

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

CASE NO: IT-04-84-PT

IN TRIAL CHAMBER II

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr. Hans Holthuis

Date filed: 12 February 2007

THE PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PRE-TRIAL BRIEF FOR RAMUSH HARADINAJ

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1. The Defence for Mr. Ramush Haradinaj files this Pre-trial Brief pursuant to Rule 65ter(F).
2. This Brief has been prepared on the basis of the evidence so far disclosed by the Prosecution. A considerable amount of the material relied upon by the Prosecution has yet to be disclosed to the Defence¹.

¹ The Prosecution has failed to disclose any statements for 12 of the witnesses who are cited in the Prosecution's Pre-trial Brief. In respect of a further 14 witnesses, the Prosecution has failed to serve all of the statements cited. Moreover, the statements of approximately 27 witnesses are still redacted despite the Trial Chamber's Order of 20 May 2005 that all redactions were to be lifted 30 days before the commencement of the trial. Furthermore, many documents have been served without translations. There are also several significant Rule 66(B), Rule 68 and Rule 70 requests which have been outstanding for some time. These disclosure matters require urgent attention.

PART 1: THE DEFENCE CASE

Introduction

3. The Prosecution alleges that Ramush Haradinaj and others planned and implemented a campaign of persecution and terror against Serb civilians and opponents of the KLA in a relatively small area of western Kosovo (characterised by the Prosecution as the “Area of Total Control”). This campaign is alleged to have occurred between the end of March and the end of August 1998, at which point the KLA were overrun by the Serb forces.
4. These allegations are denied. There was no KLA campaign to attack and persecute civilians. As the Prosecution has rightly asserted in other cases before the ICTY, during 1998 and 1999 the Serb forces conducted a systematic campaign of ethnic cleansing and mass persecution of the Albanian civilian population in the very area of western Kosovo covered by the present indictment. The targeted population took steps to defend itself against this campaign of persecution. To the extent possible, they organised and armed themselves and mounted counter-attacks on Serb forces. There was not, however, any orchestrated retaliation by the KLA against either the Serb civilian population or against civilians from other ethnic groups.
5. Witnesses called by the Prosecution in previous cases have rightly asserted that the KLA was operating defensively during 1998; that it lacked any proper organisation and resources; and that its military operations were conducted by poorly organised and ill-equipped volunteers fighting against the vastly superior firepower of the combined Serbian forces².

² Testimony of Colonel John Crosland, *Prosecutor v. Limaj et al.*, Case No. IT-03-66, T 1877-1878 and T 2009-2014; Testimony of Colonel John Crosland, *Prosecutor v. Milošević*, Case No. IT-02-54, T 815-816; Testimony of Bislim Zyrap, *Prosecutor v. Limaj et al.*, Case No. IT-03-66, T 6821-6824.

Serbian control in western Kosovo

6. Throughout the Indictment period, Serb forces maintained control of all the main towns in western Kosovo, namely Pejë/Peć³, Gjakovë/Djakovica, Deçan/Decani, Klinë/Klina and Prizren/Prizren. Serb forces also patrolled and generally controlled the major roads between these towns⁴, and conducted operations using combined forces⁵ stationed in various parts of the Dukagjin region of western Kosovo.
7. The presence and frequent activity of Serb forces in and around the Indictment area is wholly inconsistent with the Prosecution's theory of a so-called "Area of Total Control". During 1998 Serb forces were deployed and operating in this area, including in the areas around Lake Radoniq/Lake Radoničko. Indeed, there is compelling evidence that Serb forces were committing crimes, and expelling civilians, including Serb civilians, from western Kosovo, during the Indictment period⁶. As the Trial Chamber said in *Limaj*⁷:

“[T]he Chamber is conscious of the operations of the Serbian forces in Kosovo, which deployed tactics that included the razing of villages and the expulsion of civilians from villages, and which caused considerable and widespread civilian suffering.”

The Serb attack on 24 March 1998 and its aftermath

8. On 24th March 1998 combined Serb forces launched a major attack on the Haradinaj family compound on the outskirts of Glllogjan/Glllogjane (see paragraph 47 *et seq.* below). Following this attack, rudimentary defence groups began to form in Glllogjan and the surrounding villages. Those involved were,

³ The Defence uses the Albanian and then the Serbian spellings of place names in Kosovo. After the first instance a place name appears, only the Albanian spelling is used.

⁴ Prosecution Pre-trial Brief, para. 10.

⁵ The combined Serbian forces are described in paras 31 to 41 below.

⁶ See, for example, paras 100 to 103 below.

⁷ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Judgement, 30 November 2005 (*Limaj* Trial Judgement), para. 193.

by and large, part-time volunteers with no military training. Weapons and uniforms were in short supply.

9. In early April 1998 Ramush Haradinaj travelled to Albania with a group of volunteers in order to collect weapons and supplies⁸.
10. The principal objectives of the Serb forces were to destroy the local pockets of armed resistance, and to target Kosovar Albanian civilians. KLA volunteers, acting in conjunction with local defence groups, sought to resist these attacks and to prevent the Serb forces from advancing. KLA volunteers also mounted counter-attacks against Serb military positions and personnel. However, there was minimal organisation on the Kosovar Albanian side, and the resulting military engagements were unequal and asymmetrical. The Serb forces were well-organised, well-equipped and vastly superior in numbers. They had the capability to overpower the KLA and local armed resistance at any time, as they did in late July and the first half of August 1998 and then again in early September 1998.

The first co-ordination of armed resistance

11. Throughout April and most of May 1998, resistance to the Serb forces was organised on a local level. In late May, the first attempt was made to co-ordinate the village defences. Ramush Haradinaj convened a meeting of local representatives from the areas around Glogjan⁹. At this meeting, a decision was made to form a regional staff and to establish a number of sub-zones. These sub-zones covered an area that extended from Carabreg/Crnobreg on the western side to Vranoc/Vranovać on the eastern side; and from Raushiq/Rausić in the north to Gramaçel/Gramocelj in the south. The KLA base at

⁸ Ramush Haradinaj was seriously wounded at the time as a result of injuries he received during the Serbian attack on Glogjan on 24 March 1998. Whilst in Albania he received medical treatment for his injuries.

⁹ OTP witness statement by SST 7/05, ERN U002-9294-U002-9314, at U002-9302-U002-9304; Transcript of OTP witness interview by Shemsedin Çekaj, ERN ET T000-2978-T000-2979, at pp 31-43; OTP witness statement by Skender Rexhahmetaj, ERN U009-4688-U009-4698, at paras 11-14; contemporary order, 25 May 1998, ERN U002-0362.

Jabllanicë/Jablanica was outside this area. Representatives from Jabllanicë were not therefore included within the regional staff established at the May meeting.

The Serb offensive in the second half of May

12. A major Serbian offensive was launched within the so-called “Area of Total Control” in the second half of May. On or about 19-20 May 1998, Serb forces attacked Grabanicë/Grabanica (north of Jabllanicë)¹⁰. Five days later the villages of Lybeniq/Ljubenić and Strelc/Streoc were attacked; and on 28 May simultaneous attacks were launched on Vranoq and Baran (to the west of Jabllanicë), Carabreg, Strelc, Isnij/Istinić, Rastovicë and Prejlep/Prilep.

The establishment of the Dukagjin Operational Zone and the election of Ramush Haradinaj as Zone Commander

13. On 23 June 1998, at a meeting of village representatives in Jabllanicë, a decision was taken to amalgamate the area identified at the May meeting with other areas to the east and west, including Jabllanicë¹¹. This new (larger) area was to be called the Dukagjin Operational Zone. Ramush Haradinaj was elected by those present as the commander of this zone. Within this structure, the local commanders retained a significant level of *de facto* autonomy and independence.

The Serb offensive in July/August

14. In late July the combined Serbian forces launched a series of attacks across the Indictment region, including in Junik/Junik, Rastovicë and Prejlep/Prilep, and on 2 August entered Jabllanicë. The Serb attacks continued in the wider area with Gramaçel being overrun on 8 August and Shaptej and Rastavicë/Rastavica falling on 9 August. The Serb forces then moved towards Glllogjan and took control of the village on 12 August. There were many civilian casualties. Many

¹⁰ OTP witness statement by SST 7/03, U008-6965-U008-6988.

¹¹ Minutes of 23 June 1998 meeting, ERN U001-3816-U001-3819 and ERN U001-5407-U001-5411.

building were burnt, and livestock destroyed. The surviving villagers returned on around 23 August, by which time the Serb forces had withdrawn.

The Serb offensive in early September

15. A further Serbian attack on Glllogjan occurred on 3 September, launched from the direction of Jabllanicë to the east and Carabreg to the west. The Serb forces left a corridor to enable civilians to flee towards the Albanian border. This attack was part of a co-ordinated series of attacks across large swathes of Kosovo. International observers noted that extensive damage had been done to many of the villages in the area around Glllogjan.

The Black Eagles

16. The Black Eagles were a group of KLA soldiers whose function was to provide military support to the armed Kosovar Albanian resistance, and to mount attacks on Serb military positions and personnel. They would deploy, often in small combat units, across the Dukagjin Zone and outside it.
17. It is denied that Ramush Haradinaj was responsible for establishing or maintaining the Black Eagles, for appointing its commanders, or for appointing or training its members. For the avoidance of doubt, it is specifically denied that Ramush Haradinaj directed members of the Black Eagles to commit crimes as alleged in paragraph 30 of the Prosecution's Pre-trial Brief.

FARK

18. In the second half of June 1998, a unit of officers and fighters led by Tahir Zemaj crossed the border from Albania. Ramush Haradinaj met with Tahir Zemaj in Junik at this time. After an initial disagreement over the deployment of the officers who had accompanied Tahir Zemaj, Ramush Haradinaj arranged for this unit to be provided with accommodation in Prapaqan/Papraçane.

19. The allegation that Ramush Haradinaj sought to exclude FARK in order to maintain control of the region is denied. FARK did not operate as a separate entity from the KLA. The officers and men led by Tahir Zemaj were integrated within the Dukagjin KLA. Tahir Zemaj (as Commander of the First Brigade at Prapaqan) reported to Ramush Haradinaj.¹² That remained the position throughout the relevant period (apart from an interlude between 20 August 1998 and 2 September 1998 during which time Tahir Zemaj became Zone Commander and Ramush Haradinaj acted as his deputy).

20. The allegation that Ramush Haradinaj beat, physically intimidated, and even killed FARK members as part of a policy to exclude FARK from the Dukagjin Zone is categorically denied:
 - (a) The evidence of witness SST 7/55 is fabricated and is demonstrably unreliable.

 - (b) As for the allegations made by witness SST 7/29, it is accepted that an altercation took place in Gllogjan on 4 July 1998, involving witness SST 7/29. However, the account given by this witness is not an accurate reflection of the events that occurred. The suggestion made by the Prosecution that this incident is somehow evidence of a plan to eliminate opposition so as to facilitate ethnic cleansing is illogical and unfounded.

Allegations of direct participation

21. Of the 37 counts in the Indictment, Mr. Haradinaj is alleged to have directly participated in, or been present at, a total of five incidents. He is alleged (i) to have participated in the alleged ill-treatment of Dragoslav and Mijat Stojanović and Veselin Stijović in Gllogjan on or about 18 April 1998 (Counts 3 and 4); (ii) to have been present at the alleged ill-treatment of Ivan Zarić, Agron Berisha and Burim Bejta in Jabllanicë on or about 19 May 1998 (Counts 23 and 24); (iii) to have been present prior to the alleged ill-treatment of witness SST 7/38 in or

¹² Contemporary order, 12 July 1998, ERN U000-1871.

around Junik on 28 May 1998 (Counts 1 and 2); (iv) to have participated in the alleged abduction of Isuf Hoxha and Hajrullah Gashi from a bus in Malishevë/Mališevo on or about 20 July 1998 (Counts 15 and 16); and (v) to have ordered and participated in the alleged ill-treatment of witness SST 7/30 in Jabllanicë in July 1998 (Counts 33 and 34).

22. The Defence denies that Ramush Haradinaj was present at, or participated in, any of incidents (i) to (v) above. The allegation of his presence and participation in the incident listed at (i) above is based on the testimony of three witnesses closely associated with the Serb forces. In respect of each of the incidents listed in (ii) to (iv) above, the Prosecution's case against Mr. Haradinaj is based on the uncorroborated testimony of a single witness¹³. None of the evidence alleging Mr. Haradinaj's presence or participation in these events is credible and the Defence will invite the Trial Chamber to reject it.

The alleged Joint Criminal Enterprise

23. As for the remaining 32 counts in the Indictment, the Prosecution's case against Mr. Haradinaj is based solely upon an allegation of Joint Criminal Enterprise ("JCE"). The Prosecution seeks to establish Mr. Haradinaj's criminal responsibility for these incidents by alleging (i) that he was party to an agreement with his co-accused and others to commit war crimes and crimes against humanity as part of a campaign of terror and persecution against the Serb civilian population and opponents of the KLA; and (ii) that the crimes alleged in the remaining 32 counts in the Indictment were committed pursuant to that agreement, or were a natural and foreseeable consequence of it.
24. The Defence (i) denies that there was any such JCE; (ii) denies that Mr. Haradinaj was party to any such JCE; (iii) denies that there was any campaign by the KLA in the Indictment region to mount a widespread or systematic attack on a civilian population; (iv) puts the Prosecution to strict proof that the conduct

¹³ Witness SST 7/30 gives evidence alleging Mr. Haradinaj's presence and/or participation in the alleged incidents in (ii) and (v) above; witness SST 7/38 gives evidence alleging Mr. Haradinaj's presence prior to the alleged incident in (iii); and witness SST 7/08 gives evidence alleging Mr. Haradinaj's participation in the alleged incident in (iv).

alleged in the remaining 32 counts occurred as alleged; and (v) puts the Prosecution to strict proof that any crimes which may be found to have been committed, were (a) committed by persons associated with the KLA (b) pursuant to the JCE alleged. The Defence case on the alleged JCE is further developed in Part 5 below.

The Lake Radoniq canal area¹⁴

25. The Prosecution places great emphasis on the recovery of human remains in the Lake Radoniq canal area. In total, 33 sets of human remains were recorded by Serbian forensic teams as having been recovered in this area in early September 1998¹⁵. It is common ground that these individuals died on different dates and that the discovery of their remains does not imply a mass killing. Nonetheless, the Prosecution invites the Trial Chamber to infer that all of the remains recovered from the canal area must have been victims of crimes committed by the KLA pursuant to the alleged JCE. The Defence submits that this approach is fundamentally misconceived. The position in relation to the 33 sets of remains is as follows:

- (i) Ten sets of remains are still unidentified¹⁶. In addition, there are ten sets of remains identified by DNA analysis for whom there is no evidence as to the circumstances of their death (“the unattributed remains”)¹⁷. In respect of these unidentified and unattributed remains (numbering 20 in total) there is no evidence to show that they were killed by members of the KLA, let alone that their deaths were

¹⁴ As more fully explained in Part 5 below, there are substantial grounds for questioning the integrity of the Serbian recovery operation.

¹⁵ The two individuals who are the subject of Counts 11 and 12 are recorded as having been found at a separate site near the village of Dashinoc/Dašinovać but were taken to the canal area during the Serbian forensic operation and then taken for post-mortem examination and identification at the Hotel Paštrik in Gjakovë.

¹⁶ Indictment, para. 89. Note that in some instances more than one body part relates to the same unidentified individual. Accordingly, the number of unidentified body parts is greater than the number of unidentified individuals whose remains were recorded as having been found in the canal area.

¹⁷ Milka Vlahović (Counts 9 and 10); Afrim Sylejmani (Counts 21 and 22, para. 78); Rade Popadić (Counts 21 and 22, para. 79); Ilija Antić (Counts 21 and 22, para. 80); Idriz Hoti (Counts 21 and 22, para. 81); Zdravko Radunović (Counts 21 and 22, para. 84); Velizar Stošić (Counts 21 and 22, para. 85); Malush Meha (Counts 21 and 22, para. 86); Xhevat Berisha (Counts 21 and 22, para. 87); and Kemajl Gashi (Counts 21 and 22, para. 88).

committed pursuant to a joint criminal enterprise to which Mr. Haradinaj was a party.

- (ii) The inferences which the Prosecution seeks to draw from the presence of the unidentified and unattributed remains must be assessed in light of the Prosecution's decision to remove from the Indictment the six sets of identified remains recovered from the Ekonomia/Ekonomija Farm next to the canal¹⁸.
- (iii) There are 13 identified individuals in respect of whom the Prosecution proposes to call evidence alleging either that they were killed by persons associated with the KLA or that they were last seen alive in some form of KLA custody¹⁹. These 13 individuals are alleged to have died in eight separate incidents which are reflected in seven pairs of counts on the Indictment²⁰.
- (iv) The identification of four of these 13 individuals is unconfirmed by DNA analysis and remains in dispute²¹. These four sets of remains were each identified in September 1998 using "traditional means" (essentially clothing identification, together with a comparison of ante-mortem and post-mortem data). This form of identification has resulted in a misidentification rate of 50% on the facts of this case²² and is therefore demonstrably unreliable.

¹⁸ Six further sets of remains were recovered at the nearby Ekonomia Farm. In the original Indictment the Prosecution charged the accused with murder of these individuals pursuant to the alleged JCE. However, the remains were identified by DNA, and, when the circumstances and dates of their disappearances were investigated, it became apparent that they may well have been killed by Serb forces and placed at the Ekonomia Farm when it was fully under Serbian control in order falsely to implicate the KLA. The families of three of these individuals informed OTP investigators that they had last been seen alive in the custody of Serb forces. All six sets of remains found at the Ekonomia Farm have now been removed from the amended Indictment.

¹⁹ For the avoidance of doubt, the reliability of this evidence is not accepted, and the Prosecution is to put to strict proof of the allegations made.

²⁰ (1) Vukosava Marković and Darinka Kovač (Counts 7 and 8); (2) Hajrullah Gashi and Isuf Hoxha (Counts 15 and 16); (3) the mother of witness SST 7/04 (Counts 13 and 14); (4) Ilire Frrokaj (Counts 17 and 18); (5) Zenun Gashi, Misin and Sali Berisha (Counts 19 and 20, and Counts 21 and 22, para. 87); (6) Kujtim Imeraj (Counts 21 and 22, para. 82) (7) Istref and Nurije Krasniqi (Counts 21 and 22, para 83); and (8) Pal Krasniqi (Counts 31 and 32).

²¹ Vukosava Marković, Darinka Kovač, Hajrullah Gashi and Isuf Hoxha.

²² Of the remains recovered from the canal area, ten identifications were made by "traditional means" (including the four disputed identifications for whom there is no DNA comparison). Of the six sets of

- (v) There are thus nine (reliably) identified individuals in respect of whom the Prosecution proposes to call evidence alleging either that they were killed by persons associated with the KLA or that they were last seen alive in some form of KLA custody²³. These nine individuals are named as the victims of six incidents reflected in five pairs of counts in the indictment, none of which alleges the direct participation of Mr. Haradinaj²⁴.

26. The mere fact that human remains were found at the canal area, not far from Gllogjan, Irzniq/Rznic, Ratish/Ratis and other surrounding villages, cannot be a basis on which to hold Ramush Haradinaj responsible for these deaths pursuant to any theory of criminal liability. Lake Radoniq and the canal area were accessible from a number of different directions, and (as set out in Part 5 below) combined Serb forces were stationed, and conducting operations, in the immediate vicinity throughout the Indictment period.

remains for whom a DNA comparison has been made, three have turned out to be misidentifications. A body identified as Tush Frokaj turned out to be Kujtim Imeraj; a body identified as Haxhi Seferaj turned out to be Misin Berisha; and a body identified as Milovan Vlahović turned out to be Istref Krasniqi. In each case, the Serb forensic team released the wrong remains to the relevant families, following identification by “traditional means”.

²³ As noted above, the reliability of this evidence is not accepted, and the Prosecution is to put to strict proof of the allegations made.

²⁴ (1) The mother of witness SST 7/04 (Counts 13 and 14); (2) Ilire Frokaj (Counts 17 and 18); (3) Zenun Gashi, Misin and Sali Berisha (Counts 19 and 20, and Counts 21 and 22, para. 87); (4) Kujtim Imeraj (Counts 21 and 22, para. 82) (5) Istref and Nurije Krasniqi (Counts 21 and 22, para 83); and (6) Pal Krasniqi (Counts 31 and 32).

PART 2: THE MILITARY CONTEXT

Introduction

27. The paragraphs which follow summarise the military context to the Indictment, including the background to the Serbian campaign in Kosovo and the military deployments of the parties.

The origins and methodology of the Serbian campaign in Kosovo

28. The political and military context to the conflict in Kosovo has been analysed in three cases before the Tribunal: *Milošević*²⁵, *Limaj and others*²⁶ and *Milutinović and others*²⁷.
29. In the *Milošević* case, the Prosecution referred to the situation in Kosovo as the “book-ends” of the entire conflict in the former Yugoslavia. The Prosecution contended that the Serb military plan for Kosovo was part of an overall strategy for establishing a Greater Serbia, through a systematic campaign of ethnic cleansing:

“By playing on Serbian fears of victimisation by Kosovo Albanians, Milošević built popular support to take control of the FRY’s principal political institutions. He would play on the same fears of victimisation in pursuit of his campaign to create ‘Greater Serbia’: a centralised Serbian state encompassing the Serb populated areas of Croatia and Bosnia and Herzegovina, and that included all of Kosovo, considered by the Serbs to be their heartland”.²⁸

30. According to the Prosecution in *Milošević*, the methods employed by the Serbs “were largely the same for all three ethnic cleansing campaigns, as were many of the co-perpetrators”²⁹.

²⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T.

²⁶ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T.

²⁷ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T.

²⁸ OTP Pre-trial Brief in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, para. 14; see also paras 16-35 (discussing the Serb project in Kosovo).

²⁹ OTP Pre-trial Brief in *Milošević*, para. 15.

31. In the *Milutinović* case, the Prosecution is currently prosecuting Serb military leaders for the ethnic cleansing campaign in Kosovo. The Prosecution Pre-trial Brief alleges a joint criminal enterprise, “the purpose of which was to modify the ethnic balance in Kosovo by criminal means in order to ensure the continued Serbian control of the province”. According to the Prosecution:

“This purpose was to be achieved through various means, including an organized campaign of persecution against Kosovar Albanians leading to the expulsion of a substantial portion of the Kosovar Albanian population from the territory of the province of Kosovo.”³⁰

32. The Prosecution in *Milutinović* alleges that the strategy for achieving exclusive Serbian control of Kosovo was devised in Belgrade during the 1980’s and 1990’s. The strategy involved both constitutional change (depriving Kosovo of its autonomous status), and demographic change (expelling large sections of the Kosovo Albanian population). The Prosecution alleges that by the end of 1997 members of the joint criminal enterprise were planning to destroy Albanian villages in Kosovo; and that by the beginning of 1998 orders had been issued to implement the plan and to arm the Serb civilian population in Kosovo.³¹

Combined Serb forces in Kosovo

33. The Serb forces operating in Kosovo during the Indictment period were made up of a combination of the *Vojska Jugoslavije* (VJ), and the Police Security Force of the *Ministarstvo Unutrašnjih Poslova* (MUP). The MUP (as these forces were known) consisted of uniformed officers working in conjunction with special forces: the *Jedinica za Specijalne Operacije* (JSO); the *Specijalna Antiteroristička Jedinica* (SAJ); and the *Posebne Jedinice Policije* (PJP).

³⁰ OTP Pre-trial Brief in *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T., paras 59-60.

³¹ OTP Pre-trial Brief in *Milutinović*, paras 62-82.

Vojska Jugoslavije (VJ)

34. The VJ was the army of the Federal Republic of Yugoslavia (FRY), and the successor to the Yugoslav National Army (the JNA). Its highest commanding organ was the General Staff, commanded by the Chief of the General Staff. At times relevant to the present Indictment, the Chief of the General Staff was General Momčilo Perišić. General Perišić reported directly to President Slobodan Milošević.³²
35. The VJ was divided into separate armies with responsibility for different parts of the FRY. The Prishtina Corps of the Third Army was responsible for Kosovo, under the command of General Nebojša Pavković (one of the accused in the *Milutinović* case).
36. By mid-May 1998 the VJ had approximately 2,000 troops deployed in the border areas and approximately 2,500 troops deployed in the interior of Kosovo³³.
37. In western Kosovo elements of the following VJ brigades were deployed within the Indictment area: The 549th Motorised Brigade (based in Prizren) commanded by General Božidar Delić, the 52nd Mixed Artillery Brigade, the 52nd Air Defence and Mixed Rocket Brigade (based in Gjakovë), the 52nd Communications Battalion, the 52nd Bomber Regiment, the 2nd Military Police Battalion, the 3rd Military Police Battalion, the 52nd Military Police Battalion, the 52nd Reconnaissance and Sabotage Brigade, the 72nd Reconnaissance and Sabotage Battalion, the 25th Military Police Battalion, the 125th Motorised Brigade, the 53rd Border Guards Battalion, the 1st Motorised Battalion, and the 2nd Motorised Battalion (based in Gjakovë)³⁴.

³² Philip Coe, Expert report in *Milutinović*, at ERN K050-8849.

³³ *Limaj* Trial Judgement, para. 164.

³⁴ Philip Coe, Expert report *Forces of the FRY and Serbia in Kosovo: An Analysis of their Organisation, Command & Control, and Operations for Case No. IT-05-87, The Prosecutor v Milan Milutinović et al.*, K050-8845, at K050-8997; *Limaj* Trial Judgement, para. 164; contemporary order signed by General Nebojša Pavković, ERN Y001-3216-Y001-3263; testimony of General Božidar Delić, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, T 41378.

38. Under the 1992 FRY Constitution, the principal role of the VJ was to protect the FRY's "sovereignty, territory, independence and constitutional order". In the absence of a declared state of emergency, the Constitution did not provide for the VJ to take part in internal security operations³⁵. General Perišić is reported to have opposed the use of the VJ for internal security operations in Kosovo during 1998 on constitutional grounds³⁶. Nonetheless, VJ forces often acted in collaboration with MUP regular and special forces in so-called anti-terrorist operations³⁷. Colonel John Crosland, the British Military Attaché to Belgrade, observed VJ vehicles painted blue to resemble MUP vehicles on a regular basis from March 1998³⁸. On 24 March 1998, he observed VJ artillery positions in the area of Dečan jointly defended by VJ units and elements of the JSO³⁹.

Ministastvo Unutrasnih Poslova (MUP)

39. The MUP was the police security force of the Serbian Ministry of the Interior. For most of the Indictment period, the head of the MUP in Kosovo was Sreten Lukić (one of the accused in *Milutinović*)⁴⁰. By the end of March 1998 there were between 8,000 and 10,000 MUP officers in Kosovo, including uniformed MUP officers and MUP special forces⁴¹. The MUP was equipped with a range of military equipment including heavy artillery, armoured personnel carriers, cannons and helicopters⁴².

³⁵ *Milošević*, Prosecution Pre-Trial Brief, para. 48; Testimony of Colonel John Crosland in *Milošević*, T 7926; Letter from General Momčilo Perišić to Slobodan Milošević, 23 July 1998, published in *Fire and Flood*, Pero Simić and Dejan Lukić, 2001, ERN K022-4018-K002-4024, tendered by Philip Coo in *The Prosecutor v. Limaj et al.*, Case No. IT-03-66.

³⁶ *Milošević*, Prosecution Pre-Trial Brief, para. 48

³⁷ Philip Coo, Expert report in *Milutinović*, at ERN K050-8872.

³⁸ Testimony of Colonel John Crosland in *Milošević*, T 7924.

³⁹ Testimony of Colonel John Crosland in *Milošević*, T 7924

⁴⁰ Sreten Lukić was appointed in May 1998.

⁴¹ Testimony of Colonel John Crosland in *Limaj*, T 1878; Philip Coo, Expert report in *Milutinović*, at ERN K050-8853-K050-8855.

⁴² Philip Coo, Expert report in *Milutinović*, at ERN K050-8853-K050-8855; James Gow, *The Serbian Project and its Adversaries*, London: C. Hurst & Co., Ltd. (2003), p. 80.

Jedinica za Specijalne Operacije (JSO)

40. The JSO, or Special Operations Unit, was organised by the head of the State Security Service, Franko Simatović, also known as “Frenki”, (indicted in the *Stanisić* case for paramilitary activities in Croatia and Bosnia). The JSO was formed in 1996 out of a paramilitary group known as the “Red Berets” which had been set up by the Serbian Security Service in 1991 for operations in Croatia and thereafter in Bosnia⁴³. The JSO consisted of about 500 men, unofficially known as “Frenki’s Boys”⁴⁴. Their leader in Kosovo was Milorad Luković. The JSO had bases in Pejë and Deçan in 1998. Colonel John Crosland encountered the JSO in western Kosovo throughout the summer of 1998. He saw them carrying out patrols from Deçan in armoured personnel carriers in mid-May 1998, and noted their presence around the Lake Radoniq canal area in September 1998.

Specijalna Antiteroristička Jedinica (SAJ)

41. The SAJ was a specialist anti-terrorist unit of the MUP which would be called in to spearhead its most difficult operations. The SAJ also incorporated former Serbian paramilitary groups. As the Prosecution’s expert witness Philip Coe stated in his report in *Milutinović*⁴⁵:

“Notorious groups often described as paramilitaries were present in Kosovo, but available information suggests that they were integrated into official organisations rather than operating in a rogue manner. A prime example is the Scorpions Unit which was brought in as a reserve element of the MUP’s SAJ.”

⁴³ BBC News, “Serbia’s elite enemy within,” by Gabriel Partos, 26 March 2003.

⁴⁴ In his book *The Serbian Project and its Adversaries*, at pp 87-88, James Gow describes the JSO as “the lead ‘shock troops’ and murder squads...the ultimate ring of protection around Milošević”.

⁴⁵ Philip Coe, Expert report in *Milutinović*, at ERN K050-8861-K050-8862, para. 29.

Posebne Jedinice Policije (PJP)

42. The PJP were heavily armed and well-trained combat units, selected from local MUP stations. They were equipped with armoured personnel carriers, mortars, and heavy machine guns.⁴⁶
43. In early 1998, 30-50 members of a paramilitary group known as *Munja* (Lightning) were incorporated into the MUP⁴⁷, wearing the same camouflage uniforms as the PJP (but with a lightning bolt on the shoulder)⁴⁸. This group participated in a military operation in Rastavicë/Rastavica (within the so-called Area of Total Control) in early August 1998⁴⁹.

The Joint Command

44. By July 1998 a Joint Command structure had been established to co-ordinate the Serb campaign representing the highest levels of the MUP, the VJ, the State Security Services, and the Government. The leadership of the Joint Command excluded military leaders opposed to the unconstitutional use of the VJ for internal security purposes⁵⁰.

The first attacks on villages in Kosovo

45. In its pre-trial brief in *Milutinović*, the Prosecution describes the first indiscriminate attacks by combined Serb forces on villages in Kosovo in late February and early March 1998:

“Between late February and early March 1998, Serbian forces reacted to KLA provocations not by attacking military targets but rather by attacking three villages in the Drenica region, Donji Pekaz, Qirez and

⁴⁶ Crosland situation report, 11/12 May 1998, ERN R011-8465; Testimony of Colonel John Crosland in *Milošević*, T 7924, 7936.

⁴⁷ Philip Coe, Expert report in *Milutinović*, ERN K050-8862, para. 30.

⁴⁸ American Radio Works, “Justice for Kosovo”, ERN K034-9862.

⁴⁹ Joint Command Minutes, ERN K022-8412-K022-8563.

⁵⁰ See, in particular, General Momčilo Perišić in Joint Command Minutes, ERN K022-8412-8563; Philip Coe, Expert report in *Milutinović*, ERN K050-8890- K050-8891, para. 34; James Gow, *The Serbian Project and its Adversaries*, at p. 210.

Likojane. This region had by then become a KLA stronghold. More than 80 Kosovo Albanians were killed during these brutal operations, among them 24 women and children. During the police attack on the family compound of a local KLA leader, Adem Jashari, in Prekaz, around 50 people were killed, including women and children, and most of Jashari's family."⁵¹

46. In the *Limaj* judgement, the Trial Chamber recorded these massacres, noting that "the Serbian special forces attacked without warning and fired indiscriminately at civilians"⁵². The *Limaj* Trial Chamber observed that these attacks "marked a turning point in the Kosovo crisis"⁵³.

The attack on the Haradinaj family compound on 24 March 1998

47. The Serbian attack on the Haradinaj family compound on 24 March 1998 followed soon after the attacks on the Ahmeti family in Qirez/Čirez, the Jashari family in Prekaz/Prekaze, and civilians in Likoshan/Likošane.⁵⁴ It was the next stage in the implementation of the Serbian plan to eliminate Kosovar Albanian resistance and to instil terror in the Kosovar Albanian civilian population. The same strategy of excessive and indiscriminate force was used in the Serbian attack in Glllogjan as had previously been used in the attacks on Qirez, Prekaz, and Likoshan.
48. The Haradinaj family compound is situated on the outskirts of Glllogjan, bordering on a village called Dubravë/Dubrava. The house of the Stojanović family⁵⁵ on the outskirts of Dubravë was situated approximately 175 metres from the Haradinaj family compound. The Stojanović family were closely associated with the MUP. Their house was used by the Serb forces as a position from which to observe and subsequently to attack the Haradinajs.
49. The attack began with an exchange of fire outside the Haradinaj compound in which MUP officers opened fire on Ramush Haradinaj's brother Daut and

⁵¹ *Milutinović* Pre-trial Brief, para. 89.

⁵² *Limaj* Trial Judgement, para. 49

⁵³ *Limaj* Trial Judgement, para. 50

⁵⁴ *Limaj* Trial Judgement, para. 49.

⁵⁵ See Counts 3 and 4 of the present Indictment.

another man. Fire was returned, resulting in the death of a MUP officer named Miodrag Otović. Daut Haradinaj then retreated into the family compound. Serb forces, which had been accumulating in the area in preparation for an attack on the Haradinajs then moved in and launched a major assault. The combined Serbian forces used in the operation included MUP ground forces and special forces. They were armed with heavy weapons, cannons, armoured vehicles and helicopters.

50. The only people inside the compound at the time of the attack were Ramush Haradinaj and his family (including his father Hilmi, his brothers Enver, Shkelzen, Daut, and Frasher, his mother, his sisters, his brother-in-law, his sister-in-law, and three young children). Ramush Haradinaj, together with his father, his brothers and one of his sisters, resisted the attack, using rifles, handguns and hand grenades. They provided sufficient cover to enable the other women and the children to escape, and then escaped themselves, in two stages, taking up positions in empty houses in the nearby village of Glogjan.
51. During the day, Serb forces attacked a number of civilian targets in the village, including the school. Mr. Haradinaj was shot and wounded twice, once in the hip and once in the hand, by a member of the Serbian special forces. Fighting continued during the day until Mr. Haradinaj and the male members of his family were able to escape under cover of darkness.
52. As part of this attack, Serb forces blockaded the village of Dubravë, close to the Haradinaj family compound. General Božidar Delić, the VJ commander of the 549th Brigade stationed in Prizren, testified in the *Milošević* trial that 400 Serbian security forces were used in this blockade⁵⁶. They were drawn from forces stationed in Deçane, Gjakovë and Prizren. The numbers provided by General Delić give an indication of the scale of the Serb deployments.

⁵⁶ Testimony of General Božidar Delić, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, T 41351.

53. Moreover, it is clear from the military build-up in the area that this operation must have been planned in advance. Colonel John Crosland explained in a witness statement made for the *Limaj* case:

“On the 24th March 1998 I reported the first blatant indications...of Serb forces building up to conduct a joint strike in the Decani area, although these were mainly MUP forces. I indicated that they could deploy possibly 8,000 to 10,000 in an urban scenario across the whole of the relevant Kosovo areas, assisted by imported thugs...[whose] job was to stir up trouble so that the MUP would step in to sort out the participants.”⁵⁷

54. In a diplomatic telegram (dip-tel) sent on 26 March 1998, Colonel John Crosland put this operation into the context of the general Serb military build-up in western Kosovo. He stated that Serbian forces were poised to launch a two-pronged attack on the Deçan and Drenicë/Drenica areas. He described a “show of overwhelming force” involving 8,000 to 10,000 MUP officers, supported by “imported thugs” and an inner core of 500-700 PJP special forces. He noted 10-15 armoured personnel carriers, and an assault force consisting of 200-400 SAJ specialist anti-terrorist officers and secret police. The SAJ were equipped with helicopters and a Praga 30mm cannon.
55. The Trial Chamber in *Limaj* found that around 24 March 1998 there were a number of attacks by Serb forces in the region:

“Around 24 March 1998 exchanges of fire occurred in several villages between Decane/Decani and Gjakove/Djakovica...One Serbian police officer and five Kosovo Albanians were killed and one policeman and 10 Kosovo Albanians were injured. Shots from a police helicopter were heard in the village of Irzniq/Rznic...There were two explosions followed by an exchange of fire that lasted 20 minutes. At about the same time an exchange of fire occurred in the Jashanice/Josanica area in Drenice, in which the Serbian special police was involved. At least 50-100 rounds were heard. Reports indicate that heavy weapons, such as the ‘Praga’ air defence system, were moved into the area, and that two platoons of police, including a jeep equipped with a heavy machine gun were seen moving west from Skenderaj/Srbica towards Laushe/Lausa. The Serbian forces also deployed in this area a BOV-3,

⁵⁷ OTP witness statement of Colonel John Crosland, 26 May 1999, ERN K022-7752, at para. 12.

a triple-barrelled weapon. While this weapon is designed primarily for anti-aircraft use, and not for anti-personnel use, its deployment indicates that it was for anti-personnel use as the KLA had no air power. Further, there were reports that around 25 March 1998, police armoured personnel carriers (“APCs”) were used in Gjakove/Djakovica and that at least four policemen and that at least five Kosovo Albanians were killed in the exchange of fire there.”⁵⁸

KLA organisation in the period following the 24 March 1998 attack

56. At the time of the Serbian attack on Gllogjan, the KLA in western Kosovo had no military structures in place. Ramush Haradinaj and others in the region responded to the attack on Gllogjan, and other villages in the area, and to the Serbian military build-up in western Kosovo, by encouraging the establishment of village defences, and by distributing weapons to those villages most likely to be attacked. However, the KLA had not yet begun to establish itself as an organised military structure. For April and most of May there was no organisational structure in existence to co-ordinate the armed resistance in the villages around Gllogjan, and no centralised command.
57. Colonel John Crosland testified in the *Limaj* case that in this period, the strength of the KLA “was such that with 50 trained soldiers on the other side they could have been nullified”⁵⁹. He said that although, during the months which followed, the KLA succeeded from time to time in interrupting the passage of transport on the major roads bordering the so-called Area of Total Control, this “by no means meant that they controlled the areas of territory between the three roads, although people assumed that”⁶⁰. He said that the KLA did not succeed in maintaining overall control of any particular area for more than 48 hours⁶¹. They did not have extensive weaponry and they did not have enough uniforms to go around. He said that this state of affairs was typical of a “fledgling” organisation⁶².

⁵⁸ *Limaj* Trial Judgement, para. 138.

⁵⁹ Testimony of Colonel John Crosland in *Limaj*, T 2009.

⁶⁰ Testimony of Colonel John Crosland in *Limaj*, T 2009-2010.

⁶¹ Testimony of Colonel John Crosland in *Limaj*, T 2010.

⁶² Testimony of Colonel John Crosland in *Limaj*, T 2011.

58. As the Trial Chamber found in *Limaj*, the KLA placed only limited emphasis on maintaining control of territory. They concentrated instead on military engagements with the Serbian forces⁶³:

“Each opposing force maintained control over different areas in Kosovo for short periods of time. There were frequent transfers of territory, and localised pitched battles between the KLA and the Serbian forces were fought for one, two or three days throughout May, June and July 1998. This was partly due to the greater resources available to the Serbian forces, and partly to the nature of the KLA military structures and objectives. As a small, though rapidly expanding, insurgent force, the KLA put less emphasis on holding territory and concentrated on other forms of engagement.”

59. Moreover, as explained above⁶⁴, it was not until the end of May that representatives of the villages around Glogogjan met to co-ordinate their activities and to establish a number of sub-zones; and it was not until the 23 June 1998 that the Dukagjin Zone was expanded, and the zone command elected.

The Serbian operation during 1998: An overview

60. In its Pre-trial brief in *Milutinović*, the Prosecution describes the Serbian attacks in western Kosovo in the period following 24 March 1998 in these terms:

“Around Easter 1998, a VJ tank unit razed Decani to the ground. Between May and June 1998, further operations were carried out. All anti-terrorist operations were characterised by the use of indiscriminate and excessive force against the villagers, with no distinction made between combatants and civilians, and the wanton destruction of Kosovo Albanian houses.”

61. In his testimony in *Limaj*, Colonel John Crosland agreed that the Serbian military tactics adopted over the spring and summer of 1998 could be described as “ethnic cleansing, blitzkrieg, scorched earth, all these terms”⁶⁵. He described these tactics as “grossly inhumane” and “non-effective”⁶⁶. He testified that Serb

⁶³ *Limaj* Trial Judgement, para. 195.

⁶⁴ See paras 11 to 12 above.

⁶⁵ Testimony of Colonel John Crosland in *Limaj*, T 2011.

⁶⁶ Testimony of Colonel John Crosland in *Limaj*, T 2011.

forces would approach a village with superior forces and would first fire warning shots to frighten the inhabitants into leaving. There would then be a destructive phase of bombardment. Once completed, the ground troops would approach the village, torching and burning the houses, and looting premises⁶⁷.

62. After March 1998, these tactics were deployed in the course of major Serbian offensives within the so-called “Area of Total Control” at the end of May⁶⁸, towards the end of July and the beginning of August⁶⁹, and again at the end of August and the beginning of September⁷⁰.
63. Describing the Serbian tactics in the summer of 1998, the Prosecution in *Milutinović* states:

“In June 1998, a guidance document from the VJ General Staff was issued to specify how VJ units should conduct operations against the KLA. The common theme that was first used in 1998 and later also applied in 1999, was that attacks against villages typically involved the VJ establishing a cordon and providing fire support with tanks or artillery while the MUP special units entered on foot. International diplomats noted joint operations of VJ, SAJ and PJP units taking place and causing heavy destruction in various villages, including Junik, Dulje, and Blace around 28 and 29 July 1998.”⁷¹

64. The Prosecution goes on to describe the Serb campaign in September in these terms:

“In the course of this (September) offensive, Serb forces, including the VJ, MUP, and MUP special units, engaged in co-ordinated attacks on ethnic Albanian villages across large swathes of Kosovo, expelling ethnic Albanians from their homes, killing civilians, and looting and destroying property.”

⁶⁷ Testimony of Colonel John Crosland in *Limaj*, T 2011-2012.

⁶⁸ See paras 100 to 103 below.

⁶⁹ See para. 14 above.

⁷⁰ See para. 15 above.

⁷¹ *Milutinović* Pre-trial Brief, para. 90.

65. In his evidence in *Limaj*, Colonel John Crosland described the aftermath of the September offensive as he approached the Lake Radoniq canal area on 10 September 1998:

“There was ongoing operations of tanks, armoured personnel vehicles, the cutting edge of the JSO, the SAJ were clearing for the second or third time at least the villages of Riznik and Prelep which were heavily damaged. Prelep was more or less flattened to about a foot level. These operations were still going on. Haystacks were being burnt, and general destruction of the infrastructure was continuing as we drove past.”⁷²

⁷² Testimony of Colonel John Crosland in *Limaj*, T 1969.

PART 3: INTERNAL ARMED CONFLICT

Introduction

66. The Prosecution argues that a state of internal armed conflict had come into existence by the time of the Serbian attack on the Haradinaj family compound on 24 March 1998⁷³.
67. The Defence disputes this conclusion for two main reasons. First, the armed engagements occurring in Kosovo at that time cannot properly be characterised as *protracted armed violence*; and second the KLA was at that time insufficiently organised, equipped and co-ordinated to meet the test laid down in the Tribunal's jurisprudence.
68. The Defence submits that this remained the position for some months thereafter. It is for the Prosecution to prove when, during the period covered by the present Indictment, a state of internal armed conflict can properly be said to have come into existence.

The legal requirements for a state of internal armed conflict

The test laid down in Tadić

69. The applicable legal test for the existence of a state of internal armed conflict was authoritatively laid down by the Appeals Chamber in the *Tadić* case⁷⁴:

“An armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups.”

⁷³ Prosecution Pre-trial Brief, para. 48.

⁷⁴ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

There are two central requirements of this test, as it applies to a state of internal armed conflict. The first requirement is that armed violence must be *protracted*. This necessarily requires a *temporal* analysis: Before armed violence can be described as *protracted*, it must have continued, at a certain level of intensity, for an extended period of time. The second requirement is that the relevant armed group must be sufficiently well-organised to enforce the requirements of international humanitarian law. These are the features which distinguish a state of internal armed conflict from terrorism or armed insurrection.

The Delalić Judgement

70. In the *Delalić* case, the Trial Chamber again emphasised the requirement that a state of internal armed conflict requires both *organisation* of the parties, and *protracted* armed violence. After citing the *Tadić* test, the judgement continues⁷⁵:

“[I]n order to distinguish [internal armed conflict] from cases of civil unrest or terrorist activities, *the emphasis is on the protracted extent of the armed violence* and the extent of *organisation* of the parties involved.” (emphasis added)

ICRC Commentaries

71. The ICRC Commentary on Additional Protocol II, applicable in internal armed conflicts, emphasises that even where a State uses its armed forces in response to an armed insurrection, this does not necessarily imply that a state of internal armed conflict has come into existence⁷⁶:

“Internal disturbances, characterised by isolated or sporadic acts of violence do not...constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order.”

⁷⁵ *The Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Judgement, 16 November 1998, (*Delalić* Trial Judgement), para. 182.

⁷⁶ ICRC, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at para. 619 (M. Bothe *et al.*, eds 1982).

72. The ICRC Commentary on Common Article 3 to the Geneva Conventions observes that before a state of internal armed conflict can be said to have come into existence, relevant armed groups must be sufficiently well-organised to have the means of respecting and ensuring the respect for the Convention⁷⁷. In the view of the ICRC, Common Article 3 requires;

“...that the Party in revolt against the *de jure* Government possesses an organised military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.”

The *Limaj* case

The Prosecution's expert evidence in Limaj

73. In *Limaj*, the Prosecution called expert evidence to the effect that armed engagements in Kosovo became protracted from about mid-May 1998. In his expert report in *Limaj*, which was admitted by agreement between the parties, Philip Coo states that⁷⁸:

“[I]t is assessed that combat operations were conducted *on a protracted basis* in Kosovo, with the KLA on one side and the Serb forces (VJ and MUP, primarily) on the other, from at least mid-May through August 1998.” (emphasis added).

74. In reaching this conclusion, Mr. Coo relied on a report by the FRY Ministry of Foreign Affairs, dated March 2000, which lists the number of alleged attacks by the KLA on the MUP in 1998: January (5); February (7); March (27); April (25); May (28); June (77); July (222); August (140). Thus, even on the figures advanced by the Prosecution in *Limaj*, the extent of military engagements between the KLA and the MUP escalated significantly in June 1998. Prior to that time the number of recorded incidents was relatively few.

⁷⁷ ICRC, *Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, at p. 36 (J. Pictet ed. 1952).

⁷⁸ Philip Coo, Expert report in *Prosecutor v. Limaj et al.*, Case No. IT-03-66, ERN U008-3180, at ERN U008-3200, para. 48.

The approach of the Trial Chamber in Limaj

75. The Trial Chamber in *Limaj* identified two relevant criteria for determining the existence of a state of internal armed conflict, namely (i) the intensity of the conflict and (ii) the organisation of the parties⁷⁹. The judgement explains that these criteria are relevant for;

“...distinguishing an armed conflict from banditry, unorganised and *short-lived* insurrections, or terrorist activities, which are not subject to international humanitarian law”⁸⁰ (emphasis added).

76. The *Limaj* Trial Chamber did not depart from the test laid down in *Tadić*. Indeed, the relevant passage of the *Tadić* judgement is quoted with approval in *Limaj*⁸¹. Moreover, the way in which the *Limaj* Trial Chamber went on to analyse the evidence confirms that it was applying both the “*protracted armed violence*” test, and the “*organisational*” test, as laid down in *Tadić*.

77. As to the “*protracted armed violence*” requirement, the Trial Chamber began by recording the Serbian attacks in February and March 1998⁸². It then proceeded to examine each reported incident of violence thereafter, throughout the whole of Kosovo, from April to August 1998, assessing and comparing the frequency and intensity of the violence month by month⁸³. On the basis of this analysis, the Trial Chamber concluded⁸⁴:

“In the Chamber’s view, the acts of violence that took place in Kosovo from the *end of May 1998* at least until 26 July 1998 are not accurately described as *temporally sporadic* or geographically disperse...

By the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo-Albanian border in the west, to near Pristina in the east, to Prizren and the Kosovo-Macedonian border in the south and the municipality of Mitrovica in the north.

⁷⁹ *Limaj* Trial Judgement, para. 84.

⁸⁰ *Limaj* Trial Judgement, para. 84.

⁸¹ *Limaj* Trial Judgement, para. 84.

⁸² *Limaj* Trial Judgement, paras 137-138.

⁸³ *Limaj* Trial Judgement, paras 135-167.

⁸⁴ *Limaj* Trial Judgement, paras 168-173.

In view of the above the Chamber is persuaded and finds that an internal armed conflict existed in Kosovo before the end of May 1998” (emphasis added).

78. As to the “*organisational*” requirement, the Trial Chamber found, on the evidence adduced in *Limaj*, that the KLA was sufficiently well-organised to meet the requirements of the *Tadić* test by about the end of May 1998 (the operative date for the purposes of the *Limaj* indictment)⁸⁵.

“By that time the KLA had a General Staff which appointed zone commanders, gave directions to the various units formed, or in the process of being formed, and issued public statements on behalf of the organisation. Unit commanders gave combat orders, and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police, as well as to recruit, train and equip new members. Although generally inferior to the VJ and MUP’s equipment, the KLA soldiers had weapons, which included artillery mortars and rocket launchers. By July 1998 the KLA had gained acceptance as a necessary and valid participant in negotiations with international governments and bodies to determine a solution for the Kosovo crisis.”

The Prosecution’s submissions on intensity and protraction

79. In support of its argument that a state of armed conflict existed from 24 March 1998, the Prosecution relies on KLA communiqués describing armed attacks on the MUP during late 1997 and early 1998⁸⁶. In addition, the Prosecution relies on three principal sources: (a) the evidence of Zoran Stijović, an official of the Serbian State Security Services whose analysis is based on Serbian intelligence reports emanating from Kosovo⁸⁷; (b) the opinions expressed by the NGO Human Rights Watch, in a report published in October 1998⁸⁸; and (c) Security Council Resolution 1160 of 31 March 1998⁸⁹.

⁸⁵ *Limaj* Trial Judgement, para. 171. The Defence case is that the description in this paragraph does not accurately reflect the extent to which some zone commanders emerged locally, without reference to the General Staff.

⁸⁶ Prosecution Pre-trial Brief, paras 57-58.

⁸⁷ Prosecution Pre-trial Brief, paras 57-58.

⁸⁸ Prosecution Pre-trial Brief, para. 58.

⁸⁹ Prosecution Pre-trial Brief, para. 59.

KLA Communiqués

80. The KLA communiqués relied upon by the Prosecution describe a series of armed engagements between the KLA and the MUP. Even assuming that these communiqués correctly record the incidents they describe⁹⁰, they do not disclose protracted armed violence, or armed engagements of sufficient intensity, to amount to a state of internal armed conflict. Nor do they establish that the KLA was sufficiently well-organised to meet the test laid down by the Tribunal's jurisprudence.

The evidence of Zoran Stijović

81. The reliability of the intelligence reports analysed by Zoran Stijović, and the conclusions which he draws, are not accepted. Colonel John Crosland recently testified in the *Milutinović* trial that Serbian intelligence tended to report any incident, however insignificant, in order to inflate the numbers⁹¹. The existence of a state of internal armed conflict requires an objective assessment, free from the risk of bias or distortion for propaganda purposes. As the ICTR held in the *Akayesu* case⁹², the determination of the existence of an internal armed conflict "does not depend on the subjective judgement of the parties to the conflict".

Human Rights Watch report

82. The Human Rights Watch report⁹³ asserts that by 28 February 1998, hostilities "had reached a level of conflict to which the obligations of Common Article 3 apply". This date was apparently selected on the basis that it was the date of the Serbian attack on Qirez and Likoshan⁹⁴. There is no analysis in the report of the applicable legal criteria; no record of the frequency and intensity of the armed engagements that had taken place prior to the 28 February 1998; no assessment

⁹⁰ The provenance and reliability of these communiqués are not established.

⁹¹ This testimony was given on 9 February 2007. The Defence has requested the transcript.

⁹² *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Trial Judgement, 2 September 1998, para. 603.

⁹³ Human Rights Watch, *Humanitarian Law Violations in Kosovo*, October 1998, p. 91.

⁹⁴ See para. 44 above.

of the state of organisation of the KLA as at that date; and no analysis of the requirement in *Tadić* for protracted armed violence.

83. The opinions expressed by Human Rights Watch as to the applicability of Common Article 3 in late February 1998 ought not to carry any significant weight in the Trial Chamber's assessment.

Security Council Resolution 1160

84. Security Council Resolution 1160 of 31 March 1998 does not support the Prosecution's case. The Resolution neither states nor implies that a situation of internal armed conflict had by then come into existence. It condemns the use of excessive force by Serbian police forces against civilians and peaceful demonstrators; condemns acts of "terrorism" by the KLA; and calls on the international community to take steps aimed at stabilising the situation. The only comment of potential relevance to the existence of state of armed conflict appears at paragraph 17 where the Security Council calls on the Office of the Prosecutor of the ICTY to begin gathering information related to the violence in Kosovo. It is plain, however, that the Security Council was not expressing any settled opinion as to the existence of a state of internal armed conflict, since paragraph 17 specifically refers to acts of violence "that *may* fall within [the ICTY's] jurisdiction".
85. The Trial Chamber in *Limaj* identifies the fact that a situation has "attracted the attention" of the Security Council as one among a number of relevant considerations for determining the existence of a state of armed conflict⁹⁵. However, it is necessary to examine the terms of any resolution passed. There is nothing in the present resolution which comments on the applicability of Common Article 3. Moreover, in the context of the Statute of the ICTY, the existence of a state of armed conflict is a matter for objective assessment by an

⁹⁵ *Limaj* Trial Judgement, para. 90.

independent judicial tribunal, applying the relevant legal tests, following a full examination of the facts. As the Trial Chamber pointed out in *Limaj*⁹⁶:

“[T]he determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case by case basis.”

The Prosecution’s submissions on organisation

86. The Prosecution wrongly asserts that in late 1997 and early 1998, the General Staff established three KLA military zones (Drenica, Dukagjini and Llap) and appointed commanders to each of those zones⁹⁷. The Prosecution also wrongly asserts that by 28 May 1998, when Bislim Zyrapi⁹⁸ arrived in Kosovo “the territory had already been divided into seven operational zones, each of which was further divided into local headquarters headed by sub-zone commanders”⁹⁹.
87. These assertions are contradicted by the findings of the Trial Chamber in *Limaj*, which held that the establishment of KLA operational zones did not *begin* until late May, and continued until, *by the end of August*, seven zones had been established¹⁰⁰:

“[P]rogressively from late May to late August 1998, the territory of Kosovo was divided by the KLA into seven zones...Each zone had a commander and covered the territory of several municipalities.”

88. As regards the area which is the subject of the present Indictment, the Prosecution is wrong to assert (a) that the Dukagjin zone was established by the

⁹⁶ *Limaj* Trial Judgement, para. 90.

⁹⁷ Prosecution Pre-trial Brief, para. 50.

⁹⁸ Bislim Zyrapi was a member of the KLA General Staff and was described as the Chief of Staff.

⁹⁹ Prosecution Pre-trial Brief, para. 50. This assertion in the Prosecution Pre-trial Brief is a misstatement of Bislim Zyrapi’s evidence. In *Limaj* Mr. Zyrapi testified that there were *two* zones which were in a development phase and which were active in military actions on 28 May 1998, namely Drenicë and Dukagjin, and not *seven* as the Prosecution alleges. Moreover, he testified that “these two zones...were in the phase of development; they were not fully developed.” Testimony of Bislim Zyrapi in *Limaj*, T 6821-6826

¹⁰⁰ *Limaj* Trial Judgement, para 95.

General Staff (b) that it was established by “early 1998” and (c) that Ramush Haradinaj was *appointed* by the General Staff as Commander of the zone.

89. The steps leading to the establishment of the Dukagjin Zone are summarised in paragraphs 11 to 13 above:

- a. The Dukagjin Zone was not established by the General Staff. Nor was it established in “early 1998”. The zone evolved from the meeting of local village representatives held in Glllogjan in late May 1998¹⁰¹.
- b. Ramush Haradinaj was not at that point the overall Commander of the Dukagjin Zone. He was one of a number of Sub-zone Commanders. It was not until 23 June 1998 that the Dukagjin Zone was extended, and that Ramush Haradinaj became Commander of the Zone.
- c. As the minutes of the 23 June 1998 meeting make clear¹⁰², Ramush Haradinaj was not *appointed* by the General Staff at any time. He was *elected* by those present at the meeting.

¹⁰¹ OTP witness statement by SST 7/05, ERN U002-9294-U002-9314, at U002-9302-U002-9304; Transcript of OTP witness interview by Shemsedin Çekaj, ERN ET T000-2978-T000-2979, at pp 31-43; OTP witness statement by Skender Rexhahmetaj, ERN U009-4688-U009-4698, at paras 11-14; contemporary order, 25 May 1998, ERN U002-0362.

¹⁰² Minutes of 23 June 1998 meeting, ERN U001-3816-U001-3819 and ERN U001-5407-U001-5411.

PART 4: CRIMES AGAINST HUMANITY

Introduction

90. The principal evidence relied upon by the Prosecution for the purposes of Article 5 was all before the Trial Chamber in *Limaj*. On the basis of this evidence, the Trial Chamber found that the KLA had *not* engaged in a widespread or systematic attack on a civilian population.
91. Having regard to the activities of the KLA throughout Kosovo, including the activities of the KLA in the area covered by the present Indictment, the *Limaj* Trial Chamber found that the evidence did not establish, or even indicate, a policy of targeting civilians as such, whether Serbian or Kosovar Albanian.
92. The Trial Chamber found that at most the KLA had a policy, linked to its military objectives, of targeting individuals thought to be collaborating with the Serb regime. It held, however, that perceived collaborators were targeted as individuals, rather than as members of a targeted civilian population; and that such a policy could not constitute an attack on a civilian population as such. The Prosecution has not appealed this ruling.

The *Limaj* judgement

Serb civilians

93. As regards the Serbian civilian population, the findings of the *Limaj* Trial Chamber were as follows¹⁰³:

“From the evidence before the Chamber, the KLA evinced no policy to target civilians *per se*. Peter Bouckaert stated that he never saw anything issued by the KLA which constituted an order to its members to target innocent civilians or to loot or destroy Serbian property. Suzanne Ringgaard Pedersen stated that she could not discern a broad policy to target civilians. The Chamber accepts Jakup Krasniqi’s

¹⁰³ *Limaj* Trial Judgement, para. 215.

statement that it was not part of KLA political or military policy to kidnap, torture or murder innocent civilians. The evidence does not establish, or even indicate, a general policy of targeting civilians as such, whether Serbian or Kosovo Albanian.”

94. Although the Trial Chamber accepted that there was evidence of the abduction (and in some instances the death) of Serb civilians, it nevertheless concluded that¹⁰⁴:

“The evidence does not establish that the abduction, detention or mistreatment of Serbian civilians was on a scale or frequency such that the attack could be considered to have been directed against a civilian population.”

Perceived collaborators

95. As regards those perceived to be collaborating with the Serb military, the *Limaj* Trial Chamber held that¹⁰⁵:

”There was a policy, linked to military objectives, to target those individuals thought to be collaborating with the Serbian forces. Nevertheless, in the guise of giving effect to this policy, a number of Kosovo Albanian civilians may have been abducted for other reasons, such as personal revenge of individual KLA members and other motives. The KLA did not have the resources or the command structure to adequately control the implementation of this policy by its forces at the relevant time to the Indictment, and the Chamber accepts that individual cases of abduction, for reasons not within the collaborator policy, were carried out by rogue elements of the KLA.

However, the effect of the evidence is to indicate that the KLA had a policy of targeting only those who were believed to have, or suspected of having, links with the Serbian regime. Evidence before the Chamber indicates there was a limited level of co-ordination and organisation to such targeted attacks...

However, the Chamber concludes that, whether these perceived or suspected collaborators were correctly identified or not, they were targeted as individuals rather than as members of a larger targeted population. The Chamber accepts, however, that there were also instances of abduction undertaken by local elements of the KLA, who

¹⁰⁴ *Limaj* Trial Judgement, para. 225.

¹⁰⁵ *Limaj* Trial Judgement, paras 216-217.

were acting independently of any central KLA control because, at the relevant time, the KLA had only limited capacity to exert effective control.”

Relevance of the findings in Limaj to the present Indictment

96. The Prosecution does not refer in its Pre-trial Brief to the judgement of the *Limaj* Trial Chamber in respect of crimes against humanity, nor state how the Prosecution suggests it is to be distinguished. Nor does the Prosecution’s Pre-Trial Brief refer to the evidence adduced before the *Limaj* Trial Chamber on this issue or explain how the evidence it proposes to adduce in the present case differs from the evidence adduced by the Prosecution in *Limaj*.
97. The Defence points out that the findings on this issue in *Limaj* were not concerned with a particular region of Kosovo. The conclusion that the KLA had not engaged in a widespread or systematic attack on a civilian population was expressed as applying to *the whole of Kosovo*¹⁰⁶. Moreover, the Trial Chamber in *Limaj* had before it evidence of the discovery of the bodies in the Lake Radoniq Canal area¹⁰⁷ and evidence relating to the alleged ill-treatment of detainees at Jabllanicë¹⁰⁸.

The Defence submissions

Serb civilian deaths

98. The indictment counts allege the responsibility of the three accused for the deaths of 12 Serbs¹⁰⁹, over a period of approximately six months. However, there is no evidence in the Prosecution case as to the circumstances in which six of these individuals died¹¹⁰. As the Defence has pointed out in paragraph 25

¹⁰⁶ *Limaj* Trial Judgement, paras 192, 195, 204, 210, and 215-228.

¹⁰⁷ See, for example, testimony of Colonel John Crosland in *Limaj*, T 1968-1970.

¹⁰⁸ *Limaj* Trial Judgement, para. 203.

¹⁰⁹ Darinka Kovač and Vukosava Marković (Counts 7 and 8); Milovan and Milka Vlahović (Counts 9 and 10); Slobodan Radošević and Miloš Radunović (Counts 11 and 12); Rade Popadić, Ilija Antić, Zdravko Radunović and Velizar Stošić (Counts 21 and 22), Ivan Zarić (Counts 23 and 24) and Nenad Remištar (Counts 29 and 30).

¹¹⁰ Milovan and Milka Vlahović; Rade Popadić, Ilija Antić, Zdravko Radunović and Velizar Stošić.

above, there is no basis in the evidence for concluding that these individuals were killed by persons associated with the KLA. Nor is there any basis in the evidence for concluding that their deaths amounted to war crimes or crimes against humanity.

99. In addition, the indictment makes an unsubstantiated and general allegation that during the Indictment period “in the municipalities of the Dukagjin Operational Zone, in addition to the victims mentioned in this Indictment, the KLA abducted more than 60 civilians and subsequently killed many of them”¹¹¹. There is no evidence cited in the Indictment in support of this statement. Nor is this allegation even mentioned in the Prosecution’s Pre-trial Brief. The Defence has been given no notice of the case it has to meet, and is therefore unable to respond to this allegation (if indeed the allegation is to be pursued by the Prosecution).

Displacement of Serb civilians

100. There is no basis in the evidence for the general assertion made by the Prosecution that the KLA engaged in a systematic campaign aimed at displacing the Serb civilian population of the Dukagjin zone.
101. It is undoubtedly true that many Serbs in western Kosovo fled their homes in the spring of 1998, as did many Kosovar Albanians. This was due in part to the fighting that was then taking place, and in part to a deliberate policy of the Serb forces to clear the civilian population from certain areas in order to create “free fire” zones within which they could mount armed attacks on the KLA. In addition, there is evidence to suggest that Albanian villagers sometimes threatened and harassed their Serb neighbours. However, this was never any part of the military policy of the KLA.

¹¹¹ Indictment, para. 40.

102. The Trial Chamber in *Limaj* observed¹¹²:

“On 22 April 1998 substantial shooting occurred in the area of Decane/Decani and Gjakove/Djakovica as a result of which many civilians, both Serbs and Kosovar Albanians left the area.”

103. On 15 April 1998, Colonel John Crosland sent a diplomatic telegram, recording that¹¹³:

“The State media is reporting that Serb families are leaving the Decani area in large numbers as a result of threats from armed Albanians. The reports are colourful and almost certainly exaggerated, but there is more than a grain of truth in them. Some 18 Serb families left Decani on 14 April, and the atmosphere among Serbs is becoming more tense.”

104. In his evidence in *Limaj*, Colonel John Crosland testified about this report¹¹⁴. He stated that Serb families were moving away from the area because they felt “it was becoming more and more unsafe”. He stated that there was some harassment of Serbs civilians by “both sides”, and that the Serb security forces;

“...wished to have this area what they called a ‘free fire zone’ so they would fire into it at will if they thought there was a target that required attacking”.

105. On 5 May 1998 a report based on Colonel Crosland’s observations was sent by the British Embassy in Belgrade to the Foreign and Commonwealth Office in London. This report records UNHCR estimates of 5000 refugees who had fled from western Kosovo to Montenegro¹¹⁵. The report reflects Colonel Crosland’s observations on the build-up of Serb forces in the area, and continues:

“Most worryingly, he saw 80/100 of the special anti-terrorist police (JSO) in four separate locations (these are elite troops of the state security and rarely seen).”

¹¹² *Limaj* Trial Judgement, para. 140

¹¹³ Diplomatic Telegram, 15 April 1998, para. 4. See testimony of Colonel John Crosland in *Limaj*, T 1882-1885.

¹¹⁴ Testimony of Colonel John Crosland in *Limaj*, T 1885.

¹¹⁵ Testimony of Colonel John Crosland in *Limaj*, T 1909-1910.

106. Testifying about this report in *Limaj*¹¹⁶, Colonel John Crosland said that civilians living to the west of the Pejë to Gjakovë road were “cleaned out and sent packing” by the Serb forces. He said that the Serb forces “were attempting to clear the area so they could use it as a ‘free fire zone’.”
107. The scale of Serb civilian displacement in 1998 needs to be seen in its proper context. The number of Serb refugees who left the Dukagjin region in 1998 was very small by comparison with the numbers who left during the intense fighting in 1999.
108. The UNHCR (in collaboration with the European Community Humanitarian Office and the Commissioner for Refugees of the Republic of Serbia) published figures showing the number of people who were internally displaced from particularly municipalities of Kosovo¹¹⁷. The data indicates that in 1998, a total of 126 individuals were displaced from the Pejë, Deçan, Gjakovë, Istog/Istok, and Klinë municipalities¹¹⁸.
109. This figure is not broken down by ethnic origin. However, even assuming that all of the displaced person recorded by the UNHCR were Serbs, this figure would still represent a fraction of the local Serb population in these municipalities. The UNHCR report records that in 1998 the combined Serb population of those five municipalities (excluding displaced persons) was 32,343¹¹⁹. Thus the total number of internally displaced persons is less than 0.5% of the total Serbian population of the relevant municipalities.

¹¹⁶ Testimony of Colonel John Crosland in *Limaj*, T 1910.

¹¹⁷ UNHCR, Registration of Internally Displaced Persons From Kosovo and Metohija, ERN 0216-2349.

¹¹⁸ UNHCR, Registration of Internally Displaced Persons From Kosovo and Metohija, ERN 0216-2349, at 0216-2392 (table 2).

¹¹⁹ The Serb populations of the relevant municipalities (excluding internally displaced persons) as recorded by the UNHCR were as follows: Pejë (14,765), Deçan (791), Gjakovë (3,211), Istog (7,270), and Klinë (6,306).

110. By way of a comparison, the number of people who are recorded by the UNHCR as having been displaced from the same municipalities during the intense fighting which took place in 1999 was 38,936¹²⁰.

Recapitulation

111. The Defence submits that there is no evidence from which it can properly be inferred that the KLA engaged in a widespread or systematic attack on the Serb civilian population. Nor is there any evidence of an organised campaign by the KLA to expel the Serb civilian inhabitants of the Dukagjin region.

Perceived collaborators

112. The approach of the *Limaj* Trial Chamber in relation to perceived collaborators establishes a principle which is of equal application to the present case. The Trial Chamber held that perceived or suspected collaborators were singled out, not on the ground of their membership of a particular civilian group, but on the ground of their *conduct* as *individuals* who were suspected of providing information or assistance to the Serbian authorities. The fact that any alleged ill-treatment was directed towards these people on the ground of their *actions* (actual or suspected), rather than any inherent characteristic, effectively precluded a finding that they were targeted on the grounds of their membership of a civilian population as such.

113. Nor could it be said that the targets of this alleged policy were sufficiently numerous to amount to a civilian population within the meaning of Article 5. As the *Limaj* Trial Chamber held¹²¹:

¹²⁰ UNHCR, Registration of Internally Displaced Persons From Kosovo and Metohija, ERN 0216-2349, at 0216-2392.

¹²¹ *Limaj* Trial Judgement, para. 226.

“The evidence does not enable any conclusion as to the overall proportion of civilians abducted and detained by the KLA as between Serbian and Kosovo Albanian victims. What has been established in respect of those abducted and detained, indicates that the abductions occurred in diverse geographic locations, were relatively limited in number and involved relatively few abductees in comparison to the civilian population of Kosovo, such that it is not possible to discern from them that the civilian population itself was the subject of an attack, or that Kosovo Albanian collaborators and perceived or suspected collaborators and other abductees were of a class or category so numerous and widespread that they themselves constituted a ‘population’ in the relevant sense.”

114. Insofar as the present Indictment alleges the abduction, ill-treatment or murder of Kosovar Albanian or Roma civilians, the Prosecution alleges that the motive for this treatment is that the victims were perceived to be collaborating with the Serbian authorities. On the basis of the finding in *Limaj*, which the Prosecution has not appealed, and which is in any event the correct interpretation of Article 5, the ill-treatment or murder of perceived collaborators, on the ground of their actual or suspected *individual conduct*, cannot amount to an attack on a civilian population for the purposes of Article 5.

PART 5: JOINT CRIMINAL ENTERPRISE

Introduction

115. As the Trial Chamber held in the *Krajisnik* case:

“[I]t is the interaction or cooperation among persons – their joint action – in addition to their common objective, that makes those persons a group. The persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for the crimes committed through the JCE”.

In the present case, there is simply no credible evidence of Ramush Haradinaj acting together with his co-accused, or with others named as members of the alleged JCE, in pursuit of any common criminal objectives.

The approach of the Prosecution

116. In its Pre-trial Brief, the Prosecution identifies no direct evidence in support of the existence of the alleged JCE¹²². Instead, the Prosecution seeks to draw tenuous inferences from a number of items of circumstantial evidence. Most of the circumstantial matters identified by the Prosecution have been addressed in Parts 1 to 4 above. This section of the Defence Brief therefore focuses on (a) the Prosecution’s submissions concerning the extent of KLA territorial control over the Indictment area and (b) the inferences the Prosecution seeks to draw from the recovery of human remains at the Lake Radoniq canal area.

The “Area of Total Control”

117. The OTP claims that a map at Annex A to its Pre-trial Brief identifies the boundaries of an area that was within the exclusive control of the KLA at all relevant times. This map was used by Colonel John Crosland during 1998, and

¹²² Nor does the Prosecution identify any relevant documentary evidence. The two orders relied upon by the Prosecution in its Pre-trial Brief at para. 22 do not provide any support at all for the JCE allegation.

was introduced into evidence in the course of his testimony in *Limaj*. However, it is apparent from the transcript of Colonel Crosland's testimony¹²³ that he did not understand the area marked on this map to be territory that was under the exclusive military control of the KLA throughout the Indictment period.

118. Referring to the map, Colonel John Crosland did no more than describe an "area of operations" based around Irzniq/Rznic. He said "it was thought that this area was under Ramush Haradinaj", and went on:

"The area we're dealing with...is based on Riznik or close to Riznik and it was suggested or thought that perhaps this area of operations would stretch as far as Pec including Decani and down to the area of Djakovica."

119. The suggestion that the KLA had complete control of the territory marked on this map, to the exclusion of all Serb forces, is unsustainable. Combined Serb forces were positioned on most of the strategic rises throughout western Kosovo. There is also ample evidence of Serb military activity within the area identified by the Prosecution, during the Indictment period. By way of example:

- a. During his testimony in the *Milošević* case, General Božidar Delić identified the areas where 549th Motorised Brigade were deployed. These encompassed a number of positions within the so-called "Area of Total Control", including Lake Radoniq, Ljumbarde and Ereka Suka (an elevated position close to Baballoq)¹²⁴. General Delić produced a map showing the position of certain VJ deployments from 22 April 1998 until 10 September 1998¹²⁵, on which he identified three VJ positions in the immediate vicinity of Lake Radoniq.

¹²³ Testimony of Colonel John Crosland in *Limaj*, T 1958.

¹²⁴ Testimony of General Božidar Delić in *Milošević*, T 41230-41240.

¹²⁵ Testimony of General Božidar Delić in *Milošević*, T 41268.

- b. An ECMM report of 25 April 1998 confirms that VJ units were deployed in the vicinity of the Lake and that encounters with the KLA occurred in that area¹²⁶.
- c. Media reporting describes a confrontation on 1 May 1998 between a group of Kosovar Albanians and MUP officers at a Serb checkpoint at Drenoc/Drenovac.¹²⁷
- d. On 20 May 1998, Serb forces attacked Grabanicë/Grabanica (north of Jabllanicë)¹²⁸.
- e. On 25 May 1998 Serb forces attacked the villages of Lybeniq/Ljubenić and Strelc/Streoc. Colonel John Crosland filed a sit-rep on 28 May 1998 in which he recorded that buildings in the two villages had been burned, and that 11 villagers had been killed. From the descriptions given by the survivors, Colonel Crosland concluded that this attack had been perpetrated by the JSO rather than the regular MUP¹²⁹.
- f. On or about 28 May 1998, a major Serbian offensive was launched around Vranoq and Baran/Barane (to the west of Jabllanicë). The VJ and the MUP came from the direction of Pejë with tanks and other armoured vehicles and heavy weaponry.¹³⁰ Similar actions took place in Carabreg, Strelc, Isniq/Istinić, Rastovicë and Prejlep/Prilep on 28 May 1998¹³¹.
- g. Also on 28 May 1998, Colonel Vladimir Lazarević of the Prishtina Corps Command (one of the accused in the *Milutinović* trial) issued an

¹²⁶ ECMM daily report, "What the Papers ('Politika' & 'Vecernje Novosti') Say about Situation in Kosovo", 25 April 1998, R025-1692.

¹²⁷ Koha Ditore, 1 May 1998, "On the Way Coming to Burial Ceremony, Serbian Police in the Crossroad of Drenoc".

¹²⁸ OTP witness statement by SST 7/03, U008-6965-U008-6988.

¹²⁹ Situation Report by Colonel John Crosland, 28 May 1998, R011-8458.

¹³⁰ OTP witness statement of SST 7/05, U002-9305.

¹³¹ OTP witness statement of SST 7/05, U002-9305.

order to the 2nd Military Police Battalion to carry out a diversionary advance along the Lake Radoniq – Bitesh I Ulet/Donji Bites axis¹³².

- h. On 10 June 1998, General Nebojša Pavković deployed the 72nd Special Brigade for Reconnaissance and Sabotage in the area of *Maja Coban* and the 25th Military Police Battalion in the area of Lake Radoniq¹³³. The order issued by General Pavković notes that “safe and stable communication has been established with all units”¹³⁴.
- i. On 11 June 1998, a lance corporal in the VJ was wounded in the area of Lake Radoniq.¹³⁵
- j. On 16 June 1998 the VJ Military District Command Pristina reported to the 3rd Army Command that units of the MUP and VJ had been deployed in Rakovinë (East of Lake Radoniq), tasked with keeping watch on the Jabllanicë area¹³⁶.
- k. The Council for Defence of Human Rights and Freedoms reported that on 5 July 1998 Serb forces shelled Glllogjan from Bitesh and Herec/Erec (an elevated position near Babolloq/Babaloc)¹³⁷.
- l. In early July a detachment comprising 14 members of the 549th Battalion led by Lieutenant Rade Radojević was deployed to the Lake Radoniq area in order to secure the dam and the roads in the vicinity of the Lake¹³⁸.

¹³² Contemporary order from Prishtina Corps Command to the Chief of Staff, signed by Colonel Vladimir Lazarević and received General Božidar Delić, 28 May 1998, ERN Y001-3639.

¹³³ Order from the Prishtina Corps Command Post, 10 June 1998, tendered by Philip Coo in *Limaj*, Annex B, ERN K022-7980.

¹³⁴ Order from the Prishtina Corps Command Post, 10 June 1998, tendered by Philip Coo in *Limaj*, Annex B, ERN K022-7980.

¹³⁵ Prishtina Corps Report: Documentation of all incidents involving VJ Feb.-Dec., ERN ET 0230-1126-0230-1162.

¹³⁶ Testimony of Colonel John Crosland in *Limaj*, T 1935.

¹³⁷ Council for Defence of Human Rights and Freedoms, Volume 8, p. 101.

¹³⁸ Testimony of Janoš Sel in *Milošević*, T 47295.

- m. In the same period, Serb forces attacked the villages of Raskoc, Bitesh i Ulet, and Bitesh e Eperme/Gornja Bitish (in the vicinity of Lake Radoniq)¹³⁹.
 - n. There was a functioning MUP police station at Çallapek/Celopek (west of Jabllanicë) until 6 July 1998¹⁴⁰.
 - o. On 18 August 1998 General Nebojša Pavković ordered the withdrawal of the 52nd Bomber Regiment from Lake Radoniq and transferred these positions to the MUP forces¹⁴¹.
120. As explained in paragraphs 14 to 15 above, the combined Serb forces, including the MUP special paramilitary forces, mounted sustained offensives during the period between late July and mid-August, and again in early September, against villages within the so-called “Area of Total Control”.

The discovery of human remains in the Lake Radoniq canal area

121. The Prosecution submits that all 33 sets of human remains found in the Lake Radoniq canal area must have been killed by the KLA pursuant to the alleged JCE. For the reasons explained at paragraphs 25 to 26 above, this argument is fundamentally misconceived.
122. In addition, there are substantial grounds for questioning the integrity of the alleged crime scene. By way of example:
- (a) The evidence concerning the Ekonomia Farm bodies¹⁴² suggests that there was an orchestrated attempt by the Serb authorities falsely to implicate the KLA for killings committed by Serb forces. Once the integrity of the alleged crime scene appears to be compromised by the deliberate falsification of evidence, it becomes impossible to draw any

¹³⁹ Testimony of Janoš Sel in *Milošević*, T 46807-46812.

¹⁴⁰ OTP witness statement of Božidar Paunović, ERN U003-0787-U003-0791.

¹⁴¹ Order of General Nebojša Pavković, Y001-3261-Y001-3263.

¹⁴² See para. 25(ii) and fn. 17 above

safe inference from the presence of human remains (and in particular from the presence of the unidentified and unattributed remains).

- (b) The Prosecution evidence concerning the circumstances in which the presence of human remains were discovered in the canal area is open to serious question. Contemporary records suggest that the account put forward by the Prosecution witnesses is not the truth.
- (c) The statements of a number of the witnesses involved in the Serbian recovery operation in September 1998 are inconsistent in important respects with the contemporary photographs and footage.
- (d) There is evidence suggesting that remains were not found in the locations in which they are recorded; and that remains allegedly recovered at a separate site in Dashinoc/Dašinovać were permitted to become commingled with remains allegedly recovered from the canal area.
- (e) There are grounds to question the independence and integrity of the Serbian forensic team led by Professor Dusan Dunjic.
- (f) There are a number of recorded instances of the Serb forces in Kosovo engaging in the falsification of evidence, and the transportation of bodies. In the *Milutinović* case, for example, the Prosecution alleges that the bodies of more than 900 Kosovar Albanian victims were transported to Serbia¹⁴³. Many of these remains have been identified and repatriated to their families in Kosovo. There are also reported instances of Serb forces digging up the bodies of Kosovar Albanian victims, and re-burying them to conceal the commission of crimes.
- (g) The Serbian authorities claimed to have found rounds of Chinese ammunition in the canal area, which were shown to the media and

¹⁴³ Prosecution Pre-trial Brief in *Milutinović*, para. 161.

international observers as evidence of KLA responsibility. The reliability of this evidence is open to serious doubt. In the *Milutinović* case, the Prosecution alleges (by reference to contemporary military orders) that MUP troops were commanded to carry a small amount of Chinese ammunition in order falsely to implicate the KLA for crimes committed by Serb forces¹⁴⁴.

(h) As the Prosecution points out in its Pre-trial Brief in *Milutinović*¹⁴⁵:

“Moving bodies to Serbia and other locations, burning bodies, conducting *pro forma* autopsies without regard for the results, and burying corpses in unmarked mass graves or hiding them in wells or holes is inconsistent with the handling of battlefield casualties in a legitimate armed conflict against terrorists. Falsifying evidence to blame the KLA or NATO for deaths is inconsistent with the legitimate use of deadly force. These actions show the attempt to hide the evidence of the criminal plan to alter the ethnic balance of Kosovo by any means possible.”

¹⁴⁴ Prosecution Pre-trial Brief in *Milutinović*, para. 160.

¹⁴⁵ Prosecution Pre-trial Brief in *Milutinović*, para. 161.

CONCLUSION

123. The Defence (a) submits that the evidence of Ramush Haradinaj's direct participation in crimes alleged on the Indictment is false, and should be rejected; (b) submits that there is no evidence that Ramush Haradinaj was party to the JCE alleged; (c) puts the prosecution to proof of the date on which a state of armed conflict can be said to have into existence (d) denies that there was any widespread or systematic attack on a civilian population by the KLA; and (e) submits that Ramush Haradinaj should be acquitted on all counts in the Indictment.

Word count: 14,761

Dated this day the 12th day of February 2007,

Counsel for Mr. Ramush Haradinaj,

Ben Emmerson QC

Rodney Dixon 

Michael O' Reilly