵ Balaj Response, para 33.

discovery and description of the body of Pal Krasniqi, one of the victims charged in Count 5 of the Indictment, and to his cause of death. The Chamber is satisfied that the proposed evidence is relevant to charge of murder in Count 5 of the Indictment. Part of the evidence of these three witnesses relates to the discovery and description of bodies of victims not charged in the Indictment. In the Chamber's view, to the extent that this evidence may go to proof of mistreatment of Serb, Kosovo Albanian or Roma civilians, actual or perceived collaborators with the Serbian Forces or those otherwise not supporting the KLA, taking place in the territory of Dukagjin Operational Zone of the KLA in Kosovo between March and September 1998, such evidence may be relevant to establishing the existence of the common criminal purpose alleged in paragraph 24 of the Indictment. This evidence meets the requirement of relevance provided for in Rule 89(C) of the Rules. Considering that this evidence was given under oath by persons with specialised forensic knowledge, the Chamber is satisfied that the proposed evidence is of sufficient probative value to be admitted.

36. Turning next to the requirements of Rule 92*bis* the Chamber notes that the proposed evidence of Branimir Aleksandrić, Dušan Dunjić, Nebojša Avramović and Harjit Sandhu does not go to acts and conduct of the Accused as charged in the Indictment and is admissible in written form. While the evidence goes to proof of the allegations in Count 5 of the Indictment and is thus important for the Prosecution case, the Accused have had the opportunity to test this evidence in cross-examination in the original *Haradinaj* trial. The Chamber is satisfied that in the present circumstances it will be fair to admit this evidence without the four witnesses being required to attend for cross-examination. The Chamber notes, however, that the transcripts of the testimony of Branimir Aleksandrić and Dušan Dunjić refer to photographs, autopsy reports, video materials and transcripts from other proceedings before the Tribunal, which are not proposed for admission at this stage. Without these documents, the relevant transcripts are of limited assistance to the Chamber. The Prosecution, therefore, should redact any such references from the proposed two transcripts and shall notify the Registry, the Chamber and the Defence before the transcripts are admitted into evidence, or if agreed with the Defence may tender these documents.

2. Vesel Dizdari and Witness 52

37. The Prosecution seeks to tender the transcript of Vesel Dizdari's testimony in the original *Haradinaj* trial and his written witness statement pursuant to Rule 92*bis*. The witness, an Albanian Muslim from the village of Kosurić/Kosuriq, gives evidence of the existence of KLA headquarters in the school in Barane/Baran, Peć/Pejë municipality, about him being told by military police commander Metë Krasniqi to bring Zenun Gashi to the KLA HQ in Barane/Baran, sometime before 7 September 1998, and about him showing two KLA soldiers Zenun Gashi's house where they

arrested Zenun Gashi and handed him over to commander Krasniqi at the KLA headquarters in Barane/Baran. He also testifies about commander Krasniqi ordering the witness to search Gashi's house for weapons, which the witness did not find.

38. The Prosecution also seeks to tender the confidential and public redacted versions of the transcript of Witness 52's evidence in the original *Haradinaj* trial and as an associated exhibit, Witness 52's pseudonym sheet. Witness 52 testifies about the disappearance of Zenun Gashi, a recently retired police officer, on 1 August 1998 and about events preceding this incident. Witness 52 testifies in particular that on 1 August 1998, Vesel Dizdari and two other men took Zenun Gashi away, saying that they had an order from the commander and that they would bring him back in 20 minutes but he never returned. Two or three days after Gashi's disappearance two persons, with KLA insignia, went to his house to fetch his medicine. There was a KLA headquarters in the village in the basement of a house.

39. Haradinaj opposes the admission of the evidence of Vesel Dizdari and Witness 52 on the grounds that the proposed evidence concerns events in another part of the Dukagjin area that are not the subject of the retrial, that the disappearance of Zenun Gashi was associated with the FARK barracks and had nothing to do with the KLA. He submits that a substantial body of evidence was led in the original trial, all of which would have to be considered by the Chamber if any part of the evidence concerning this area of activity was to be admitted at the Prosecution's request.⁸⁶ Balaj opposes the admission of this evidence as not relevant to the retrial.⁸⁷ For reasons given earlier in this Decision the Chamber is not satisfied that evidence that goes to proof of matters other than the allegations in Counts 1 to 6 of the Indictment should be excluded as irrelevant.

40. The proposed evidence of Vesel Dizdari and Witness 52 relates to what appears to be an unlawful removal of a former police officer from his house in Peć/Pejë municipality in Kosovo in August 1998 and is therefore relevant to the existence of a common criminal purpose as alleged in paragraph 24 of the Indictment. The proposed evidence was given by witnesses under oath in proceedings before this Tribunal and is of sufficient probative value to be admitted. The proposed evidence does not go to proof of acts and conduct of the Accused as charged in the Indictment and does not refer to a pivotal element of the Prosecution case as the incident described in the evidence is not charged as a count in the Indictment. The proposed evidence is admissible in written form. The witnesses were available for cross-examination in the original trial and the Accused have had the opportunity to cross-examine them. In the circumstances the Chamber is satisfied that the

⁸⁶ Haradinaj Response, para 10.

⁸⁷ Balaj Response, para 30.

proposed evidence of Vesel Dizdari and Witness 52 can be admitted in written form without the witnesses being required to appear for cross-examination.

3. Marijana Andelković

41. The Prosecution seeks to tender the public redacted and the under seal versions of the transcript of the testimony of Marijana Andelković in the original *Haradinaj* trial pursuant to Rule 92bis. In 1998 the witness worked as a human rights officer, filing reports for the Belgrade-based Humanitarian Law Centre. She was sent by her employer to Kosovo to prepare incident reports on alleged attacks on Serbs based on interviews with villagers. She travelled to Kosovo perhaps 18 times between February and September 1998, for up to a week at a time. The witness testified about her conversations with several dozen villagers, mainly Serbs, in municipalities including Klina/Klinë, Dečani/Deçan, Peć/Pejë, and Đakovica/Gjakovë. In these interviews, Serb civilians described incidents of, *inter alia*, shots fired at their houses, being stopped on roads, migration from villages because of fear, beatings, seizure of weapons, killings of family members, and attacks on the police. She also testified that in April 1998 she sensed and the villagers she interviewed described a general feeling of insecurity among the residents of the areas she visited and increased activity at night.

42. Haradinaj and Balaj submit that the proposed evidence is not relevant to this retrial as it is not relevant to any of the Counts charged in the Indictment, that the witness did not visit Jablanica/Jabllanicë and was not an eye witness to any of the events charged in the Indictment.⁸⁸ The Chamber has rejected this argument earlier in this Decision. The Chamber is satisfied that to the extent that the proposed evidence relates to unlawful removal or mistreatment of Serb, Kosovo Albanian or Roma civilians, actual or perceived collaborators or those otherwise not supporting the KLA, taking place in the territory of Dukagjin Operational Zone of the KLA in Kosovo between March and September 1998 the evidence is relevant to the common criminal purpose and thus relevant to the Indictment. The requirements of Rule 89(C) have been met. The proposed evidence, does not go to acts and conduct of the Accused and is not pivotal for the Prosecution case. It is, therefore, in principle admissible in written form pursuant to Rule 92bis.

43. The Prosecution seeks to tender as an associated exhibit document Rule 65ter No 00005 which consists of 22 Humanitarian Law Centre Incident Reports based on forms filled out by the witness and her colleagues. The witness was cross-examined on the incident reports during the original trial by Haradinaj and Balaj. Brahimaj declined the opportunity to cross-examine the

⁸⁸ See Haradinaj Response, para 13. See also Balaj Response, para 30.

witness. The Chamber is satisfied that in the circumstances document Rule 65ter No 00005 can be admitted into evidence.

44. The Prosecution also seeks to tender as associated exhibits two blue notebooks belonging to the witness in which she transcribed villagers' statements. The Prosecution requests that these be tendered as both "Blue Notebook" #1 and #2, and as "Marijana Andelković's Diary" Vols. 1 and 2. Each of the proposed documents is a large document consisting of multiple pages. While the B/C/S original documents appear to be the same, the draft English translations associated with them differ. Blue Notebook #1 includes a less complete translation than Diary Vol. 1, while Blue Notebook #2 includes a more complete translation than Diary Vol. 2. The Prosecution makes no submissions as to the specific parts of Marijana Andelković's evidence to which the proposed documents refer. No explanation is provided as to the differences between "Blue Notebook" #1 and #2 on the one hand and "Marijana Andelković's Diary" Vols. 1 and 2 on the other. No official translation is provided for any of the proposed four documents. The Chamber is unable in the circumstances to make a determination as to the relevance and the probative value of the proposed four documents. Documents described as "Blue Notebook" #1 and #2 and "Marijana Andelković's Diary" Vols. 1 and 2 will not be admitted into evidence at this stage. The Prosecution may seek to tender specific pages of these documents after first identifying the difference between the two sets of documents. Further, in such case, the Prosecution should identify to which pages of the transcript of Marijana Andelković's earlier testimony, the pages it seeks to tender refer. It should also provide official English translations of the documents prior to seeking their admission.

4. Mijat Stojanović, Dragoslav Stojanović and Veselin Stijović

45. The Prosecution seeks to tender the transcript of Mijat Stojanović's evidence in the original *Haradinaj* trial. The witness's family house was located in close proximity to Ramush Haradinaj's house at the border between the villages of Glodane/Gllogjan and Dubrava/Dubravë. The witness testifies about the presence of many young men in the village in the first three months of 1998, about seeing many of these young men carrying plastic bags in which, he learned, they were carrying grenades, and about vehicles bringing construction material into Haradinaj's house, under which, he found out, there were weapons. The witness testifies further about a fighting at Haradinaj's house on 24 March 1998 in which a police helicopter was used following which he and his family left their house. He testifies about his attempt to return to the village with his brother and another relative on 18 April 1998, during which fire was opened on him and the other two men, about the three men being taken to the house of Smajl Haradinaj in Glodane/Gllogjan where they were mistreated, about the role of Nasim Haradinaj and Hilmi Haradinaj (father of Ramush) in the mistreatment and about the circumstances of the witness's and the other two men's release. He

testifies to seeing Ramush Haradinaj immediately after the beatings very close to the house where he and his two relatives had been mistreated.

46. The Prosecution also seeks to tender pursuant to Rule 92bis the transcript of Dragoslav Stojanović's evidence in the original *Haradinaj* trial. The witness, a brother of Mijat Stojanović, testifies about an incident in the first three months of 1998 when he was stopped on the road by four Kosovo Albanian men and interrogated and about the shooting at the Haradinaj house on 24 March 1998. He also testifies about his attempt to return to his family house on 18 April together with his brother Mijat and another relative, when they came under fire and about the ensuing events. In particular he testifies that he and his relatives were taken to Smajl Haradinaj's house in Glodane/Gllogjan where they were beaten and that the witness was given a substance which made him faint. The witness testifies that after the beatings, while lying on the floor in a corridor in Smajl Haradinaj's house, he saw Ramush Haradinaj and that the Accused kicked him. He also describes Ramush Haradinaj as the person in charge in Smajl Haradinaj's house. The Prosecution seeks to tender as associated exhibits the following documents: a map marked by the witness, a photograph of the village of Glodane/Gllogjan, Dragoslav Stojanović's hospital release sheet, an aerial photograph of Glodane/Gllogjan and its surroundings, a photograph depicting the house of Ramush Haradinaj and a video-clip which it suggests is related to the beatings of the two Stojanović brothers and their relative.

47. The Prosecution seeks to tender the written evidence of a third witness in relation to the same events. It proposes for admission pursuant to Rule 92bis the transcript of Veselin Stijović's evidence in the *Haradinaj* trial. The witness, a relative of the Stojanović brothers, testifies that he attempted, together with Dragoslav and Mijat Stojanović, to return to the Stojanović family house in Dubrava/Dubravë in April 1998 when fire was opened on the three men, that approximately 30 men in camouflage uniforms and with KLA insignias entered the house and took the three men to a house in Glodane/Gllogjan where they were interrogated and mistreated. He also testifies about the circumstances of the witness's and his relatives' release.

48. Haradinaj opposes the admission of the evidence of the three witnesses discussed above. He submits that the proposed evidence goes to proof of his acts and conduct as it suggests that he was present at the alleged beatings. It is submitted further that the evidence about the alleged mistreatment on 18 April 1998 occurred before a state of armed conflict existed and was not subject to international humanitarian law, that this evidence and the evidence about the attack on the Haradinaj house on 24 March 1998 have no connection to the alleged mistreatment at Jablanica/Jabllanicë and that the alleged attack on the Stojanović family members is irrelevant to a JCE to commit crimes at Jablanica/Jabllanicë as the beatings were alleged to be an act of

opportunistic retaliation for the involvement of the Stojanović family in the attack on the Haradinaj house on 24 March 1998.⁸⁹ Balaj opposes the admission of the proposed evidence on the ground that it is irrelevant to the retrial.⁹⁰ In the event the Chamber admits in whole or in part this evidence Balaj proposes for admission the following documents: Dragoslav Stojanović's witness statement to OTP, two Humanitarian Law Centre incident reports, an aerial photograph and a newspaper article, in relation to Dragoslav Stojanović, and two photographs marked by Mijat Stojanović, a Humanitarian Law Centre Incident Report and the OTP proofing notes of Mijat Stojanović, in relation to Mijat Stojanović.⁹¹ The Prosecution does not oppose the admission of the documents proposed by Balaj, except for Dragoslav Stojanović's written statement to OTP which the Prosecution submits was not admitted in the original trial.⁹²

49. In the Chamber's view the evidence related to the beatings of the two Stojanović brothers and Veselin Stijović on 18 April 1998 goes to proof of mistreatment of Serb civilians not supporting the KLA, taking place in the territory of Dukagjin Operational Zone of the KLA in Kosovo between March and September 1998. The evidence is, therefore, relevant to the common criminal purpose alleged in paragraph 24 of the Indictment. The evidence of Mijat and Dragoslav Stojanović about the attack by the Serbian police on the Haradinaj house on 24 March 1998 is relevant to the context in which the beatings on 18 April took place and can assist in providing a better understanding of the relevance of the beatings to the alleged common criminal purpose. The Chamber is satisfied that this evidence is relevant and of sufficient probative value to be admitted.

50. Mijat Stojanović and Dragoslav Stojanović testify to seeing Ramush Haradinaj immediately after the beatings, in the house where the beatings took place (Dragoslav Stojanović) or in its immediate vicinity (Mijat Stojanović). There were visible traces of beatings and mistreatment on the witnesses at the time. Dragoslav Stojanović gives evidence about Ramush Haradinaj assaulting him while he was lying in the corridor of Smajl Haradinaj's house. The Chamber recalls that the Indictment alleges that Ramish Haradinaj participated in the alleged JCE, *inter alia*, by condoning and encouraging the criminal conduct of his co-Accused and other subordinates in the Dukagjin Operational Zone, at such places as the Jablanica/Jabllanicë detention facility.⁹³ The Chamber also notes that written statements that go to proof of acts and conduct of the accused, upon which the Prosecution relies to prove the accused's state of mind, are not admissible under Rule 92*bis*. The portions of Mijat Stojanović's and Dragoslav Stojanović's evidence, identified above, are, therefore, not admissible on these bases.

⁸⁹ Haradinaj Response, para 9.

⁹⁰ Balaj Response, para 30.

⁹¹ Balaj Response, Annex A.

51. A portion of the proposed evidence of Mijat Stojanović refers to the presence in large numbers of young men carrying grenades in close proximity to Ramush Haradinaj's house and about the clandestine delivery of weapons to Haradinaj's house. The Indictment alleges that Ramush Haradinaj participated in the alleged JCE, *inter alia*, "by making use of his house as a centre of operations, and by using other Haradinaj family resources and the support of his family members to further the consolidation of his power for the purpose, among others, of carrying out the JCE, including the persecution of civilians."⁹⁴ This portion of Mijat Stojanović's evidence is, therefore, not admissible under Rule 92*bis* as it goes to proof of acts and conduct of Haradinaj as charged in the Indictment.

52. For the reasons identified in paragraphs 50 and 51 of this Decision, Mijat Stojanović and Dragoslav Stojanović will be required to give their testimony *viva voce* following which the Accused will have the opportunity to cross-examine the witnesses. The Prosecution shall move for admission of the associated exhibits it proposes in relation to Dragoslav Stojanović when the witness appears in court. Balaj will have the opportunity to tender the documents he proposes for admission when Mijat Stojanović and Dragoslav Stojanović appear in court. The Chamber will admit the evidence of Veselin Stijović in written form pursuant to Rule 92*bis*.

5. Staniša Radošević and Novak Stijović

53. The Prosecution seeks to tender pursuant to Rule 92*bis* the public redacted and the under seal versions of the transcript of Staniša Radošević's testimony in the original *Haradinaj* trial. The witness, a Serb from Dašinovac/Dasinoc, Dečani/Deçan municipality, testifies that in April 1998 he visited his friends Dragoslav Stojanović, Mijat Stojanović, and Veselin Stijović in the hospital where they told him that between 15 and 18 April 1998 they had been captured by the KLA in their house, fired upon and shelled, maltreated and beaten, and then released. He also testifies that around 22 April 1998, he, his mother Rosanda Radošević, and his friend Novak Stijović, were stopped by KLA soldiers near Požar/Pozhar, Dečani/Deçan municipality and forced to drive to Glodane/Gllogjan. There, the witness and Novak Stijović were questioned, beaten, and insulted. The witness's mother and Novak Stijović were held at Glodane/Gllogjan, but the witness was released on the condition that he return with his father's and Stijović's father's hunting rifles. The witness collected his father's hunting rifle after seeing his father (Slobodan Radošević) at the family home, handed it to KLA soldiers at Požar/Pozhar, and drove to Dečani/Deçan, apparently to collect the other rifle. However, once there, he reported to the police and was treated in the hospital. The

⁹² Reply, para 12.

⁹³ Indictment, para 28(k).

⁹⁴ Indictment, para 28(d).

witness further testifies that after hearing rumours of his father's kidnapping and/or death at the hands of the KLA, he was informed around 9 September 1998 by a policeman that his father had been found dead near Dašinovac/Dasinoc; the witness identified his body at Hotel Paštrik in Đakovica/Gjakovë.

54. The Prosecution also seeks to tender the public redacted and the under seal versions of Novak Stijović's evidence in the *Haradinaj* trial pursuant to Rule 92bis. The witness, a Serb from Požar/Pozhare, Dečani/Deçan municipality, testifies that on 21 April 1998 he, Staniša Radošević, and Rosanda Radošević were arrested by KLA soldiers near Požar/Pozhar, and taken to Glodane/Gllogjane. He testifies that he and Staniša Radošević were beaten there, questioned, and told they could not return home. He testifies that he and Rosanda Radošević were held in a house in Glodane/Gllogjane for a short time and then released, while Staniša Radošević was released without being held, in order to retrieve two rifles. He also testifies that Mijat and Dragoslav Stojanović and Veselin Stijović were taken by KLA members from their home in Dubrava village to the KLA headquarters in Glodane/Gllogjane, and were beaten and mistreated, and that the witness heard of this incident from the mother of the Stojanović brothers.

55. Haradinaj opposes the admission of the evidence of Staniša Radošević and Novak Stijović for the same reasons he gives for his opposition to the admission of the evidence of Mijat Stojanović, Dragoslav Stojanović and Veselin Stijović. He submits further that in any event the evidence suggests that the assaults were acts of disorganised, ill-disciplined and unauthorised mistreatment carried out by unidentified men under no clear command and that there is no evidence that the mistreatment formed part of a policy to attack Serb civilians.⁹⁵ Balaj opposes the admission of the evidence of these two witnesses on the basis that it is not relevant to the retrial.⁹⁶ In the event the Chamber admits in whole or in part the evidence of Novak Stijović, Balaj moves for the admission into evidence of the following associated exhibits: a list of PJP members, two documents entitled, respectively "CDHRF Statement from Halil Sadikaj" and "CDHRF Statement from Kumrije Sadikaj", a photograph, and an ICG Report.⁹⁷ The Prosecution does not oppose the admission of the documents proposed by Balaj.

56. The proposed evidence of Staniša Radošević and Novak Stijović goes to proof of acts of mistreatment of Serb civilians in the Dukagjin Operational Zone in April 1998 and is thus relevant to the common criminal purpose alleged in the Indictment. The Chamber is satisfied that the proposed evidence is relevant and of probative value. The proposed evidence does not go to acts

⁹⁵ Haradinaj Response, paras 11-12.

⁹⁶ Balaj Response, para 30.

⁹⁷ Balaj Response, Annex A.

and conduct of the Accused or to a pivotal element of the Prosecution case and is admissible in written form. Haradinaj has cross-examined the witness in the original trial, Balaj and Brahimaj have waived their right to cross-examination. The Chamber is satisfied that in these circumstances it is not necessary for the two witnesses to appear for cross-examination. The Chamber is also satisfied that the associated exhibits proposed by Balaj for admission with the evidence of Novak Stijović are admissible. The Chamber notes that the transcript of the evidence of Staniša Radošević refers to an image of a KLA emblem, to maps shown to and marked by the witness and to a photograph. These documents are necessary for the better understanding of the transcript. The Prosecution, therefore, should redact any such references from the proposed transcript and shall notify, the Defence, the Chamber and the Registry accordingly, or, if agreed with the Defence, may tender the missing documents.

6. Witness 78 and Witness 79

57. The Prosecution seeks to tender pursuant to Rule 92*bis* a witness statement of Witness 79. The witness testifies about the disappearance of Uke Rexhepaj and Nesret Alijaj on 20 May 1998 in or around the village of Dolovo/Dollovë, Klina/Klinë municipality. The witness was not present when the two men were kidnapped and her description of the alleged perpetrators is based on hearsay evidence. She also gives evidence relevant to the possible motives for the kidnapping.

58. The Prosecution proposes for admission pursuant to Rule 92*bis* the witness statement of Witness 78. The witness gives evidence relevant to Uke Rexhepaj's and Nesret Alijaj's disappearance. The witness was not present at the time of the kidnapping of the two victims and his evidence is based on hearsay. He also gives hearsay evidence about sighting of Uje Rexhepaj alive after his alleged death.

59. Haradinaj opposed the admission of the evidence of Witness 78 and Witness 79 on the grounds that this evidence was not admitted in the original trial, partly on the basis that it lacked sufficient probative value, and submits that the Prosecution has not established any proper basis for its admission in the retrial.⁹⁸ Balaj makes similar submissions.⁹⁹ The Prosecution replies that the decision of the Trial Chamber in the original Haradinaj trial not to admit these two witnesses "was also informed by reasons of expediency, such as the 'orderly and timely case management' and the 'proximity of the close of the Prosecution's case.'"¹⁰⁰

⁹⁸ Haradinaj Response, para 3(c).

⁹⁹ Balaj Response, para 29.

¹⁰⁰ Reply, para 7.

60. The proposed evidence of Witness 78 and Witness 79 goes to establishing the disappearance of two victims named in Count 2 of the Indictment. Although alone this evidence may not be sufficient to prove these allegations, the proposed evidence is relevant to the Indictment and is of some probative value. It is admissible. The proposed evidence does not go to proof of acts and conduct of the Accused and is not pivotal for the Prosecution case. It can be admitted in written form pursuant to Rule 92*bis*. The evidence, however, is relevant to the allegations in Count 2 of the Indictment. Both witnesses provide description of the individuals who allegedly have kidnapped the two men, which is an important element of the Prosecution case. The witnesses did not testify in the original trial and the Defence has not had the opportunity to cross-examine the witnesses. In fairness to the Accused, Witness 78 and Witness 79 should appear in court for cross-examination.

V. DISPOSITION

For the foregoing reasons and pursuant to Rules 89, 92*bis* and 126*bis* of the Rules the Chamber:

- (1) **GRANTS** leave to the Prosecution to file a reply and takes note of the contents of the Reply;
- (2) **GRANTS** the Motion **IN PART** and **ORDERS**:
 - a. The proposed transcripts of the evidence and/or written statements of Branimir Aleksandrić, Dušan Dunjić, Nebojša Avramović, Harjit Sandhu, Vesel Dizdari, Witness 52, Marijana Anđelković, Veselin Stijović, Staniša Radošević, Novak Stijović, Witness 78, and Witness 79 will be admitted into evidence pursuant to Rule 92*bis*;
 - b. The admission into evidence of the transcripts of Branimir Aleksandrić, Dušan Dunjić, and Staniša Radošević is subject to compliance by the Prosecution with the conditions set out in paragraphs 36 and 56, respectively, of this Decision;
 - c. The admission into evidence of the written statements of Witness 78 and Witness 79 is subject to these witnesses appearing in court for cross-examination;
 - d. Mijat Stojanović and Dragoslav Stojanović shall give evidence *viva voce*;
 - e. Documents Rule 65*ter* Numbers 01109, 01113, 01114, 01115, 01116, 01135, 01260, 00005, 00380, 00381, 00382, 00384, 00385, 00389, 00405, 00412, 00414, 00416, 00418, 00452, 00453, 00454, 00455, 00366, 01254, 00620, 00623, 00624, 00625, 00630, 00643, 00645, 00646, 00648, 00649, 00654, 00667, 00668, 00669, 00670,

01218, 01219, 01220, and 01137 and documents ID 1D02-0840, 1D00-1685, 1D52-0001, 1D00-1700, 1D52-0002 will be admitted into evidence;

- f. The audio and video recordings of the testimonies of the witnesses listed in item 2(a) of this disposition should be admitted into evidence as separate exhibits;
- g. The under seal versions of the transcripts or written statements of Dušan Dunjić, Nebojša Avramović, Witness 52, Marijana Anđelković, Staniša Radošević and Novak Stijović, the audio and video recordings of their testimonies, the written statements of Witness 78 and Witness 79, and document Rule 65*ter* Number 01137 shall be admitted under seal.

(3) **REQUESTS** the Registrar to assign exhibit numbers to the admitted documents, audio and video recordings, and to the admitted written statements and transcripts, after receiving notification from the Prosecution pursuant to item 2(b) of this disposition.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-second day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]