

**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-T
Date: 26 January 2012
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 26 January 2012

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT
EVIDENCE FROM THE BAR TABLE, REVISE ITS 65 *TER*
WITNESS AND EXHIBIT LISTS AND ADMIT EVIDENCE
PURSUANT TO RULE 92 *TER***

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 M. Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

I. PROCEDURAL HISTORY

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65*ter* Witness and Exhibit Lists and admit Evidence Pursuant to Rule 92*ter*”, filed publicly with public Annexes A and B on 5 October 2011 (“Motion”), whereby the Prosecution seeks:

- (1) permission to exceed the word limit set in the Practice Direction;¹
- (2) leave to add Marlène Schnieper to its Rule 65*ter* witness list and call her pursuant to Rule 92*ter*(A) of the Rules of Procedure and Evidence (“Rules”);
- (3) the admission of Schnieper’s written statement (Rule 65*ter* number 3111), once the formalities of Rule 92*ter*(A) are complied with, the admission of an interview with Ramush Haradinaj (Rule 65*ter* number 3000) as an exhibit associated to Schnieper’s written statement, and permission for the Prosecution to conduct a limited direct examination of Schnieper;²
- (4) leave to add a signed copy of a book entitled “A Narrative about War and Freedom”, and a letter by the Haradinaj Defence dated 9 January 2007 (Rule 65*ter* numbers 3112 and 3113, respectively) to the Prosecution’s Rule 65*ter* exhibit list, and to revise and supplement Rule 65*ter* number 1276, which consists of documents obtained from the International Committee of the Red Cross’ (“ICRC”) website;³
- (5) the admission into evidence from the bar table of forensic documentation (Rule 65*ter* numbers 3060-3064), extracts of the above mentioned book (Rule 65*ter* number 3002) as identified in Annex A to the Motion, and Rule 65*ter* numbers 1276 and 3113;⁴
- (6) in the alternative, if the Chamber rejects the request to add Schnieper to the Prosecution’s witness list, the admission into evidence of Rule 65*ter* number 3000 from the bar table.⁵

¹ IT/184 Rev. 2, Practice Direction on the Length of Briefs and Motions, 16 September 2005 (“Practice Direction”), para. 5.

² Motion, paras 3, 31.

³ Motion, paras 1, 3, 14, 31.

⁴ Motion, paras 1, 14, 31.

⁵ Motion, paras 4, 32.

2. On 19 October 2011 Haradinaj filed a “Response on Behalf of Ramush Haradinaj to Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65^{ter} Witness and Exhibit Lists and Admit Evidence pursuant to Rule 92^{ter}” (“Haradinaj Response”) opposing the Motion and requesting an extension of the word limit.⁶ The same day, and on 20 October 2011, respectively, Balaj and Brahimaj joined the Haradinaj Response.⁷

3. On 26 October 2011 the Prosecution filed publicly the “Prosecution Request for Leave to Reply and Reply to Haradinaj’s Response to Prosecution Motion to Admit Evidence From the Bar Table, Revise Its 65^{ter} Witness And Exhibit Lists and Admit Evidence Pursuant to Rule 92^{ter}” (“Reply”). The Prosecution sought leave to reply to the Haradinaj and Balaj Responses, noted that the Brahimaj Response was submitted after the fourteen days period set out in Rule 126^{bis} of the Rules, and requested that the Chamber grant the Motion.⁸

4. On 2 November 2011, the Parties filed a joint submission agreeing on four forensic facts relating to Pal Krasniqi’s death.⁹ In light of this, on the same day, the Prosecution withdrew its request to admit Rule 65^{ter} number 3064, which consists of an autopsy report relating exclusively to the death of Pal Krasniqi.¹⁰

II. SUBMISSIONS

A. The Motion

5. The Prosecution seeks leave to add Swiss journalist Marlène Schnieper to its witness list.¹¹ If this request is granted, the Prosecution seeks leave to lead Schnieper’s evidence pursuant to Rule 92^{ter} and plans to tender the record of an interview Schnieper conducted with Haradinaj as associated exhibit (“Interview”), which is already on the Prosecution’s exhibit list as Rule 65^{ter} number 3000.¹² The Prosecution contends that the witness statement of Schnieper

⁶ Haradinaj Response, para. 1, fn. 1, paras 2, 34. The Haradinaj Response was initially filed publicly, but changed to confidential on 26 October 2011 as per the submitter’s notice.

⁷ *Prosecutor v. Haradinaj et al*, Case No. IT-04-84^{bis}-T, Idriz Balaj’s Joinder in the “Response on Behalf of Ramush Haradinaj to Prosecution Motion to Admit Evidence from the Bar Table, Revise Its 65^{ter} Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92^{ter}”, 19 October 2011 (“Balaj Response”), paras 3, 6; *Prosecutor v. Haradinaj et al*, Case No. IT-04-84^{bis}-T, Lahi Brahimaj’s Joinder in “Response on Behalf of Ramush Haradinaj to Prosecution Motion to Admit Evidence from the Bar Table, Revise Its 65^{ter} Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92^{ter}”, 20 October 2011 (“Brahimaj Response”), para. 3.

⁸ Reply, paras 1, 15.

⁹ *Prosecutor v. Haradinaj et al*, Case No. IT-04-84^{bis}-T, Joint Prosecution and Defence Submission on Agreed Facts With Annex, 2 November 2011 (“Agreed Facts Relating to Pal Krasniqi’s Death”), para. 1, Annex.

¹⁰ *Prosecutor v. Haradinaj et al*, Case No. IT-04-84^{bis}-T, Prosecution Submission Withdrawing Request to Admit 65^{ter} Exhibit 3064, 2 November 2011.

¹¹ Motion, para. 3.

¹² Motion, para. 3.

(Rule 65*ter* number 3111) is relevant as she authenticates the record of the Interview.¹³ The Prosecution also seeks to conduct a limited direct examination of Schnieper, which would not last longer than 45 minutes.¹⁴ It seeks to do so in order to confirm that after the Interview, Haradinaj provided her with his copy of a book which he personally signed and inscribed.¹⁵ The Prosecution has received this signed and inscribed copy of the book on 27 September 2011 and seeks to add it to its exhibit list as Rule 65*ter* number 3112.¹⁶ The Prosecution contends that there is good cause to add Schnieper to the witness list and the signed book to the exhibit list at this stage as this would allow the Chamber to hear this important evidence, and because Haradinaj has changed his view on the reliability and admissibility of this book which he now challenges.¹⁷ The Prosecution further contends that this would not unfairly prejudice the Accused as Schnieper's testimony is limited; the Accused had been in the possession of her statement since 24 February 2006 and the recordings of the Interview since 15 February 2006.¹⁸ It submits that in these circumstances, the addition of Schnieper and the signed book to the lists would not delay the proceedings and the Accused would have enough time to prepare.¹⁹ The Prosecution further makes submissions that the Interview is relevant and probative of charges in the Indictment, that the Trial Chamber in the initial trial was wrong to exclude it, and that re-litigating its admission would not unduly prejudice the Accused.²⁰

6. In relation to the Rule 65*ter* number 3002, which contains extracts from a book entitled "A Narrative about War and Freedom (Dialog with the Commander Ramush Haradinaj)" written by Bardh Hamzaj ("Book"), the Prosecution submits that it should be admitted as it discusses the following issues and, thus, is relevant and probative of the charges in the Indictment: Haradinaj's authority, including his close association with and authority over the other two Accused and his role within the KLA; Brahimaj's authority; issues important to establishing the existence of the alleged JCE; the Accused's participation in the JCE; and their liability under the alternative modes of liability alleged in the Indictment.²¹ In addition, the Prosecution submits that the tendered extracts should be admitted, and given weight, as in a letter of 9 January 2007 (Rule 65*ter* number 3113, "Letter") Haradinaj, through his counsel, accepted the authenticity and admissibility of the entire Book. He further admitted that the Book consists of a compilation of interviews conducted with him.²² Noting that Haradinaj now objects to the authenticity and admissibility of the Book, both in his Pre-Trial brief and during the Prosecution's opening statement, the Prosecution submits that the

¹³ Motion, paras 3, 26; *cf.* Reply, para. 9.

¹⁴ Motion, paras 3, 27, 30.

¹⁵ Motion, paras 3, 27.

¹⁶ Motion, paras 1, 27, 31.

¹⁷ Motion, para. 28.

¹⁸ Motion, para. 29.

¹⁹ Motion, paras 29-30.

²⁰ Motion, paras 26-27.

²¹ Motion, paras 1, 12, Annex A.

Chamber should allow the Prosecution to add the Letter to its exhibit list and should admit the Letter with the extracts from the Book.²³ The Prosecution further contends that the Letter is a sufficient basis to admit the tendered extracts of the Book.²⁴ As an additional indicator for the Book's authenticity, the Prosecution alleges that Haradinaj adopted the Book as his own during the Interview with Schnieper where Haradinaj referred to the Book as "my book".²⁵

7. As the Book was denied admission into evidence in the original trial, the Prosecution submits that pursuant to the Appeals Chamber decision,²⁶ the evidentiary decisions made in the original trial are not binding on the Chamber in the retrial.²⁷ In its submissions, the Chamber in the retrial would only be obliged to consider whether the re-litigation would be unduly prejudicial to the Accused.²⁸ The Prosecution submits that there is nothing to suggest that the re-litigation of the admission of the Book would be unduly prejudicial to the Accused.²⁹ It asserts that on the contrary, failing to admit the tendered extracts from the Book would undermine the interests of justice because highly relevant and probative evidence, coming directly from Haradinaj would be excluded.³⁰ The Prosecution submits that the decision in the original trial denying the Book's admission was plainly wrong and should not be relied upon.³¹

8. With regard to Rule 65ter number 1276, the Prosecution asserts that it consists of documentation from the ICRC's website confirming that five victims named in Counts 1 and 2 of the Indictment remain unaccounted for to date, and the date when and the place where these victims were last seen.³² The Prosecution contends that these documents are of sufficient probative value and their authenticity cannot be questioned as they had been obtained from the ICRC website.³³ With regard to its request to be allowed to revise and supplement Rule 65ter number 1276, the Prosecution avers that the originally submitted Rule 65ter number 1276 contained documentation relating to Ivan Zarić and Agron Berisha, which was last updated on 29 May 2006.³⁴ The Prosecution now seeks leave to replace these documents with more recently updated versions from the same website (31 December 2010). The Prosecution also seeks to add documentation from the ICRC website relating to Nasret Alijaj, Burim Bejta and Ukë Redžepaj, the victims named in

²² Motion, paras 1, 12-14, 28, Annex B (Rule 65ter number 3113), p. 2.

²³ Motion, paras 1, 14-15.

²⁴ Motion, para. 15.

²⁵ Motion, paras 15, 27.

²⁶ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial, 31 May 2011, paras 25-26.

²⁷ Motion, para. 16.

²⁸ Motion, para. 17.

²⁹ Motion, para. 17.

³⁰ Motion, para. 17.

³¹ Motion, para. 18.

³² Motion, paras 1, 21.

³³ Motion, para. 22.

Counts 1 and 2 of the Indictment.³⁵ The Prosecution argues that there is good cause for these additions, as it will be of benefit to the Chamber to have the most up-to-date information on the victims named in Counts 1 and 2 of the Indictment.³⁶ It alleges that the Accused are not prejudiced because the information in relation to Ivan Zarić and Agron Berisha has not changed and the documentation relating to Nasret Alijaj, Burim Bejta and Ukë Redžepaj is corroborative of evidence that is part of the retrial record.³⁷

9. The Prosecution further seeks the admission into evidence, pursuant to Rule 89(C) of the Rules, of Rule 65*ter* numbers 1276, 3060, 3061, 3062 and 3063.³⁸ The Prosecution submits that the documents being tendered meet the requirements for admission, as they are relevant and probative, and that admitting them from the bar table is in the interest of judicial economy.³⁹ The Prosecution contends that Rule 65*ter* numbers 3060 to 3063 are official forensic documents obtained from the United Nations Mission in Kosovo (“UNMIK”) which confirm the cause of death of Zenun Gashi, a victim whose death, in the Prosecution’s submission, is relevant to establishing the common purpose of the JCE.⁴⁰ The Prosecution further submits that these documents originate from an official source and, thus, their reliability is readily apparent.⁴¹ According to the Prosecution, the Parties had reached an agreement on the cause of death of Zenun Gashi during the original *Haradinaj et al.* trial which obviated the need to tender any underlying documentation.⁴² However, while an agreement was reached on the facts relating to the death of Pal Krasniqi in the present retrial, the Prosecution had been unable to reach such an agreement with the Defence on facts relating to the death of Zenun Gashi.⁴³ Hence, the Prosecution contends that Rule 65*ter* numbers 3060 to 3063 should be admitted from the bar table as there was no dispute over these numbers in the initial trial and therefore no witnesses had been listed through whom Rule 65*ter* numbers 3060 to 3063 could be tendered.⁴⁴

B. Haradinaj Response

10. Haradinaj submits that none of the extracts of the Book should be admitted from the bar table as the extracts are hearsay statements and nothing in Schnieper’s statement or other evidence before the Chamber supports the content of the Book. He alleges that Schnieper cannot provide

³⁴ Motion, paras 1, 23.

³⁵ Motion, paras 23-24.

³⁶ Motion, para. 24.

³⁷ Motion, para. 24.

³⁸ Motion, paras 1, 31.

³⁹ Motion, paras 1-2, 19-22.

⁴⁰ Motion, paras 1, 19.

⁴¹ Motion, para. 19.

⁴² Motion, para. 20.

⁴³ Motion, para. 20; Agreed Facts Relating to Pal Krasniqi’s Death.

evidence about the truth of the Book's content, or how it was compiled and from which sources.⁴⁵ Haradinaj further submits that the Prosecution did not provide any evidence to support the context and circumstances in which the information in the extracts arose, what their source was, how the information has been compiled and for what purpose.⁴⁶ Also, Haradinaj submits that the Book was not authored by him and there is no evidence that the extracts reflect his approval of the content of the Book in whole or in part.⁴⁷ According to Haradinaj's submissions, there is also no evidence to verify that the Book, even though based on interviews with him, features Haradinaj's words or views of its author, and whether its contents are true or false, or distorted for propaganda and political reasons.⁴⁸ Thus, Haradinaj contends that the Prosecution failed to meet the requirements for admissibility and to establish the *prima facie* reliability of the Book.⁴⁹

11. As for the Letter, Haradinaj submits that it was written as part of ongoing "without prejudice" discussions between the Parties in respect of potential agreed facts before the commencement of the original trial which did not result in any agreed facts.⁵⁰ Haradinaj contends that the Defence opposed any agreement of facts based on this Book and the admissibility of the Book itself.⁵¹ He further submits that the Chamber in the initial trial had denied admission of the Book because there was no evidence submitted during the trial to verify the reliability and credibility of the Book's contents.⁵² According to Haradinaj, he has made it clear from the outset of the retrial that he opposes the Book's admission.⁵³ Furthermore, even assuming that the Letter shows that Haradinaj had agreed to the admissibility of the Book (which Haradinaj contests), Haradinaj contends that on the Prosecution's own reasoning the Chamber and the Parties are not bound by what occurred in the original trial and may take a different position in the retrial.⁵⁴ Haradinaj also submits that the Prosecution has failed to explain why the Letter has not been included in its exhibit list earlier, and that the Letter does not assist the Prosecution's application to admit the Book from the bar table.⁵⁵

12. Haradinaj submits that in the Interview he made only a single reference to the Book as "my book" when discussing the attack on his family home in March 1998.⁵⁶ According to him, this does

⁴⁴ Motion, para. 20.

⁴⁵ Haradinaj Response, paras 3-4, 16-17, 19, 24, 26.

⁴⁶ Haradinaj Response, paras 4, 17, 25-26.

⁴⁷ Haradinaj Response, paras 4, 25.

⁴⁸ Haradinaj Response, paras 4, 19, 25-26.

⁴⁹ Haradinaj Response, paras 4, 25-26.

⁵⁰ Haradinaj Response, para. 27.

⁵¹ Haradinaj Response, paras 27-28.

⁵² Haradinaj Response, para. 27.

⁵³ Haradinaj Response, para. 28.

⁵⁴ Haradinaj Response, para. 28.

⁵⁵ Haradinaj Response, para. 29.

⁵⁶ Haradinaj Response, paras 17, 20.

not help to establish the truth or reliability and credibility of the content of any part of the Book that the Prosecution seeks to have admitted.⁵⁷ Haradinaj contends that his very short inscription in the Book provided to Schnieper does not show that Haradinaj adopted the contents of the Book or any particular passage of the Book.⁵⁸ Haradinaj argues that there is no other evidence in Schnieper's statement or associated exhibits to support the Prosecution's submissions with regard to the admission of the Book.⁵⁹ Haradinaj avers that Schnieper's evidence is not relevant to any other issue of the retrial.⁶⁰ Haradinaj also submits that the Prosecution failed to provide a reasonable explanation for the late admission of a new witness and evidence.⁶¹ According to him, the position of the Defence about the admissibility of the Book has been known to the Prosecution before the beginning of the retrial while this witness has been known to the Prosecution since 2005.⁶² Haradinaj avers that the Prosecution has failed to show due diligence in seeking to obtain this evidence.⁶³ He contends that allowing the Prosecution to continue to add witnesses to its list will extend the proceedings and undermine the Accused's right to an expeditious trial for no good reason.⁶⁴

13. Haradinaj contends that with the filing of the Agreed Facts Relating to Pal Krasniqi's Death, there is no need to admit documents bearing Rule 65*ter* numbers 3062 and 3063 from the bar table, on which the agreed facts are based.⁶⁵ Haradinaj opposes the admission of the forensic documents concerning the death of Zenun Gashi from the bar table as in his submission, Zenun Gashi's death is not relevant to any of the counts in the retrial.⁶⁶ With regard to Rule 65*ter* number 1276, Haradinaj submits that these documents are merely information from the internet which have not been verified by any witness. He alleges that the Chamber already received evidence about these alleged victims from their families.⁶⁷

⁵⁷ Haradinaj Response, para. 17.

⁵⁸ Haradinaj Response, para. 18.

⁵⁹ Haradinaj Response, paras 19-20.

⁶⁰ Haradinaj Response, paras 16, 22.

⁶¹ Haradinaj Response, paras 13, 21-22.

⁶² Haradinaj Response, paras 14, 21.

⁶³ Haradinaj Response, paras 16, 22.

⁶⁴ Haradinaj Response, para. 22.

⁶⁵ Haradinaj Response, para. 31; Agreed Facts Relating to Pal Krasniqi's Death.

⁶⁶ Haradinaj Response, para. 32.

⁶⁷ Haradinaj Response, para. 33.

C. Balaj and Brahimaj Responses

14. Balaj and Brahimaj joined the Haradinaj Response adopting all its submissions.⁶⁸ Balaj objects to the relevance of Zenun Gashi to the retrial.⁶⁹ Balaj also contends that the Prosecution failed to show that the admission of the evidence in question is not prejudicial.⁷⁰

D. Reply

15. The Prosecution alleges that the submissions in the Haradinaj Response contradict his own statement in the Letter about the admissibility of the Book.⁷¹ The Prosecution contends that there is nothing in the Letter to suggest that the admission of the Book's authenticity and admissibility was "without prejudice". It alleges that the admission in the Letter cannot be retracted because of the change in the Defence's trial strategy in order not to frustrate the Tribunal's truth-seeking function.⁷² The Prosecution further submits that in the Letter counsel for Haradinaj indicated that there was no need for a formal agreement on the admissibility of the Book in the initial trial as Haradinaj did not dispute its authenticity and admissibility.⁷³ The Prosecution further indicated that later in the initial trial Haradinaj did not file any response to the Prosecution's motion to admit the Book as the Chamber informed the Parties that it would not admit the Book before he was able to do so.⁷⁴ The Prosecution submits that in the light of this, and given Haradinaj's unequivocal position expressed in the Letter, it is difficult to see how Haradinaj could have opposed the Book's admission in the first trial, as he asserts.⁷⁵

16. The Prosecution argues that the issue of authenticity is a factual matter and Haradinaj's acceptance of authenticity and admissibility through his counsel is dispositive of the matter.⁷⁶ It has to be distinguished from determinations on evidentiary matters made by the Chamber in the original trial, which are in fact not binding on the Retrial Chamber.⁷⁷

17. As for the proposed new witness, the Prosecution contends that contrary to Haradinaj's argument that Schnieper's evidence is not relevant to any other issue of the retrial, the Interview is relevant for other matters of the retrial named in the Motion.⁷⁸ The Prosecution further contends that her expected evidence shows that Haradinaj, well before he was indicted by the Tribunal, had

⁶⁸ Balaj Response, paras 3, 6; Brahimaj Response, para. 3.

⁶⁹ Balaj Response, para. 4.

⁷⁰ Balaj Response, para. 5.

⁷¹ Reply, paras 2-3.

⁷² Reply, para. 4.

⁷³ Reply, para. 5.

⁷⁴ Reply, para. 6.

⁷⁵ Reply, para. 6.

⁷⁶ Reply, para. 7.

⁷⁷ Reply, para. 8.

publicly referred to the Book as “my book”, which demonstrated that he adopted and accepted the contents of the Book.⁷⁹ Also, the Prosecution contends that Schnieper’s expected evidence might assist in determining the weight of the extracts of the Book.⁸⁰ The Prosecution notes that Haradinaj expressed his new position with regard to the admissibility of the Book during the Prosecution’s opening statement and during the testimony of witness Bislim Zyrapi who was shown an extract of the Book. Thus, the Prosecution contends that it acted with diligence asking to add Schnieper to its witness list at this stage after deciding to contact her in September 2011.⁸¹ The Prosecution further submits that the addition of this new witness will not cause any unfair prejudice to the Defence as it is the only request to add a witness to its list the Prosecution submitted in the retrial.⁸² The Prosecution further submits that the addition of this single new witness will not adversely affect the Accused’s rights to an expeditious trial as her anticipated testimony would take less than one session.⁸³

18. The Prosecution further argues that Rule 65ter numbers 3060-3063 contain information relating to the cause of death of Zenun Gashi.⁸⁴ The Prosecution submits that contrary to Haradinaj’s submissions, this is relevant to the allegations in the Indictment as set out in the Chamber’s Rule 92bis decision.⁸⁵

III. APPLICABLE LAW

A. Rule 65ter Witness List

19. Pursuant to Rule 73bis(F) of the Rules, the Chamber may grant a party’s request to amend its witness list if it is satisfied that this is in the interests of justice.⁸⁶ The Chamber, however, should ensure that no prejudice will arise to the Defence as a result of the late addition of the witness.⁸⁷ In the exercise of its discretion, the Chamber shall consider the *prima facie* relevance and probative value of the proposed evidence, whether the moving party has shown good cause for

⁷⁸ Reply, para. 9.

⁷⁹ Reply, para. 9.

⁸⁰ Reply, para. 9.

⁸¹ Reply, para. 10.

⁸² Reply, para. 11.

⁸³ Reply, para. 12.

⁸⁴ Reply, para. 14.

⁸⁵ Reply, para. 14, referring to *Prosecutor v. Haradinaj et al*, Case No. IT-04-84bis-T, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to 92bis, 22 July 2011, paras 24-25, 35, 37, 40.

⁸⁶ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion for Leave to Amend its Rule 65ter Witness List, 14 May 2009 (“*Đorđević* Decision”), para. 5; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution’s Motions Regarding Rule 65ter Witness and Exhibits Lists, Rule 92ter, and Protective Measures, 30 March 2010, confidential (“*Tolimir* Decision”), para. 9.

the amendment, whether it has exercised due diligence in identifying the proposed witness, whether granting the amendment would result in undue delay, and the stage of proceedings at which the request is made.⁸⁸ Any prejudice caused by the timing of the proposed amendment may be cured by calling the witness later in the trial, thus giving the defence time to prepare.⁸⁹

B. Rule 65ter Exhibit List

20. The Chamber may, if it is satisfied that this is in the interests of justice, and in the exercise of its inherent discretion in managing the trial proceedings, grant a request for the amendment of the party's exhibit list.⁹⁰ In doing so, the Chamber must carefully balance any amendment to the list with an adequate protection of the rights of the accused, including an assessment of the extent to which the new exhibits create an additional burden for the defence.⁹¹ The Chamber must be satisfied that good cause is shown in amending the original list and that newly offered material is *prima facie* relevant, likely to be of probative value to the charges in the indictment, and of sufficient importance to justify the late addition.⁹²

C. Admission of evidence pursuant to Rule 92ter

21. The Chamber has set out the law pursuant to Rule 92ter in its Rule 92ter decision.⁹³ The Chamber recalls that the main objective of Rule 92ter is to ensure an effective and expeditious trial

⁸⁷ *Dordević* Decision, para. 5; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Leave to Amend its Witness List to Add One Fact Witness, 19 February 2010, confidential ("*Karadžić* Decision"), para. 5.

⁸⁸ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Prosecution Motion to Amend Rule 65ter Witness List, 27 February 2008, confidential, p. 5; *Dordević* Decision, para. 5; *Karadžić* Decision, para. 5.

⁸⁹ *Karadžić* Decision, para. 5.

⁹⁰ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 ("*Popović* Appeal Decision"), para. 37.

⁹¹ *Popović* Appeal Decision, para. 37; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion to Amend the 65ter Exhibit List, 4 March 2008, confidential ("*Šešelj* Decision"), para. 20; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Eleventh, Twelfth and Thirteenth Prosecution Motions for Leave to Amend its Rule 65ter Exhibit List, 10 February 2010 ("*Stanišić and Simatović* Decision"), para. 26.

⁹² *Popović* Appeal Decision, para. 37; *Šešelj* Decision, para. 20; *Stanišić and Simatović* Decision, para. 26; *Tolimir* Decision, paras 7-8; cf. *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Guidelines on Notice and Presentation of Evidence, 19 August 2011 ("*Guidelines*"), para. 4.

⁹³ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 23 August 2011 ("*Haradinaj et al.* Rule 92ter Decision"), paras 27-30.

while simultaneously ensuring the respect of the rights of the accused.⁹⁴ The decision whether to admit evidence pursuant to this Rule remains entirely within the discretion of the Trial Chamber.⁹⁵

22. Although Rule 92ter does not explicitly mention the admission of exhibits, case law of the Tribunal allows for such admission provided that the exhibits accompany written statements or transcripts.⁹⁶ In order to be admitted, the exhibits must form an “inseparable and indispensable part” of the witness’s testimony.⁹⁷ In order to satisfy this requirement the witness’s testimony must actually discuss the document, and the document must be one without which the witness’s testimony would become incomprehensible or of lesser probative value.⁹⁸

23. The evidence sought to be admitted pursuant to Rule 92ter, whether a written statement or a transcript of oral testimony, must also fulfil the general requirements for admissibility.⁹⁹ That is, the proposed evidence must be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.¹⁰⁰

D. Admission of evidence from the bar table

24. Admission of evidence from the bar table is a practice established in the case-law of the Tribunal.¹⁰¹ In accordance with Rule 89(C) of the Rules, the Chamber may admit any relevant evidence which it deems to have probative value. The tendering party must demonstrate with clarity

⁹⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Application of Rule 92ter of the Rules, 3 July 2007, p. 2; *Prosecutor v. Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion to Admit Written Witness Statements under Rule 92ter, 27 September 2007, confidential, para. 10; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T Decision Denying Stanišić Motion for Admission of Evidence Pursuant to Rule 92ter, 20 April 2011, confidential (“*Stanišić and Župljanin Rule 92ter Decision*”), para. 19; *Haradinaj et al. Rule 92ter Decision*, para. 27.

⁹⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion to Convert Viva Voce Witnesses to Rule 92ter Witnesses, 31 May 2007, p. 3; *Stanišić and Župljanin Rule 92ter Decision*, para. 19; *Haradinaj et al. Rule 92ter Decision*, para. 27.

⁹⁶ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92bis, 22 February 2007 (“*Milošević Decision*”), p. 3; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92ter, 9 July 2008, confidential (“*Lukić and Lukić Decision*”), para. 15; *Haradinaj et al. Rule 92ter Decision*, para. 29.

⁹⁷ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts Under Rule 92 bis(D), 9 July 2001, para. 8; *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to Rule 92bis(D) of the Rules, 23 January 2004, confidential, p. 5; *Lukić and Lukić Decision*, para. 15; *Haradinaj et al. Rule 92ter Decision*, para. 29; *see also Milošević Decision*, p. 3.

⁹⁸ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution’s Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92ter with Confidential Annex, 16 May 2008, para. 19; *Lukić and Lukić Decision*, para. 15; *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92bis and/or 92ter, 2 September 2008, confidential (“*Haraqija and Morina Decision*”), para. 12; *Haradinaj et al. Rule 92ter Decision*, para. 29.

⁹⁹ *Lukić and Lukić Decision*, para 20; *Haraqija and Morina Decision*, para. 13; *Haradinaj et al. Rule 92ter Decision*, para. 30.

¹⁰⁰ Rule 89(C) and (D) of the Rules.

¹⁰¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 5; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Granting in Part the Stanišić Defence Bar Table Motion, 15 September 2011 (“*Stanišić and Župljanin Bar Table Decision*”), para. 12.

and specificity, the relevance of each document and where and how it fits in the party's case.¹⁰² For a document to be held admissible; it is sufficient that it has *some* relevance and *some* probative value.¹⁰³ This Chamber's Guidelines provide that only in exceptional circumstances, upon good cause being shown, the Chamber may allow a Party to tender documents or other items from the bar table.¹⁰⁴

25. A document's reliability is an underlying factor in determining whether prerequisites of relevance and probative value have been met, and, thus, whether it is admissible.¹⁰⁵ This, however, does not mean that definite proof of reliability must be shown for the evidence to be admissible; on the contrary, *prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.¹⁰⁶

26. Although Rule 89(C) establishes that the two criteria for the admissibility of evidence are relevance and probative value, the Rules also provide grounds for the exclusion of evidence. The Chamber maintains a discretionary power over the admission of the evidence, including, by way of Rule 89(D), which provides that it may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Further, Rule 95 states that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

27. To establish whether the document is reliable, questions of authenticity of the document may play a role, but proof of authenticity is not required in the admissibility stage.¹⁰⁷ Authenticity relates to whether a document is what it professes to be in origin or authorship.¹⁰⁸

¹⁰² *Prosecutor v. Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion to Admit Documents in Evidence, 9 May, 2008, para. 8; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution's First Bar Table Motion, 5 October 2009, confidential, para. 20; *Stanišić and Župljanin* Bar Table Decision, para. 12.

¹⁰³ *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, 19 August 2004, confidential ("*Hadžihasanović and Kubura* Admission Decision"), para. 55.

¹⁰⁴ Guidelines, para. 6.

¹⁰⁵ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on the Admission into Evidence of Intercept-Related Materials, 18 December 2003, para. 15; *Hadžihasanović and Kubura* Admission Decision, para. 55; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al.* Appeals Decision of 12 January 2009"), para. 15; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("*Prlić et al.* Appeals Decision of 3 November 2009"), para. 33.

¹⁰⁶ *Prlić et al.* Appeals Decision of 12 January 2009, para. 15; *Prlić et al.* Appeals Decision of 3 November 2009, paras 33-34.

¹⁰⁷ *Prlić et al.* Appeals Decision of 3 November 2009, para. 34; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Reasons for Decision Denying Admission of Document Rule 65ter Number 03003, 6 October 2011, para. 9.

¹⁰⁸ *Prlić et al.* Appeals Decision of 3 November 2009, para. 34.

IV. DISCUSSION

A. Request to admit excerpts of the Book (Rule 65ter number 3002) from the bar table

28. The Chamber notes that some of the tendered parts of the Book refer to events relevant to the Indictment and are relevant to the present case, such as those describing the level of organization and dealings of the KLA during the Indictment period (such as meetings, strategy considerations, weapons supply, friction with the FARK, battles, control of territory), the relationship between the Accused and their levels of authority.¹⁰⁹

29. In relation to the probative value of the extracts of the Book, the Chamber notes that in Haradinaj's own submissions, the book parts which the Prosecution tenders from the bar table are based on a dialogue with him.¹¹⁰ The Chamber further notes that the book is written in a question and answer-form, seemingly following the course of an interview. The Chamber, Judge Delvoie dissenting, considers that it is, however, not clear for what purpose the information was provided by Haradinaj during the dialogue, and for what purpose the book was written, whether to tell the truth or to boast, and whether or not the accounts are tainted for political purposes. Furthermore, the book contains multiple levels of hearsay which cannot be tested during the trial, and the information provided by Haradinaj was not given under oath or intended to be used in legal proceedings.

30. The Chamber, Judge Delvoie dissenting, notes that the Chamber did not receive any evidence to show whether the author of the Book, Bardh Hamzaj, reflected Haradinaj's views correctly. It notes Haradinaj's inscription in a copy of the Book he handed to Schnieper ("To Marlène Schnieper /?Lanfrancois/ with respect Ramush Haradinaj, 15 shtator 2001, Prishtinë, Kosovë"),¹¹¹ and Haradinaj's single reference in his Interview with Schnieper to the Book as "my book" while talking about the attack on his home in March 1998. The Chamber, Judge Delvoie dissenting, is of the view that even if the inscribed copy of the Book and the Interview were to be considered in assessing the *prima facie* reliability of the tendered extracts of the Book, as submitted by the Prosecution, neither of these documents shows whether Haradinaj meant to adopt the content of the entire Book as truth of the matters asserted. In these circumstances, the Majority is not satisfied that the Prosecution has established the *prima facie* reliability of the tendered extracts. More importantly, the Majority considers that Haradinaj's Letter, in which he, through his counsel, accepts the authenticity and the admissibility of the Book, was written in the course of preliminary communications between the Parties in the initial trial seeking to find common ground for agreed

¹⁰⁹ Rule 65ter number 3002, pp 45-62, 71-78, 83-90, 92-94, 96-109, 114-115, 118; cf. Motion, Annex A, pp 4-14.

¹¹⁰ Haradinaj Response, para. 25.

¹¹¹ Rule 65ter number 3112.

facts, and may have been influenced by trial strategy. Haradinaj contests the admission of the Book in the present trial. The Prosecution has not offered any witness who can confirm the facts described in the extracts of the Book which are tendered, as was the case with witness Bislim Zyrapi through whom two pages of the Book had been admitted.¹¹²

31. For the foregoing reasons, the Majority, Judge Delvoic dissenting, concludes that considerable doubts remain with regard to the reliability of the tendered extracts of the Book, and that the extracts thus fail the *prima facie* reliability test and it will, therefore, deny admission of the tendered extracts of the Book.

**B. Requests to add an inscribed copy of the Book and the Letter
(Rule 65ter numbers 3112 and 3113) to the Prosecution's exhibit list**

32. The Prosecution seeks to add the inscribed copy of the Book and the Letter to its Rule 65ter exhibit list, in order to establish *prima facie* reliability of the extracts of the Book. The relevance and probative value of the inscribed copy of the Book and the Letter are therefore limited to determining the admissibility of the extracts of the Book. For reasons given above, the Majority, Judge Delvoic dissenting, will deny admission of the extracts of the Book. The Majority concludes for this reason that the inscribed copy of the Book and the Letter do not meet the *prima facie* requirements of relevance and probative value to be added to the Prosecution's Rule 65ter exhibit list and will deny these requests of the Prosecution.

C. Request to add Schnieper to the Prosecution's witness list

33. Schnieper's expected evidence confirms that Schnieper conducted the Interview with Haradinaj. The Chamber notes that large parts of the Interview relate to a time before or after the Indictment period and deal with, *inter alia*, biographical details of Haradinaj's life before the war, or his political ambitions after the war, and the early founding years of the KLA from 1994 onwards, and thus have no relevance to any issues in the present Indictment.¹¹³ Limited parts of the Interview are relevant, namely those about Haradinaj's military education, when he entered Kosovo in 1998, the attack on his family compound on 24 March 1998, his role as a commander and other details of the 1998 war.¹¹⁴ Even if Schnieper's expected evidence relating to these restricted portions of the Interview may be relevant, the Majority considers these limited portions of her expected evidence are not sufficiently important to justify the late addition of this witness to the

¹¹² T. 680-681; P283.

¹¹³ Rule 65ter number 3000, pp 1-19, 23-34.

¹¹⁴ Rule 65ter number 3000, pp 20-22.

Prosecution's witness list.¹¹⁵ The Chamber further considers that Schnieper has been known to the Prosecution since 2005,¹¹⁶ and had given a statement to the Prosecution during the original trial.¹¹⁷ While the Prosecution provides an explanation for the late addition of the witness, this explanation relates only to her expected evidence in relation to the Book. In the view of the Majority, this explanation is not satisfactory, as the Prosecution could not have relied on a position taken by the Defence in "without prejudice" discussions between the Parties before the start of the original trial, to assume that the Book would not be opposed in the present trial. The Chamber also recalls in this respect Haradinaj's submission that he made his position about the admissibility of the Book clear in his pre-trial brief filed on 11 July 2011.¹¹⁸ No explanation for the late addition is provided in relation to the rest of Schnieper's expected evidence. In these circumstances the Majority finds that the Prosecution neither acted with due diligence nor showed good cause for the requested amendment to its witness list at this stage of the proceedings.

34. For the reasons mentioned above, the Majority will deny the Prosecution's request to add the proposed witness to its Rule 65*ter* witness list and to lead her evidence pursuant to Rule 92*ter*(A).

D. Alternative requests to admit the Interview (Rule 65*ter* number 3000) from the bar table

35. As mentioned above, the Majority, Judge Delvoie dissenting notes that most parts of the Interview are not relevant to the case before it, and considers the remaining parts to be of insufficient probative value to be admitted. The Majority notes in this respect that it is not known for what purpose answers therein were given, whether for political purposes, for purposes of boasting, propaganda, to tell the truth, or other, and will therefore deny admission of the Interview, Judge Delvoie dissenting.

E. Requests to revise and supplement ICRC documentation (Rule 65*ter* number 1276) on the Prosecution's exhibits list and admit forensic documentation (Rule 65*ter* numbers 1276, 3060-3063) from the bar table

36. The Chamber now turns to the Prosecution's request to revise and supplement ICRC documentation (Rule 65*ter* number 1276) on its exhibit list and to admit this and forensic documentation (Rule 65*ter* numbers 1276, 3060-3063) into evidence from the bar table. The Chamber considers that the Accused will not be prejudiced by the suggested revision of ICRC

¹¹⁵ Cf. *Popović* Appeal Decision, para. 37.

¹¹⁶ Cf. Haradinaj Response, para. 21.

¹¹⁷ Cf. Motion, para. 29.

¹¹⁸ Haradinaj Response, para. 21.

documentation (Rule 65ter number 1276), as the information that Ivan Zarić and Agron Berisha remain missing had been in the Defence's possession before and had not changed.¹¹⁹ The suggested addition to and revision of Rule 65ter number 1276 will also not unduly prejudice the Accused, as the information that Ivan Zarić, Agron Berisha, Nasret Alijaj, Burim Bejta and Ukë Redžepaj remain missing is corroborated by other evidence before the Chamber.¹²⁰ Rule 65ter number 1276 consists of documents obtained from the ICRC website confirming that the five above mentioned victims named in Counts 1 and 2 of the Indictment remain unaccounted for to date, and the date when and the place where they were last seen. These documents are relevant to these counts in the Indictment. Rule 65ter numbers 3060-3063 consist of forensic documents obtained from UNMIK which confirm the cause of the death of Zenun Gashi, a victim whose death may be relevant to establishing the common purpose of the JCE as alleged in the Indictment.¹²¹ The Chamber notes that page 3 of Rule 65ter number 3060, page 3 of Rule 65ter number 3062, and pages 4-5 of Rule 65ter number 3063 relate to Pal Krasniqi, in relation to whom the Parties have reached agreement on certain forensic facts, and that therefore these pages need not be admitted. The tendered documents (Rule 65ter numbers 1276, 3060-3063) bear indicia of reliability, such as that they originate from official sources, are dated, signed or stamped, or are corroborated by other evidence. They are sufficiently probative.

37. For the foregoing reasons, the Chamber will grant the Prosecution's request to revise and supplement ICRC documentation (Rule 65ter number 1276) on its exhibit list and admit this and forensic documentation (Rule 65ter numbers 1276, 3060 (except page 3), 3061, 3062 (except page 3), and 3063 (except pages 4-5) into evidence from the bar table.

V. DISPOSITION

38. For the foregoing reasons, the Chamber hereby
- a. **GRANTS** the Prosecution's and Haradinaj's requests for leave to exceed the word limit;
 - b. **GRANTS** the Prosecution's request for a leave to reply and takes notice of the content of the Reply;

¹¹⁹ Cf. Motion, para. 24.

¹²⁰ Exhibits P1; P105; P107; P286; cf. Motion, para. 24; Haradinaj Response, para. 33.

¹²¹ Cf. *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to 92bis, 22 July 2011, paras 23-25.

- c. **GRANTS** the Prosecution's request to revise and supplement ICRC documentation (Rule 65*ter* number 1276) on its exhibit list;
- d. **ADMITS** Rule 65*ter* numbers 1276, 3060 (except page 3), 3061, 3062 (except page 3), and 3063 (except pages 4-5) into evidence from the bar table, and **DENIES** admission of the remainder of Rule 65*ter* numbers 3060, 3062, and 3063; and
- e. **REQUESTS** the Registry to assign exhibit numbers to the admitted documents.

For the foregoing reasons, the Chamber by majority, Judge Delvoie dissenting hereby

- f. **DENIES** the Prosecution's request to admit excerpts of the Book (Rule 65*ter* number 3002);
- g. **DENIES** the Prosecution's requests for leave to add an inscribed copy of the Book and the Letter (Rule 65*ter* numbers 3112 and 3113, respectively) to its Rule 65*ter* exhibit list;
- h. **DENIES** the Prosecution's request to add Schnieper to its Rule 65*ter* witness list and to call her pursuant to Rule 92*ter*(A) of Rules; and
- i. **DENIES** the Prosecution's request to admit the Interview.

Judge Delvoie will append his dissenting opinion in due course.

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



Judge Bakone Justice Moloto,
Presiding

Dated this twenty-sixth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]