UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No.	IT-04-84-A
		Date:	19 July 2010
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Judgement: **19 July 2010**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:
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Mr. Marwan Dalal
Ms. Elena Martin Salgado

Counsel for Ramush Haradinaj:
Mr. Ben Emmerson
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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seised of two appeals from the judgement rendered by Trial Chamber I ("Trial Chamber") on 3 April 2008 in the case of *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-T ("Trial Judgement").[1]

A. Background

2. Ramush Haradinaj was born on 3 July 1968 in Glođane/Gllogjan, in the municipality of Dečani/Deçan in Kosovo/Kosova, in the former Yugoslavia.[2] The Indictment alleges that from about 1 March 1998 until mid-June 1998, he served as a *de facto* commander in the KLA, and that in mid-June 1998, he was appointed a commander, with overall command of the KLA forces in the Dukagjin area.[3] Idriz Balaj was born on 23 August 1971 in Iglarevo/Gllarevë, in the municipality of Klina/Klinë in Kosovo/Kosova.[4] The Indictment alleges that at all times relevant to the Indictment he was a member of the KLA and commanded a special unit known as the "Black Eagles".[5] Lahi Brahimaj was born on 26 January 1970 in Jablanica/Jabllanicë, in the municipality of Đakovica/Gjakovë in Kosovo/Kosova.[6] The Indictment alleges that at all times relevant to the Indictment he was a member of the KLA, serving as Deputy Commander of the Dukagjin Operative Staff from 23 June 1998 to 5 July 1998, and thereafter serving as Finance Director of the KLA General Staff.[7]

3. The events giving rise to this case took place between 1 March 1998 and 30 September 1998 in Kosovo/Kosova.[8] The Indictment alleges that during this period the KLA persecuted and abducted Serbian and Kosovar Roma/Egyptian civilians, as well as Kosovar Albanian civilians perceived to be collaborating with Serbian forces in the Dukagjin area of Kosovo/Kosova.[9] The Prosecution charged Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj as participants in a joint criminal enterprise ("JCE") in relation to the commission of crimes against humanity, under Article 5 of the Statute of the Tribunal ("Statute"), and violations of the laws or customs of war, under

[1] Prosecution's Notice of Appeal; Prosecution's Appeal Brief; Brahimaj's Notice of Appeal; Brahimaj's Appeal Brief.
[2] Indictment, para. 1.
[3] Indictment, para. 2; Trial Judgement, para. 2.
[4] Indictment, para. 8.
[5] Indictment, para. 9; Trial Judgement, para. 3.
[6] Indictment, para. 11.
[7] Indictment, para. 12; Trial Judgement, para. 4.
[8] Indictment, para. 13; Trial Judgement, para. 1.
[9] Indictment, paras 14, 26; Trial Judgement, para. 1.

Article 3 of the Statute.[10] The common criminal purpose of the alleged JCE was to consolidate total KLA control over the Dukagjin area through the unlawful removal and mistreatment of the aforementioned categories of civilians.[11] In the alternative, the Prosecution charged the three defendants with individual criminal responsibility under Article 7(1) of the Statute for committing, planning, instigating, ordering, or aiding and abetting the commission of crimes alleged in the Indictment.[12]

4. The Trial Chamber found the evidence before it insufficient to establish the existence of a JCE in which the three defendants participated. It acquitted all three defendants of Counts 6, 14, 20, 22 (with regard to the murder of Nurije and Istref Krasniqi and the murder of Sanije Balaj), 30, 36, and 37 of the Indictment.[13] The Trial Chamber also acquitted Ramush Haradinaj and Idriz Balaj of Counts 28 and 32 of the Indictment and held that Lahi Brahimaj would not be held responsible under Counts 28 and 32 of the Indictment as a participant in a JCE.[14] The Trial Chamber further acquitted Ramush Haradinaj and Idriz Balaj of all alternative charges in the Indictment.[15]

5. The Trial Chamber found Lahi Brahimaj guilty of torture as a violation of the laws or customs of war, as charged in Count 28 of the Indictment, and torture and cruel treatment as violations of the laws or customs of war, as charged in Count 32 of the Indictment.[16] Lahi Brahimaj was found not guilty under all other Counts in the Indictment.[17] The Trial Chamber sentenced Lahi Brahimaj to a single sentence of six years of imprisonment.[18]

B. Prosecution's Appeal

6. On 2 May 2008, the Prosecution filed a notice of appeal, setting forth three grounds of appeal against the Trial Judgement. First, the Prosecution requests the Appeals Chamber to: (a) reverse the decisions to acquit the three defendants of criminal responsibility based on their alleged participation in a JCE for crimes committed at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32, and 34 of the Indictment; (b) reverse the decisions to acquit the three defendants of individual criminal responsibility under Counts 24 and 34 of the Indictment; (c) reverse the decision to acquit Lahi Brahimaj of individual criminal responsibility under Count 26 of the Indictment; and (d) remit the matter back to a Trial Chamber

[10] Indictment, para. 25; Trial Judgement, para. 5.
[11] Indictment, para. 26; Trial Judgement, para. 5.
[12] Indictment, paras 17-24; Trial Judgement, para. 5.
[13] Trial Judgement, paras 475-478, 502-503.
[14] Trial Judgement, paras 478, 502-503.
[15] Trial Judgement, paras 502-503.
[16] Trial Judgement, paras 479-481, 504.
[17] Trial Judgement, para. 504.
[18] Trial Judgement, paras 501, 505.

for a re-trial to determine the liability of the three defendants for these crimes.[19] Second, the Prosecution requests the Appeals Chamber to reverse the acquittal of Idriz Balaj for murder and enter a conviction against him under Count 14 of the Indictment for murder as a violation of the laws or customs of war under Article 3 of the Statute for having aided and abetted the murders of sister "S", the mother of Witness 4, and sister "M".[20] Third, the Prosecution requests the Appeals Chamber to reverse Idriz Balaj's acquittal for the rape, torture, and cruel treatment of Witness 61 and the cruel treatment of Witness 1 and enter convictions against him under Counts 36 and 37 for rape, torture, and cruel treatment of Witness 61 and cruel treatment of Witness 1 as violations of the laws or customs of war under Article 3 of the Statute.[21]

C. Brahimaj's Appeal

7. On 5 May 2008, Lahi Brahimaj filed a notice of appeal setting forth nineteen grounds of appeal, requesting the Appeals Chamber to reverse his conviction in relation to the torture and cruel treatment of Witness 6 and Witness 3, and challenging his sentence.[22]

D. Appeal Hearing

8. The Appeals Chamber heard oral submissions of the parties regarding these appeals on 28 October 2009. Having considered their written and oral submissions, the Appeals Chamber hereby renders its Judgement.

[19] Prosecution's Notice of Appeal, paras 6-7; Prosecution's Appeal Brief, paras 42-43.
[20] Prosecution's Notice of Appeal, para. 16; Prosecution's Appeal Brief, para. 71.
[21] Prosecution's Notice of Appeal, para. 21; Prosecution's Appeal Brief, paras 89, 96.
[22] Brahimaj's Notice of Appeal, paras 27-28; Brahimaj's Appeal Brief, paras 181-182.

II. STANDARD OF REVIEW

9. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice.[23] These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of the *ad hoc* Tribunals.[24] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the Trial Judgement but that is nevertheless of general significance to the Tribunal's jurisprudence.[25]

10. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the alleged error invalidates the decision.[26] An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[27] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.[28] It is necessary for any appellant claiming an error of law on the basis of lack of a reasoned opinion to identify the specific issues, factual findings, or arguments which an appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[29]

11. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[30] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[31]

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[23] *Nchamihigo* Appeal Judgement, para. 7; *Zigiranyirazo* Appeal Judgement, para. 8; *Karera* Appeal Judgement, para. 7.

[24] *Boškoski and Tarčulovski* Appeal Judgement, para. 9; *D. Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6.

[25] *Boškoski and Tarčulovski* Appeal Judgement, para. 9; *D. Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8; *Orić* Appeal Judgement, para. 7; *Hadžihasanović and Kubura* Appeal Judgement, para. 7.

[26] *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Nchamihigo* Appeal Judgement, para. 8; *Zigiranyirazo* Appeal Judgement, para. 9.

[27] *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12.

[28] *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Strugar* Appeal Judgement, para. 11; *Hadžihasanović and Kubura* Appeal Judgement, para. 8. *See also Nchamihigo* Appeal Judgement, para. 8; *Zigiranyirazo* Appeal Judgement, para. 9.

[29] *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Strugar* Appeal Judgement, para. 11; *Halilović* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9.

[30] *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 8.

[31] *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10;

In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[32] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the Trial Judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[33]

12. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.[34] In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[35] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[36] Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[37]

13. When applying these basic principles, the Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which are bound to be summarily dismissed.[38] In particular, the Appeals Chamber will dismiss without detailed analysis (a) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (b) mere assertions that the Trial Chamber must have

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Strugar Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Nchamihigo* Appeal Judgement, para. 9; *Zigiranyirazo* Appeal Judgement, para. 10; *Karera* Appeal Judgement, para. 9.

[32] *Boškoski and Tarčulovski* Appeal Judgement, para. 11; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Nchamihigo* Appeal Judgement, para. 9; *Zigiranyirazo* Appeal Judgement, para. 10; *Karera* Appeal Judgement, para. 9.

[33] *Boškoski and Tarčulovski* Appeal Judgement, para. 12; *D. Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8.

[34] *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10.

[35] *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Orić* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12.; *Nchamihigo* Appeal Judgement, para. 10; *Zigiranyirazo* Appeal Judgement, para. 11.

[36] *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10.

[37] *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *D. Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Nchamihigo* Appeal Judgement, para. 10; *Zigiranyirazo* Appeal Judgement, para. 11.

failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the Trial Chamber; (c) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (d) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (e) arguments contrary to common sense; (f) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (g) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber; (h) allegations based on material not on the record; (i) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and (j) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[39]

[38] *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 17; *Mrkšić and Šljivančanin* Appeal Judgement, paras 16-18; *Krajišnik* Appeal Judgement, para. 17; *Martić* Appeal Judgement, para. 15; *Strugar* Appeal Judgement, para. 17.

[39] *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, paras 17-27; *Martić* Appeal Judgement, paras 14-21; *Strugar* Appeal Judgement, paras 18-24; *Brdanin* Appeal Judgement, paras 17-31; *Galić* Appeal Judgement, paras 256-313; *Nchamihigo* Appeal Judgement, paras 11-12; *Zigiranyirazo* Appeal Judgement, paras 12-13.

III. THE PROSECUTION'S APPEAL

A. Alleged Breach of the Prosecution's Right to a Fair Trial (Ground 1)

1. Introduction

14. The Prosecution alleges that the Trial Chamber committed an error of law by violating its right to a fair trial under Article 20(1) of the Statute.[40] Specifically, the Prosecution argues that the Trial Chamber erred when it refused the Prosecution's requests for additional time to exhaust all reasonable steps to secure the testimony of two crucial witnesses, Shefqet Kabashi ("Kabashi") and another witness, and ordered the close of the Prosecution case before such reasonable steps could be taken.[41] The Prosecution asserts that these witnesses possessed direct evidence relating to the guilt of the three defendants and refused to testify due to intimidation and fear.[42]

15. The Prosecution contends that the Trial Chamber's error invalidated the verdict by precluding the Prosecution from presenting crucial evidence regarding: (a) the participation of Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32, and 34 of the Indictment; (b) the individual criminal responsibility of Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj under Counts 24 and 34 of the Indictment; and (c) the individual criminal responsibility of Lahi Brahimaj under Count 26 of the Indictment.[43] The Prosecution accordingly requests the Appeals Chamber to reverse the Trial Chamber's decision to acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of the aforementioned Counts and to remand the matter to a Trial Chamber for a re-trial,[44] asserting that a re-trial would provide the reasonable possibility of hearing these crucial witnesses.[45]

16. The Defence[46] asserts that ground 1 of the Prosecution's Appeal is unfounded. The Defence argues that the Trial Chamber went to considerable lengths to secure the testimonies of both Kabashi and the other witness, and that, despite the Trial Chamber's efforts, both witnesses resolutely refused to testify throughout the trial although they knew the potential consequences of

[40] Prosecution's Notice of Appeal, para. 3; Prosecution's Appeal Brief, para. 5.
[41] Prosecution's Notice of Appeal, para. 3; Prosecution's Appeal Brief, paras 4-5.
[42] Prosecution's Notice of Appeal, para. 3
[43] Prosecution's Notice of Appeal, para. 5.
[44] Prosecution's Notice of Appeal, para. 6; Prosecution's Appeal Brief, para. 43.
[45] Prosecution's Appeal Brief, paras 42-43. *See also* AT. 23-53, 104-105, 120-128 and 158-159 (Open and Private Session).
[46] Note that "Defence" refers to counsel for all three defendants, as Balaj and Brahimaj joined in Haradinaj's Response Brief, which was confined to ground 1 of the Prosecution's Appeal. *See* Balaj's Response Brief, paras 14-16; Brahimaj's Response Brief, para. 3.

such refusal.[47] The Defence argues that, by the end of the Prosecution's case, there was no indication that the Prosecution could secure their testimony in the foreseeable future, and the Trial Chamber was therefore entitled to conclude that the Prosecution had been provided an adequate opportunity to present its case.[48]

17. The Appeals Chamber recalls that, when a party alleges on appeal that its right to a fair trial has been infringed, the party must prove that the Trial Chamber violated a provision of the Statute and/or the Rules of Procedure and Evidence of the Tribunal ("Rules") and that this violation caused prejudice that amounts to an error of law invalidating the Trial Judgement.[49] The Appeals Chamber notes that Trial Chamber decisions related to trial management, such as those determining the time available to a party to present its case as well as requests for additional time to present evidence, are discretionary decisions to which the Appeals Chamber accords deference.[50] Accordingly, the Appeals Chamber must determine whether the Trial Chamber abused its discretion by closing the Prosecution case before Kabashi and the other witness had testified, in violation of its obligation under Article 20(1) of the Statute to ensure that a trial is fair and conducted with due regard for the protection of victims and witnesses. If the Trial Chamber did abuse its discretion, the Appeals Chamber must determine whether this violation caused prejudice that amounted to an error of law invalidating the Trial Judgement.

2. Alleged decisions of the Trial Chamber depriving the Prosecution of a fair trial

18. The Prosecution points to several Trial Chamber decisions that it claims either individually or cumulatively violated its right to a fair trial,[51] including: (a) an oral decision on 31 October 2007;[52] (b) an oral decision on 15 November 2007;[53] (c) an oral decision on 20 November 2007;[54] (d) an oral decision on 26 November 2007 in relation to Kabashi;[55] (e) an oral decision on

[47] Haradinaj's Response Brief, para. 2
[48] Haradinaj's Response Brief, para. 3. *See also* AT. 61-93, 103-120 and 159-163 (Open and Private Session).
[49] *Galić* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 119; *Blaškić* Appeal Judgement, para. 221; *Kupreškić et al.* Appeal Judgement, para. 87; Article 25(1)(a) of the Statute.
[50] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 7 (referring specifically to the Trial Chamber's discretion to set time limits on the presentation of the Prosecution's case); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 20.
[51] Prosecution's Notice of Appeal, para. 4 and Confidential Annex pp. 1-2; Prosecution's Appeal Brief, para. 17.
[52] Prosecution's Appeal Brief, paras 19-22 (citing T. 9984-9986 (31 October 2007) (Open Session) ("Decision of 31 October 2007")).
[53] Prosecution's Appeal Brief, para. 40 (citing T. 10876 (15 November 2007) (Private Session) ("Decision of 15 November 2007")).
[54] Prosecution's Appeal Brief, paras 24-25 (citing T. 10935-10936, 10956 (20 November 2007) (Open Session) ("Decision of 20 November 2007")).
[55] Prosecution's Appeal Brief, paras 24, 26 (citing T. 10977-10979 (26 November 2007) (Open Session) ("Decision of 26 November 2007 in relation to Kabashi")).

26 November 2007 in relation to the other witness;[56] (f) a scheduling order issued on 30 November 2007;[57] (g) a written decision on 5 December 2007;[58] and (h) a written decision on 21 December 2007.[59] The Appeals Chamber will address each decision in turn.

19. At the Appeal Hearing, the Prosecution further argued that, given the extraordinary circumstances of the trial, during which two crucial witnesses did not testify due to intimidation, the Trial Chamber was obliged under Article 20(1) of the Statute to consider, *proprio motu*, receiving their written statements under Rule 89(F) of the Rules.[60] The Appeals Chamber recalls that, unless specifically authorised by the Appeals Chamber, parties should not raise new arguments during an appeal hearing that are not contained in their written briefs.[61] Given that the Prosecution raised this argument for the first time during the Appeal Hearing without authorisation from the Appeals Chamber, the Appeals Chamber declines to consider it.

(a) Decision of 31 October 2007 and Scheduling Order of 30 November 2007

20. The Prosecution asserts that the Trial Chamber's inflexibility in varying the time it allotted the Prosecution to present its case precluded the Prosecution from securing the evidence of Kabashi and the other witness, amounting to an abuse of discretion and violating the Prosecution's right to a fair trial.[62] In this regard, the Prosecution notes that the Trial Chamber allotted it 125 hours to present its case.[63] The Prosecution asserts that, although the Trial Chamber was aware that it had not yet heard from two crucial Prosecution witnesses and that these witnesses were afraid to testify due to witness intimidation, as the Prosecution case neared the 125-hour limit, "the 125 hours remained the [Trial] Chamber's inflexible measure,"[64] and "the [Trial] Chamber over reacted [*sic*] to time pressure and closed the Prosecution's case."[65] The Prosecution submits that the Trial Chamber's error is demonstrated by the Decision of 31 October 2007, in which the Trial Chamber noted that: (a) "it had 'reviewed the time still available under the 125 hours'" as well as "what still

[56] Prosecution's Appeal Brief, para. 37 (citing T. 10975-10978 (26 November 2007) (Open Session) ("Decision of 26 November 2007 in relation to the other witness")).
[57] Prosecution's Appeal Brief, para. 23 (citing *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Scheduling Order for Final Trial Briefs and Closing Arguments, 30 November 2007 ("Scheduling Order of 30 November 2007")).
[58] Prosecution's Appeal Brief, para. 24 (citing *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision Concerning Shefqet Kabashi, 5 December 2007 ("Decision of 5 December 2007")).
[59] Prosecution's Appeal Brief, para. 24 (citing *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Request to Reopen Its Case to Hear Evidence of Shefqet Kabashi and for a Judicial Representation to the Authorities of the United States of America, 21 December 2007 ("Decision of 21 December 2007")).
[60] AT. 23-24, 30-31, 34-38, 43-44, 47-52, 60-61, 120-124, 127 (Open Session). *See also* AT. 66, 77-81, 87-93, 103, 161-162 (Open Session) (in which the Defence responds to this argument).
[61] *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Prosecution's Motion to Strike and on Appellant's Motion for Leave to File Response to Prosecution Oral Arguments, 5 March 2007, para. 15.
[62] Prosecution's Appeal Brief, para. 17.
[63] Prosecution's Appeal Brief, para. 18.
[64] Prosecution's Appeal Brief, paras 18, 20.

remains of the list of witnesses"; (b) it expected the Prosecution to close its case by 16 November 2007; and (c) the Prosecution, Defence, and Trial Chamber were "all under time pressure."[66] The Prosecution further refers to the Scheduling Order of 30 November 2007, in which the Trial Chamber indicated that "the presentation of the Prosecution evidence in this case has concluded and that the Prosecution case is therefore closed."[67] The Prosecution asserts that, contrary to the Trial Chamber's indication, it had neither finished presenting its evidence nor closed its case, given that two crucial Prosecution witnesses had not yet testified.[68] The Prosecution argues that this decision demonstrates the Trial Chamber's "unreasonable rush to judgement".[69]

21. In response, the Defence submits that, although the Prosecution implies that it was allotted insufficient time to present its case, the Prosecution never applied to the Trial Chamber to extend the time allotted beyond 125 hours.[70] In this regard, the Defence notes that, on 15 October 2007, the Trial Chamber expressly pointed out that the Prosecution had not sought such an extension.[71] The Defence observes that nonetheless, on 31 October 2007, the Trial Chamber extended the Prosecution case until 16 November 2007 to enable the Prosecution to present testimony from Kabashi and the other witness via video-conference link.[72] The Defence submits that, after attempts to secure the testimony of the other witness failed, the Trial Chamber granted the Prosecution a second extension until 20 November 2007 to accommodate the testimony of Kabashi via video-conference link.[73] The Defence further submits that on 20 November 2007, when Kabashi refused to testify, the Trial Chamber granted a third extension until 27 November 2007 to provide the Prosecution with another opportunity to secure the testimony of the other witness.[74] Additionally, the Defence asserts that, on 26 November 2007, after the other witness failed to attend the video-conference link and the Prosecution informed the Trial Chamber that he had been admitted to the hospital, the Prosecution made no further request to extend its case in order to secure his testimony or explore his medical condition.[75]

(b) Decision of 15 November 2007

22. The Prosecution notes that, after the other witness failed to testify via video-conference link on 13 November 2007, he was arrested on 15 November 2007; however, he could not be brought to

[65] Prosecution's Appeal Brief, para. 20.
[66] Prosecution's Appeal Brief, para. 19.
[67] Prosecution's Appeal Brief, para. 23, *citing* Scheduling Order of 30 November 2007.
[68] Prosecution's Appeal Brief, para. 23.
[69] Prosecution's Appeal Brief, para. 23.
[70] Haradinaj's Response Brief, para. 9; *see also* AT. 66-67 (Open Session).
[71] Haradinaj's Response Brief, para. 10.
[72] Haradinaj's Response Brief, para. 11.
[73] Haradinaj's Response Brief, para. 13; *see also* AT. 70 (Open Session).
[74] Haradinaj's Response Brief, para. 14.

the video-conference link location until after 7:00 p.m.[76] The Prosecution asserts that, because the Trial Chamber was "fixated on time pressures," it did not accommodate the other witness's delay by sitting longer or sitting the next day, and that it provided no reason for its inability to do so other than indicating that it was not possible.[77]

23. The Defence asserts that, although the Prosecution faults the Trial Chamber for failing to accommodate the other witness's testimony on 15 November 2007 by sitting past 7:00 p.m. or sitting the following day, the Prosecution made no such request at the time.[78] In this regard, the Defence notes that, shortly thereafter, the Prosecution filed a motion conceding that the Trial Chamber was required to adjourn without hearing the other witness's evidence and that the Trial Chamber could not sit the following day.[79] The Defence further notes that the other witness stated in court on 15 November 2007, in the presence of his counsel, that, if brought to the video-conference link location, he would refuse to testify.[80] The Defence contends that, given that the Trial Chamber provided the Prosecution a further opportunity to secure the testimony of the other witness on 26 November 2007, its argument is manifestly unfounded.[81]

(c) Decision of 20 November 2007

24. The Prosecution notes that, during the 20 November 2007 hearing, Kabashi's United States Public Defender informed the Trial Chamber that Kabashi refused to "testify today and […] does not intend to give evidence in this proceeding today".[82] The Prosecution submits that the Trial Chamber subsequently rendered its 20 November 2007 decision, in which it closed the Prosecution case subject to the exceptional extension until 27 November 2007 in order to hear the evidence of the other witness.[83] The Prosecution asserts that, in so doing, the Trial Chamber failed to explore the possibility that Kabashi might testify in the future once he consulted with his lawyer, who was appointed to provide him with legal assistance in relation to possible contempt proceedings in the United States.[84]

25. In response, the Defence notes that, at the 20 November 2007 hearing, Kabashi refused to answer any of the Prosecution's questions and stated in unqualified terms that he was "not prepared

[75] Haradinaj's Response Brief, para. 15.
[76] Prosecution's Appeal Brief, para. 40.
[77] Prosecution's Appeal Brief, paras 40-41; *see also* AT. 32 (Open Session).
[78] Haradinaj's Response Brief, para. 79.
[79] Haradinaj's Response Brief, para. 79.
[80] Haradinaj's Response Brief, para. 80.
[81] Haradinaj's Response Brief, para. 80; *see also* AT. 81-85 (Open Session).
[82] Prosecution's Appeal Brief, para. 25.
[83] Prosecution's Appeal Brief, para. 25.
[84] Prosecution's Appeal Brief, para. 25; *see also* AT. 47 (Open Session).

to speak before this Tribunal".[85] The Defence also notes that the Presiding Judge informed Kabashi of the penalties for contempt; that Kabashi confirmed that he would not answer any question put to him as a witness in the *Haradinaj et al.* case; and that Michael Karnavas, Kabashi's Tribunal-appointed lawyer, informed the Trial Chamber that Kabashi was fully aware of the consequences of that position.[86] The Defence also points out that the Trial Chamber indicated that it "had 'struggled' to secure Mr. Kabashi's testimony for 'many, many months'"; the Prosecution case was about to close and Kabashi repeatedly refused to testify; and, "if there were to be a 'dramatic change' in Mr. Kabashi's attitude, which gave cause to believe that he genuinely intended to testify, then the Trial Chamber would entertain a further application to receive his testimony."[87] The Defence submits that the Trial Chamber terminated the video-conference link on the basis that, after the Prosecution asked the Trial Chamber to allow Kabashi to reconsider his position overnight with the benefit of legal advice, Kabashi confirmed that an adjournment would not result in a change of position.[88]

(d) Decision of 26 November 2007 in relation to Kabashi

26. The Prosecution submits that, during the 26 November 2007 hearing, the Trial Chamber "again demonstrated its fixation on an expeditious trial" when it denied a Prosecution motion, filed on 23 November 2007,[89] to extend its case in order to secure Kabashi's testimony.[90] The Prosecution asserts that, in denying the Motion of 23 November 2007, the Trial Chamber disregarded the Prosecution's argument regarding the likelihood of securing Kabashi's testimony if he were informed that contempt proceedings could be initiated against him as a result.[91] The Prosecution also argues that the Trial Chamber demonstrated its "rush to close the Prosecution case and to end the trial" when it stated that:

> […] the Prosecution seems not to have heeded the Chamber's instruction given during the 20th of November, 2007 hearing, in which it was informed that aside for the exceptional extension until the 27th of November, 2007 in order to hear the evidence of [the other witness], the Chamber considered the Prosecution's case closed. Moreover, the Prosecution has now exceeded the 125 hours that were allotted to it at the beginning of the case.[92]

27. The Defence argues that the Trial Chamber was justified in rejecting the Motion of 23 November 2007,[93] noting that the Trial Chamber based this decision "on the fact that Mr. Kabashi was still unwilling to testify, and on the fact that there had been no material change of

[85] Haradinaj's Response Brief, para. 33.
[86] Haradinaj's Response Brief, paras 36-37.
[87] Haradinaj's Response Brief, para. 39.
[88] Haradinaj's Response Brief, para. 40; *see also* AT. 70-72 (Open Session).
[89] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Prosecution's Motion to Extend the Prosecution Case to Secure the Testimony of Shefqet Kabashi, 23 November 2007 ("Motion of 23 November 2007").
[90] Prosecution's Appeal Brief, para. 26.
[91] Prosecution's Appeal Brief, para. 26.
[92] Prosecution's Appeal Brief, para. 26 (citing T. 10978 (26 November 2007) (Open Session)).

circumstances since the last hearing."[94] The Defence asserts that "[t]he mere possibility that he might change his mind at some later stage if he received further legal advice did not warrant a further adjournment of the Prosecution case."[95]

(e) Decision of 26 November 2006 in relation to the other witness

28. The Prosecution further notes that, on 26 November 2006, the other witness was again scheduled to testify via video-conference link.[96] However, the Prosecution was informed before the hearing that the other witness had been hospitalised and that seven to ten days were needed to reassess his situation.[97] The Prosecution observes that, when it informed the Trial Chamber of this development, the Trial Chamber noted: "The result being that we cannot hear […] the evidence of [the other witness] on this day, which was together with tomorrow, the last days for the presentation of the Prosecution's case."[98] The Prosecution argues that the Trial Chamber erred in closing the Prosecution's case in relation to the other witness on 26 November 2007 without allowing the Prosecution additional time to obtain information about the other witness's medical condition and to consider the possibility of securing his testimony.[99] The Prosecution also notes that, in ordering the Prosecution's case closed, the Trial Chamber emphasised that "the Prosecution had now exceeded the 125 hours allotted to it at the beginning of the case," and argues that this statement demonstrates that the Trial Chamber focused on conducting an expeditious trial while ignoring its duty to ensure a fair trial.[100]

29. The Defence notes that the Prosecution informed the Trial Chamber on 23 November 2007 that the other witness had been hospitalised, that he would not be available to testify on 26 November 2007, and that his doctors would "reassess his state within 7 to 10 days."[101] The Defence submits that the Prosecution accordingly had three days in which to apply for an adjournment to obtain a further medical assessment or an extension of time in order to secure the other witness's evidence but failed to do so at that time or any time thereafter.[102] The Defence argues that, if the Prosecution had considered that an adjournment or extension of time was necessary to ensure its right to a fair trial, then it was incumbent upon the Prosecution to request

[93] Haradinaj's Response Brief, para. 47.
[94] Haradinaj's Response Brief, para. 46.
[95] Haradinaj's Response Brief, para. 46; *see also* AT. 72-74 (Open Session).
[96] Prosecution's Appeal Brief, para. 37.
[97] Prosecution's Appeal Brief, para. 37.
[98] Prosecution's Appeal Brief, para. 37, *citing* T. 10975 (26 November 2007) (Open Session).
[99] Prosecution's Appeal Brief, para. 37; *see also* AT. 32, 47.
[100] Prosecution's Appeal Brief, para. 38, *citing* T. 10978 (26 November 2007) (Open Session).
[101] Haradinaj's Response Brief, para. 83.
[102] Haradinaj's Response Brief, paras 83-90.

this course of action from the Trial Chamber.[103] The Defence also argues that the Trial Chamber's statement indicating that it could not hear the other witness on 26 November 2007 was accurate and did not prejudge any future application the Prosecution might make for additional time.[104]

(f) Decision of 5 December 2007

30. The Prosecution submits that, on 5 December 2007, the Trial Chamber erroneously applied Rule 73(B) of the Rules when it denied the Prosecution's request for certification to appeal the Decision of 26 November 2007 in relation to Kabashi.[105] The Prosecution notes that, in denying the Request for Certification, the Trial Chamber considered that "the Prosecution had advanced no argument as to the likelihood that Shefqet Kabashi would ever testify."[106] The Prosecution asserts that, in drawing this conclusion, the Trial Chamber failed to consider the Prosecution's argument regarding the likelihood of securing Kabashi's testimony – namely, that:

> […] if Shefqet Kabashi would be properly informed, either by his US public defender or by his appointed defence attorney at the Tribunal, as to the possible repercussions of contempt proceedings against him, he would change his mind and testify.[107]

31. The Defence submits that the Trial Chamber correctly applied the provisions of Rule 73(B) of the Rules and that the Prosecution has not demonstrated any discernible error in the Trial Chamber's reasoning.[108]

(g) Decision of 21 December 2007

32. The Prosecution observes that, during a hearing on 10 December 2007, a United States District Court Judge indicated that, if the Trial Chamber were to reopen the case and schedule a date to hear Kabashi's testimony, the Judge "would in *all likelihood* issue an order compelling Shefqet Kabashi to testify on that day."[109] The Prosecution avers that, if Kabashi had failed to testify on the designated day, the Judge would likely have held him in contempt.[110] The Prosecution notes that, although the Trial Chamber reasoned that the "mere possibility of contempt proceedings before a national court does not constitute new circumstances of such a nature that it would warrant a re-opening" of the case, the information provided by the United States court indicated "that it was not only a *mere possibility* that contempt and other proceedings would have been triggered by a

[103] Haradinaj's Response Brief, para. 88.
[104] Haradinaj's Response Brief, paras 87-88; *see also* AT 85-87 (Open Session).
[105] Prosecution's Appeal Brief, para. 27 (citing *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Prosecution's Request for Certification for Interlocutory Appeal of Trial Chamber's Decision Re Shefqet Kabashi, 30 November 2007 ("Request for Certification")).
[106] Prosecution's Appeal Brief, para. 28 (citing Decision of 5 December 2007, para. 3).
[107] Prosecution's Appeal Brief, para. 29.
[108] Haradinaj's Response Brief, para. 52; *see also* AT. 74 (Open Session).
[109] Prosecution's Appeal Brief, para. 32 (internal citations omitted).

United States Federal Court to secure Shefqet Kabashi's testimony; it was an *all likelihood* probability."[111] The Prosecution asserts that, although this development should have compelled the Trial Chamber to reopen the case as a means of securing Kabashi's testimony,[112] the Trial Chamber denied the Prosecution's request to reopen its case,[113] and in so doing "failed to give appropriate weight to the serious probability of triggering contempt proceedings against Shefqet Kabashi in the United States that would have included incarceration, the purpose of which was to compel him to testify."[114]

33. The Defence asserts that the Trial Chamber did not discernibly err in the 21 December 2007 Decision when it denied the Prosecution's request to reopen its case.[115] In support of this assertion, the Defence argues that Kabashi consistently indicated that he would face imprisonment rather than testify and that the Prosecution's argument that he might have changed his mind when faced with civil contempt proceedings in the United States is "mere speculation."[116] The Defence argues that "[t]here was no change in circumstances to warrant the exceptional measure of re-opening of the Prosecution's case at this very late stage of the trial."[117]

3. Analysis

34. The central factual context of the Prosecution's appeal is the unprecedented atmosphere of widespread and serious witness intimidation that surrounded the trial. The Trial Chamber acknowledged this in the Trial Judgement, observing that:

> […] throughout the trial, the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo/Kosova, for example Kosovo/Kosova's small communities and tight family and community networks which made guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo/Kosova that was particularly unfavourable to witnesses.[118]

35. In circumstances of witness intimidation such as this, it is incumbent upon a Trial Chamber to do its utmost to ensure that a fair trial is possible. Witness intimidation of the type described by the Trial Chamber undermines the fundamental objective of the Tribunal, enshrined in Article 20(1)

[110] Prosecution's Appeal Brief, para. 32.
[111] Prosecution's Appeal Brief, para. 33 (internal citations omitted).
[112] Prosecution's Appeal Brief, para. 35.
[113] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Prosecution's Request to Reopen its Case to Hear Evidence of Shefqet Kabashi and for a Judicial Representation to the Authorities of the United States, 17 December 2007, Public with Confidential Annex ("Prosecution Motion of 17 December 2007").
[114] Prosecution's Appeal Brief, para. 31; *see also* AT. 74-76 (Open Session).
[115] Haradinaj's Response Brief, para. 57.
[116] Haradinaj's Response Brief, para. 57.
[117] Haradinaj's Response Brief, para. 57.
[118] Trial Judgement, para. 6 (internal citations omitted).

of the Statute: to ensure that trials are fair, expeditious, and conducted with due regard for the protection of victims and witnesses. Countering witness intimidation is a primary and necessary function of a Trial Chamber. While a Trial Chamber is always required to "provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case",[119] this obligation is especially pressing when outside forces seek to undermine the ability of a party to present its evidence at trial. For the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*.

36. A Trial Chamber possesses broad powers with which to assure the fairness of a trial. Under Rule 54 of the Rules, a Trial Chamber has the power to issue such orders, subpoenas, warrants, and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial, which includes the power to: adopt witness protection measures; take evidence by video-conference link or by way of deposition; and summon witnesses and order their attendance. In addition, if such measures fail, upon the request of a party or *proprio motu*, a Trial Chamber can order that proceedings be adjourned or stayed.[120]

37. The Trial Chamber in this case recognised that witnesses called by the Prosecution faced particular difficulties in testifying, stating that "[a] high proportion of Prosecution witnesses in this case expressed a fear of appearing before the Trial Chamber to give evidence".[121] More specifically, the Trial Chamber was aware that Kabashi and the other witness were reluctant to testify.[122] Indeed, in open court, Kabashi raised the endemic problem of witness intimidation, stating "there were persons who were asked questions as witnesses and whose names don't even appear on witness lists because they have been killed. I don't want protective measures because such measures do not exist in reality; they only exist within the boundaries of this courtroom, not outside it."[123]

38. Furthermore, the Trial Chamber was aware that both Kabashi and the other witness were particularly important to the Prosecution case.[124] Kabashi, a former KLA member, was to testify, *inter alia*, to specific acts of mistreatment by the defendants; these included ordering the killing and beating of specific individuals. He was also to testify as to their leadership roles in relation to

[119] *Tadić* Appeal Judgement, para. 52.
[120] *Tadić* Appeal Judgement, para. 52.
[121] Trial Judgement, para. 22.
[122] *See Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Prosecution's Application for Issuance of Subpoena (Confidential but referred to in the Trial Judgement), 25 May 2007, para. 2; Kabashi, T. 5438-5439 (5 June 2007) (Open Session), T. 10939-10941 (20 November 2007) (Open Session); *see generally* Trial Judgement, para. 28; Trial Judgement, Appendix A (Procedural History), paras 20, 24.
[123] Kabashi, T. 5439-5440 (5 June 2007) (Open Session).
[124] *See* T. 10120 (1 November 2007) (Open Session); T. 10956 (20 November 2007) (Open Session).

activities such as interrogations and executions.[125] The other witness was to testify as to the specific abuse he suffered at the hands of the defendants, and specific acts of torture and mutilation he witnessed them inflicting.[126] The two witnesses' testimonies would have potentially been significant in relation to the defendants' responsibility for crimes committed at KLA headquarters and the prison in Jablanica/Jabllanicë, including through the alleged JCE.[127] However, despite the importance of Kabashi and the other witness, the two witnesses never meaningfully testified during the Trial, depriving the Prosecution of vital support for its case. The accused were subsequently acquitted on almost all the counts that the two witnesses' testimony might have helped to establish.[128]

39. The Appeals Chamber recalls that Trial Chambers enjoy considerable discretion in managing the trials before them. However, the manner in which such discretion is exercised by a Trial Chamber should be determined in accordance with the case before it. Indeed, what is reasonable in one trial is not automatically reasonable in another. Thus, the question of whether a Trial Chamber abused its discretion should not be considered in isolation, but rather should be assessed taking into account all the relevant circumstances of the case at hand.

40. Taken individually and outside the context of the trial, each of the Trial Chamber's decisions concerning Kabashi and the other witness could be considered as falling within its scope of discretion. When these decisions are evaluated together, however, particularly in the context of the serious witness intimidation that formed the context of the Trial, it is clear that the Trial Chamber seriously erred in failing to take adequate measures to secure the testimony of Kabashi and the other witness. By contrast, the Trial Chamber appeared to place undue emphasis on ensuring that the Prosecution took no more than its pre-allotted time to present its case, and that the Trial Chamber's deadlines for presenting evidence were respected, irrespective of the possibility of securing the testimony of two key witnesses. This misplaced priority demonstrates that the Trial Chamber failed to appreciate the gravity of the threat that witness intimidation posed to the trial's integrity. The Appeals Chamber notes that the Trial Chamber was on notice regarding the serious threat to witnesses from the very opening of the trial[129] and yet manifestly failed to take sufficient steps to ensure the protection of vulnerable witnesses and safeguard the fairness of the proceedings.

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[125] *See* Motion of 23 November 2007, pp. 3-4.
[126] *See* the other witness statement, 13 January 2004, paras 15, 23, 24, at Prosecution's Appeal Brief, Annex B (Confidential).
[127] *Compare* Fourth Amended Indictment, pp. 31-39 (Counts 24, 26, 28, 30, 32, 34) *with* Prosecution's Appeal Brief, Appendices A and B.
[128] *See* Trial Judgement, paras 502-504.
[129] *See* Opening Statement, T. 359-361 (5 March 2007): "MS DEL PONTE: […] The protection of witnesses who have had the courage to come forward has been, and will continue to be, of critical importance. You know that

41. The Trial Chamber erred by issuing a series of decisions in November and December 2007 that significantly constrained the Prosecution in its efforts to secure the testimony of both Kabashi and the other witness. Some of these failures were in response to specific requests by the Prosecution, while in certain other cases the Trial Chamber should have *proprio motu* undertaken measures to facilitate witness testimony and to ensure the proper protection of vulnerable witnesses.[130] With regard to Kabashi, following a 20 November 2007 video-conference link hearing in which he and his lawyer issued confused and equivocal refusals to speak on that particular occasion,[131] the possibility remained that Kabashi might testify under different circumstances. However, the Trial Chamber chose not to persevere in attempts to hear his testimony. Instead, it admonished the Prosecution for attempting to reschedule Kabashi's testimony because "the [Trial] Chamber considered the Prosecution's case closed" and the "Prosecution ha[d] now exceeded the 125 hours that were allotted to it at the beginning of the case."[132] This commentary underscored the Trial Chamber's preference for meeting its deadlines over assisting the Prosecution in overcoming attempts at witness intimidation. The Trial Chamber also refused the Prosecution's request for certification to appeal the decision not to hear Kabashi's testimony.[133] The Trial Chamber's explanation of this decision again included a specific reference to the time constraints it had imposed on the number of hours allotted for the Prosecution to present its case.[134]

42. In an order filed on 21 December 2007, the Trial Chamber again refused to reopen the Prosecution's case after the conclusion of its submissions, despite the fact that the Prosecution had demonstrated a strong possibility that Kabashi's testimony could finally be obtained.[135] The

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many witnesses are reluctant to testify. Some are even terrified. The intimidation and threats suffered by witnesses in this case has been a serious ongoing problem for the individuals concerned and for this Prosecution. This problem has not gone away. Witnesses continue to receive threats, both veiled and direct. Just this weekend, our first direct victim witness […] Mr. President, I'm just informing the Court that this weekend […] I received an [*sic*] information about threats that a witness [has] received now. […] So I wonder why I could not inform the Court about an event, about the facts that occurred during the weekend and it's directly related with this trial. Because, Mr. President, if I have no witnesses appearing in court, I will be obliged to withdraw this indictment. JUDGE ORIE: Madam Prosecutor, I think there's nothing inappropriate about informing the Court about threats. But […] whether to go into any further details, where we'll not be able to further inquire into the matter, whether that would be the best course is subject to doubt."

[130] *See Tadić* Appeal Judgement, para. 52. The Appeals Chamber notes with extreme concern that confidential information concerning protected witnesses was, on occasion, made public by the Trial Chamber. The Appeals Chamber recalls that, pursuant to Rule 75(F) of the Rules, protective measures once ordered *continue to have effect* in any proceeding before the Tribunal *until rescinded, varied, or augmented*. Moreover, the Appeals Chamber underscores that potential witnesses who do not testify may face similar risks to those who did. In particular, witnesses who do not testify out of fear may also require continued anonymity. *Cf. Nshogoza* Appeal Judgement, paras 65, 67.

[131] *See* Kabashi, T. 10935-10937, 10941, 10958-10959, 10964 (20 November 2007) (Open Session).

[132] T. 10978 (26 November 2007) (Open Session). The Trial Chamber made reference to the need for "dramatic" events before it would be willing to reschedule Kabashi's testimony (*see* Kabashi, T. 10961 (20 November 2007) (Open Session); T. 10977-10979 (26 November 2007) (Open Session)), a standard that would be particularly hard for the Prosecution to meet when dealing with witnesses who were subject to witness intimidation and who were afraid of testifying.

[133] Decision of 5 December 2007, para. 3.

[134] Decision of 5 December 2007, para. 3.

[135] Decision of 21 December 2007, paras 7-8.

Decision on Reopening unjustifiably discounted an order by a United States District Court Judge stating that if the case were reopened and a date for Kabashi's testimony scheduled, he would "in all likelihood" issue an order compelling Kabashi to testify that day.[136] The Trial Chamber's decision failed to appreciate that Kabashi's physical presence in the United States would have directly exposed him to the contempt penalties wielded by United States federal courts, including imprisonment,[137] should he refuse to testify. Actual arrest and the immediate threat of imprisonment had proved effective in compelling testimony from other unwilling witnesses during the course of the trial,[138] strongly suggesting that the threat of arrest, if carried out, could have compelled Kabashi's testimony as well.

43. The Trial Chamber's treatment of the other witness's testimony was also demonstrably unfair and injudicious. Despite having acknowledged difficulties in convincing the other witness to testify,[139] and despite this witness's potential importance to the Prosecution,[140] the Trial Chamber on multiple occasions failed to make efforts that could have resulted in obtaining his testimony. Such failure was manifest in the hearing of 15 November 2007. The Trial Chamber was informed that the other witness had been arrested on the basis of an indictment by the Tribunal and according to the Trial Chamber's information would have been available to testify by video-conference link at approximately 6:30 p.m.[141] Nonetheless, and despite the other witness's known reluctance to testify and potential importance to the Prosecution's case, the Trial Chamber chose to significantly delay his testimony on the basis of objectively less important logistical considerations. It commented that:

> […] it's not only Thursday close to 7.00 but it's also 125 hours since the beginning of the presentation of the Prosecution's case. There's no way to further sit either on Friday or on Monday. We have explored that. That's not possible. Tuesday […] is reserved for another witness [and even] if [the other witness] would testify, there's a fair chance that we would not come any further than that he will not answer questions. There's another possibility that he starts answering questions. And then, of course, what follow-up to give, because there's no time.[142]

The Trial Chamber's language and approach manifestly prioritised logistical considerations and the specific number of hours assigned to the Prosecution case over the much more significant consideration of securing the testimony of a potentially important witness who was finally available to testify. The Trial Chamber's rationale for its refusal to immediately hear the other witness took no account of the witness intimidation that was a characteristic of the case, and the importance of obtaining witness testimony when it was available. The Trial Chamber was aware that the other

[136] Prosecution Motion of 17 December 2007, para. 4.
[137] *See generally United States v. Marquado*, 149 F.3d 36 (1st Cir. 1998).
[138] See the cases of Sadri Selca and Avni Krasniqi, who testified after being arrested and transferred to The Hague on the charge of contempt of the court (Trial Judgement, Appendix A (Procedural History), paras 21-22).
[139] *See, e.g.*, T. 5667-5668 (14 June 2007) (Open Session); T. 10956 (20 November 2007) (Open Session).
[140] *See, e.g.*, T. 10956, 20 November 2007 (Open Session).
[141] T. 10876 (15 November 2007) (Private Session).
[142] T. 10876 (15 November 2007) (Private Session).

witness was potentially non-cooperative, but equally acknowledged that cooperation was also possible.

44. The Trial Chamber's misguided approach to the other witness continued on 26 November 2007, when the results of its refusal to hear the other witness on 15 November 2007 became manifest. Although the other witness had been re-scheduled to testify via video-conference link, the Prosecution informed the Trial Chamber that:

> [the other witness] has been hospitalised since last week […]. He is being examined by a medical practitioner, and the last information we had was on Friday, I think it was, last Friday, which the […] authorities said that his position would be reassessed within seven to ten days of that date.[143]

Rather than seeking to accommodate this event, the Trial Chamber again sought to prioritise its schedule, stating that:

> […] we cannot hear the witness—the evidence of [the other witness] on this day, which was together with tomorrow, the last days for the presentation of the Prosecution's case.[144]

Subsequently, four days later, the Trial Chamber issued the Scheduling Order of 30 November 2007, in which it set the schedule for the filing of the parties' final trial briefs and the parties' closing arguments, after indicating that,

> […] the presentation of the Prosecution evidence in this case has concluded and that the Prosecution case is therefore closed[.][145]

45. The Appeals Chamber observes that, given the Prosecution's indication on 26 November 2007 that the other witness's health condition would be reassessed within a week, a reasonable Trial Chamber cognisant of the witness intimidation threatening the integrity of the trial would have ordered, *proprio motu*, the proceedings adjourned or stayed for a reasonable time to allow the Prosecution the opportunity to obtain information about the other witness's condition and to explore the possibility of securing his testimony upon his release from the hospital. The decision not to hear the other witness or allow additional time were especially harmful given that the other witness reportedly provided equivocal answers on whether he would have provided testimony,[146] leaving open the possibility that, once in front of the video-conference link, he would eventually have testified.

46. The Appeals Chamber also notes with concern the Trial Chamber's decision not to accept two witnesses proposed by the Prosecution who would have testified as to some of the same events

[143] The Appeals Chamber notes that the date "last Friday", to which the Prosecution refers, was 23 November 2007. T. 10975 (26 November 2007) (Open Session).
[144] T. 10975 (26 November 2007) (Open Session).
[145] Scheduling Order of 30 November 2007, p. 2.
[146] *See* T. 10633-10635 (13 November 2007) (Open Session).

as the other witness.[147] The Trial Chamber partially based its decision on the lateness of the witnesses' addition to the Prosecution's witness list and refused to hear their testimony, invoking the value of "orderly and timely case management" and "the proximity of the close of the Prosecution's case".[148] Given the difficulties in obtaining evidence from the other witness,[149] and the context of intimidation faced by all witnesses,[150] this decision again inappropriately prioritised logistical considerations over the Prosecution's right to a fair trial.

47. Although the Prosecution limits its appeal to aspects of the Trial Chamber's approach to Kabashi and the other witness, the Appeals Chamber notes that these are not the only examples of the Trial Chamber's failure to adequately respond to the impact of potential witness intimidation on the Prosecution's case. For example, after the death of a witness,[151] the Prosecution added another witness to its list to provide testimony on some of the same issues.[152] When this other witness refused to testify, the Prosecution asked for a subpoena and provided information to allow the Trial Chamber to determine whether a threat assessment for the witness was necessary.[153] The Trial Chamber chose to dismiss the request for a subpoena, despite the fact that the witness's testimony was "sufficiently important to justify the issuance of a subpoena", on the basis that no threat assessment had been conducted,[154] even though the Prosecution had offered to conduct one, should the Trial Chamber feel this was necessary.[155]

48. Reviewed cumulatively, the Trial Chamber's decisions regarding Prosecution witnesses, especially Kabashi and the other witness, demonstrate that the Trial Chamber failed to exercise its powers appropriately given the context of serious witness intimidation. The Appeals Chamber notes that the Trial Chamber appreciated the importance of the two key witnesses' testimony, providing

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[147] *Compare Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Confidential Annex A, Prosecution's Third Amended Witness List and Application to Admit Two Statements Pursuant to Rule 92 *Bis*, 14 September 2007, para. 7, *with* Prosecution's Appeal Brief, para. 16.
[148] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on the Prosecution's Request to Add Two Witnesses to its Witness List and to Substitute one Witness for Another, 1 November 2007, paras 6-8.
[149] *See* Trial Judgement, Appendix A (Procedural History), para. 24.
[150] *See* Trial Judgement, para. 22.
[151] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Confidential Request to Delay Decision on "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment" Following the Death of a Prosecution Witness, 16 February 2007, para. 2; *see also* Pre-Trial Conference, T. 304-307 (1 March 2007) (Private Session).
[152] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Prosecution's Amended Witness List (Confidential), 2 March 2007, para. 4. The Appeals Chamber notes that this witness is also referred to as "Witness 11" in certain documents.
[153] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Confidential Annex A to Prosecution's 23rd Application for a Subpoena ad Testificandum, 19 October 2007, para. 4.
[154] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Motion to Have Witness 25 Subpoenaed to Testify, 30 October 2007, p. 2.
[155] *See* Kabashi, T. 5439-5440; 5471-5473 (5 June 2007) (Open Session); *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007, pp. 2-3. The Appeals Chamber also notes that in June 2007, once Kabashi came to the Tribunal and refused to testify, the Trial Chamber should have arrested him immediately for contempt.

limited extensions to the time limits originally allotted for securing the witnesses' testimony.[156] These efforts might have been within the scope of its discretion in a trial conducted under normal circumstances, especially given certain instances where the Prosecution failed to challenge decisions of the Trial Chamber. But the context of this trial was far from normal and required the Trial Chamber to proactively focus on ensuring the fairness of the proceedings in accordance with the Statute.[157] This required flexibility from the Trial Chamber with regard to subsidiary issues of witness scheduling, trial logistics, and deadlines. The Trial Chamber's failure to show the required flexibility effectively helped to ensure that witness intimidation succeeded in denying the Prosecution an opportunity to present potentially crucial evidence in support of its case.[158]

49. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and the other witness. Given the potential importance of these witnesses to the Prosecution's case, the Appeals Chamber finds that, in the context of this case, the error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice.

4. Conclusion

50. The Appeals Chamber, Judge Robinson dissenting, accordingly grants this ground of appeal and quashes the Trial Chamber's decisions to: (a) acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32, and 34 of the Indictment; (b) acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of individual criminal responsibility under Counts 24 and 34 of the Indictment; and (c) acquit Lahi Brahimaj of individual criminal responsibility under Count

[156] Decision of 31 October 2007; T. 10893 (15 November 2007) (Open Session); T. 10956 (20 November 2007) (Open Session).

[157] The Appeals Chamber underscores that the Trial Chamber should have pursued every reasonable opportunity, whether upon the request of a party or *propio motu*, to obtain the evidence of Kabashi and the other witness in the context of this case. This approach should have included granting further extensions of time to assist the Prosecution in obtaining the testimony of key witnesses.

[158] *See* Article 20(1) of the Statute. The Appeals Chamber notes that the Trial Chamber was on notice from the first day of the trial that witness intimidation posed a significant threat to the integrity of the judicial process. *See* T. 359-361 (5 March 2007) (Open Session). It notes that the Trial Chamber's approach to issues such as witness confidentiality did not demonstrate sufficient respect for this threat, and resulted in the disclosure of confidential witnesses' information. *Cf. Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, 13 December 2006 ("Decision of 13 December 2006"), p. 1; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Prosecution Motion for Protective Measures Concerning the Identity of a Person Who Can Provide Rule 68 Information Concerning Third Parties, 25 October 2006, filed confidentially, but rendered public by order of the Trial Chamber (*see* Decision of 13 December 2006, p. 9). The Trial Chamber also disclosed protected information about the health of a witness. *See Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Motion for Videolink [the other witness], 14 September 2007, para. 3.

26 of the Indictment. The Appeals Chamber therefore orders that Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj be retried on these counts.[159]

51. The Appeals Chamber, however, will not construe the Prosecution's Appeal as a request to quash the convictions of Lahi Brahimaj on two of the above counts for which he was convicted, namely Counts 28 and 32. Lahi Brahimaj will therefore not be re-tried in relation to those two counts.

B. Alleged Errors Relating to the Murders of Sister "S", the Mother of Witness 4, and Sister "M" (Ground 2)

52. The Trial Chamber found that: (a) KLA soldiers murdered sister "S", the mother of Witness 4, and sister "M"; (b) these murders were closely related to the armed conflict in Kosovo/Kosova; and (c) the victims were not taking active part in hostilities at the time the murders were committed.[160] The Trial Chamber further found that Idriz Balaj's actions were "a link in the chain of events" leading to their murders, given that he "brought and kept them in the vicinity of the perpetrators".[161] However, the Trial Chamber, by majority, acquitted Idriz Balaj of aiding and abetting the commission of the murders of sister "S", the mother of Witness 4, and sister "M"[162] and accordingly found him not guilty under Count 14 of the Indictment.[163] The Trial Chamber reasoned that there was a lack of sufficient evidence regarding the events that occurred after the three women ended up in KLA custody and therefore that the Trial Chamber lacked "a sufficient basis to assess the relevance and importance of Idriz Balaj's acts". The Trial Chamber further reasoned that "there is no evidence that Idriz Balaj knowingly contributed to or facilitated the commission of any of these murders, especially as there is no evidence that Idriz Balaj was aware at the time that these murders were or would be committed."[164]

53. The Prosecution challenges this verdict, arguing that the Trial Chamber erred when it held that the *mens rea* and *actus reus* requirements of aiding and abetting were not satisfied.[165]

54. In relation to the *mens rea* requirement for aiding and abetting, the Prosecution submits that the Trial Chamber erred by applying an incorrect legal standard when it concluded that this

[159] The Appeals Chamber notes that on re-trial, the latest version of the Rules (IT/32/Rev. 44 of 10 December 2009) are to be applied by the Trial Chamber.
[160] Trial Judgement, paras 239- 240.
[161] Trial Judgement, para. 242.
[162] Trial Judgement, para. 242.
[163] Trial Judgement, para. 503. Count 14 of the Indictment charges Idriz Balaj with a Violation of the Laws or Customs of War, Murder and Cruel Treatment, as recognized by Common Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Article 3 and Article 7(1) of the Statute. Indictment, para. 70.
[164] Trial Judgement, para. 242.
[165] Prosecution's Appeal Brief, para. 45.

requirement was not established.[166] The Prosecution argues that the Trial Chamber required it to prove that Idriz Balaj was "aware […] of a certainty" that the principal crime would be committed, when it should have only required a showing that Idriz Balaj was aware of a probability.[167] The Prosecution argues that this awareness of a probability test was confirmed by the ICTR Appeals Chamber in the *Ndindabahizi* case.[168] It submits that, because the *mens rea* required for planning, instigating, and ordering liability is "awareness of a substantial likelihood" and because aiding and abetting liability is not more serious than these other forms of liability, it would not make sense to "require a higher *mens rea* for aiding and abetting".[169] Moreover, the Prosecution argues that the awareness of a probability test must logically be the "test for both elements of the *mens rea* for aiding and abetting: awareness regarding the occurrence of the crime and awareness regarding the assisting conduct."[170] Finally, the Prosecution avers that, "[h]ad the Trial Chamber used the correct awareness of a probability standard, it would have concluded that [Idriz] Balaj had the required *mens rea* for aiding and abetting."[171]

55. In support of its argument, the Prosecution points to evidence that Idriz Balaj, as head of the Black Eagles, must have been aware that the Black Eagles and the KLA generally had a "reputation for violence."[172] In particular, the Prosecution argues that Idriz Balaj, a person with authority in the KLA, was involved in harassing the family about its connections to the Serbian police.[173] The Prosecution further argues that "[m]urder was a considered option for [Idriz] Balaj", as demonstrated by the fact that he had threatened to kill sister "S" if she did not kill someone else and that another KLA soldier told the mother of Witness 4 that she would be killed if she attempted to travel.[174] Finally, the Prosecution points to evidence that it describes as demonstrating that Idriz Balaj was aware of the vulnerability of the victims, given that he was in command of the KLA soldiers who targeted the family at night, and that the victims were unarmed females who did not have a husband or father in the house.[175]

56. Idriz Balaj responds that the Prosecution "has failed to establish [that] the Trial Chamber applied an incorrect legal standard and [has] also failed to demonstrate beyond a reasonable doubt

[166] Prosecution's Appeal Brief, paras 58-70. The Prosecution abandons its alternative claim originally pleaded in its Notice of Appeal that the Trial Chamber committed a factual error in its assessment of the *mens rea* requirement. Prosecution's Appeal Brief, para. 45, fn. 121.
[167] Prosecution's Appeal Brief, paras 59-62.
[168] Prosecution's Appeal Brief, para. 59, referring to *Ndindabahizi* Appeal Judgement, para. 122.
[169] Prosecution's Appeal Brief, para. 60.
[170] Prosecution's Appeal Brief, para. 61.
[171] Prosecution's Appeal Brief, para. 63.
[172] Prosecution's Appeal Brief, paras 68-69.
[173] Prosecution's Appeal Brief, para. 66.
[174] Prosecution's Appeal Brief, para. 65.
[175] Prosecution's Appeal Brief, para. 67.

that the evidence proved Mr. Balaj had the requisite *mens rea* for aiding and abetting."[176] He argues that the Trial Chamber applied the correct legal standard of "knowledge or awareness that his or her conduct assisted or facilitated the commission of the crime",[177] and properly concluded that this standard could not be met where there was no evidence that Idriz Balaj was aware that these murders were "even contemplated" at the time that he acted.[178]

57. The Appeals Chamber notes that, in relation to the *mens rea* element of aiding and abetting, the Trial Chamber articulated the legal standard as follows:

> The aider and abettor must have knowledge that his or her acts assist in the commission of the crime of the principal perpetrator. The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind. The aider and abettor does not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.[179]

The Appeals Chamber further notes that the Trial Chamber, by majority, found that "there is no evidence that Idriz Balaj knowingly contributed to or facilitated the commission of any of these murders, especially as there is no evidence that Idriz Balaj was aware at that time that these murders were or would be committed."[180]

58. The Appeals Chamber considers it firmly established that, to satisfy the *mens rea* requirement for aiding and abetting, "[i]t must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal" (for example, murder, extermination, rape, torture)[181] and that the aider and abettor was "aware of the essential elements of the crime which was ultimately committed by the principal".[182] Where the *mens rea* of the principal perpetrator is an element of the principal crime, the aider and abettor need not share the intent of the principal perpetrator,[183] but he or she must be aware of the intent of the principal perpetrator.[184] *Mens rea* can be established if the aider and abettor is not certain which of a number of crimes will ultimately be committed.[185] In this regard, where an accused "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has

[176] Balaj's Response Brief, para. 65.
[177] Balaj's Response Brief, para. 69.
[178] Balaj's Response Brief, para. 70.
[179] Trial Judgement, para. 145 (internal citations omitted).
[180] Trial Judgement, para. 242.
[181] *Aleksovski* Appeal Judgement, para. 163 (citing *Tadić* Appeal Judgement, para. 229); *see also Blaškić* Appeal Judgement, para. 45 (citing *Vasiljević* Appeal Judgement, para. 102); *Krnojelac* Appeal Judgement, para. 51.
[182] *Orić* Appeal Judgement, para. 43 (citing *Simić* Appeal Judgement, para. 86); *Aleksovski* Appeal Judgement, para. 162.
[183] *Krstić* Appeal Judgement, para. 140; *Krnojelac* Appeal Judgement, paras 51-52; *Simić* Appeal Judgement, para. 86.
[184] *Simić* Appeal Judgement, para. 86; *Brdanin* Appeal Judgement, para. 487; *Blagojević and Jokić* Appeal Judgement, para. 127; *Krstić* Appeal Judgment, paras 140-141.
[185] *Blaškić* Appeal Judgement, para. 50 (citing *Blaškić* Trial Judgement, para. 287); *Simić* Appeal Judgement, para. 86.

intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[186] Accordingly, the Trial Chamber correctly set out the legal standard for the *mens rea* of aiding and abetting.[187]

59. Furthermore, the Appeals Chamber can identify no error on the part of the Trial Chamber in its application of the legal standard for the *mens rea* of aiding and abetting.[188] The requirement of knowledge that a crime would be committed by the principal perpetrator is in line with the jurisprudence of the Tribunal as set forth above. Moreover, the Appeals Chamber considers that the Trial Chamber did not reach its conclusion because Idriz Balaj "lacked certainty" that a crime would be committed but rather because it found that there was no evidence at all to establish that he was aware to any standard that by his actions he was assisting in the commission of a crime against the sisters.[189]

60. The Appeals Chamber considers that the evidence referred to by the Prosecution, at best, shows that Idriz Balaj put vulnerable women in contact with KLA soldiers who had a reputation for violence. The Prosecution does not point to any evidence as to what happened to the women between the time that they were last seen alive and the time that they were killed, in particular which KLA soldiers killed them or under what circumstances they were killed. As the Trial Chamber correctly noted, none of the evidence shows that Idriz Balaj was aware that a crime would be committed against the women at the relevant time.[190]

61. Accordingly, the Appeals Chamber concludes that the Trial Chamber did not err in finding that Idriz Balaj lacked the requisite *mens rea* for aiding and abetting the murder of sister "S", sister "M", and the mother of Witness 4. In view of this conclusion, the Appeals Chamber will not consider the Prosecution's contention in relation to the *actus reus* requirement.

62. Consequently, the Appeals Chamber dismisses this ground of appeal and the Trial Chamber's acquittal of Idriz Balaj for Count 14 stands.

[186] *Blaškić* Appeal Judgement, para. 50 (citing *Blaškić* Trial Judgement, para. 287); *Simić* Appeal Judgement, para. 86.
[187] *See* Trial Judgement, para. 145.
[188] *See Blagojević and Jokić* Appeal Judgement, para. 223.
[189] Trial Judgement, para. 242.
[190] Trial Judgement, para. 242.

C. Alleged Errors Regarding the Rape, Torture, and Cruel Treatment of Witness 61 and the Cruel Treatment of Witness 1 (Ground 3)

63. The Trial Chamber found Idriz Balaj not guilty of the rape, cruel treatment, and torture of Witness 61, and the cruel treatment and torture of Witness 1 in violation of the laws or customs of war, as charged in Counts 36 and 37 of the Indictment.[191]

64. The Prosecution argues that having found that Idriz Balaj was "Toger", it was "patently unreasonable" for the Trial Chamber to acquit him of Count 36 of the Indictment, given the clear and consistent evidence that a KLA soldier called "Toger" had taken into custody, detained, interrogated, and raped Witness 61.[192] The Prosecution also submits that the Trial Chamber erred in law when it found that Witness 1 was not subjected to cruel treatment by Idriz Balaj and the KLA soldiers who placed him in a well and then covered it with a lid, and thus acquitted Idriz Balaj of Count 37 of the Indictment.[193] The Prosecution therefore requests the Appeals Chamber to reverse Idriz Balaj's acquittals of Counts 36 and 37 of the Indictment, convict him, and sentence him accordingly.[194]

65. Idriz Balaj responds that the Trial Chamber's findings were reasonable and argues that the Prosecution's arguments are essentially an invitation to the Appeals Chamber to re-weigh the credibility of witnesses and the strength of individual items of evidence.[195] He therefore requests that the Appeals Chamber affirm the Trial Chamber's decision to acquit him.[196]

1. Idriz Balaj's alleged rape, torture, and cruel treatment of Witness 61

(a) Whether the Trial Chamber erred in finding that there was reasonable doubt that Idriz Balaj (a.k.a. "Toger") was responsible for the rape, torture, and cruel treatment of Witness 61

66. The Prosecution argues that, in concluding that there was a reasonable doubt as to whether Idriz Balaj or another KLA soldier raped Witness 61, the Trial Chamber misread the evidence and failed to consider other crucial evidence. According to the Prosecution, the evidence leaves no doubt that it was Idriz Balaj who raped Witness 61, "given her clear and consistent evidence that she was raped by the KLA soldier called Toger."[197] The Prosecution contends that, in light of the

[191] Trial Judgement, paras 459-469, 503.
[192] Prosecution's Appeal Brief, paras 72-89; AT. 54 (Open Session).
[193] Prosecution's Appeal Brief, paras 90-96; AT. 59 (Open Session).
[194] Prosecution's Appeal Brief, paras 89, 96; AT. 59-60 (Open Session).
[195] Balaj's Response Brief, para. 95; AT. 100 (Open Session).
[196] Balaj's Response Brief, para. 98.
[197] Prosecution's Appeal Brief, para. 73.

evidence, it is not possible that she confused him with someone else, and the Trial Chamber's conclusion is one that no reasonable Trial Chamber could have reached.[198]

67. In support of its argument, the Prosecution submits that Witness 61 saw Toger in her home when he and four other KLA soldiers came to find her and her husband. Although Witness 61 saw Toger, she did not recognise him because she did not know him; but, her husband did recognise him as someone he knew of as "Toger". The Prosecution also argues that Witness 61 heard other soldiers call one of the KLA soldiers by the name of "Toger". According to the Prosecution, this evidence demonstrates that Witness 61 knew which soldier was Toger from the outset and that the Trial Chamber failed to discuss it entirely.[199]

68. Idriz Balaj responds that, contrary to the Prosecution's argument, no evidence was adduced at trial to show that there was sufficient light in the home of Witness 61 for her to identify which of the soldiers was Toger. Further, there was evidence that power shortages were not an uncommon occurrence in the region.[200] Not only did the Prosecution not ask Witness 61 if she could clearly see Toger, but there was direct testimony from Witness 61 that it was dark and she could not see the soldiers very well.[201] During cross-examination, Witness 61 emphasised that she was unable to describe the soldiers because it was too dark:

> Q: Now, the other three soldiers who were at your house initially, could you describe for the Chamber what they looked like?
>
> A: I don't know. I didn't see them. They were all the same. I didn't see them all at the same time. It was night. I didn't see them inside. I saw them only outside. Then outside it was dark. I couldn't see them so I could not tell you how they looked like.[202]

69. Idriz Balaj also points out that Witness 61 testified that her husband, Witness 1, told her who Toger was after they had returned home later that morning. Idriz Balaj argues that this testimony further calls into question the reliability of Witness 61's references to "Toger" because it is impossible to accurately conclude whether Witness 61's information was derived from her own experiences or from information given to her by her husband after they had returned home.[203]

70. Idriz Balaj submits that Witness 61 testified that she was able to see the man who interrogated her for a significant amount of time in the room before raping her. Despite this, however, Witness 61 was not able to identify that man as Idriz Balaj in a photo spread containing

[198] Prosecution's Appeal Brief, paras 73-75; AT. 55-57 (Open Session).
[199] Prosecution's Appeal Brief, paras 78-80; AT. 54-56 (Open Session).
[200] Balaj's Response Brief, para. 105, fn. 126.
[201] Balaj's Response Brief, paras 105-106.
[202] Balaj's Response Brief, para. 107 (citing Witness 61, T. 4043 (11 May 2007) (Open Session)).
[203] Balaj's Response Brief, paras 108-110.

his picture in October 2002.[204] Moreover, Idriz Balaj points out that Witness 61 testified that she was unable to describe the man who raped her, but that she was sure that he was "short, not a big man, black hair […] just a little taller than me."[205] He further argues that this description is inconsistent with the fact that Witness 61 is 1.58 metres tall, and he is 1.78 metres tall.[206]

71. Idriz Balaj also recalls that Witness 61 testified that, when she heard that "Toger" was in The Hague, she watched him on television and remarked, "He looks older. The person on the TV didn't look like Toger to me. He looks older. My family [said] that Toger was on the TV and that it is Toger in The Hague."[207]

72. The Appeals Chamber notes that the Trial Chamber was satisfied that a KLA soldier raped and tortured Witness 61.[208] However, it also observed that there was reasonable doubt as to the identity of this soldier. More specifically, the Trial Chamber considered, *inter alia*, that Witness 61 did not recognise Idriz Balaj when presented with an ICTY photo board; stated, after seeing Idriz Balaj on television in 2005, that he did not look like the man who raped her; and testified that she was not able to recognise the man who raped her anymore.[209] The Trial Chamber further observed that Witness 1 could not have known who committed the rape of Witness 61, given the broader doubts about the identification evidence before it.[210]

73. The Appeals Chamber is satisfied that, given the uncertainties surrounding Witness 61's identification of Idriz Balaj, the evidence of his guilt is not conclusive. The Trial Chamber thus acted within the bounds of its discretion in finding that there was reasonable doubt as to whether he raped and tortured Witness 61.

74. The Appeals Chamber therefore rejects the Prosecution's argument.

(b) Whether the Trial Chamber erred by not relying upon other identification evidence

75. The Prosecution argues that the Trial Chamber failed to analyse evidence of another identifying feature of the KLA soldier "Toger", namely, that he spoke Albanian to Witness 61 and that she could tell that he was not from her village, just as Idriz Balaj was not from her village. The Prosecution also contends that the Trial Chamber failed to analyse evidence that Toger was in command and gave orders to other soldiers during the events at issue, and that he took notes in a

[204] Balaj's Response Brief, paras 112-116; AT. 96-97 (Open Session).
[205] Balaj's Response Brief, para. 117; AT. 98 (Open Session).
[206] Balaj's Response Brief, para. 118; AT. 98 (Open Session).
[207] Balaj's Response Brief, paras 119-121 (citing Witness 61, T. 4050-4051 (11 May 2007) (Open Session)); AT. 97-98 (Open Session).
[208] Trial Judgement, paras 465-466.
[209] Trial Judgement, para. 469.

notebook throughout the interrogation of Witness 61. According to the Prosecution, this is evidence that the Trial Chamber should have used to identify the soldier who raped Witness 61 as Idriz Balaj, because Idriz Balaj, like the man who raped Witness 61, was in command of KLA soldiers and "carried a notebook containing the names of collaborators."[211]

76. Idriz Balaj responds that speaking Albanian is hardly a reliable method of identifying a particular individual given the fact that the vast majority of the population spoke Albanian and the fact that the KLA was composed of ethnic Albanians who came from all over Kosovo/Kosova. Moreover, Idriz Balaj points out that, when asked if the perpetrator's accent indicated to her where he was from, Witness 61 testified that all she could say was that he spoke Albanian.[212] He also argues that the fact that the perpetrator took notes during the interrogation is such a common feature of interrogations that it has virtually no probative value.[213]

77. The Appeals Chamber recalls that:

> [w]ith regard to factual findings, a Trial Chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. In short, a Trial Chamber should limit itself to indicating in a clear and articulate, yet concise manner, which, among the wealth of jurisprudence available on a given issue and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual.[214]

The Appeals Chamber finds that the Trial Chamber considered the evidence that was essential to determining whether Idriz Balaj was guilty under this Count. Furthermore, it does not consider that the other identification evidence cited by the Prosecution adds any essential facts to those already considered by the Trial Chamber. Accordingly, the Prosecution has not established that the Trial Chamber erred in failing to explicitly address such evidence in the Trial Judgement.

78. The Appeals Chamber therefore rejects the Prosecution's argument.

(c) Whether the Trial Chamber erred by not relying on hearsay evidence

79. The Trial Chamber, because of the doubts arising from the evidence of Witnesses 1 and 61 on whether Toger committed the rape, decided that it would not rely upon the hearsay evidence that Toger admitted to having raped Witness 61.[215]

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[210] Trial Judgement, para. 469.
[211] Prosecution's Appeal Brief, paras 81-82; AT. 57-58 (Open Session).
[212] Balaj's Response Brief, paras 129, 130 (referring to Witness 61, T. 4000 (11 May 2007) (Open Session)); AT. 98 (Open Session).
[213] Balaj's Response Brief, para. 131.
[214] *Hadžihasanović and Kubura* Appeal Judgement, para. 13 (internal citation omitted).
[215] Trial Judgement, para. 469.

80. The Prosecution points to evidence that three high-ranking commanders of the KLA, including Shemsedin Cekaj, told Witness 61 that "Toger" had admitted the crime and that it would not happen again. The Prosecution further observes that Witnesses 61, 1, and 56's evidence is consistent on this point and that Shemsedin Cekaj's failure to recall this occurrence is irrelevant. Thus, according to the Prosecution, the Trial Chamber erred in not taking this hearsay evidence into consideration as corroboration.[216]

81. Idriz Balaj responds that the evidence of Witness 1 and Witness 56 (Witness 1's father) is unreliable, given that Witness 1 was never cross-examined due to his death during the trial and because Witness 56 was an elderly, ailing man who had considerable difficulty in understanding what it meant to take the solemn oath before testifying, stating on more than one occasion that he was not a witness.[217] Moreover, Idriz Balaj takes issue with the Prosecution's characterisation of the evidence of Shemsedin Cekaj, a KLA commander. Whereas the Prosecution states that Shemsedin Cekaj "fail[ed] to recall" Toger's confession, Idriz Balaj points out that Shemsedin Cekaj testified that the first time he heard anything about these events was when the Prosecution discussed them with him when he was first contacted about the case.[218]

82. Witness 61 testified that three "commanders" came to her house after the incident and told her that Toger had admitted to raping her. In her testimony, she stated:

> [T]he next morning at 5.00 in the morning, my father-in-law went to the headquarters. He told them what had happened to me and to his son. Then they came and asked me about what had happened. I told them what had happened, what he did to me. Then they asked him. At first he did not admit. He said that I had lied, but it was not true. I told them what had really happened. Then they came to me. They said to me that it was not a lie -- I told them it was not a lie, and that was the truth. Then they went back to him again and they asked him. Then he admitted that.[219]

When asked to clarify this statement, Witness 61 again repeated, "He at first did not admit, but then later he confessed."[220] She did not provide additional information on the circumstances surrounding the purported confession.

83. The Appeals Chamber considers that there were circumstances surrounding the testimony of Witness 56 that cast doubt upon its reliability. He was confused, reluctant to testify, and generally exhibited a lack of understanding concerning the questions posed to him.[221] He often made

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[216] Prosecution's Appeal Brief, para. 84.
[217] Balaj's Response Brief, paras 137-138 (citing Witness 56, T. 7111, 7130 (18 July 2007) (Private Session)).
[218] Balaj's Response Brief, paras 132-133, para. 135 (citing Shemsedin Cekaj, T. 4518 (17 May 2007) (Private Session)). Witness 56 said the man's name was "Abedin Ceki, Shabedin Ceki". Witness 56, T. 7106 (18 July 2007) (Private Session). Idriz Balaj does not challenge that this is a reference to Shemsedin Cekaj. Balaj's Response Brief, para. 132.
[219] Witness 61, T. 3997 (11 May 2007) (Open Session).
[220] Witness 61, T. 3997 (11 May 2007) (Open Session).
[221] Witness 56, T. 7120-7121 (18 July 2007) (Private Session).

statements such as, "I am 75 years old. I am sick. I'm disabled. Please don't burden me with these things. This is all I know and what I tell you."[222] Importantly, the testimony of Witness 56 did not, as the Prosecution suggests, corroborate Witness 61's statement that three KLA "commanders" stated that Toger had admitted to raping her. Witness 56 stated that KLA soldiers had come to his house after the incident took place, but that he was unable to provide further information.[223]

84. Following the death of Witness 1 during the trial, the Trial Chamber admitted five of his written statements, but excluded many portions of them due to the fact that they went to the acts and conduct of the accused, contained internal inconsistencies, lacked corroboration, and/or were directly contradicted by sworn evidence presented at trial.[224] In addition, the statements do not contain information about Toger's purported confession.[225]

85. Similarly, as noted above, Witness 56 was not able to speak to this point. The Appeals Chamber also notes that Shemsedin Cekaj—one of the KLA soldiers to whom, according to Witness 1, Toger reported the events—testified that he did not know Witness 61 and Witness 1.[226] Shemsedin Cekaj further testified that he had not heard that these witnesses had been taken from their houses until the Prosecution mentioned it to him.[227] Only Witness 61 stated that Toger had made a hearsay admission of raping her. The Appeals Chamber does not doubt that Witness 61 was testifying of her own volition and in a sincere manner; however, in assessing whether her hearsay evidence on this point is reliable, the surrounding circumstances must be considered.[228] Witness 61 is the direct victim of serious crimes—rape, torture, and cruel treatment—at the hands of an individual she identifies as "Toger". Her reported statement is second-hand hearsay, *i.e.*, she testified that KLA soldiers told her that Toger had admitted to committing the rape.

86. In these circumstances, it was reasonable for the Trial Chamber to treat the hearsay evidence of Toger's purported confession with circumspection and ultimately not rely upon it. The

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[222] Witness 56, T. 7104 (18 July 2007) (Private Session).
[223] Witness 56, T. 7106 (18 July 2007) (Private Session).
[224] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Motion to Admit Five Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater* With Confidential Annex, 28 November 2007, para. 20.
[225] P1250 (Witness 1 Statement, 24 August 2002), pp. 3, 5 (Under Seal); P1251 (Witness 1 Statement, 16 October 2002), p. 3 (Under Seal).
[226] Shemsedin Cekaj, T. 4517-4518 (17 May 2007) (Private Session).
[227] Shemsedin Cekaj, T. 4518 (17 May 2007) (Private Session).
[228] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 15-16 (stating "[t]he Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. […] In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate."); *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (holding that "a Trial Chamber must be satisfied that [the evidence] is reliable for that purpose […] and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose").

Prosecution has not succeeded in demonstrating that the Trial Chamber acted unreasonably when it concluded that it had not been proved beyond a reasonable doubt that the person responsible for the rape, torture, and cruel treatment of Witness 61 was Idriz Balaj, or that he planned for anyone else to do so.

87. The Appeals Chamber therefore rejects the Prosecution's argument.

2. Idriz Balaj's alleged responsibility for the cruel treatment of Witness 1

88. The Prosecution claims that the Trial Chamber committed an error in law when it failed to find that KLA soldiers' actions in throwing Witness 1 into a well constituted cruel treatment. As argued by the Prosecution, "[t]he acts committed against Witness 1 fell squarely within the definition of cruel treatment under Article 3 of the Statute because they constituted a serious attack on his human dignity or caused him at least serious emotional suffering."[229] According to the Prosecution, Idriz Balaj "acted as the person in authority and issued orders to the other soldiers who brought Witness 61 and her husband to the headquarters."[230] The Prosecution does not, however, allege that Idriz Balaj specifically directed the other soldiers to throw Witness 1 into the well.[231]

89. In response, Idriz Balaj argues that "no reasonable trier of fact could or would have found cruel treatment on these facts"[232] and that "[t]here was no evidence that Mr. Balaj was personally involved in putting Witness 1 in the well."[233]

90. The Appeals Chamber recalls Witness 61's testimony that Idriz Balaj (a.k.a. "Toger") came to her home with four other people and asked her father-in-law, who answered the door, where his son was.[234] The father-in-law told them that his son was sleeping, but the men nevertheless took Witness 61 and her husband (Witness 1).[235] Witness 1 recognised Toger.[236] As she left the house, Witness 61 was not expecting to come back alive because her husband had told her that Toger "had done massacres".[237] She explained, "That's why we were scared of him and that is why we were thinking that we wouldn't be able to come back home."[238] Witness 61 and Witness 1 were then brought to the KLA headquarters, which took about 15 to 20 minutes on foot.[239] Witness 1's hands

[229] Prosecution's Appeal Brief, para. 91; *see also* AT. 59 (Open Session).
[230] Prosecution's Appeal Brief, para. 82; *see also* AT. 58 (Open Session).
[231] Prosecution's Appeal Brief, para. 92.
[232] Balaj's Response Brief, para. 152.
[233] Balaj's Response Brief, para. 146; *see also* AT. 102 (Open Session).
[234] Witness 61, T. 3982 (11 May 2007) (Open Session).
[235] Witness 61, T. 3982 (11 May 2007) (Open Session).
[236] Witness 61, T. 4003 (11 May 2007) (Open Session).
[237] Witness 61, T. 3985, 3987 (11 May 2007) (Open Session).
[238] Witness 61, T. 3987 (11 May 2007) (Open Session).
[239] Witness 61, T. 3990 (11 May 2007) (Private Session).

were tied behind his back, and he was taken to a well by two men.[240] Witness 1, in his statement, noted that Toger took his wife into the KLA headquarters.[241]

91. According to Witness 61, Witness 1 recounted to her after they returned home that he had been thrown into a well with water up to his waist, with the lid closed over it.[242] Witness 61 was unable to provide detailed information about what happened to her husband while he was in the well. She stated, "He simply said he was taken, he was put in the well. He's never—he didn't tell me anything what they were asking about. He simply told me that he was put in the well and they'd been—they were guarding him."[243] Witness 61 noted that her husband's clothes were wet and that he had to change when he returned to their home.[244]

92. The details of Witness 1's statement describing the incident differ somewhat from Witness 61's testimony. According to a statement of Witness 1, when they arrived at the KLA headquarters, Toger took his wife inside the house, while two masked soldiers took Witness 1 to a well in front of the house. They then threw him into the well and put a cover on it. Witness 1 stated that the well was "some three meters deep and filled with 1,5 meter [*sic*] of water, so that [he] was standing up to [his] neck in the water."[245] From this evidence, the Trial Chamber concluded that it was not established that KLA soldiers, by putting Witness 1 into the well or by any other acts, caused him serious mental or physical suffering or injury, or seriously attacked his human dignity. The Trial Chamber therefore was not convinced beyond a reasonable doubt that Witness 1 suffered cruel treatment or torture.[246]

(a) Whether the Trial Chamber erred in finding that the treatment of Witness 1 did not cross the threshold for the offence of cruel treatment under Article 3

93. In deciding whether the treatment of Witness 1 satisfies the legal prerequisites for cruel treatment under Article 3, the Appeals Chamber recalls the *Čelebići* Trial Judgement, which held that:

> The basis of the inclusion of cruel treatment within Article 3 of the Statute is its prohibition by common article 3(1) of the Geneva Conventions, which proscribes, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture". In addition to its

[240] Witness 61, T. 3991 (11 May 2007) (Open Session); Trial Judgement, para. 460.
[241] P1250 (Witness 1 Statement, 23-24 August 2002, p. 3) (Under Seal).
[242] Witness 61, T. 4005-4006 (11 May 2007) (Open Session).
[243] Witness 61, T. 4007 (11 May 2007) (Open Session). The Trial Chamber did not address this statement in the Trial Judgement.
[244] Witness 61, T. 4007 (11 May 2007) (Open Session).
[245] P1250 (Witness 1 Statement, 23-24 August 2002, p. 3) (Under Seal). The Appeals Chamber is of the view that the discrepancy over whether the water was up to Witness 1's neck or waist is minor and not determinative of the issue before it.
[246] Trial Judgement, para. 467.

> prohibition in common article 3, cruel treatment or cruelty is proscribed by article 87 of the Third Geneva Convention, which deals with penalties for prisoners of war, and article 4 of Additional Protocol II, which provides that the following behaviour is prohibited:
>
> > violence to life, health and physical and or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.
>
> As with the offence of inhuman treatment, no international instrument defines this offence, although it is specifically prohibited by article 5 of the Universal Declaration of Human Rights, article 7 of the ICCPR, article 5, paragraph 2, of the Inter-American Convention of Human Rights and article 5 of the African Charter of Human and Peoples' Rights. In each of these instruments, it is mentioned in the same category of offence as inhuman treatment.[247]

94. As is the case with the international law instruments mentioned above, the jurisprudence of the Tribunal does not provide a comprehensive definition of the offence of cruel treatment, but the Appeals Chamber has defined the elements of cruel treatment as a violation of the laws or customs of war as follows:

> a. an intentional act or omission […] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,
>
> b. committed against a person taking no active part in the hostilities.[248]

95. The Appeals Chamber considers that, although Witness 1 (a person taking no active part in the hostilities) was not the victim of an intentional act or omission causing serious *physical* suffering or injury, his treatment caused him serious *mental* suffering and constituted a serious attack on his human dignity. The testimony of Witness 61 (the wife of Witness 1) establishes that her husband knew who Toger was, and feared him, knowing him to have committed "massacres."[249] Moreover, after the couple had been forcibly awakened in the middle of the night and taken from their home by armed men and after Witness 1 had been incapacitated in a well, Witness 1's wife was taken away to be interrogated at a headquarters of the KLA, which had a reputation for violence. Contrary to the finding of the Trial Chamber, the only reasonable inference from the evidence was that Witness 1 suffered serious *mental* harm when he was incapacitated in the well and separated from his wife, who was now in the hands of armed KLA soldiers. The *actus reus* of the crime was therefore proved by the Prosecution.

96. As to the *mens rea*, when all the evidence surrounding this incident is taken into account, the only reasonable inference to be drawn is that the KLA soldiers who threw Witness 1 into the well, as others led away his wife for interrogation, intended to cause serious *mental* suffering to Witness 1, a person taking no active part in the hostilities.

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[247] *Čelebići* Trial Judgement, paras 548-549.
[248] *Blaškić* Appeal Judgement, para. 595 (citing *Čelebići* Appeal Judgement, paras 424, 426 (internal citations omitted)).
[249] Witness 61, T. 3986-3987 (11 May 2007) (Open Session).

97. The Appeals Chamber therefore grants the Prosecution's ground of appeal, in part, and reverses the Trial Chamber's finding that the treatment of Witness 1 did not constitute cruel treatment under Article 3 of the Statute.

98. Having found that the acts committed against Witness 1 constituted cruel treatment, the Appeals Chamber will now assess Idriz Balaj's responsibility for these acts.

(b) Whether Idriz Balaj is responsible for the cruel treatment of Witness 1

99. The Prosecution argues that the Trial Chamber found that Idriz Balaj was one of the KLA soldiers who took Witness 1 and his wife to the KLA headquarters in Rznić/Irniq. It also submits that the evidence shows that Idriz Balaj was in charge and that his personal involvement in the cruel treatment of Witness 1 makes him guilty of committing the crime.[250]

100. Idriz Balaj responds that there was no evidence, including from Witness 1, that he threw Witness 1 into the well. He asserts that there was also no pre-existing plan to put Witness 1 into the well, nor any evidence of his knowledge of or participation in any such plan. Therefore, according to Idriz Balaj, "the elements of the only two modes of criminal liability alleged as to this count—committing or planning—were simply not proved at trial."[251]

101. The Appeals Chamber notes that, according to Witness 61, two men other than Idriz Balaj threw her husband into the well. The record does not indicate whether Idriz Balaj knew that Witness 1 had been thrown into the well or that Idriz Balaj ordered Witness 1 to be thrown into the well. Moreover, the primary evidence that goes to the issue of whether Idriz Balaj committed or planned the cruel treatment of Witness 1 comes from Witness 1 himself. However, Witness 1 was not available for cross-examination due to his untimely death and therefore his evidence must be corroborated in order for it to support a conviction.[252] In light of this, and the very limited

[250] Prosecution Appeal Brief, para. 95; AT. 54, 58-60 (Open Session).
[251] Balaj Response, paras 145-146. Balaj was also charged with committing Counts 36 and 37 via a joint criminal enterprise, but the Trial Chamber found that no such enterprise had been proved by the Prosecution. Trial Judgement, paras 475-478, 503; AT. 102 (Open Session).
[252] The jurisprudence of the Tribunal includes safeguards for an accused in whose trial evidence is admitted without being subjected to cross-examination. The Appeals Chamber in *Prosecutor v. Galić* held that the admission into evidence of written statements made by a witness in lieu of his oral evidence in chief is not inconsistent with Article 21(4)(e) of the Statute, citing relevant European Court of Human Rights case law for support. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, p. 9, n. 34. This decision has been used by the *Milutinović et al.* Trial Chamber to support the principle in relation to Rule 92 *quater* that the admission of a written statement in lieu of oral testimony cannot support a conviction all by itself where the witness does not appear for cross-examination unless the written evidence is otherwise corroborated. *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 13. Finally, the Appeals Chamber has expanded on this principle in relation to an interview of an accused given to the Prosecution in a multi-accused trial, where that accused does not take the stand and is thus unavailable for cross-examination by his co-accused. The Appeals Chamber held that, in such a situation and where the evidence at issue is indispensable for a conviction, it is not only evidence of the acts and conduct of the

corroborative value of Witness 61's evidence, the Appeals Chamber does not consider that the only reasonable inference to be drawn from the evidence was that Idriz Balaj committed or planned the cruel treatment of Witness 1.

102. Consequently, although the Prosecution proved that the KLA soldiers committed cruel treatment against Witness 1, it did not prove that Idriz Balaj was responsible for that treatment under the modes of liability charged by the Prosecution.

103. The Appeals Chamber therefore grants the Prosecution's third ground of appeal, in part, insofar as it argues that the Trial Chamber erred in law in finding that throwing Witness 1 into a well by KLA soldiers did not constitute cruel treatment under Article 3 of the Statute. The Appeals Chamber dismisses the Prosecution's third ground of appeal in all other respects and upholds Idriz Balaj's acquittal of Count 37 of the Indictment.

accused that must be corroborated, but also evidence of any "critical element" of the Prosecution case. *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, paras 58-59.

IV. THE APPEAL OF LAHI BRAHIMAJ

A. Alleged Errors Relating to the Credibility of Witness 6 (Ground 1)

104. The Trial Chamber convicted Lahi Brahimaj of torture as a violation of the laws or customs of war, as charged under Count 28 of the Indictment.[253] It found that Lahi Brahimaj personally participated in the cruel treatment and torture of Witness 6.[254]

105. Lahi Brahimaj submits that, in drawing these conclusions, the Trial Chamber committed errors of fact and/or law by failing to take into account or by failing to give appropriate reasons for rejecting fundamental issues relating to the assessment of Witness 6's credibility.[255]

106. As a preliminary matter, the Appeals Chamber reiterates that an appellant claiming an error of law on the basis of a lack of a reasoned opinion must identify the specific issues, factual findings, or arguments that the appellant submits the Trial Chamber omitted to address and must explain why this omission invalidated the decision. The Appeals Chamber observes that, under this ground of appeal, although Lahi Brahimaj identifies specific alleged errors of the Trial Chamber, he does not provide a detailed explanation of precisely how these alleged errors invalidate the Trial Judgement. However, the Appeals Chamber notes that Lahi Brahimaj provides such information in the introductory section of his Appeal Brief. Specifically, he states that the core of his appeal concerns the evidence of Witnesses 3 and 6, in that:

> [i]t is safe to say that, but for their testimony, [he] would have been acquitted of all counts in the indictment. For this reason, as set out below, the credibility, consistency and reliability of these two witnesses requires detailed analysis and, before a Trial Chamber could be satisfied of their testimony beyond a reasonable doubt, a reasoned opinion as to the grounds for finding them credible, consistent and reliable was required. It is the Trial Chamber's failure to provide such reasoned opinion that forms the main substance of this appeal.[256]

The Appeals Chamber finds that these details, coupled with Lahi Brahimaj's explanation of the alleged errors under ground 1 of his Appeal, satisfy the requirement of explaining how the alleged errors of the Trial Chamber invalidate the decisions at issue.

1. The Prosecution's alleged Rule 68 violation

107. Lahi Brahimaj submits that, towards the end of his examination of Witness 6, the Prosecution disclosed the English translation of a document ("English translation") that suggested

[253] Trial Judgement, para. 504.
[254] Trial Judgement, para. 395.
[255] Brahimaj's Notice of Appeal, para. 7; Brahimaj's Appeal Brief, paras 21-64; AT. 136-140 (Open Session).
[256] Brahimaj's Appeal Brief, para. 5.

that Witness 6 was either a police officer or directly involved in police activities.[257] Lahi Brahimaj further submits that, during the subsequent cross-examination, Witness 6 "stated that he had nothing to do with either the police or the army."[258] Lahi Brahimaj asserts that, "if Witness 6 were involved in police activities, counsel would have been entitled to explore whether he was taking an active part in hostilities."[259] Due to the late disclosure of the English translation, however, he claims that he was deprived of a line of cross-examination and an opportunity to challenge Witness 6's credibility with regard to this issue.[260] Lahi Brahimaj argues that the Trial Chamber erred in failing to consider and/or failing to provide reasons for rejecting this argument, which both he and Idriz Balaj set forth in their Final Trial Briefs.[261]

108. In response, the Prosecution submits that it had disclosed original BCS and Albanian language documents to Lahi Brahimaj on 31 May 2007, prior to the commencement of the cross-examination of Witness 6.[262] It argues that the late disclosure of the English translation of a single document "does not raise a concrete disclosure breach".[263] It further asserts that Lahi Brahimaj did not request to cross-examine Witness 6 about the English translation between the day that he received the translation on 4 June 2007 and the last day of the trial[264] and that he does not show how cross-examination on the English translation could have impacted the Trial Judgement.[265]

109. In reply, Lahi Brahimaj reiterates that the Prosecution disclosed the English translation the very afternoon that Witness 6 commenced his testimony, that the Prosecution knew that "any evidence of collaboration between Witness 6 and Serbian police would be of central importance to the defence", and that "'disclosing' the document without a translation as this pivotal witness was about to enter the courtroom for the first time fails to comply with the wording or the spirit of Rule 68(i)."[266] Lahi Brahimaj also asserts that cross-examination on the English translation was important as "it had the potential to weigh in the balance of reasonable doubt in favour of the Accused."[267]

110. The Appeals Chamber notes that Rule 68 of the Rules obliges the Prosecution to disclose "as soon as practicable" material that "may suggest the innocence or mitigate the guilt of the

[257] Brahimaj's Appeal Brief, para. 25.
[258] Brahimaj's Appeal Brief, para. 24.
[259] Brahimaj's Appeal Brief, para. 25; AT. 134 (Open Session).
[260] Brahimaj's Appeal Brief, para. 25; AT. 135-136 (Open Session).
[261] Brahimaj's Appeal Brief, paras 27-28 (citing Brahimaj's Final Trial Brief, para. 16; Balaj's Final Trial Brief, para. 47).
[262] Prosecution's Response Brief, para. 21.
[263] Prosecution's Response Brief, para. 21.
[264] Prosecution's Response Brief, para. 21; AT. 149 (Open Session).
[265] Prosecution's Response Brief, para. 22.
[266] Brahimaj's Reply Brief, para. 3.1; AT. 132-134, 157-158 (Open Session).
[267] Brahimaj's Response Brief, para. 4.

accused or affect the credibility of the Prosecution's evidence."[268] This is a continuing obligation that applies whenever the Prosecution receives new information, rather than a requirement that all exculpatory evidence be disclosed by a certain point in the trial.[269] In the present case, the original BCS and Albanian language versions of the document in question were disclosed on 31 May 2007,[270] while the English translation was disclosed on 4 June 2007.[271] The Appeals Chamber observes that Lahi Brahimaj does not provide any information regarding when the Prosecution received the English translation and therefore fails to demonstrate that, pursuant to its obligation under Rules 68 of the Rules, the Prosecution did not disclose the document in question "as soon as practicable".

111. With respect to the argument that Lahi Brahimaj was deprived of a line of cross-examination,[272] the Appeals Chamber notes Lahi Brahimaj's claim that his line of defence was that Witness 6 "was a creature of the Serbian security forces at the time he was in Jablanica/Jabllanicë, [and] that he was *still* their creature while he was giving his testimony to the Trial Chamber."[273] The Appeals Chamber observes that, if Lahi Brahimaj considered the English translation relevant to the cross-examination of Witness 6, he could have requested the Trial Chamber to recall Witness 6 for this purpose. The Appeals Chamber notes that the Trial Chamber indicated its willingness to consider such a request at the hearing of 5 June 2007.[274]

112. The Appeals Chamber also considers that Lahi Brahimaj could have tendered the English translation as an exhibit arising from Witness 6's testimony or had it admitted as documentary evidence with leave from the Trial Chamber. However, there is no indication from Lahi Brahimaj's submissions or from the trial record that he explored any of these options. The Appeals Chamber reiterates that, absent special circumstances, a party cannot remain silent on a matter at trial only to raise it for the first time on appeal.

113. In addition, the Appeals Chamber notes that Lahi Brahimaj was provided the opportunity to cross-examine Witness 6 on issues that may have been relevant to his line of defence that Witness 6 "was a creature of the Serbian security forces",[275] such as whether he was a "reservist

[268] Rule 68(i) of the Rules.
[269] *See Blaškić* Appeal Judgement, paras 270-275 (holding that the Prosecution "did not take an inordinate amount of time before disclosing" Rule 68 material under the facts of that case, where the Prosecution disclosed the material after the end of the trial and eight months after receiving it).
[270] Brahimaj's Reply Brief, para. 3.1.
[271] Brahimaj's Appeal Brief, para. 25.
[272] Brahimaj's Appeal Brief, para. 25.
[273] Brahimaj's Reply Brief, para. 4.
[274] T. 5474-5476 (5 June 2007) (Open Session).
[275] Brahimaj's Reply Brief, para. 4.

policeman",[276] the reasons for his possession of a pistol,[277] and whether he was a spy for Serbia.[278] Lahi Brahimaj has failed to demonstrate how his approach on cross-examination would have changed had he been in possession of the English translation earlier.

114. In light of the foregoing, the Appeals Chamber finds that Lahi Brahimaj has not demonstrated that the Prosecution violated Rule 68 of the Rules or that he was deprived of the opportunity to adequately cross-examine Witness 6 in relation to his alleged connection with the Serbian security forces.

115. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

2. The alleged implausibility of Witness 6's account of his contact with Sret Camović

116. Lahi Brahimaj submits that the Trial Chamber failed to address his argument that the implausibility of Witness 6's account of his relations with the Serbian Security Services demonstrated that Witness 6 was not credible.[279] Specifically, he claims that Witness 6 testified that, a few days after leaving Jablanica/Jabllanicë, he met two police officers and Sret Camović, the Head of Serbian State Security, in Đakovica/Gjakovë. Lahi Brahimaj states that, although Sret Camović knew that Witness 6 had been detained in Jablanica/Jabllanicë, Sret Camović did not ask Witness 6 about his experiences there or about KLA soldiers or other alleged detainees there.[280] Lahi Brahimaj argues that it is highly improbable that the Head of Serbian State Security in Đakovica/Gjakovë would have failed to question Witness 6 if the Head of Serbian State Security had known that Witness 6 had just been in Jablanica/Jabllanicë or that the Serbian police would have failed to ask Witness 6 about the fate of their missing colleague, with whom Witness 6 claimed to have been detained.[281]

117. The Prosecution responds that the Trial Chamber correctly considered the testimony of Witness 6 in the context of his communication with Sret Camović and the two police officers. The Prosecution also points out that the Trial Chamber questioned Witness 6 over the alleged contradictions in this testimony.[282]

[276] Witness 6, T. 5305 (4 June 2007) (Open Session).
[277] Witness 6, T. 5352 (4 June 2007) (Open Session).
[278] Witness 6, T. 5402 (4 June 2007) (Open Session).
[279] Brahimaj's Appeal Brief, paras 21, 33-41; AT. 137-138 (Open Session).
[280] Brahimaj's Appeal Brief, para. 34.
[281] Brahimaj's Appeal Brief, paras 38-39.
[282] Prosecution's Response Brief, para. 24.

118. The Appeals Chamber notes that Witness 6 testified that he had known Sret Camović for many years because Sret Camović was a "professor" in the local high school.[283] He testified that, after his release from Jablanica/Jabllanicë, he met Sret Camović by chance in the Pashtrik Hotel when he went there for coffee.[284] Witness 6 explained that he spent half an hour having coffee with Sret Camović but only spoke to him for about ten minutes regarding Witness 6's detention in Jablanica/Jabllanicë.[285] Witness 6 stated:

> He asked me how it was, what did you go through? And I said it was a very bad time. The KLA was harsh on me. I told him that I was maltreated, then they took away my car. And then he told me, [b]ring your photos and you will have a duplicate of the papers.[286]

Witness 6 testified that he was not asked by Sret Camović about those who tortured him[287] or about the people who were detained with him.[288] The Trial Chamber also clarified with Witness 6 that Sret Camović did not ask him about the persons he saw during his imprisonment.[289]

119. The Appeals Chamber considers Lahi Brahimaj's claim that it is improbable that Sret Camović would have failed to question Witness 6 about his experiences while detained in Jablanica/Jabllanicë and about the fate of his missing colleague to be speculative. This matter was not essential to the Trial Chamber's assessment of Witness 6's credibility, and the Trial Chamber was not required to address it. Accordingly, Lahi Brahimaj has failed to demonstrate any error on the part of the Trial Chamber in its assessment of Witness 6's testimony in relation to this issue.

120. The Appeals Chamber accordingly dismisses this sub-ground of appeal.

3. Whether the Trial Chamber erred by not specifically addressing Witness 6's alleged failure to provide a credible explanation for the change in his conditions of detention

121. Lahi Brahimaj contends that the Trial Chamber failed to provide reasons for rejecting his argument, as set forth in his Final Trial Brief, that Witness 6 was unable to explain the improvement in his conditions of his detention.[290] Specifically, Lahi Brahimaj notes the testimony of Witness 6 that, after he was mistreated in Jablanica/Jabllanicë for a period of four weeks, his captors "suddenly" allowed him to walk around the meadow outside the barracks and wash dishes, and that he had the opportunity to escape but chose not to do so.[291] According to Lahi Brahimaj, the only

[283] Witness 6, T. 5279 (1 June 2007) (Private Session).
[284] Witness 6, T. 5301-5303 (4 June 2007) (Open Session).
[285] Witness 6, T. 5304 (4 June 2007) (Open Session).
[286] Witness 6, T. 5304 (4 June 2007) (Open Session).
[287] Witness 6, T. 5305 (4 June 2007) (Open Session).
[288] Witness 6, T. 5309 (4 June 2007) (Open Session).
[289] Witness 6, T. 5308 (4 June 2007) (Open Session).
[290] Brahimaj's Appeal Brief, paras 51-54 (citing Brahimaj's Final Trial Brief, paras 113-114).
[291] Brahimaj's Appeal Brief, para. 52.

credible explanation for this alleged change of circumstances was that Witness 6 was not subject to an extended period of sustained mistreatment.[292]

122. The Prosecution responds that Lahi Brahimaj has not demonstrated how the argument that Witness 6 was unable to explain the improvement in his detention conditions could affect Witness 6's credibility.[293]

123. The Appeals Chamber finds Lahi Brahimaj's argument regarding the inability of Witness 6 to explain the conditions of his detention to be speculative. Lahi Brahimaj has identified no inconsistencies in Witness 6's explanation or any evidence on the record that contradicts that explanation. Nor has he provided any evidence that demonstrates that this explanation was unreasonable. The Appeals Chamber thus considers that it was reasonably open to the Trial Chamber to accept it.

124. In light of the foregoing, the Appeals Chamber dismisses this sub-ground of appeal.

4. Whether the Trial Chamber erred by not specifically addressing alleged inconsistencies

125. Lahi Brahimaj implies that the Trial Chamber failed to address and/or failed to provide reasons for rejecting numerous arguments raised in his Final Trial Brief regarding inconsistencies in Witness 6's testimony.[294] First, he asserts that Witness 6's testimony—that he was beaten unconscious with a baseball bat and that he was regularly beaten and tortured for four weeks thereafter—was inconsistent with his reported injuries.[295] He states that the only injury detected in an examination by Dr. Shkëlzen Zajmi was a left wrist fracture,[296] and that the lack of serious injuries other than this fracture casts substantial doubt on Witness 6's testimony.[297]

126. Lahi Brahimaj also submits that the Trial Chamber failed to address a number of serious contradictions in Witness 6's testimony. These contradictions included the following:[298] Witness 6 testified that he was not given anything to eat and later testified that he received water and bread; he testified that he could not tell day from night while in detention but was able to indicate the time alleged detainees were taken away; and, he initially stated that he had seen pictures of Nazmi Brahimaj and Lahi Brahimaj and found out their names, but later denied seeing pictures of them.

[292] Brahimaj's Appeal Brief, para. 53.
[293] Prosecution's Response Brief, para. 34.
[294] Brahimaj's Appeal Brief, paras 48-50, 55-63.
[295] Brahimaj's Appeal Brief, paras 48-50.
[296] Brahimaj's Appeal Brief, para. 49.
[297] Brahimaj's Appeal Brief, para. 50; AT. 156 (Open Session).
[298] Brahimaj's Appeal Brief, paras 21, 55-60 (citing Brahimaj's Final Trial Brief, paras 118-122, 155-156). Lahi Brahimaj presents his submissions in relation to the alleged inconsistencies between the evidence of Witness 6 and that

Lahi Brahimaj also submits that Witness 6 provided a "totally improbable" response when asked the meaning of the phrase "[h]is release is conditional. If the mistake is repeated the accused [Witness 6] will face criminal charges", which appeared in a document given to him upon his release from Jablanica/Jabllanicë. Finally, Lahi Brahimaj contends that Witness 6 gave differing accounts regarding who mistreated four unidentified people, first stating that he did not know who was present when the mistreatment took place and could not describe the perpetrators and later claiming "that 'Nazmi and Hamza' were there."[299]

127. The Prosecution responds that the Trial Chamber properly found the testimony of Witness 6 to be credible in relation to his injuries, noting that the Trial Chamber based its finding—that the beatings inflicted on Witness 6 caused him serious physical suffering and injury—on the testimonies of Witnesses 6 and 23, as well as a medical report from an examination of Witness 6.[300] The Prosecution further asserts that the Trial Chamber properly considered any internal inconsistencies in his testimony and reasonably considered that:

> […] as the evidence presented in this case related to events which occurred in 1998, it would not treat minor discrepancies between the evidence of a particular witness in court and his prior statement, as discrediting the evidence where the witness nevertheless recounted the essence of an incident charged in acceptable detail, without undermining the fundamental features of their evidence.[301]

According to the Prosecution, Lahi Brahimaj has failed to demonstrate that the Trial Chamber's acceptance of Witness 6's evidence was unreasonable or that his argument, if accepted, would affect his conviction.[302]

128. The Appeals Chamber recalls that, pursuant to Article 23(2) of the Statute and Rule 98 *ter* (C) of the Rules, Trial Chambers are obliged to set out a reasoned opinion in writing.[303] A reasoned opinion ensures that the accused can exercise his right of appeal and that the Appeals Chamber can understand and review the findings of the Trial Chamber as well as its evaluation of the evidence.[304] A Trial Chamber is not obliged, however, to address every argument in detail.[305] The Appeals Chamber recalls that:

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of Witness 3 under Ground 3 of his appeal. Brahimaj's Appeal Brief, para. 62. These alleged inconsistencies will thus be considered under Ground 3 of Lahi Brahimaj's appeal.

[299] Brahimaj's Appeal Brief, paras 55-60.

[300] Prosecution's Response Brief, paras 30-32; AT. 151-152 (Open Session).

[301] Prosecution's Response Brief, para. 35; AT. 147 (Open Session).

[302] Prosecution's Response Brief, para. 35.

[303] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41; *Furundžija* Appeal Judgement, para. 69.

[304] *Limaj et al.* Appeal Judgement, para. 81 (citing *Naletilić and Martinović* Appeal Judgement, para. 603, *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41).

[305] *Furundžija* Appeal Judgement, para. 69 (citing the jurisprudence of the European Court of Human Rights (*Van de Hurk v. The Netherlands*)).

> [w]ith regard to legal findings, this obligation does not require a Trial Chamber to discuss at length all of the case-law of the International Tribunal on a given legal issue but only to identify the precedents upon which its findings are based. With regard to factual findings, a Trial Chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. In short, a Trial Chamber should limit itself to indicating in a clear and articulate, yet concise manner, which, among the wealth of jurisprudence available on a given issue and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual.[306]

129. The Appeals Chamber also recalls that the Trial Chamber exercises considerable discretion in addressing minor inconsistencies in the testimony of a witness. However, this discretion must be reconciled with the right of each accused to a reasoned opinion. In this regard, the Appeals Chamber has stated:

> It is to be presumed that the Trial Chamber evaluated all of the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the finding is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[307]

Thus, although a Trial Chamber is not required to provide every detail of its assessment of minor inconsistencies in the testimony of witnesses, neither can it completely disregard all inconsistencies.

130. The Appeals Chamber observes that the Trial Chamber generally addressed its method and criteria for evaluating the evidence of witnesses given *viva voce*.[308] The Trial Chamber stated that it (a) assessed the internal consistency of each witness's testimony and whether there was corroborating evidence; (b) did not treat minor discrepancies as discrediting the evidence where the witnesses nevertheless recounted the essence of an incident in acceptable detail; and (c) accepted certain parts of witness's testimony while rejecting others.[309]

131. The Appeals Chamber further observes that, in relation to the allegation of the cruel treatment and torture of Witness 6 under Count 28 of the Indictment, the Trial Chamber summarised Witness 6's testimony. It noted that, on or about 13 June 1998, KLA soldiers severely beat Witness 6 at a compound in Jablanica/Jabllanicë and that, over approximately the next four weeks, Witness 6 was held in a room at the compound and regularly beaten by KLA soldiers. The

[306] *Hadžihasanović and Kubura* Appeal Judgement, para. 13 (internal citation omitted).
[307] *Kvočka et al.* Appeal Judgement, para. 23 (internal citation omitted).
[308] Trial Judgement, para. 13.
[309] Trial Judgement, para. 13 (internal citations omitted).

Trial Chamber also noted that Witness 6 was in a poor physical condition and suffered lasting physical consequences from the beatings.[310] The Trial Chamber then concluded that it considered Witness 6 to be a credible witness, that it was satisfied that the beatings caused him serious physical suffering and injury, that the perpetrators of the beatings intended to cause such suffering and injury, and therefore that KLA soldiers were responsible for the cruel treatment of Witness 6.[311] The Trial Chamber also found that KLA soldiers mistreated Witness 6 in order to punish him for his perceived collaboration with Serbs and to discriminate against him on political grounds.[312] Accordingly, the Trial Chamber concluded that KLA soldiers tortured Witness 6.[313]

132. The Trial Chamber found that Lahi Brahimaj participated in this mistreatment and torture of Witness 6. In drawing this conclusion, it considered the testimony of Witness 6 that, *inter alia*, Lahi Brahimaj was often present at some of the beatings, was among those who accused Witness 6 of associating with the Serbs and heard others address him as "Lahi" or "Maxup", and heard from Gani Brahimaj that "Maxup" was Lahi Brahimaj's nickname. Furthermore, the Trial Chamber considered that throughout the approximately four weeks during which he was beaten, Witness 6 had ample opportunity to observe Lahi Brahimaj and noted that he had subsequently recognised Lahi Brahimaj on a photo board. In light of these factors, the Trial Chamber found that it was "convinced beyond a reasonable doubt that Lahi Brahimaj personally participated in the cruel treatment and torture of Witness 6, and that he should be convicted for committing these crimes."[314]

133. Besides the evidence of Witness 6, the Trial Chamber also took into account the evidence of Pekka Haverinen,[315] Witness 23,[316] Witness 16,[317] and Witness 7.[318] The evidence of these witnesses confirmed that Witness 6 was detained by the KLA, that he sustained injuries as a consequence of beatings, and that he recognised Lahi Brahimaj from photo boards shown to him during an interview by a Prosecution investigator. However, none of these witnesses corroborated Witness 6's identification of Lahi Brahimaj as one of the persons who beat him and accused him of spying for the Serbs. Thus, the Trial Chamber relied solely on the identification evidence of Witness 6 to convict Lahi Brahimaj under Count 28 of the Indictment.

134. The Appeals Chamber notes that the Trial Chamber concluded that Witness 6 was a credible witness without providing any reasons for this finding or addressing any of the alleged

[310] Trial Judgement, para. 391; *see also* Trial Judgement, paras 381-384, 392, 395.
[311] Trial Judgement, para. 391.
[312] Trial Judgement, para. 392.
[313] Trial Judgement, para. 392.
[314] Trial Judgement, para. 395.
[315] Trial Judgement, para. 386.
[316] Trial Judgement, para. 387.
[317] Trial Judgement, para. 388.
[318] Trial Judgement, paras 389-390.

inconsistencies within his testimony. The Appeals Chamber recognises that a Trial Chamber is not obliged to address every minor inconsistency in a witness's statement; however, neither can a Trial Chamber fail to address alleged inconsistencies in cases such as the instant one, when the evidence of the witness at issue is the principal evidence relied upon to convict an accused. The Appeals Chamber finds that this failure contravened Lahi Brahimaj's right to a reasoned opinion, constituting an error of law. Accordingly, the Appeals Chamber will evaluate Lahi Brahimaj's arguments under this sub-ground of appeal to determine whether a reasonable Trial Chamber could have concluded that Witness 6 was credible despite the alleged inconsistencies in his testimony.[319]

135. With regard to Lahi Brahimaj's claim that Witness 6's injuries are inconsistent with his mistreatment,[320] as the only injury detected in the medical report from Dr. Shkëlzen Zajmi was a fractured left wrist,[321] the Appeals Chamber notes that the only medical report on record issued by Dr. Shkëlzen Zajmi is Exhibit P336. This report bears the words "X-Ray Service" and states, "[r]eferred for examination […] X-Ray of the urinary tract and left forearm", which indicates that only Witness 6's left forearm and urinary tract were examined. This report does not reflect the results of a comprehensive medical examination of Witness 6, and thus has no impact upon the probative value of Witness 6's evidence in relation to his other injuries, as well as in relation to the beatings that caused these injuries. Consequently, the Appeals Chamber does not consider the medical report to be inconsistent with Witness 6's account of his beatings and his injuries and finds that it does not impact upon his credibility.

136. As for Witness 6's response when asked the meaning of the phrase, "[h]is release is conditional. If the mistake is repeated the accused will face criminal charges", which appeared in the document given to him upon his release, the Appeals Chamber notes Witness 6 responded that the document told him that he must not go to Đakovica/Gjakovë for personal reasons.[322] The Appeals Chamber considers Lahi Brahimaj's assertion that this statement is improbable to be speculative. Lahi Brahimaj does not point to any inconsistency between this statement and any other statement made during Witness 6's testimony. Accordingly, the Appeals Chamber finds that it has no impact upon Witness 6's credibility.

137. As regards the claim that Witness 6 initially stated that he had seen pictures of Nazmi Brahimaj and Lahi Brahimaj and found out their names but later denied seeing pictures of them,[323] the Appeals Chamber notes that Witness 6 testified that, during his four-week imprisonment, he did

[319] *See Kordić and Čerkez* Appeal Judgement, paras 385-388.
[320] Brahimaj's Appeal Brief, paras 48-50.
[321] Brahimaj's Appeal Brief, para. 49.
[322] Witness 6, T. 5255 (1 June 2007) (Private Session).
[323] Brahimaj's Appeal Brief, para. 57.

not know the names of anyone, but saw Nazmi Brahimaj and Lahi Brahimaj every day.[324] The Appeals Chamber does not consider that Witness 6's evidence contains any inconsistency on this point. Rather, Witness 6 initially stated that he saw pictures of Lahi and Nazmi Brahimaj and then immediately corrected himself, indicating that he saw their faces.[325] His testimony was thereafter consistent that he did not see any pictures of them, but rather saw them in person.[326]

138. Turning to Lahi Brahimaj's claim that there are inconsistencies in Witness 6's testimony as to whether Nazmi and Hamza were present when four unidentified prisoners were beaten, the Appeals Chamber considers Witness 6's testimony in this regard to be inconclusive. The Appeals Chamber notes that Witness 6 first testified during his examination-in-chief that four other prisoners were present in his room for a period of three days and that during that time they were beaten with a baseball bat and stabbed all over their bodies with knives. When asked, "During the time that [they] were in the room, did you see any of the other personalities whose names you've mentioned, Lahi Brahimaj, and Hamza?", Witness 6 responded, "Nazmi and Hamza were there."[327] From this testimony, it is unclear whether Witness 6 wished to convey that Nazmi and Hamza were in the room while the four prisoners were being beaten or only that they were in the room at some point during the time that those prisoners were there. The Appeals Chamber notes that, when subsequently asked in cross-examination who was present when the four prisoners were beaten, Witness 6 replied, "I didn't know them."[328] The Appeals Chamber considers that, given the ambiguity in Witness 6's first statement, it cannot be concluded that these two statements are inconsistent, and therefore, the statements do not undermine Witness 6's credibility.

139. The Appeals Chamber considers that other alleged inconsistencies in Witness 6's testimony relating to the time of day and whether the witness was given anything to eat are minor and do not impact upon the credibility of the evidence as a whole.[329] In this regard, the Appeals Chamber recalls that minor inconsistencies do not render a witness's testimony unreliable and Trial Chambers have the discretion to evaluate them and to consider whether the evidence as a whole is credible.[330]

[324] Witness 6, T. 5295 (4 June 2007) (Open Session).
[325] Witness 6, T. 5295 (4 June 2007) (Open Session).
[326] Witness 6, T. 5296 (4 June 2007) (Open Session) (stating that "[f]or the two weeks I had more freedom, then I saw their faces […]" and "I wasn't shown any pictures of them; I saw them in person"); Witness 6, T. 5297 (4 June 2007) (Open Session) (stating that "I didn't see any pictures of them. I saw their faces every day […]").
[327] Witness 6, T. 5228 (1 June 2007) (Open Session).
[328] Witness 6, T. 5330 (4 June 2007) (Open Session).
[329] Brahimaj's Appeal Brief, para. 56.
[330] *Kvočka et al.* Appeal Judgement, para. 23 (citing *Čelebići* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32).

140. Accordingly, the Appeals Chamber finds, based upon the evidence on the record, that a reasonable Trial Chamber could have found that the inconsistencies in Witness 6's testimony did not have an impact upon his credibility.

141. The Appeals Chamber therefore dismisses this sub-ground of appeal.

5. Whether the Trial Chamber erred by not specifically addressing motive

142. Lahi Brahimaj implies that the Trial Chamber failed to address and/or provide reasons for rejecting his argument that Witness 6 had "motives to give hostile evidence" against him.[331] He asserts that these motives arise from a feud between Witness 6 and the Brahimaj family, Witness 6's hostility towards the KLA, and his desire to seek monetary compensation for his car, which was requisitioned by KLA soldiers.[332] Lahi Brahimaj explains that, when Nazmi Brahimaj provided Witness 6 with requisition slips for his car, pistol, identity card, driver's licence, and wallet upon his release from Jablanica/Jabllanicë, Witness 6 threatened Nazmi Brahimaj, stating that "there will be bloodshed because of this car."[333] He also notes that Witness 6 asked the Trial Chamber where he could seek compensation for the loss of his car.[334]

143. The Prosecution responds that the Trial Chamber "properly considered any factor that may have affected the credibility of Witness 6, including the motive to lie, as alleged by Brahimaj".[335] It argues that Lahi Brahimaj merely repeats an argument already set forth at trial and fails to demonstrate that it was unreasonable for the Trial Chamber to find Witness 6 credible.[336]

144. The Appeals Chamber notes the testimony of Witness 6 that, upon his release from Jablanica/Jabllanicë, KLA soldiers retained his car, gun, identity documents, driver's licence, and wallet.[337] Witness 6 also stated that he was angry that his car and gun were not returned to him upon his release.[338] In addition, he stated:

> I asked [Nazmi] to give me my documents and my wallet. I had about 50 Deutschemarks [*sic*] there. I asked him to give me my car back and the documents, and when I left I said that there will be bloodshed because of this car. And he said, "Just go home. Take these papers and go home."[339]

Furthermore, Witness 6 raised the possibility of compensation for his car, stating:

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[331] Brahimaj's Notice of Appeal, para. 7; *see also* Brahimaj's Appeal Brief, paras 21, 29-32 (citing Brahimaj's Final Trial Brief, paras 87-91).
[332] Brahimaj's Appeal Brief, paras 29-31.
[333] Brahimaj's Appeal Brief, para. 30; AT. 140 (Open Session).
[334] Brahimaj's Appeal Brief, para. 32.
[335] Prosecution's Response Brief, para. 23 (internal citation omitted); *see also* AT. 146-147 (Open Session).
[336] Prosecution's Response Brief, para. 23.
[337] Witness 6, T. 5254-5255 (1 June 2007) (Private Session), T. 5379-5380 (4 June 2007) (Open Session).
[338] Witness 6, T. 5378-5379 (4 June 2007) (Open Session).
[339] Witness 6, T. 5256 (1 June 2007) (Private Session).

> I have a question. The tortures I was subjected to, the car I was stolen [as interpreted], what should I do to have compensation for what I went through during the war? Should I address you or somewhere else?[340]

Witness 6 also testified that KLA soldiers caused the death of his brother's son, as there was no one to take him to the hospital while Witness 6 was in detention.[341] The witness further referred to the KLA soldiers who beat him as "soldiers that pretended they were fighting";[342] and, when asked whether the KLA was supported in his village, he replied that "[n]obody from the village was mobilised. Maybe some of the arrogant ones were […]", which Lahi Brahimaj interprets as indicative of Witness 6's hostility towards the KLA.[343]

145. The Appeals Chamber recalls that a Trial Chamber may enter a conviction on the "basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness."[344] The Appeals Chamber further recalls that "a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence."[345]

146. In the subsection of the Trial Judgement entitled "Sources and use of evidence", the Trial Chamber generally addressed the issue of possible motives on the part of witnesses who testified in the trial, stating that it "considered the individual circumstances of a witness, including […] whether the witness would have an underlying motive to give a certain version of the events."[346] The Trial Chamber further stated:

> On several occasions, only one witness gave evidence of an incident with which the Accused were charged. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. On these occasions, the Trial Chamber exercised particular caution, considering all circumstances relevant to the testimony of the witness, including any possible underlying motive for the witness's testimony and other factors mentioned.[347]

However, the Trial Chamber never specifically addressed the arguments of Lahi Brahimaj, as set forth in his Final Trial Brief, regarding a possible motive of Witness 6 to implicate Lahi Brahimaj.[348] Rather, as stated above, the Trial Chamber found that Witness 6 was credible without providing any reasoning whatsoever in support of its determination.

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[340] Witness 6, T. 5403 (4 June 2007) (Open Session).
[341] Witness 6, T. 5255 (1 June 2007) (Private Session).
[342] Witness 6, T. 5208 (1 June 2007) (Open Session).
[343] Witness 6, T. 5263 (1 June 2007 (Private Session); Brahimaj's Appeal Brief, para. 31.
[344] *Kordić and Čerkez* Appeal Judgement, para. 274.
[345] *Krajišnik* Appeal Judgement, para. 146.
[346] Trial Judgement, para. 13.
[347] Trial Judgement, para. 14 (internal citation omitted).
[348] Brahimaj's Final Trial Brief, paras 87-91.

147. The Appeals Chamber finds that, given that the testimony of Witness 6 was critical to Lahi Brahimaj's conviction on this Count, the Trial Chamber was required to specifically explain why it found Witness 6 credible despite this evidence of a possible motive on his part. The Appeals Chamber finds that the Trial Chamber's failure to do so violated Lahi Brahimaj's right to a reasoned opinion, constituting an error of law. Accordingly, the Appeals Chamber will evaluate the evidence on the record to determine whether a reasonable Trial Chamber would have found Witness 6 credible despite evidence of a possible motive on his part.[349]

148. The Appeals Chamber considers that the evidence of Witness 6 was primarily concerned with the beatings that he suffered at the hands of the KLA, which was accepted by the Trial Chamber.[350] Moreover, Witness 6's evidence was confirmed by that of Pekka Haverinen,[351] Witness 23,[352] Witness 16,[353] and Witness 7.[354] While Witness 6's mistreatment may have caused him to resent his tormentors, there is no indication in the trial record that such resentment caused Witness 6 to falsely implicate Lahi Brahimaj. In addition, Witness 6, during his testimony, did not seek to conceal his resentment, candidly answered in the affirmative when asked whether he was angry that his car and gun were not returned to him upon his release, informed the Trial Chamber of his statement that there would be bloodshed because of the car, and informed the Trial Chamber of his view that KLA soldiers caused the death of his nephew. In this context, the Appeals Chamber is not convinced that Witness 6 was seeking to falsely implicate Lahi Brahimaj. Considering the evidence in the record, the Appeals Chamber finds that a reasonable Trial Chamber could have found Witness 6 credible despite this evidence.

149. The Appeals Chamber consequently dismisses this sub-ground of appeal.

6. Alleged errors in relation to identification

150. Lahi Brahimaj submits that there were "numerous shortcomings" in the identification made by Witness 6, which he pointed out in his Final Trial Brief, and claims that the Trial Chamber failed to take them into account when assessing Witness 6's credibility and reliability.[355] He argues that Witness 6 did not know Lahi Brahimaj's name or the names of Nazmi Brahimaj or "Hamz" and learned of them only after his release.[356] He also argues that Witness 6 was unable to identify the

[349] *See Kordić and Čerkez* Appeal Judgement, paras 385-388.
[350] Trial Judgement, para. 391.
[351] Trial Judgement, para. 386.
[352] Trial Judgement, para. 387.
[353] Trial Judgement, para. 388.
[354] Trial Judgement, paras 389-390.
[355] Brahimaj's Appeal Brief, paras 42 (citing Brahimaj's Final Trial Brief, paras 101-107, 149-154), 23-47.
[356] Brahimaj's Appeal Brief, para. 43.

commanders or indicate whether Lahi Brahimaj was a commander.[357] He claims that Witness 6 was unable to identify individuals allegedly detained at the same time he was,[358] as well as "Hamz Brahimaj", whom the witness indicated was responsible for the beatings.[359] Lahi Brahimaj argues that the Trial Judgement does not contain any evidence that these shortcomings were taken into account in assessing Witness 6's credibility and reliability.[360]

151. The Prosecution responds that the Trial Chamber adequately explored the issue of identifications in the Trial Judgement.[361] It argues that Witness 6 correctly identified both Lahi Brahimaj and his brother, Nazmi Brahimaj,[362] and that Lahi Brahimaj did not challenge this point at trial.[363] Finally, the Prosecution contends that Lahi Brahimaj does not show how the other alleged "failed identifications" are relevant to Witness 6's credibility, nor does he show their impact on his conviction.[364]

152. The Appeals Chamber recalls that, in the case of complex issues, such as the assessment of identification evidence, the reasoned opinion requirement to be met by a Trial Chamber is higher.[365] The Appeals Chamber has held that, "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a 'reasoned opinion'."[366] In these instances, the Trial Chamber is required to "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence."[367] The Appeals Chamber observes that, in such cases:

> [w]here the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.[368]

153. In the present case, the evidence relating to Witness 6's identification of Lahi Brahimaj indicates that such identification was made under difficult circumstances. In this regard, the Appeals Chamber notes the poor lighting in the room,[369] as well as the testimony of Witness 6 that he was beaten not only by Lahi Brahimaj but by a number of soldiers and that he was sick and often

[357] Brahimaj's Appeal Brief, para. 43.
[358] Brahimaj's Appeal Brief, paras 44-45.
[359] Brahimaj's Appeal Brief, para. 46.
[360] Brahimaj's Appeal Brief, para. 47.
[361] Prosecution's Response Brief, para. 28 (citing Trial Judgement, paras 29-31); AT. 149-150 (Open Session).
[362] Prosecution's Response Brief, para. 28 (citing Witness 6, T. 5371-5373 (4 June 2007) (Open and Private Session) and Trial Judgement, para. 382, fns 1915-1916; paras 385-386, 395).
[363] Prosecution's Response Brief, para. 28 (citing Witness 6, T. 5371-5372 (4 June 2007) (Open and Private Session)).
[364] Prosecution's Response Brief, para. 29.
[365] *Kvočka et al.* Appeal Judgement, para. 24.
[366] *Kupreškić et al.* Appeal Judgement, para. 39.
[367] *Kupreškić et al.* Appeal Judgement, para. 39.
[368] *Kupreškić et al.* Appeal Judgement, para. 39, citing *Harper v. The Queen*, [1982] 1 S.C.R. 2, p. 14.

unconscious.[370] Furthermore, the Trial Chamber relied solely on the identification evidence of Witness 6 to convict Lahi Brahimaj.[371] Thus, the Trial Chamber was required to be especially rigorous in the discharge of its obligation to provide a reasoned opinion.[372]

154. The Appeals Chamber notes that, in the "Sources and use of evidence" subsection of the Trial Judgement, the Trial Chamber discussed the criteria it used to evaluate identification evidence in general, including both "identification evidence *stricto sensu* and recognition evidence".[373] However, in the Trial Judgement, the Trial Chamber failed to provide a reasoned opinion that specifically addressed the reliability of Witness 6's identification evidence. Rather, as indicated previously, the Trial Chamber found Witness 6's evidence credible, including his identification evidence, without providing any reasons. Given that the Trial Chamber did not fulfil its obligation, the Appeals Chamber will assess the reliability of Witness 6's identification of Lahi Brahimaj to determine whether a reasonable Trial Chamber would have found such evidence credible.[374]

155. The Appeals Chamber recalls that Trial Chambers must consider the difficulties associated with identification evidence in a particular case and carefully evaluate it before accepting it as the sole basis for sustaining a conviction. In particular, Trial Chambers must exercise extreme caution before convicting a person based on the identification evidence of a single witness made under difficult circumstances in light of the frailties of human perception and the risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations.[375]

156. Factors relevant to the Appeals Chamber's determination of whether a Trial Chamber's decision to rely upon identification evidence was unreasonable or renders a conviction unsafe include:

> […] identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.[376]

[369] Witness 6, T. 5325-5326, 5401 (4 June 2007) (Open Session).
[370] Witness 6, T. 5326 (4 June 2007) (Open Session).
[371] Trial Judgement, para. 395.
[372] *Kordić and Čerkez* Appeal Judgement, para. 274 (citing *Kupreškić et al.* Appeal Judgement, para. 135).
[373] Trial Judgement, para. 29.
[374] *See Kordić and Čerkez* Appeal Judgement, paras 385-388.
[375] *Kupreškić et al.* Appeal Judgement, para. 34. *See also Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, Decision on Motion for Acquittal, 3 July 2000, para. 8
[376] *Kupreškić et al.* Appeal Judgement, para. 40 (internal citations omitted).

Furthermore, the Appeals Chamber recalls that identification evidence may be affected by the length of time between the crime and the confrontation.[377]

157. Witness 6 testified that on 13 June 1998[378] at about 1:00 p.m., on the main road near Volujak/Volljakë, in Klina/Klinë municipality, he was stopped by more than ten KLA soldiers.[379] According to the witness, some of these soldiers wore civilian clothes and others camouflage uniforms, although none of them had insignia on their uniforms.[380] Witness 6 did not identify any of the soldiers by name, and from his evidence there is no indication that Lahi Brahimaj was among them. The witness stated that he was taken to Jablanica/Jabllanicë in Đakovica/Gjakovë municipality.[381] On his arrival, before 6:00 p.m., while it was still daylight, he was taken to a room where soldiers took turns kicking and beating him with baseball bats and other items.[382] He testified that he did not remember seeing Lahi Brahimaj that evening.[383] Witness 6 also testified that the next day, 14 June 1998, he was moved to a room in a four-room, one-storey red-brick house in the middle of the yard by persons he did not identify.[384] He was detained in a room in that house for the rest of his time in Jablanica/Jabllanicë.[385] This was the same room in which Witness 6 testified that Lahi Brahimaj beat him and was present when others beat him.

158. The Appeals Chamber notes that the lighting in this room was poor. Witness 6 testified that, during the time that he was held in this room and beaten, he was not able to tell what time it was or whether it was day or night.[386] Witness 6 testified that the room did have a window, but that it was boarded up with wooden planks so that only a little light could come through.[387] Witness 6 also testified that there was no light-bulb in the socket and therefore that they were in the dark.[388]

159. The Appeals Chamber notes that Witness 6 testified that Hamza Brahimaj was one of the people who beat him while he was detained in the same room in which he was beaten by Lahi

[377] *Limaj et al.* Appeal Judgement, para. 30.
[378] Witness 6, T. 5168-5170 (31 May 2007) (Open Session), T. 5293, 5386 (4 June 2007) (Open Session); P331 (Map on which the witness marked his journey) (Under Seal).
[379] Witness 6, T. 5171, 5173-5174 (31 May 2007) (Open and Private Session), T. 5190-5191, 5193 (1 June 2007) (Open Session), T. 5293-5294 (4 June 2007) (Open Session); P331 (Map on which the witness marked his journey) (Under Seal).
[380] Witness 6, T. 5193-5194 (1 June 2007) (Open Session).
[381] Witness 6, T. 5197-5201, 5203 (1 June 2007) (Open Session); P331 (Map on which the witness marked his journey) (Under Seal).
[382] Witness 6, T. 5207-5211, 5214-5215 (1 June 2007) (Open Session), T. 5324, 5350-5351 (4 June 2007) (Open Session).
[383] Witness 6, T. 5372 (4 June 2007) (Open Session).
[384] Witness 6, T. 5204-5205, 5216 (1 June 2007) (Open Session), T. 5316, 5324 (4 June 2007) (Open Session); P332 (photo of Jablanica/Jabllanicë compound).
[385] Witness 6, T. 5205, 5213, 5216 (1 June 2007) (Open Session), T. 5316-5317, 5325, 5347 (4 June 2007) (Open Session).
[386] Witness 6, T. 5325 (4 June 2007) (Open Session).
[387] Witness 6, T. 5325-5326 (4 June 2007) (Open Session).
[388] Witness 6, T. 5401 (4 June 2007) (Open Session).

Brahimaj.[389] He also testified that he saw Hamza Brahimaj almost every day, during the first four weeks of his detention—the period during which he was beaten and restricted solely to the room in which the beatings took place.[390] Witness 6 incorrectly identified Hamza Brahimaj when interviewed by Prosecution Investigator Pekka Haverinen.[391] The Appeals Chamber considers, however, that Witness 6's incorrect identification of Hamza Brahimaj does not render his identification of Lahi Brahimaj unreliable.

160. The Appeals Chamber further considers that, despite the difficult conditions that prevailed in the room where the beatings took place, the evidence shows that Witness 6 learned the name of one of the men who beat him—whom he identified as Lahi Brahimaj—during the last "week and a half",[392] of his detention at Jablanica/Jabllanicë, when he was permitted to leave the room in which he was detained, and required to assist Gani Brahimaj with kitchen duties.[393] Witness 6 testified that he only heard the names of Lahi Brahimaj, Nazmi Brahimaj, and Hamza while in detention and did not come to know the names of other KLA soldiers.[394] Witness 6 therefore did not know Lahi Brahimaj's name before he was beaten or during the four-week duration of his beatings, and only learned his name after the beatings had stopped.[395] The Appeals Chamber notes that the Trial Chamber questioned Witness 6 on this matter, who stated that, during the last two weeks of his detention, Gani Brahimaj told him the names of several people.[396] Witness 6 also testified that, during this period, he heard others address Lahi Brahimaj by "Lahi" and "Maxhup",[397] and that Gani Brahimaj told him that "Maxhup" was Lahi Brahimaj's nickname.[398]

161. The Appeals Chamber notes that Lahi Brahimaj did not dispute that Witness 6 correctly identified him when the photo boards were shown to the witness by Prosecution Investigator Pekka Haverinen.[399] The Trial Chamber stated that it was generally satisfied that the photo boards were compiled in an effort to avoid influencing the witnesses to whom they were shown, including through the selection of photographs of similar size, colour, and background lighting and the

[389] Witness 6, T. 5208-5209 (1 June 2007) (Open Session).
[390] Witness 6, T. 5219 (1 June 2007) (Open Session).
[391] Haverinen, T. 6344-6345, 6347 (27 June 2007) (Open Session).
[392] *See* Witness 6, T. 5386 (4 June 2007) (Open Session).
[393] *See* Witness 6, T. 5218, 5244-5245 (1 June 2007) (Open Session), T. 5295-5297, 5378 (4 June 2007) (Open Session).
[394] Witness 6, T. 5226 (1 June 2007) (Open Session).
[395] Witness 6, T. 5378 (4 June 2007) (Open Session).
[396] Witness 6, T. 5378 (4 June 2007) (Open Session).
[397] Witness 6, T. 5245 (1 June 2007) (Open Session). Sometimes the transcript uses "Maxhupi" instead of "Maxhup". *See*, *e.g.*, T. 5218 (1 June 2007) (Open Session).
[398] Witness 6, T. 5218-5219 (1 June 2007) (Open Session).
[399] Witness 6, T. 5371 (4 June 2007) (Open Session).

portrayal of individuals bearing a resemblance to the accused,[400] although the Prosecution's guidelines for the conduct of photo board identification were not followed at all times.[401]

162. As regards Lahi Brahimaj's argument that Witness 6 was unable to identify the commanders or indicate whether he, Lahi Brahimaj, was a commander, the Appeals Chamber finds that this argument is unpersuasive. Witness 6 was able to identify Lahi Brahimaj, based upon the fact that Lahi Brahimaj personally beat him and that he learned his name during the last week and a half of his detention. Whether Witness 6 was able to identify Lahi Brahimaj as a commander *per se* is irrelevant.

163. Having evaluated the identification evidence with caution, and having taken into account the difficult circumstances in which the identification was made, the Appeals Chamber is satisfied that a reasonable trier of fact could have concluded beyond a reasonable doubt that Witness 6 accurately recognised Lahi Brahimaj as a person who had previously tortured him when he subsequently saw him in the yard in the last week and a half of his detention, during which time the witness learned Lahi Brahimaj's name.

164. This sub-ground of appeal therefore is dismissed.

7. Conclusion

165. The Appeals Chamber therefore dismisses this ground of appeal.

B. Alleged Errors Relating to Torture of Witness 6 (Ground 2)

166. Lahi Brahimaj argues that the Trial Chamber erred in concluding that the reason that he tortured Witness 6 was to punish him for his perceived collaboration with Serbs and to discriminate against him on political grounds.[402]

167. The Prosecution responds that the Trial Chamber properly concluded that Witness 6 was tortured by Lahi Brahimaj for his perceived collaboration with Serbs because Witness 6, who was found to be a credible witness, testified that Lahi Brahimaj physically participated in torturing him and accused him of associating with or spying for the Serbs.[403] The Appeals Chamber will address each alleged error in turn.

[400] Trial Judgement, para. 30.
[401] Trial Judgement, para. 31.
[402] Brahimaj's Appeal Brief, paras 65-74.
[403] Prosecution's Response Brief, paras 37-40; AT. 148, 150-151 (Open Session).

1. Alleged error in relation to the imputation of intention to Lahi Brahimaj

168. Lahi Brahimaj argues that, in determining that he should be convicted of torture, rather than cruel treatment, the Trial Chamber erred by imputing to him the conduct of unidentified KLA soldiers, an unidentified commander, and Nazmi Brahimaj, who displayed the intention to discriminate against Witness 6 for his perceived collaboration with Serbs and on political grounds.[404] The Prosecution responds that Witness 6 testified that Lahi Brahimaj participated in torturing him and accused Witness 6 of associating with or spying for the Serbs.[405]

169. The Appeals Chamber recalls that Witness 6 testified on re-examination by the Prosecution that Lahi Brahimaj and Nazmi Brahimaj accused him of "staying with Serbs", while they themselves dealt with the Serbs during the war.[406] When asked how he understood that allegation, Witness 6 replied,

> That night when we arrived there, they asked such questions, then they continued to torture me. And then they, the soldiers, came and told me, You are a spy of Serbia. But I was not considered as an Albanian for them, and even now they don't consider me as an Albanian. […] They just said—they were kind of trying to make fun of me. I don't know why.[407]

The Appeals Chamber also takes note of the fact that Witness 6 testified, on both direct and cross-examination, that Lahi Brahimaj personally beat him.[408]

170. Based upon the evidence of Witness 6, as well as the evidence of Witnesses 7, 16, and 23, the Trial Chamber found that KLA soldiers mistreated Witness 6 to punish him for this perceived collaboration with Serbs and to discriminate against him on political grounds and that, therefore, KLA soldiers tortured Witness 6.[409]

171. The Appeals Chamber considers that, although the evidence adduced on this matter shows intent on the part of KLA soldiers, an unidentified commander, and Nazmi Brahimaj to discriminate against Witness 6 for his perceived collaboration with Serbs, it also clearly refers to intent on the part of Lahi Brahimaj, since some of the comments were made by him. Thus, the Trial Chamber did not impermissibly impute the intention of others to Lahi Brahimaj. Furthermore, the Appeals Chamber finds that it was reasonable, in light of all the evidence, for the Trial Chamber to conclude that Lahi Brahimaj intended to discriminate against Witness 6 due to his perceived collaboration with Serbs and therefore had the requisite state of mind for the torture of Witness 6.

[404] Brahimaj's Appeal Brief, paras 66-67, 74.1.
[405] Prosecution's Response Brief, paras 38-39.
[406] Witness 6, T. 5397-5398 (4 June 2007) (emphasis added) (Open Session).
[407] Witness 6, T. 5400 (4 June 2007) (Open Session).
[408] Witness 6, T. 5208-5209, 5219-5220 (1 June 2007) (Open Session), T. 5372-5373 (4 June 2007) (Open Session).
[409] Trial Judgement, para. 392.

172. The Appeals Chamber therefore rejects this argument.

2. Alleged error in relation to the reason for mistreatment of Witness 6 (political grounds)

173. Lahi Brahimaj argues that the Trial Chamber erred in finding that he had an intention to discriminate against Witness 6 on political grounds without referring to any evidence that he had such an intention.[410] Lahi Brahimaj asserts that, although the Trial Chamber refers to evidence of statements by "Commander Maxhupi", such statements cannot be attributed to him because the Trial Chamber never found that he was "Maxhupi".[411] Furthermore, Lahi Brahimaj argues that the Trial Chamber probably based its reasoning that Witness 6 was mistreated on political grounds on the fact that he was from a village that did not support the KLA, and that it is thus notable that others from his village were not mistreated when they visited Jablanica/Jabllanicë.[412] The Prosecution responds that the Trial Chamber's finding was a reasonable one based on the evidence.[413]

174. The Trial Chamber recalled the evidence of Witnesses 7, 16, and 23 regarding a group of villagers' efforts to free Witness 6 from captivity.[414] During these attempts to secure the release of Witness 6, "Maxhupi" told the villagers that Witness 6 had been convicted and that he had to serve his time with the KLA. "Maxhupi" also asked the group why they were not fighting at the front line, to which one of the villagers replied that they had expected Rugova to be their leader in the war. "Maxhupi" responded very angrily to this, saying that he considered Rugova a traitor and a supporter of the Serbian authorities.[415] Based upon this and other evidence, the Trial Chamber determined that KLA soldiers mistreated Witness 6 to punish him for his perceived collaboration with Serbs, and to discriminate against him on political grounds, and that therefore KLA soldiers tortured Witness 6.[416] The Trial Chamber then went on to find Lahi Brahimaj responsible for the torture of Witness 6, as is more fully discussed in the previous subsection.[417]

175. The Appeals Chamber recalls its finding above that the Trial Chamber did not impermissibly impute to Lahi Brahimaj the intent of others to discriminate against Witness 6 for his perceived collaboration with Serbs and that it was reasonable for the Trial Chamber to conclude based upon the evidence before it that Lahi Brahimaj himself had the requisite intent. The Appeals Chamber is of the view that the same evidence from which a reasonable trier of fact could have

[410] Brahimaj's Appeal Brief, paras 69, 74.2.
[411] Brahimaj's Appeal Brief, para. 69.
[412] Brahimaj's Appeal Brief, paras 70, 74.3.2.
[413] Prosecution's Response Brief, para. 40.
[414] Trial Judgement, paras 387-390.
[415] Trial Judgement, para. 389.
[416] Trial Judgement, para. 392.
[417] Trial Judgement, para. 395.

found that Lahi Brahimaj intended to discriminate against Witness 6 for his perceived collaboration with Serbs is also evidence from which a reasonable trier of fact could conclude that Lahi Brahimaj intended to discriminate against Witness 6 on political grounds. This is the case even without ascribing the statements of "Maxhupi" to Lahi Brahimaj. Finally, Lahi Brahimaj's argument that he could not have discriminated against Witness 6 based upon the fact that the other persons from his village were not similarly mistreated is speculative.

176. The Appeals Chamber therefore rejects Lahi Brahimaj's argument.

3. Alleged error in relation to the reason for mistreatment of Witness 6 (perceived collaboration with Serbs)

177. Lahi Brahimaj submits that the Trial Chamber erred in finding that he displayed the intention to punish Witness 6 for his perceived collaboration with Serbs because, although there is evidence indicating that he and some KLA soldiers accused Witness 6 of spying for Serbia, "Witness 6's own evidence was that this was not meant seriously but with the intention of making fun of him."[418] The Prosecution responds that the Trial Chamber's finding was a reasonable one based on the evidence.[419]

178. The Appeals Chamber recalls the evidence of Witness 6 that Lahi Brahimaj and Nazmi Brahimaj accused him of staying with Serbs.[420] When asked how he understood that allegation, Witness 6 replied that, on the night he arrived, he was tortured by the soldiers, who told him that he was a spy for Serbia. Witness 6 stated that he was not considered an Albanian to them and that even now they do not consider him to be an Albanian. When asked to clarify this, Witness 6 stated, "They just said—they were kind of trying to make fun of me. I don't know why."[421] This evidence arose at the end of Witness 6's testimony on re-examination and reflects a final effort on the part of the Prosecution to explore the extent of Witness 6's knowledge of why the KLA had detained and tortured him. Based upon Witness 6's testimony—that he understood the allegation that he was "staying with the Serbs" to mean that he was "a spy of Serbia" and "not considered as an Albanian for them"—the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that Lahi Brahimaj displayed the intention to punish Witness 6 due to his perceived collaboration with Serbs. Moreover, the Appeals Chamber considers that Witness 6's subsequent explanation that his tormentors "were kind of trying to make fun of [him]" can reasonably co-exist with a finding that Witness 6 was mistreated because he was perceived to be a spy for Serbia.

[418] Brahimaj's Appeal Brief, para. 74.5; *see also* para. 68.
[419] Prosecution's Response Brief, para. 40.
[420] Witness 6, T. 5397-5398 (4 June 2007) (emphasis added) (Open Session).
[421] Witness 6, T. 5400 (4 June 2007) (Open Session).

179. The Appeals Chamber accordingly dismisses Lahi Brahimaj's argument.

4. Further alleged errors in relation to the reason for the mistreatment of Witness 6

180. Lahi Brahimaj advances several arguments alleging that the Trial Chamber erred in finding that he intended to mistreat Witness 6 because of his association with Serbs and in order to discriminate against him on political grounds.[422] The Prosecution responds that the Trial Chamber's finding was a reasonable one based on the evidence.[423]

181. Lahi Brahimaj argues that the Trial Chamber erred in finding that he intended to mistreat Witness 6 because of his association with Serbs and in order to discriminate against him on political grounds because Witness 7 stated that he did not know why Witness 6 had been abducted.[424] The Appeals Chamber considers that the fact that Witness 7 gave evidence that he did not know why Witness 6 had been abducted[425] in no way renders the findings of the Trial Chamber unreasonable.

182. Lahi Brahimaj argues that the Trial Chamber erred in finding that he intended to mistreat Witness 6 because of his association with Serbs and in order to discriminate against him on political grounds because Witness 6 testified that, when he was first detained, he was asked questions but no one explained why he was being beaten.[426] The Appeals Chamber considers that Witness 6's testimony—that, when he was first beaten, no one explained why he was being detained[427]—is not inconsistent with his testimony that his tormenters later accused him of associating with or spying for the Serbs.

183. Lahi Brahimaj argues that the Trial Chamber erred in finding that he intended to mistreat Witness 6 because of his association with Serbs and in order to discriminate against him on political grounds because Witness 6 testified that he was never told why he was detained.[428] The Appeals Chamber is of the view that Lahi Brahimaj cites the testimony of Witness 6—that he was never told why he was detained—out of context. During direct examination, when asked whether, up until the time that he was released, he was given any reason why he was detained, Witness 6 replied, "No."[429] Bearing in mind Witness 6's evidence as a whole, the Appeals Chamber construes Witness 6's statement as indicating that he was never given an *official* reason for why he had been detained,

[422] Brahimaj's Appeal Brief, para. 65.
[423] Prosecution's Response Brief, para. 40.
[424] Brahimaj's Appeal Brief, para. 71.1.
[425] Trial Judgement, para. 390 (citing P1248 (Witness 7 Statement, 28 April 2004, paras 40-41) (Under Seal)).
[426] Brahimaj's Appeal Brief, para. 71.2.
[427] Trial Judgement, para. 382 (citing Witness 6, T. 5210 (1 June 2007) (Open Session), 5400 (4 June 2007) (Open Session)).
[428] Brahimaj's Appeal Brief, para. 71.3.
[429] Witness 6, T. 5252-5253 (1 June 2007) (Open Session) (emphasis added).

although such reasons could be inferred from the statements and actions of those who mistreated him.

184. Lahi Brahimaj argues that the Trial Chamber erred in finding that he intended to mistreat Witness 6 because of his association with Serbs and in order to discriminate against him on political grounds because, although the Trial Chamber concluded that Witness 6's release document demonstrated that he was discriminated against on these grounds,[430] Witness 6 testified, to the contrary, that the document indicated that he should not go to Đakovica/Gjakovë for personal reasons:[431]

> […] *This document tells me that I need not go to Gjakove, must not go to Gjakove for personal reasons.* I have 30 members of my family, and three days after I was imprisoned in Jabllanice, my brother's son died because there was nobody there to take him to hospital. And they -- they caused this because they kept me there, and they took all my documents, my licence, my car. *And they told me I had to stay inside my house and not move around, but I didn't. I was not that arrogant as they were. I had a family to take care of, so I couldn't stay inside. So I went to the Gjakove SUP* and I took the same documents again, the licence and everything, and I bought a new car, a used car, cheaper one. They have this on their conscience.[432]

The Appeals Chamber considers that a review of the above evidence makes it clear that, when Witness 6 was using the term "personal reasons" when he was being examined about the KLA decision releasing him, he was not referring to the reasons for which he was detained, but rather to his belief that his release was conditional upon him restricting his movements. In his view, because he was on conditional release from detention, he was not permitted to go to Đakovica/Gjakovë for "personal reasons".[433] Lahi Brahimaj therefore misconstrues Witness 6's evidence.

185. Lahi Brahimaj's arguments are therefore rejected.

5. Alleged error in relation to the reason for the mistreatment of Witness 6 (possession of gun)

186. Lahi Brahimaj contends that the Trial Chamber erred by ignoring the likely reason for Witness 6's detention and mistreatment, namely that he was carrying a gun that was not authorised by the KLA.[434]

[430] The paper given to Witness 6 by Nazmi Brahimaj was Exhibit P335. It is a "decision" from the KLA Operative Staff of the Subzone of Dukagjin, Local Staff of Jablanica/Jabllanicë, dated 25 July 1998 and reads as follows: "Pursuant to KLA regulations, the [Operative Staff of the Subzone of Dukagjin] has decided that the Accused [Witness 6] should be released from detention. His release is conditional. If he repeats his mistakes, the Accused [Witness 6] will be prosecuted." P335 (Document signed by Nazmi Brahimaj) (Under Seal).
[431] Brahimaj's Appeal Brief, para. 71.4.
[432] Witness 6, T. 5253-5256 (1 June 2007) (Open and Private Session) (emphasis added).
[433] Witness 6, T. 5255-5256 (1 June 2007) (Private Session).
[434] Brahimaj's Appeal Brief, paras 73, 74.4.

187. The Prosecution does not specifically respond to this argument, but points out that Witness 6 was abducted by KLA soldiers and was detained at Jablanica/Jabllanicë after they found in his car a police-issued pistol and a photograph depicting Witness 6 and a retired police officer.[435]

188. The Appeals Chamber recalls the testimony of Witness 6 on this issue. Witness 6 was in his car when he was stopped at a KLA roadblock; his car was searched by members of the KLA, who found and confiscated a pistol and his license for it. Witness 6 explained on cross-examination that he had inherited the pistol from his father, had re-registered the gun in his name, and had been in possession of the pistol both while the Albanian police were in control and then when the Serbian police took over.[436] Witness 23 gave a similar account of this incident.[437] Witness 6 also gave evidence about his release from the KLA Jablanica/Jabllanicë facility, including the fact that his gun was confiscated from him and never returned.[438]

189. The Trial Chamber addressed all of this evidence in the Trial Judgement.[439] Lahi Brahimaj is therefore incorrect when he states that the Trial Chamber "ignored" the matter of the confiscation of the pistol from Witness 6. Furthermore, the fact that the KLA seized the pistol from Witness 6 and never returned it to him, even after his release, does not render unreasonable the Trial Chamber's finding that KLA soldiers, including Lahi and Nazmi Brahimaj, accused Witness 6 of associating with or spying for the Serbs, and mistreated Witness 6 in order to punish him for this perceived collaboration with Serbs and to discriminate against him on political grounds.[440]

190. The Appeals Chamber therefore rejects Lahi Brahimaj's argument.

6. Conclusion

191. The Appeals Chamber therefore dismisses this ground of appeal.

C. Alleged Errors Relating to the Torture and Cruel Treatment of Witness 3 (Grounds 3-6)

192. The Trial Chamber convicted Lahi Brahimaj of torture and cruel treatment as violations of the laws and customs of war, as charged under Count 32 of the Indictment.[441] The Trial Chamber "found two incidents of criminal conduct which were separate in time and place."[442] First, the Trial

[435] Prosecution's Response Brief, para. 39.
[436] Witness 6, T. 5194 (1 June 2007) (Open Session), T. 5352-5353 (4 June 2007) (Open Session).
[437] Witness 23, T. 10540-10541 (12 November 2007) (Open Session).
[438] Witness 6, T. 5254 (1 June 2007) (Private Session), T. 5361, 5378-5380 (4 June 2007) (Open Session).
[439] Trial Judgement, paras 381, 384, 387.
[440] Trial Judgement, paras 382, 392, 395.
[441] Trial Judgement, para. 504.
[442] Trial Judgement, para. 481.

Chamber found that Lahi Brahimaj "brought Witness 3 to a room in the Jablanica/Jabllanicë compound" where Witness 3 was beaten with baseball bats. It further found that:

> Witness 3 was held in the same room until Lahi Brahimaj took him to another room and interrogated [him] while others beat him. The Trial Chamber [found] that Lahi Brahimaj's role in the interrogation establishes his intent, upon Witness 3's arrival at the Jablanica/Jabllanicë compound, to inflict serious physical suffering on Witness 3 for the purposes of punishing him for withholding a weapon and discriminating against him on the basis of his perceived ties to Serbs.[443]

Accordingly, it found Lahi Brahimaj responsible for the torture of Witness 3.[444] Second, the Trial Chamber found that Lahi Brahimaj "personally placed Witness 3 in the trunk of a car and carried out his mock execution",[445] therefore intentionally causing serious mental suffering to Witness 3.[446] Accordingly, it found Lahi Brahimaj responsible for the cruel treatment of Witness 3.[447]

1. Alleged errors relating to the Trial Chamber's evaluation of Witness 6's evidence regarding the torture of Witness 3 (Grounds 3 and 5.1)

193. Lahi Brahimaj challenges the Trial Chamber's finding that Witness 3 was beaten, noting that, in paragraph 445 of the Trial Judgement, the Trial Chamber concluded that Witness 3 was beaten while at the same time acknowledging that "Witness 6 also testified that Witness 3 was *not beaten*, which appears to contradict the evidence of Witness 3."[448] Lahi Brahimaj argues that the Trial Chamber found that both Witness 3 and Witness 6 were credible without providing any reasons for its conclusion and without addressing this conflict between their testimonies. According to Lahi Brahimaj, the Trial Chamber instead "chose to re-interpret Witness 6's testimony 'to mean that he was not aware of Witness 3 being beaten'", which was unreasonable given "Witness 6's clear and unequivocal evidence on this point".[449]

194. Lahi Brahimaj argues that the Trial Chamber ignored a number of conflicts in the testimony of these two witnesses. More specifically, he notes that: (a) the Trial Chamber presumed that Witness 3 was beaten upon his arrival at the barracks although Witness 6 testified that Witness 3 was not beaten;[450] (b) the Trial Chamber's conclusion that Witness 6 did not enter the room where Witness 3 was detained contradicts the facts found by the Trial Chamber;[451] (c) the Trial Chamber's finding that Witness 6 was not in a position to ascertain whether or not Witness 3 was beaten and its

[443] Trial Judgement, para. 451.
[444] Trial Judgement, paras 451, 481. The Trial Chamber found that this first incident amounted to both torture and cruel treatment, but entered a conviction for torture only based upon the laws of cumulative convictions.
[445] Trial Judgement, para. 451.
[446] Trial Judgement, para. 451.
[447] Trial Judgement, paras 449, 451.
[448] Brahimaj's Appeal Brief, para. 76.
[449] Brahimaj's Appeal Brief, para. 77; *see also* AT. 141-142 (Open Session).
[450] Brahimaj's Appeal Brief, para. 79.1.
[451] Brahimaj's Appeal Brief, para. 79.2.

interpretation of Witness 6's evidence to mean that he was not aware of Witness 3 being beaten do not reflect the evidence;[452] and (d) Witness 6 provided a good explanation for why Witness 3 was not beaten, and no reasonable trier of fact could have rejected it.[453] Finally, Lahi Brahimaj argues that, insofar as it may be argued that there is more than one conclusion that can reasonably be drawn from the evidence, the Trial Chamber, in accordance with the principle *in dubio pro reo*, had no option but to draw a conclusion consistent with Lahi Brahimaj's innocence.[454]

195. The Prosecution responds that the Trial Chamber's consideration of the evidence of Witnesses 6 and 3 was reasonable.[455] It argues that there was no evidence on the record that showed any direct contact between Witness 3 and Witness 6, and that the testimony of Witness 6 corroborates Witness 3's evidence in relation to his presence at the KLA's Jablanica/Jabllanicë compound, as well as his escape.[456] The Prosecution claims that Witness 6's evidence does not undermine the Trial Chamber's finding as to the torture of Witness 3, nor does it affect its finding that Witnesses 3 and 6 were credible.[457] The Prosecution asserts that the Trial Chamber properly gave no weight to Witness 6's speculation as to why Witness 3 was not beaten.[458] Finally, the Prosecution contends that Lahi Brahimaj has not shown that the Trial Chamber's analysis of and findings on the evidence were unreasonable.[459]

196. The Appeals Chamber recalls that, although Trial Chambers exercise considerable discretion in addressing minor inconsistencies in the testimony of witnesses, this discretion must be reconciled with the right of an accused to a reasoned opinion.[460] In accordance with the right to a reasoned opinion, Trial Chambers are obliged to provide sufficient reasons for preferring the testimony of one crucial witness over another.[461]

197. The Appeals Chamber observes that, in finding Lahi Brahimaj guilty of the torture and cruel treatment of Witness 3, the Trial Chamber relied primarily on the evidence of Witness 3 and Witness 6. Accordingly, the Trial Chamber was obliged to provide a reasoned opinion that at least briefly addressed the inconsistencies in their testimony and that explained why it preferred the testimony of Witness 3 over Witness 6. The Appeals Chamber finds that the Trial Chamber met this burden for the reasons elaborated below.

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[452] Brahimaj's Appeal Brief, para. 79.3.
[453] Brahimaj's Appeal Brief, para. 81.
[454] Brahimaj's Appeal Brief, paras 81-82; AT. 141-142 (Open Session).
[455] Prosecution's Response Brief, para. 41; *see also* AT. 146-147 (Open Session).
[456] Prosecution's Response Brief, para. 41.
[457] Prosecution's Response Brief, para. 41.
[458] Prosecution's Response Brief, para. 41.
[459] Prosecution's Response Brief, para. 42.
[460] *See supra* section IV.A.4.

(a) Whether the Trial Chamber "presumed" that Witness 3 was beaten

198. Lahi Brahimaj notes the Trial Chamber's holding that "[t]he evidence does not indicate that Witness 6 saw the initial beating of Witness 3". Lahi Brahimaj asserts that, in drawing this conclusion, the Trial Chamber presumed that Witness 3 was beaten upon his arrival to Jablanica/Jabllanicë even though, according to Lahi Brahimaj and the evidence of Witness 6, Witness 3 was not beaten. According to Lahi Brahimaj, the evidence is equally consistent with a finding that the beating did not occur. Lahi Brahimaj further points out that neither the Prosecution nor the Trial Chamber questioned Witness 6 on whether Witness 3 could have been beaten without Witness 6's knowledge.[462]

199. The Prosecution responds that the Trial Chamber's consideration of Witness 6 and Witness 3's evidence was reasonable with regard to Witness 3's torture at the Jablanica/Jabllanicë compound.[463]

200. The Appeals Chamber does not agree with Lahi Brahimaj that the Trial Chamber presumed that Witness 3 was beaten and then proceeded to ignore contrary evidence. Rather, the Appeals Chamber finds that the Trial Chamber clearly considered the evidence of both Witness 6 and Witness 3 with regard to this issue and provided a reasoned opinion, which explicitly addressed the conflict between their testimony and why it preferred the latter's testimony over that of the former. Specifically, the Trial Chamber observed that Witness 6's testimony that Witness 3 was not beaten contradicts the evidence of Witness 3, but nevertheless accepted the evidence of Witness 3 on the basis that: (a) Witness 6 appeared to have little or no direct contact with Witness 3;[464] and (b) it was not clear from the evidence that Witness 6 saw Witness 3 as he escaped from the room. The Trial Chamber accordingly considered "that Witness 6 was not in a position to ascertain whether or not Witness 3 was beaten" and interpreted his testimony "to mean that he was not aware of Witness 3 being beaten."[465]

201. The Appeals Chamber recalls that a Trial Chamber may accept some parts of a witness's testimony and reject others.[466] The Trial Chamber therefore was not obliged to accept every aspect of Witness 6's evidence. The Trial Chamber had the advantage of observing both witnesses in

[461] *Kupreškić et al.* Appeal Judgement, para. 32; *Nchamihigo* Appeal Judgement, paras 281-282, 354; *Muvunyi* Appeal Judgement, paras 142-147.
[462] Brahimaj's Appeal Brief, para. 79.1; AT. 141-142 (Open Session).
[463] Prosecution's Response Brief, para. 41.
[464] In particular, the evidence did not indicate that Witness 6 saw the initial beating of Witness 3 or entered his room when bringing him food and water.
[465] Trial Judgement, para. 445.
[466] *Blagojević and Jokić* Appeal Judgement, para. 82 (citing *Kupreškić et al.* Appeal Judgement, para. 333). *See also Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248).

person and was better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence on this issue.[467]

202. Furthermore, the Appeals Chamber finds that Lahi Brahimaj's suggestion that the Prosecution or Trial Chamber should have questioned Witness 6 as to whether Witness 3 could have been beaten without Witness 6's knowledge is without merit. The Appeals Chamber finds that any answer on the part of Witness 6 to this question would be speculative and that, if Lahi Brahimaj considered that the answer to this question could have shed light on this issue, he could have raised it himself during the trial.

203. Considering the foregoing, the Appeals Chamber finds that the Trial Chamber discharged its duty of addressing the inconsistencies in the statements of these crucial witnesses and explaining why it preferred the testimony of one over the other in a reasoned opinion. Lahi Brahimaj has identified no error on the part of the Trial Chamber in this regard.

204. Accordingly, the Appeals Chamber rejects this argument.

(b) Whether the Trial Chamber erred in finding that Witness 6 did not enter the room where Witness 3 was detained

205. Lahi Brahimaj argues that the Trial Chamber's finding that the evidence did not indicate that Witness 6 entered Witness 3's room when bringing food and water contradicts the facts found by the Trial Chamber in paragraphs 418, 427, and 443 of the Trial Judgement.[468] Lahi Brahimaj also argues that Witness 6's testimony[469] demonstrates that Witness 6 must have entered the room in which Witness 3 and the other two detainees were housed.[470] Lahi Brahimaj points out that the Trial Chamber noted the testimony of Witness 6 that, on the same day at around 1:00 p.m., the man from Grabanica/Grabanicë managed to escape through the window in his room, while the man from Zahać/Zahaq and Pal Krasniqi were caught trying to do the same.[471] Finally, Lahi Brahimaj quotes six passages of Witness 6's evidence about how Witness 6, *inter alia*, assisted the two men in the room by, for example, bringing them food and water, which, according to Lahi Brahimaj, supports his position that Witness 6 had to have entered the room.[472] In light of the foregoing, Lahi Brahimaj avers that no reasonable trier of fact could have concluded that Witness 6 did not enter the room,

[467] *Čelebići* Appeal Judgement, paras 485, 496-498; *Furundžija* Appeal Judgement, para. 37.
[468] Brahimaj's Appeal Brief, para. 79.2.
[469] Witness 6, T. 5332-5337 (4 June 2007) (Open Session), T. 5237-5238 (1 June 2007) (Open Session).
[470] Brahimaj's Appeal Brief, para. 79.2.
[471] Brahimaj's Appeal Brief, para. 79.2; Trial Judgement, para. 443 (citing Witness 6, T. 5236-5238 (1 June 2007) (Open Session), T. 5338-5339, 5389-5390 (4 June 2007) (Open Session)). *See also* Trial Judgement, paras 418, 427.
[472] Brahimaj's Appeal Brief, para. 79.2 (citing T. 5237-5238 (1 June 2007) (Open Session), T. 5332-5333, 5335-5336 (4 June 2007) (Open Session)).

and consequently the Trial Chamber's finding that Witness 6 did not enter the room when bringing food and water is "frankly disingenuous".[473]

206. The Prosecution responds that: (a) there was no evidence that Witness 6 had direct contact with Witness 3; (b) Witness 6 was not in the room where and when Witness 3 was beaten; and (c) Witness 6 testified that he did not enter the room where Witness 3 was imprisoned.[474]

207. The Appeals Chamber recalls that Witness 6, on cross-examination, testified that he did not go into the room, but only took bread and water up to the door of the room. He testified further that he left the water inside the room, close to the door, and then Pal Krasniqi would take it. But he did not know whether anyone drank it.[475] The Appeals Chamber finds that, based upon the evidence given by Witness 6 on this issue, it was reasonable for the Trial Chamber to find that Witness 6 did not enter the room where Witness 3 and the other two men were detained when bringing food and water. Moreover, the Trial Chamber's finding in this regard does not contradict other parts of its Judgement. The Trial Chamber therefore did not commit an error of fact.

208. Accordingly, the Appeals Chamber rejects this argument.

(c) Whether the Trial Chamber erred in finding that Witness 6 did not see Witness 3 when he escaped from the room

209. Lahi Brahimaj next argues that the Trial Chamber's finding that it was not clear that Witness 6 saw Witness 3 as he escaped from his room does not reflect the evidence. He asserts that, in the circumstances, the Trial Chamber's conclusion that Witness 6 was not in a position to ascertain whether or not Witness 3 was beaten, as well as its interpretation of Witness 6's evidence as meaning that he was not aware of Witness 3 being beaten, is fatally flawed.[476]

210. The Prosecution responds that Witness 6 saw Witness 3 attempting to escape.[477]

211. The Appeals Chamber recalls that, when Witness 6 was asked in the Prosecution's examination-in-chief whether he saw all three men, or just Witness 3, leave through the window, he responded that he saw the man from Grabanica/Grabanicë running through the meadows, after he had opened the window for the other two to escape and after he had helped them go through it; but, Witness 6 then testified that he did not see the man from Grabanica/Grabanicë at all.[478] The Trial

[473] Brahimaj's Appeal Brief, para. 79.2.
[474] Prosecution's Response Brief, para. 41.
[475] Witness 6, T. 5336-5337 (4 June 2007) (Open Session).
[476] Brahimaj's Appeal Brief, paras 79.3, 80.
[477] Prosecution's Response Brief, para. 41.
[478] Witness 6, T. 5236-5238 (1 June 2007) (Open Session).

Chamber's finding that it was "not clear that Witness 6 saw Witness 3 as he escaped from his room" is therefore one that a reasonable trier of fact could have arrived at, based upon the evidence before it. The Trial Chamber therefore did not commit an error of fact.

212. Accordingly, the Appeals Chamber rejects this argument.

(d) Whether the Trial Chamber erred in rejecting the reasons given by Witness 6 for why Witness 3 was not beaten

213. Lahi Brahimaj further argues that the reasons provided by Witness 6 with regard to why Witness 3 was not beaten demonstrate the unreasonableness of the Trial Chamber's conclusion that Witness 6 was not in a position to ascertain whether or not Witness 3 was beaten.[479]

214. The Prosecution responds that Witness 6's speculation for Witness 3's lack of mistreatment was properly given no weight by the Trial Chamber.[480]

215. The Appeals Chamber notes that Witness 6 testified that he knew that the man from Grabanica/Grabanicë was not beaten because "he was married to someone from Jabllanice, and his wife's family came and intervened and he was not beaten."[481] The Appeals Chamber considers that, even if Witness 6's testimony were accepted—that Witness 3 was married to someone from Jabllanice and that his wife's family came and intervened—a reasonable trier of fact could still have accepted Witness 3's evidence that he was beaten.[482] Consequently, the Appeals Chamber finds that Lahi Brahimaj has not demonstrated any error on the part of the Trial Chamber when it concluded that Witness 3 was beaten despite this evidence.

216. Accordingly, the Appeals Chamber rejects this argument.

(e) Whether the Trial Chamber erred in accepting Witness 3's evidence when it was not corroborated, but rather was contradicted, by the evidence of Witness 6 (Ground 5.1)

217. Lahi Brahimaj argues that the Trial Chamber failed to consider that Witness 6, the only witness who was present and who could have confirmed the evidence of Witness 3, did not corroborate the evidence of Witness 3.[483] Although Lahi Brahimaj acknowledges that corroboration is not required, he claims that the evidence of Witness 6 contradicted the evidence of Witness 3 and

[479] Brahimaj's Appeal Brief, paras 80-82.
[480] Prosecution's Response Brief, para. 41.
[481] Witness 6, T. 5336 (4 June 2007) (Open Session).
[482] *See Kvočka et al.* Appeal Judgement, para. 23.
[483] Brahimaj's Appeal Brief, para. 94; AT. 132 (Open Session). Lahi Brahimaj also recalls the arguments he raised in Grounds 3 and 4 of his appeal. Brahimaj Appeal Brief, para. 93. These arguments are addressed by the Appeals Chamber under Grounds 3 and 4 of Lahi Brahimaj's appeal.

that Witness 6 provided clear and cogent reasons for this contradiction.[484] Lahi Brahimaj argues that the Trial Chamber failed to provide a "reasoned opinion for dismissing such a material failure of proof."[485]

218. In its response, the Prosecution relies upon the jurisprudence of the Tribunal and argues that the Trial Chamber correctly applied the law for considering the evidence of an uncorroborated witness.[486] The Prosecution argues that Lahi Brahimaj does not provide any authority to support his claim that, despite the lack of a legal requirement to corroborate a witness's testimony, corroboration should have been relevant to the assessment of the credibility of Witness 3's evidence.[487] The Prosecution argues that the Trial Chamber did consider the alleged inconsistency between the evidence of Witness 3 and Witness 6, and that Lahi Brahimaj has failed to show that the Trial Chamber's conclusion was unreasonable.[488]

219. The Appeals Chamber recalls that a Trial Chamber is at liberty to rely on the evidence of a single witness when making its findings.[489] The testimony of a single witness may be accepted without the need for corroboration, even if it relates to a material fact.[490] In the present case, the Trial Chamber took into account that Witness 6 was at the Jablanica/Jabllanicë compound at the same time that Witness 3 was detained there. The Trial Chamber also considered relevant aspects of Witness 6's testimony in its assessment of Witness 3's evidence, namely Witness 6's testimony that Witness 3 was not beaten, which contradicted Witness 3's evidence.[491] As discussed above, the Trial Chamber provided a sufficient explanation regarding why it preferred the testimony of Witness 3 over that of Witness 6 with respect to this issue, despite the contradiction in their testimonies. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in relying upon the evidence of Witness 3 without requiring corroboration and despite the fact that Witness 3's evidence was contradicted by the evidence of Witness 6.

220. The Appeals Chamber therefore dismisses this sub-ground of appeal.

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[484] Brahimaj's Appeal Brief, paras 91-94.
[485] Brahimaj's Appeal Brief, para. 94.
[486] Prosecution's Response Brief, para. 46 (citing *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, paras 62-64; *Čelibići* Appeal Judgement, para. 492; *Kupreškić et al*. Appeal Judgement, para. 33); *see also* AT. 146-147 (Open Session).
[487] Prosecution's Response Brief, para. 46.
[488] Prosecution's Response Brief, para. 47 (citing Trial Judgement, para. 445). *See also Kupreškić et al*. Appeal Judgement, para. 333; *Blagojević and Jokić* Appeal Judgement, para. 82 (stating that it is not unreasonable for a Trial Chamber to accept certain parts of a witness's testimony and to reject others).
[489] *Kupreškić et al*. Appeal Judgement, para. 33.
[490] *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, para. 62; *Čelebići* Appeal Judgement, paras 492, 506; *Kayishema and Ruzindana* Appeal Judgement, para. 154.
[491] Trial Judgement, para. 445.

(f) Whether the Trial Chamber violated the principle of *in dubio pro reo*

221. The Appeals Chamber has dismissed each of the sub-grounds of appeal raised by Lahi Brahimaj in relation to the conflicts in the testimonies of Witness 3 and Witness 6. As a result, the Appeals Chamber is not satisfied that Lahi Brahimaj has established that the Trial Chamber misapplied the principle of *in dubio pro reo* to its finding that Witness 3 was beaten, despite Witness 6's evidence to the contrary, as part of its finding beyond reasonable doubt that Lahi Brahimaj was guilty of the torture and cruel treatment of Witness 3.

(g) Conclusion

222. Consequently, the Appeals Chamber dismisses Lahi Brahimaj's grounds of appeal 3 and 5.1.

2. Alleged errors relating to the Trial Chamber's evaluation of evidence about the time spent by Witness 3 at the KLA Jablanica/Jabllanicë compound (Ground 4)

223. Lahi Brahimaj submits that the Trial Chamber failed to address the material and irreconcilable conflict in the evidence of Witnesses 3 and 6 in relation to the length of time that Witness 3 was at the Jablanica/Jabllanicë compound, which is relevant to the assessment of the credibility of Witness 3. He argues that the Trial Chamber "duly noted" this conflict but failed to address it when assessing the credibility of Witness 3 and that this amounts to an error of law.[492]

224. In response, the Prosecution argues that the conclusion of the Trial Chamber with regard to the credibility of Witness 3 and his evidence concerning his stay at the Jablanica/Jabllanicë compound is reasonable.[493] The Prosecution also submits that Witness 3 gave more than a short description of the two other prisoners, and that he was able to describe their injuries, the lack of a lavatory in the room, and the conditions of detention at night.[494] The Prosecution further argues that, during cross-examination, Witness 3 maintained his testimony that he stayed at the Jablanica/Jabllanicë compound for two nights, and reiterated that his hands were tied at night.[495]

225. The Appeals Chamber observes that the discrepancy at issue is the fact that Witness 3 testified that he was detained for two nights and three days, whereas Witness 6 testified that Witness 3 escaped on the day that he was detained.

[492] Brahimaj's Appeal Brief, para. 84-85, 88; *see also* Brahimaj's Notice of Appeal, para. 10.
[493] Prosecution's Response Brief, para. 43 (citing Trial Judgement, paras 440, 446).
[494] Prosecution's Response Brief, para. 43, fns 133-136 (citing Witness 3, T. 7946-7947, 7950-7951 (4 September 2007) (Private Session)).
[495] Prosecution's Response Brief, para. 43, fn. 138 (citing Witness 3, T. 8010 (5 September 2007) (Private Session)).

226. While the Trial Chamber considered Witness 6 to be a credible witness,[496] this does not mean that it was obliged to accept every aspect of his evidence. The Appeals Chamber recalls that a Trial Chamber may accept some parts of a witness's testimony and reject other parts.[497] However, due to the fact that Witness 6's evidence contradicted Witness 3's evidence and the fact that the Trial Chamber preferred the latter's evidence over that of the former, the Trial Chamber essentially convicted Lahi Brahimaj solely upon the evidence of Witness 3. In so doing, the Trial Chamber concluded that Witness 3 was credible on this specific issue without providing sufficient reasons for its finding. The Appeals Chamber is therefore unable to determine the weight that the Trial Chamber attached to the discrepancy in the evidence of the two witnesses in relation to the length of Witness 3's detention or whether the Trial Chamber disregarded this discrepancy. The Appeals Chamber finds that this failure on the part of the Trial Chamber contravened Lahi Brahimaj's right to a reasoned opinion, constituting an error of law. Accordingly, the Appeals Chamber will evaluate Lahi Brahimaj's argument under this ground of appeal in order to determine whether a reasonable Trial Chamber could have concluded that Witness 3 was credible under the relevant circumstances.

227. The Appeals Chamber notes that the Trial Chamber considered the evidence of Witnesses 3 and 6 in relation to the length of Witness 3's detention at the Jablanica/Jabllanicë compound,[498] and found that Witness 3 was detained in the room within the Jablanica/Jabllanicë compound for two nights and three days.[499]

228. The relevant evidence of Witness 6 in this regard is that, around the middle of July 1998—the day after the arrival at Jablanica/Jabllanicë of a man from Zahać/Zahaq, and two to three hours after the arrival of Pal Krasniqi—a third man arrived from Grabanica/Grabanicë in Klina/Klinë municipality.[500] Witness 6 then testified that on the same day at around 1:00 p.m., the man from Grabanica/Grabanicë managed to escape through the window in his room, while the man from Zahać/Zahaq and Pal Krasniqi were caught trying to escape.[501] The Trial Chamber was satisfied that Witness 6's evidence in relation to the man from Grabanica/Grabanicë referred to Witness 3.[502] The evidence of Witness 3 on this issue is that in early to mid-July 1998 Lahi Brahimaj took him from the house of Tal Zeka in Zabelj/Zhabel, in Đakovica/Gjakovë municipality, to Jablanica/Jabllanicë,

[496] Trial Judgement, para. 391.
[497] *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333. *See also Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248.
[498] Trial Judgement, paras 443, 446.
[499] Trial Judgement, para. 440.
[500] Trial Judgement, para. 443 (citing Witness 6, T. 5206, 5233, 5247-5249, 5252-5255 (1 June 2007) (Open and Private Session), T. 5293, 5297-5298, 5331-5332, 5334-5335, 5386, 5388-5389, 5391 (4 June 2007) (Open Session)).
[501] Trial Judgement, para. 443 (citing Witness 6, T. 5236-5238 (1 June 2007) (Open Session), T. 5338-5339, 5389-5390 (4 June 2007) (Open Session)).
[502] Trial Judgement, para. 445.

brought him to a room in the KLA staff building, and then left.[503] A few minutes later, several persons entered the room and beat Witness 3 with baseball bats until he lost consciousness.[504] Witness 3 testified that he remained detained for two nights and three days with two other persons, and that all of their hands were tied at night.[505]

229. The Appeals Chamber notes that the core of Witness 6's testimony related to the seizure of his own property, in addition to his detention and beatings at Jablanica/Jabllanicë,[506] whereas Witness 3 provided detailed testimony in relation to his detention in Jablanica/Jabllanicë, and in particular the conditions of his detention,[507] the room where he was detained,[508] the persons who came into the room,[509] and the clothing and condition of the two other men detained with him.[510] On the basis of Witness 3's first-hand account of his own detention and based upon the fact that Witness 6's evidence was more focused, when viewed as a whole, upon other issues, such as his own mistreatment, the Appeals Chamber finds that a reasonable trier of fact could have preferred Witness 3's account regarding the length of his own detention over that of Witness 6's account. Moreover, the discrepancy is not of the kind that goes to the essence of Witness 3's evidence, namely whether Witness 3 was beaten, but rather goes to a detail that is not central to the issue at hand. As such, the Appeals Chamber does not find that the discrepancy undermines the credibility of Witness 3 to a degree that would cast doubt upon his testimony that he was beaten at the Jablanica/Jabllanicë compound and finds that the Trial Chamber's conclusion was one at which a reasonable trier of fact could have arrived.

230. Consequently, this ground of appeal is dismissed.

3. Alleged errors relating to the Trial Chamber's assessment of the credibility of Witness 3 (Ground 5)

231. Lahi Brahimaj contends that the Trial Chamber committed errors of fact and law by failing to consider or give reasons for dismissing fundamental concerns regarding Witness 3's reliability

[503] Trial Judgement, para. 440 (citing Witness 3, T. 7937-7938, 7942-7943, 7945 (4 September 2007) (Private Session), T. 8008 (5 September 2007) Private Session)); D118 (Photograph of a shack in Jablanica/Jabllanicë that was used as a prison (view with meadow)).
[504] Trial Judgement, para. 440 (citing Witness 3, T. 7943, 7945-7946, 7948 (4 September 2007) (Private Session), T. 8009 (5 September 2007) (Private Session)).
[505] Trial Judgement, para. 440 (citing Witness 3, T. 7945-7946, 7948, 7951 (4 September 2007) (Private Session), T. 8009-8010 (5 September 2007) (Private Session)).
[506] Trial Judgement, paras 381-385.
[507] Witness 3, T. 7948-7952 (4 September 2007) (Private Session).
[508] Witness 3, T. 7951 (4 September 2007) (Private Session).
[509] Witness 3, T. 7949 (4 September 2007) (Private Session).
[510] Witness 3, T. 7946-7947, 7950-7951 (4 September 2007) (Private Session).

and credibility.[511] He submits that, although there is no legal requirement for corroboration, the Trial Chamber, when assessing the credibility of Witness 3, should have taken into account "that Witness 3's evidence of alleged mistreatment was not corroborated by any other witness."[512] Specifically, he submits that the Trial Chamber failed to take into account: (a) the discrepancies between the evidence of Witness 3 and that of Witness 6 (ground 5.1);[513] (b) the conflicts in the evidence of Witness 3 and Fadil Fazliu (ground 5.2);[514] (c) Witness 3's strong motive to fabricate his evidence (ground 5.3);[515] and (d) the internal inconsistencies within the evidence of Witness 3 (ground 5.4).[516] Specific arguments in relation to each of these submissions are considered below, in turn.

232. The Appeals Chamber considers that ground 5.1 relates to ground 3 and accordingly addresses ground 5.1 in section IV.C.1 above.

(a) Alleged conflict between the evidence of Witness 3 and Fadil Fazliu (Ground 5.2)

233. Lahi Brahimaj argues that, when assessing the evidence in relation to Count 34 of the Indictment, the Trial Chamber noted the fundamental conflict between the evidence of Fadil Fazliu and Witness 3,[517] but that there is no indication that the Trial Chamber took this conflict into account when assessing the credibility of Witness 3.[518]

234. The Prosecution responds that Fadil Fazliu's evidence does not relate to Count 32, under which Lahi Brahimaj is charged with the cruel treatment and torture of Witness 3, but to the charges contained in Count 34,[519] of which all the accused were acquitted. The Prosecution also points out that the Trial Chamber did not reject the evidence of Fadil Fazliu or Witness 3 on Count 34 in finding that there was reasonable doubt.[520] The Prosecution also asserts that the evidence given by the other witness in relation to Count 34 would have confirmed Witness 3's evidence, not that of Fadil Fazliu.[521]

[511] Brahimaj's Notice of Appeal, para. 11; Brahimaj's Appeal Brief, paras 89-112; AT. 131-132, 141-144 (Open Session).
[512] Brahimaj's Appeal Brief, para. 91; *see also* Brahimaj's Notice of Appeal, para. 11.
[513] Brahimaj's Notice of Appeal, para. 11.1; Brahimaj's Appeal Brief, paras 93-94.
[514] Brahimaj's Notice of Appeal, para. 11.2; Brahimaj's Appeal Brief, para. 95; Brahimaj's Reply Brief, para. 11.
[515] Brahimaj's Notice of Appeal, para. 11.3; Brahimaj's Appeal Brief, paras 96-100; Brahimaj's Reply Brief, para. 13.
[516] Brahimaj's Notice of Appeal, para. 11.4; Brahimaj's Appeal Brief, paras 101-112.
[517] Brahimaj's Appeal Brief, para. 95 (citing Trial Judgement, paras 454-455, 457).
[518] Brahimaj's Appeal Brief, para. 95; Brahimaj's Reply Brief, para. 11; AT. 142 (Open Session).
[519] Prosecution's Response Brief, para. 48.
[520] Prosecution's Response Brief, para. 48.
[521] Prosecution's Response Brief, para. 48.

235. Lahi Brahimaj replies that the Prosecution cannot rely upon what it proposed the other witness would have said if he had given evidence in the trial.[522]

236. The Appeals Chamber notes that, in relation to Count 34 of the Indictment, the Trial Chamber held that it was not proved that Naser Lika and Fadil Fazliu were subjected to torture and cruel treatment.[523] The Trial Chamber found that the totality of the evidence, including the evidence of Fadil Fazliu, Witness 3, and Witness 6, pointed to Naser Lika and Fadil Fazliu both being present at Tal Zeka's house in Žabelj/Zhabel and then at Jablanica/Jabllanicë. [524] As summarised in the Trial Judgement, Witness 3 saw "Ujku", Tahir Qorri, and a third person who might have been Sadri Berisha forcing Naser Lika and Fadil Fazliu down stairs in Tal Zeka's house, kicking and beating them, while Ujku called them traitors;[525] a few weeks later, Witness 3 saw Naser Lika who told him that they had been taken to Jablanica/Jabllanicë where they were beaten.[526] Fadil Fazliu's evidence, as summarised by the Trial Chamber, is that he and Naser Lika arrived at the house of Tal Zeka.[527] Thereafter, a group of KLA soldiers arrived at the house, and Lahi Brahimaj and a person referred to as "Tahir" came to speak to those present. According to Fadil Fazliu, a man called "Ujku" or "the wolf" was offensive to him and Naser Lika. Fadil Fazliu stated that the next day "Ujku" returned with Arbnor Zeneli and insulted those present[528] and that he went to Jablanica/Jabllanicë of his own free will after being told to do so by Arbnor Zeneli.[529] Having assessed this evidence, the Trial Chamber found that Fadil Fazliu's evidence contradicted Witness 3's evidence in relation to whether Fadil Fazliu and Naser Lika were taken to Jablanica/Jabllanicë by force or went there of their own free will, and in relation to whether they were ill-treated or detained.[530] It should also be noted that the Trial Chamber recalled the evidence of Witness 6, namely that he did not know a man named Naser Lika, did not recognise him in a photograph, and had never seen him at Jablanica/Jabllanicë or elsewhere.[531]

237. The Trial Chamber took the contradiction between the evidence of Witness 3 and Fadil Fazliu into account both in relation to Count 32 and Count 34. In relation to Count 34, the Trial Chamber found that all of the evidence taken as a whole did not lead to proof beyond reasonable doubt; however, this does not necessarily lead to the conclusion that all of Witness 3's evidence or all of Fadil Fazliu's evidence is unreliable and must be rejected. The Appeals Chamber considers

[522] Brahimaj's Reply Brief, para. 12.
[523] Trial Judgement, para. 457.
[524] Trial Judgement, para. 457.
[525] Trial Judgement, para. 455.
[526] Trial Judgement, paras 455, 457.
[527] Trial Judgement, para. 454.
[528] Trial Judgement, para. 454.
[529] Trial Judgement, para. 454.
[530] Trial Judgement, para. 457.
[531] Trial Judgement, para. 456.

that it is well within the reasonable exercise of a Trial Chamber's discretion to accept some parts of a witness's evidence and reject other parts.

238. This sub-ground of appeal is therefore dismissed.

(b) Witness 3's alleged motive to fabricate evidence (Ground 5.3)

239. Lahi Brahimaj claims that the evidence demonstrated that Witness 3 had a motive to exaggerate or lie in order to seek a better life for himself and his family by obtaining from the Prosecution the status of a relocated witness.[532] In support of his contention, he submits, *inter alia*, that, when Witness 3 was asked during an interview by the Prosecution "whether he was aware that in order to obtain relocation for himself and his family, he had to spin a pretty spectacular story […], he accepted that 'maybe it is important'."[533] Lahi Brahimaj submits that, before his relocation, Witness 3 was living in Italy apart from his family, which was unable to join him due to financial constraints, and that now he is living with his family in "a third country which he confirmed had one of the highest standards of living in the Western World" and "has thus secured considerable financial and other advantages in return for his testimony."[534] Lahi Brahimaj asserts that Witness 3 demanded that his family be relocated and implies that Witness 3 had no reason to do so because he did not have problems with Lahi Brahimaj, Brahimaj's family, or anyone else in Kosovo/Kosova before or after the war.[535] Lahi Brahimaj contends that, despite the fact that in his Final Trial Brief he argued that, in view of these circumstances and in the absence of reliable corroborating evidence, it would be unsafe to convict him on the basis of Witness 3's evidence, the Trial Chamber failed to apply the requisite standards of scrutiny as set out in paragraph 13 of the Trial Judgement and/or failed to give any reasons for rejecting his arguments.[536]

240. The Prosecution responds that Witness 3 had no motive to fabricate evidence. In support of this assertion, the Prosecution submits that Witness 3, when confronted during cross-examination, rejected this allegation and asserted that he was telling the truth.[537] The Prosecution also submits that witness intimidation accompanied the conduct of the trial, that a high proportion of witnesses called by the Prosecution expressed fear of testifying in the case, and that the Trial Chamber

[532] Brahimaj's Appeal Brief, para. 96; Brahimaj's Reply Brief, para. 13; *see also* AT. 142-143 (Open Session).
[533] Brahimaj's Appeal Brief, para. 97.
[534] Brahimaj's Appeal Brief, paras 98-99.
[535] Brahimaj's Appeal Brief, para. 97.
[536] Brahimaj's Appeal Brief, paras 96, 100.
[537] Prosecution's Response Brief, para. 50 (citing T. 8022-8023 (5 September 2007) (Private Session)).

granted protective measures to witnesses called by the Prosecution on the basis of an objectively grounded risk to the security or welfare of the witnesses or their families.[538]

241. The Appeals Chamber recalls, as indicated above, that the Trial Chamber, in the subsection of the Trial Judgement entitled "Sources and use of evidence", generally noted that, when assessing the evidence of witnesses during the trial, it considered "whether the witness would have an underlying motive to give a certain version of the events."[539] The Trial Chamber also stated that, although corroboration of evidence on material facts was not required, in instances where it relied on the testimony of a single witness to establish a material fact, it "exercised particular caution, considering all circumstances relevant to the testimony of the witness, including any possible underlying motive for the witness's testimony".[540] However, the Appeals Chamber observes that the Trial Chamber never explicitly addressed Lahi Brahimaj's contentions that Witness 3 had a motive to implicate Lahi Brahimaj, even though it relied mainly on Witness 3's evidence in convicting Lahi Brahimaj of committing cruel treatment and torture as alleged under Count 32 of the Indictment.[541] Rather, the Trial Chamber concluded that Witness 3 was credible without providing reasons in support of its finding.[542]

242. The Appeals Chamber reiterates that, if a Trial Chamber relies on the evidence of a single witness to convict an accused, the evidence of that witness "must be assessed with appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of that witness".[543] Furthermore, "a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence".[544]

243. In accordance with this jurisprudence, the Trial Chamber was obliged to address, at least briefly, why it found Witness 3's evidence credible despite the allegations of a motive on Witness 3's part to implicate Lahi Brahimaj. The Appeals Chamber finds that the Trial Chamber's failure to do so constitutes an error of law. In light of the foregoing, the Appeals Chamber will determine whether a reasonable Trial Chamber could have found Witness 3 credible despite Lahi Brahimaj's allegations.[545]

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[538] Prosecution's Response Brief, para. 51 (citing Trial Judgement, para. 22).
[539] Trial Judgement, para. 13.
[540] Trial Judgement, para. 14.
[541] Trial Judgement, paras 445-451.
[542] Trial Judgement, para. 445.
[543] *Kordić and Čerkez* Appeal Judgement, para. 274.
[544] *Krajišnik* Appeal Judgement, para. 146.
[545] *See Kordić and Čerkez* Appeal Judgement, paras 385-388.

244. Upon evaluation of the evidence on the record, the Appeals Chamber finds that Lahi Brahimaj has failed to establish a motive on the part of Witness 3 to exaggerate or lie in order to seek a better life for himself and his family. The Appeals Chamber considers that Lahi Brahimaj's arguments to this effect are speculative and without basis.

245. The Appeals Chamber observes that Lahi Brahimaj appears to insinuate that Witness 3 admitted to fabricating his story in the following testimony on cross-examination:

> Q. You were aware that in order to be relocated, you had to spin a pretty spectacular story about how important you were in terms of detention, were you not?
>
> A. Maybe it is important.[546]

246. The Appeals Chamber disagrees with Lahi Brahimaj's interpretation of this evidence. The Appeals Chamber considers that the question posed to Witness 3 was unclear and misleading, and notes that when asked immediately thereafter whether he blamed Lahi Brahimaj for his "downfall",[547] Witness 3 vehemently denied the allegation and stated, "I am not here to accuse Lahi Brahimaj of anything more than he already did to me."[548] Such evidence does not amount to an admission by Witness 3 to fabricating his testimony.

247. Furthermore, the Appeals Chamber considers that evidence that Witness 3 had no problems with Lahi Brahimaj before or after the war and that his life improved after relocation does not demonstrate that Witness 3 lied or exaggerated his testimony so that he and his family could be relocated. In this regard, the Appeals Chamber notes that relocation is one of a number of measures that Trial Chambers employ to protect witnesses during trial and that, in the instant case, the Trial Chamber only granted protective measures to witnesses after determining that a witness demonstrated "an objectively grounded risk to the security or welfare of the witness or the witness's family should it become known that the witness had given evidence before the Tribunal."[549]

248. In light of the foregoing, the Appeals Chamber finds that a reasonable Trial Chamber could have found Witness 3 credible despite Lahi Brahimaj's allegations of a motive to falsify his testimony.

249. This sub-ground of appeal is therefore dismissed.

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[546] Witness 3, T. 8022 (5 September 2007) (Private Session).
[547] Witness 3, T. 8022 (5 September 2007) (Private Session).
[548] Witness 3, T. 8023 (5 September 2007) (Private Session).
[549] Trial Judgement, para. 22.

(c) Other conflicts (Ground 5.4)

250. Lahi Brahimaj submits that in his Final Trial Brief he raised further issues relevant to the assessment of the credibility of Witness 3. First, Witness 3's claim that the reason for his detention was because Lahi Brahimaj "wanted him 'to become his soldier'"[550] does not make sense, as Witness 3 was "hardly an ideal soldier",[551] supported the KLA, and had already fought alongside them. Second, Witness 3's claim that he was detained at the Jablanica/Jabllanicë compound because the villagers from Grabanica/Grabanicë had deserted in the face of the Serb attack does not make sense given that the retreat took place on 21 May 1998, and Witness 3 testified that he had no problems with the KLA or Lahi Brahimaj for almost two months thereafter.[552] Third, although Witness 3 confirmed the accuracy of statements he had given to the Prosecutor, which were read to him in Albanian, when he was confronted with two claims from the statements during cross-examination, he denied them and attributed the changes in his story to mistakes by the translator.[553] Fourth, Witness 6's evidence differs from Witness 3's in that Witness 6 testified that there was no shooting while Witness 3 was escaping through the meadow, whereas Witness 3 testified that the shooting was so heavy that it caused branches to fall from the trees.[554] Fifth, when confronted with the fact that Witness 3's mother's statement to the Prosecution made no mention of his alleged second abduction, Witness 3 explained that his mother was not aware of it, which is inconceivable given the "highly charged atmosphere of Kosovo at the time".[555] Sixth, Witness 3 did not mention his alleged second abduction to the Kosovo/Kosova Police Service when he was interviewed in 2002, even though he was interviewed as a victim.[556] Lahi Brahimaj asserts that there is no indication that the Trial Chamber considered these issues[557] and argues that, if the Trial Chamber did consider them, it did not provide a reasoned opinion for dismissing them.[558]

251. The Prosecution responds that Witness 3's combat abilities are irrelevant,[559] that the alleged inconsistencies between the evidence of Witness 3 in-court and his previous statements were considered by the Trial Chamber,[560] that Lahi Brahimaj has not shown that the Trial Chamber's finding that Witness 3 heard shots while escaping from the Jablanica/Jabllanicë compound was

[550] Brahimaj's Appeal Brief, para. 102 (citing T. 7943 (4 September 2007) (Private Session)).
[551] Brahimaj's Appeal Brief, para. 102.
[552] Brahimaj's Appeal Brief, paras 103-104 (citing T. 7897 (3 September 2007) (Open Session), T. 7929 (4 September 2007) (Private Session), T. 8006, 8008 (5 September 2007) (Private Session)).
[553] Brahimaj's Appeal Brief, paras 106-108.
[554] Brahimaj's Appeal Brief, para. 109 (citing T. 7957 (4 September 2007) (Private Session), T. 5236 (1 June 2007) (Open Session)); Brahimaj's Final Trial Brief, para. 207.
[555] Brahimaj's Appeal Brief, para. 110.
[556] Brahimaj's Appeal Brief, para. 111
[557] Brahimaj's Appeal Brief, paras 101-112.
[558] Brahimaj's Appeal Brief, para. 112.
[559] Prosecution's Response Brief, para. 53.
[560] Prosecution's Response Brief, para. 54 (citing Trial Judgement, para. 13).

unreasonable,[561] and that the reasons for Witness 3 not mentioning his second abduction to his mother are reasonable and credible.[562]

252. The Appeals Chamber reiterates that, although an accused has the right to a reasoned opinion, Trial Chambers are not obliged to address every argument in detail. Trial Chambers are also not obliged to address every inconsistency in the testimony of a witness and exercise considerable discretion in addressing minor inconsistencies in witness testimony. However, this discretion must be reconciled with the accused's right to a reasoned opinion. In addition, a Trial Chamber may not completely disregard all inconsistencies, especially when, as in the instant case, the Trial Chamber relies primarily on the evidence of one witness to convict an accused.

253. As mentioned previously, the Trial Chamber generally stated in the Trial Judgement that it assessed the internal consistency of each witness's testimony and whether there was corroborating evidence.[563] However, in finding Witness 3 credible, the Trial Chamber did not provide any reasons or address any of the alleged inconsistencies in his testimony. As a result, the Appeals Chamber is unable to determine the weight, if any, the Trial Chamber ascribed to them or whether it disregarded them altogether.

254. The Appeals Chamber finds that this failure on the part of the Trial Chamber violated Lahi Brahimaj's right to a reasoned opinion, constituting an error of law. Accordingly, the Appeals Chamber will proceed to evaluate his arguments under this sub-ground of appeal to determine whether a reasonable Trial Chamber could have found that Witness 3 was credible despite the alleged inconsistencies in his testimony.[564]

255. Upon evaluation of the record, the Appeals Chamber observes that Witness 3 provided substantial and detailed information about the facilities where he was detained,[565] the conditions of his detention,[566] the persons that entered his room during his detention,[567] and the clothing and condition of the two other men detained with him.[568] The Appeals Chamber considers that the alleged inconsistencies in his evidence are minor and do not discredit this testimony as a whole.

256. As to Lahi Brahimaj's first challenge to Witness 3's credibility under this sub-ground of appeal, the Appeals Chamber finds that Witness 3's claim that the reason for his detention was

[561] Prosecution's Response Brief, para. 54 (citing Trial Judgement, para. 441, fn. 2250).
[562] Prosecution's Response Brief, para. 54.
[563] Trial Judgement, para. 13.
[564] *See Kordić and Čerkez* Appeal Judgement, paras 385-388.
[565] Witness 3, T. 7951 (4 September 2007) (Private Session).
[566] Witness 3, T. 7948, 7951 (4 September 2007) (Private Session).
[567] Witness 3, T. 7949 (4 September 2007) (Private Session).
[568] Witness 3, T. 7946-7947, 7950-7951 (4 September 2007) (Private Session).

because Lahi Brahimaj wanted him to become his soldier can reasonably co-exist alongside the fact that he may not have been considered an ideal soldier and the fact that he was already a supporter of the KLA. Lahi Brahimaj's contention—that there was no reason to detain Witness 3 to make him a KLA soldier since he had already fought with the KLA—is without merit: the KLA was not the type of organisation where membership was a clear-cut matter, but rather often involved Kosovo Albanians fighting on behalf of the KLA in an *ad hoc* manner.[569] It could thus reasonably be concluded that, although Witness 3 had fought in one instance for the KLA, he might not have been willing to do so on another occasion.

257. With regard to Lahi Brahimaj's second challenge, the Appeals Chamber considers that a delay of approximately two months between the time that Witness 3 retreated from Grabanica/Grabanicë and the time he was detained in Jablanica/Jabllanicë was a reasonable occurrence under the circumstances.

258. Third, the Appeals Chamber finds that the inaccuracies in Witness 3's statement to the Prosecution are not crucial ones that go to the main events about which Witness 3 gave evidence and do not rise to the level that would demonstrate that the witness was not credible. Furthermore, errors can be expected when working in different languages, and these errors were corrected when Witness 3 was examined during the trial.[570]

259. Fourth, it was reasonably open to the Trial Chamber to accept Witness 3's version of the events surrounding his escape (*e.g.*, heavy gunfire) and to reject Witness 6's account that there was no shooting while Witness 3 was escaping through the meadow. In this regard, the Appeals Chamber notes the Trial Chamber's finding that it was "not clear that Witness 6 saw Witness 3 as he escaped from his room."[571]

260. In relation to Lahi Brahimaj's fifth challenge, when it was put to Witness 3 that his mother did not mention in her statement his second abduction, Witness 3 explained that, having already been abducted once, he did not tell his mother of his second abduction because he wanted to spare her the pain, especially due to the fact that she was in poor health.[572] The Appeals Chamber

[569] *See* Trial Judgement, para. 66 (noting that the KLA organisation "consisted mainly of ordinary people appointing night guards and setting up checkpoints at village entrances" (citing Rrustem Tetaj, T. 3626 (7 May 2007) (Open Session), T. 3707 (8 May 2007) (Open Session))), para. 68 (noting that villagers "would organize themselves into defence units spontaneously, often electing a village commander" (citing P328 (Jakup Krasniqi, Witness Statement, 24 May 2007, para. 8); P340 (Jakup Krasniqi, *Limaj et al.* T. 3330, 3378-3379, 3415, 3450-3452, 3470-3471 (10-12 February 2005)); Krasniqi, T. 5007-5009, 5046-5049 (30 May 2007) (Open Session))).
[570] *See, e.g.*, Witness 3, T. 8013 (5 September 2007) (Private Session) (Witness 3 noting that he corrected a mistake of the interpreter the third time his statement was taken).
[571] Trial Judgement, para. 445.
[572] Witness 3, T. 8025 (5 September 2007) (Private Session).

considers that the Trial Chamber's acceptance of this explanation constituted a reasonable exercise of its discretion.

261. Finally, Witness 3's explanation that he omitted to tell the Kosovo/Kosova police service about his abduction because he feared discussing it over the telephone and because of the brevity of the conversation[573] is entirely reasonable.

262. In light of the foregoing, the Appeals Chamber considers that a reasonable Trial Chamber could have found Witness 3 credible despite these alleged inconsistencies in his testimony.

263. This sub-ground of appeal is therefore dismissed.

(d) Conclusion

264. Consequently, this ground of appeal is dismissed in its entirety.

4. Alleged errors relating to Witness 3's evidence of his return to Jablanica/Jabllanicë (Ground 6)

265. Lahi Brahimaj submits that the Trial Chamber made a finding of fact for which there was no evidence and which ran contrary to the record[574] when it found that Witness 3 returned to Jablanica/Jabllanicë because he thought he was no longer in danger due to the fact that a rifle had been returned to its rightful owner.[575] Lahi Brahimaj argues that Witness 3's decision to return to Jablanica/Jabllanicë should be seen in the context of his testimony, as Witness 3 claimed that orders had been given to capture or kill him[576] and that an individual named Florim Zeneli tried to kill him.[577] Lahi Brahimaj asserts that Witness 3's decision to return to Selim Ademi's house in Jablanica/Jabllanicë, which was located less than 150 metres away from where Lahi Brahimaj lived, is "inexplicable"[578] in view of his testimony about his mistreatment, his escape, and the orders given to kill him, as shown by the questions put by the Presiding Judge to Witness 3 during his testimony.[579] Lahi Brahimaj submits that the explanation given by Witness 3 casts doubt on his credibility[580] and that, insofar as there were alternative conclusions available to be drawn from the

[573] Witness 3, T. 8024 (5 September 2007) (Private Session).
[574] Brahimaj's Appeal Brief, para. 119; AT. 143-144 (Open Session).
[575] Brahimaj's Appeal Brief, para. 113.
[576] Brahimaj's Appeal Brief, para. 114 (citing Witness 3, T. 7960 (4 September 2007) (Private Session)).
[577] Brahimaj's Appeal Brief, para. 114 (citing Witness 3, T. 7968 (4 September 2007) (Private Session)).
[578] Brahimaj's Appeal Brief, para. 115.
[579] Brahimaj's Appeal Brief, paras 114-116. Judge Orie asked Witness 3 if he did not consider coming back to Jablanica/Jabllanicë to be a "great risk". Witness 3, T. 7968 (4 September 2007) (Private Session).
[580] Brahimaj's Appeal Brief, para. 116.

evidence, the Trial Chamber erred in law in failing to draw the conclusion that was consistent with the innocence of the accused.[581]

266. In response, the Prosecution submits that the Trial Chamber's consideration of Witness 3's evidence was reasonable[582] given the two reasons provided by Witness 3 in his testimony for returning to Jablanica/Jabllanicë, namely that he would have been victimised by the KLA and by the Serb forces, and that he thought that the reason for which Lahi Brahimaj was pursuing him, the missing weapon, had been resolved.[583] In this regard, the Prosecution refers to portions of Witness 3's testimony explaining that the rifle had been returned to Lahi Brahimaj between Witness 3's escape from the KLA staff building and his return to Jablanica/Jabllanicë, and concludes that Witness 3 thought that the danger from Lahi Brahimaj had passed before his return to Jablanica/Jabllanicë.[584]

267. The Trial Chamber found that Witness 3, after his escape, wandered from village to village and that people were afraid to help him because they had heard that he was a wanted fugitive. The Trial Chamber then found that Witness 3 returned to Jablanica/Jabllanicë for approximately ten to 12 days where he thought it was safe because a Kalashnikov rifle he had taken from a wounded comrade during the battle of Grabanica/Grabanicë had been returned to its rightful owner. The Trial Chamber added that Witness 3 had thought that the unreturned rifle might have been the reason for his earlier treatment.[585]

268. The Appeals Chamber will examine the evidence surrounding this finding to assess whether it was a reasonable one. The Appeals Chamber notes that Witness 3's testimony was not fully consistent. He first testified during his examination-in-chief that, while he was being beaten, he told Lahi Brahimaj that, if he were set free, he would bring the automatic rifle that Lahi Brahimaj was asking about.[586] However, in his testimony, he subsequently stated that the rifle had already been returned to Lahi Brahimaj. Witness 3 explained that "Selim Ademi went to have a word with Lahi [Brahimaj], to the effect that I was not to have any problems with him any more. And so they agreed that there was [*sic*] no outstanding issues now that the automatic rifle had been returned."[587] On cross-examination, Witness 3 stated that he thought Lahi Brahimaj's assurance to Selim Ademi

[581] Brahimaj's Appeal Brief, para. 119.
[582] Prosecution's Response Brief, para. 56.
[583] Prosecution's Response Brief, para. 56 (citing Witness 3, T. 7960-7961, 7967-7968 (4 September 2007) (Private Session), T. 8012 (5 September 2007) (Private Session)).
[584] Prosecution's Response Brief, para. 56 (citing Witness 3, T. 7960 (4 September 2007) (Private Session)).
[585] Trial Judgement, paras 441, 442 (citing Witness 3, T. 7957, 7959-7960, 7968 (4 September 2007) (Private Session), T. 8003-8005, 8010-8012, 8015-8016, 8026 (5 September 2007) (Private Session)).
[586] Witness 3, T. 7954 (4 September 2007) (Private Session).
[587] Witness 3, T. 7960-7961 (4 September 2007) (Private Session).

put an end to the matter, but that "it did not turn out to be that way."[588] Witness 3 was also cross-examined about how he came into possession of the rifle, which was previously owned by a KLA fighter who was wounded in battle. Later, he met an individual who claimed that the rifle belonged to him, and Witness 3 gave the rifle to him because the man was able to identify its distinctive features.[589]

269. The Appeals Chamber considers that Witness 3's evidence supports the Trial Chamber's finding that Witness 3 returned to Jablanica/Jabllanicë because he thought he was no longer in danger due to the fact that the rifle had been returned to its rightful owner. Lahi Brahimaj makes the point that there was no direct evidence that Witness 3 knew, before he returned to Jablanica/Jabllanicë, that the rifle had been returned. However, the Appeals Chamber finds that the Trial Chamber's conclusion was reasonable considering all of the evidence. Moreover, the Appeals Chamber notes that Witness 3 was in a very difficult situation, could find no one to help him, and felt as though he simply could not find refuge anywhere else other than Selim Ademi's house.[590] He testified as follows upon questioning by the Chamber:

> I decided to return to Jabllanice regardless of the risk, because my imminent death was almost a certainty, but I had no where else to go and the other villages, there was a lot of Serbian police. So I was beaten too far, as it were, they kill me there, they kill me here. So I thought that [they] were going to help me, and I was in a way forced to seek shelter there. I was in the middle, as it were, between the Serbs and the Albanians. Whoever was going to catch me first was going to kill me, be it the Serbs or the KLA.[591]

Consequently, the Appeals Chamber considers that Lahi Brahimaj has not established that the Trial Chamber erred in finding that the reason for Witness 3's return to Jablanica/Jabllanicë was that he thought it was safe because the rifle had been returned to its rightful owner. The Appeals Chamber further finds that Lahi Brahimaj has failed to establish that there were alternative reasonable conclusions, consistent with the innocence of Lahi Brahimaj, to be drawn from the evidence.

270. The Appeals Chamber accordingly dismisses this ground of appeal.

D. Alleged Errors Relating to the Initial Beating of Witness 3 (Grounds 7 and 8)

1. Alleged failure to make findings on the initial beating (Ground 7)

271. Lahi Brahimaj argues that the Trial Chamber described three series of facts on which the conviction for Witness 3's mistreatment was based:[592] (a) a beating with baseball bats by

[588] Witness 3, T. 8012 (5 September 2007) (Private Session).
[589] Witness 3, T. 8003-8005 (5 September 2007) (Private Session).
[590] Witness 3, T. 7959-7960, 7968 (4 September 2007) (Private Session).
[591] Witness 3, T. 7968 (4 September 2007) (Private Session).
[592] Brahimaj's Appeal Brief, para. 120 (citing Trial Judgement, paras 440-442).

unidentified individuals when Witness 3 was first brought to the KLA staff building ("initial beating");[593] (b) an interrogation by individuals including Lahi Brahimaj ("interrogation");[594] and (c) an abduction and mistreatment by Lahi Brahimaj at least ten days later ("abduction").[595] Lahi Brahimaj submits that the Trial Chamber violated his right to a reasoned opinion by failing to clearly specify whether or not it intended to include the initial beating in the conviction in addition to the interrogation and the abduction when finding that it was convinced beyond reasonable doubt that he committed cruel treatment and torture under Count 32.[596]

272. In support of his contention, Lahi Brahimaj points to two findings made by the Trial Chamber. First, Lahi Brahimaj recalls that the Trial Chamber attributed the commission of the initial beating to several "unidentified persons",[597] then to "KLA soldiers or persons affiliated with the KLA",[598] but subsequently concluded that Lahi Brahimaj committed the cruel treatment and torture under Count 32, without specifying whether or not this finding included the initial beating.[599] Second, Lahi Brahimaj notes that, under the section "Cumulative convictions", the Trial Chamber found that "two incidents of criminal conduct"[600] in relation to Count 32 took place, but discussed three series of facts taking place on different days. Lahi Brahimaj concludes that this suggests that the Trial Chamber may have intended to convict Lahi Brahimaj only for the later series of facts, namely the interrogation and the abduction, and not for the initial beating.[601]

273. The Prosecution responds that the Trial Chamber explained that Lahi Brahimaj's conviction included both the initial beating and the interrogation,[602] which in fact were a single event in which Lahi Brahimaj was a leading and primary actor.[603] The Prosecution submits that Lahi Brahimaj's arguments do not show that the Trial Chamber's conclusion was unreasonable.[604]

274. The Appeals Chamber notes that the Trial Chamber analysed two series of facts that occurred shortly after Witness 3's arrival at the Jablanica/Jabllanicë compound and during his detention, namely, the beating by KLA members or persons affiliated to it[605] and the interrogation during which two women beat Witness 3 on his hands.[606] The Trial Chamber considered them as

[593] Brahimaj's Appeal Brief, para. 120.1 (citing Trial Judgement, para. 440).
[594] Brahimaj's Appeal Brief, para. 120.2 (citing Trial Judgement, para. 441).
[595] Brahimaj's Appeal Brief, para. 120.3 (citing Trial Judgement, para. 442).
[596] Brahimaj's Appeal Brief, paras 121, 124, 126,
[597] Brahimaj's Appeal Brief, para. 122 (citing Trial Judgement, para. 440).
[598] Brahimaj's Appeal Brief, para. 123 (citing Trial Judgement, para. 447).
[599] Brahimaj's Appeal Brief, para. 124 (citing Trial Judgement, para. 451).
[600] Trial Judgement, para. 481.
[601] Brahimaj's Appeal Brief, para. 125.
[602] Prosecution's Response Brief, para. 58 (citing Trial Judgement, paras 445-447, 449, 490).
[603] Prosecution's Response Brief, para. 58 (citing Trial Judgement, para. 441); AT. 154-155 (Open Session).
[604] Prosecution's Response Brief, para. 61.
[605] Trial Judgement, para. 445.
[606] Trial Judgement, para. 446.

constituting *the first incident* of criminal conduct.[607] The Trial Chamber then found that the abduction of Witness 3 by Lahi Brahimaj constituted *the second incident* of criminal conduct.[608] The Trial Chamber concluded that the first incident of criminal conduct caused Witness 3 serious physical suffering, that the perpetrators intended to cause such suffering, that the beatings were aimed at punishing and discriminating against Witness 3, and that the mistreatment amounted to cruel treatment and torture.[609] The Appeals Chamber considers that the foregoing demonstrates the Trial Chamber's clear intention to include both the "initial beating" and the "interrogation", which also included beatings, in its finding related to the first incident of criminal conduct.

275. In relation to the second incident of criminal conduct, the Trial Chamber analysed the evidence given by Witness 3[610] and concluded that the facts amounted to cruel treatment only.[611]

276. The Appeals Chamber considers that the Trial Chamber identified two incidents of criminal conduct that led to two findings of guilt,[612] namely (a) cruel treatment and torture[613] covering the first incident of criminal conduct (the "initial beating" and the "interrogation") and (b) cruel treatment alone covering the second incident of criminal conduct (the "abduction"). Moreover, the Trial Chamber found that "Brahimaj's role in the interrogation establishes his intent, *upon Witness 3's arrival* at the Jablanica/Jabllanicë compound, to inflict serious physical suffering on Witness 3 for the purposes of punishing him for withholding a weapon and discriminating against him on the basis of his perceived ties to Serbs".[614] The formulation of this finding is a further indication that the Trial Chamber included the initial beatings in its consideration of the conviction under Count 32, given that both the initial beating and the interrogation followed Witness 3's arrival at the compound.

277. Consequently, the Appeals Chamber considers that Lahi Brahimaj has failed to show that the Trial Chamber committed an error of law on the basis of unclear reasoning as to whether or not it was convicting him for mistreatment in relation to the initial beating.[615]

278. Accordingly, the Appeals Chamber dismisses this ground of appeal.

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[607] Trial Judgement, para. 481.
[608] Trial Judgement, para. 481.
[609] Trial Judgement, para. 447.
[610] Trial Judgement, para. 449.
[611] Trial Judgement, para. 449.
[612] Trial Judgement, para. 481.
[613] The Trial Chamber found Lahi Brahimaj guilty of cruel treatment and torture in relation to the first incident of criminal conduct and, after applying the law on cumulative convictions, entered a conviction for torture only.
[614] Trial Judgement, para. 451 (emphasis added).
[615] Brahimaj's Appeal Brief, paras 121, 124, 126.

2. Alleged error in relation to Lahi Brahimaj's responsibility for the initial beating (Ground 8)

279. Lahi Brahimaj argues that, if the Trial Chamber intended to convict him for the initial beating of Witness 3, it failed to give reasons for its decision and committed errors of fact.[616] Lahi Brahimaj submits that the Trial Chamber found that the acts committed in relation to the initial beating were carried out by KLA soldiers or persons affiliated with them[617] and that, although Lahi Brahimaj brought Witness 3 to the barracks, he left before the beating took place.[618] Lahi Brahimaj also argues that the Trial Chamber convicted him for committing these acts rather than on the basis of participation in a JCE, planning, instigating, or aiding and abetting, as alleged in the Indictment. He asserts that the Indictment does not allege that he held the position of commander of the KLA Dukagjin Operative Staff at the relevant time and that, therefore, the basis of the Trial Chamber's conviction is unclear.[619]

280. The Prosecution responds that the Trial Chamber described Lahi Brahimaj's conduct when Witness 3 was tortured and that it properly concluded that it amounted to torture.[620] The Prosecution argues, moreover, that the material facts[621] related to Lahi Brahimaj's conduct were alleged in the Indictment, as well as in the Prosecution's Pre-Trial Brief.[622] The Prosecution submits that Lahi Brahimaj's arguments do not show that the Trial Chamber's conclusion was unreasonable.[623]

281. The Appeals Chamber considers that Lahi Brahimaj's attempt to separate the initial beating of Witness 3 from the interrogation that took place during the same short period of detention is an effort to artificially distinguish between two series of facts that logically constituted one incident, and that were correctly analysed by the Trial Chamber as such. As stated above, the Appeals Chamber considers that the first incident of criminal conduct consisted of an initial beating and a subsequent interrogation, while the second incident consisted of the abduction of Witness 3 committed by Lahi Brahimaj.[624] Thus, the Trial Chamber correctly analysed the initial beating

[616] Brahimaj's Notice of Appeal, para. 14 (citing Trial Judgement, paras 440-451); Brahimaj's Appeal Brief, para. 127.
[617] Brahimaj's Notice of Appeal, para. 14.1; Brahimaj's Appeal Brief, para. 128 (citing Trial Judgement, para. 440).
[618] Brahimaj's Notice of Appeal, para. 14.2; Brahimaj's Appeal Brief, para. 128 (citing Trial Judgement, paras 440-445).
[619] Brahimaj's Appeal Brief, para. 129.
[620] Prosecution's Response Brief, para. 60 (citing Trial Judgement, paras 440-441).
[621] Prosecution's Response Brief, para. 60 (citing *Simić* Appeal Judgement, para. 20; *Naletilić and Martinović* Appeal Judgement, para. 23; *Kvočka et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 88; *Ntakirutimana* Appeal Judgement, para. 470; *Semanza* Appeal Judgement, para. 85; *Gacumbitsi* Appeal Judgement, para. 123).
[622] Prosecution's Response Brief, para. 60 (citing Indictment, paras 103, 105; Prosecution's Pre-Trial Brief, paras 148-149).
[623] Prosecution's Response Brief, para. 61.
[624] *See supra* section IV.D.1.

within the greater context of events, which included Lahi Brahimaj's initial detainment of Witness 3 and later role in interrogating and beating Witness 3.

282. The Appeals Chamber further observes that the Trial Chamber relied on the facts related to the initial beating in order to establish Lahi Brahimaj's conviction for the cruel treatment and torture of Witness 3 for the first incident of criminal conduct. The Trial Chamber found that Lahi Brahimaj's intention to inflict serious physical suffering on Witness 3 was established from the time when Witness 3 arrived at the compound and included the entire time that he was detained there.[625] The Trial Chamber found that the beatings caused Witness 3 serious physical suffering, that the perpetrators intended to cause such suffering, that the beatings were aimed at punishing Witness 3 for withholding a weapon and at discriminating against him on the basis of his perceived ties to Serbs, and that this amounted to cruel treatment and torture.[626] Accordingly, the Appeals Chamber finds no merit in Lahi Brahimaj's contention that the Trial Chamber failed to provide reasons for his conviction for the initial beating of Witness 3.

283. With regard to Lahi Brahimaj's assertion that the basis of his conviction for committing the initial beating is unclear, given that the Indictment does not allege that he held a position of commander at the relevant time, the Appeals Chamber observes that the Fourth Amended Indictment alleges that Lahi Brahimaj "committed, or planned, instigated, or aided and abetted the commission of, the crimes described".[627] The Appeals Chamber has already found that the Trial Chamber did not err when it analysed the evidence related to the initial beating and the interrogation as a single criminal incident.[628] Given the evidence in relation to the initial beating and interrogation of Witness 3, the Trial Chamber found that "Lahi Brahimaj's role in the interrogation establishe[d] his intent, upon Witness 3's arrival at the Jablanica/Jabllanicë compound, to inflict serious physical suffering on Witness 3 for the purposes of punishing him for withholding a weapon and discriminating against him on the basis of his perceived ties to Serbs."[629] The Trial Chamber was therefore convinced beyond a reasonable doubt that Lahi Brahimaj committed the above-mentioned cruel treatment and torture under Count 32.[630] The Appeals Chamber thus considers that the Trial Chamber clearly convicted Lahi Brahimaj of committing the crimes—rather than pursuant to a JCE or for planning, instigating, or aiding and abetting them—and that Lahi Brahimaj's leadership role was neither an essential element of his individual criminal

[625] Trial Judgement, para. 451.
[626] Trial Judgement, para. 447.
[627] Indictment, para. 106.
[628] *See supra* section IV.D.1.
[629] Trial Judgement, para. 451.
[630] Trial Judgement, para. 451.

responsibility for committing nor a material fact necessary for his conviction under that mode of responsibility.

284. In light of the foregoing, the Appeals Chamber finds that Lahi Brahimaj has failed to identify any error on the part of the Trial Chamber in convicting him for committing the cruel treatment and torture of Witness 3.

285. Accordingly, the Appeals Chamber dismisses this ground of appeal.

E. Alleged Errors Relating to Lahi Brahimaj's Motivations for the Torture of Witness 3 (Ground 9)

286. Lahi Brahimaj submits that the Trial Chamber erred in its findings with respect to his conviction for the torture of Witness 3. In this respect, Lahi Brahimaj argues that the Prosecution failed to prove any of the motivations behind mistreatment that are necessary for a torture conviction. He also avers that the Trial Chamber wrongly found that he intended to discriminate against Witness 3 on the basis of Witness 3's "perceived ties" to Serbs.[631] Lahi Brahimaj further contends that the Trial Chamber ignored evidence pertaining to Witness 3's retention of a rifle. Finally, Lahi Brahimaj submits that the Trial Chamber's conclusion—that the motivation behind the mistreatment of Witness 3 was punishment for withholding a rifle—amounts to "an error of fact and/or law because this material fact was not alleged in the indictment and Lahi Brahimaj did not have adequate, or indeed any, notice of this alternative basis for conviction".[632]

287. The Prosecution responds that Lahi Brahimaj's arguments "fail to show that the [Trial] Chamber erred and should be dismissed."[633] The Prosecution maintains that Lahi Brahimaj's motivations for torturing Witness 3 "are intertwined and [his] attempt to separate them is unfounded."[634]

1. Whether the Prosecution failed to prove one or more of the elements of torture

288. Lahi Brahimaj claims that the Prosecution "failed to prove one or more of the material elements of the charge of torture, namely the intent to obtain information or confession, punishing, intimidating or coercing, or discriminating on any ground."[635] The Prosecution provides no specific response to this argument.

[631] Brahimaj's Appeal Brief, para. 133, referring to Trial Judgement, para. 451.
[632] Brahimaj's Appeal Brief, paras 131-136.
[633] Prosecution's Response Brief, para. 63.
[634] Prosecution's Response Brief, para. 63.
[635] Brahimaj's Appeal Brief, para. 136.

289. As an initial matter, the Appeals Chamber notes that Lahi Brahimaj does not attempt to point to evidence supporting this broad contention. Nor is it clear whether Lahi Brahimaj is asserting that the alleged error was legal or factual in nature; thus, the Appeals Chamber is not obliged to consider this submission.[636] However, because this claim is intrinsically linked to Lahi Brahimaj's other claims, the Appeals Chamber will proceed to address it.

290. The jurisprudence of the Tribunal defines torture as follows:

> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
>
> (ii) The act or omission must be intentional.
>
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[637]

291. In the instant case, Witness 3 testified that he, along with four or five others, unsuccessfully attempted to defend Grabanica/Grabanicë in Klina/Klinë municipality and thereafter withdrew.[638] While in Peć/Pejë municipality, Witness 3 came across Lahi Brahimaj and Alush Agushi, who denounced Witness 3 and the others as traitors for abandoning their attempts to defend the village.[639] Witness 3 briefly stayed in Jablanica/Jabllanicë, but then left because he heard from the villagers with whom he was staying that KLA staff was searching for individuals who had abandoned Grabanica/Grabanicë.[640] In July 1998, Lahi Brahimaj came searching for Witness 3 and thereafter brought him to a KLA staff building in Jablanica/Jabllanicë and left Witness 3 in a room.[641] A few minutes later, Witness 3 was beaten by several people with baseball bats until he lost consciousness.[642] Witness 3 remained in the room for two nights and three days.[643] Lahi Brahimaj brought Witness 3 to the room next door at one point and interrogated him, accusing him of supporting the Serbian police and withholding an automatic weapon.[644] Lahi Brahimaj also told the two women who were in the room to "practice" on Witness 3, who thereafter beat Witness 3

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[636] The *Krnojelac* Appeals Chamber noted the following: "In principle, the Appeals Chamber is not obliged to consider a party's submissions if they do not relate to an error of law which invalidates the decision or an error of fact occasioning a miscarriage of justice. There is therefore no point whatsoever in a party reiterating arguments which failed at trial on appeal, unless the party demonstrates that the fact that they were dismissed resulted in an error such as to justify the Appeals Chamber intervening." *Krnojelac* Appeal Judgement, para. 15.
[637] *Kunarac et al.* Appeal Judgement, para. 142 (quoting the definition of torture adopted by the Trial Chamber in the *Kunarac et al.* Trial Judgement, para. 497).
[638] Trial Judgement, para. 439 (citing Witness 3, T. 7916, 7922, 7993 (4 September 2007) (Private Session)).
[639] Trial Judgement, para. 439 (citing Witness 3, T. 7922-7924, 7989, 7992 (4 September 2007) (Private Session)).
[640] Trial Judgement, para. 439 (citing Witness 3, T. 7929-7930, 7933-7937, 7993 (4 September 2007) (Private Session), T. 8006 (5 September 2007) (Private Session)).
[641] Trial Judgement, para. 440 (citing Witness 3, T. 7943-7945 (4 September 2007) (Private Session)).
[642] Trial Judgement, para. 440 (citing Witness 3, T. 7943, 7945-7946, 7958 (4 September 2007) (Private Session), T. 8009 (5 September 2007) (Private Session)).
[643] Trial Judgement, para. 441 (citing Witness 3, T. 7945, 7948 (4 September 2007) (Private Session), T. 8009-8010 (5 September 2007) (Private Session)).
[644] Trial Judgement, para. 441 (citing Witness 3, T. 7951-7953, 7958 (4 September 2007) (Private Session)).

with a telescope for five to ten minutes.[645] Lahi Brahimaj also gave his revolver to Witness 3, telling him to kill himself.[646] The other man in the room accused Witness 3 of collaborating with the Serbs, threatening to cut Witness 3's throat.[647]

292. The Trial Chamber found that:

> The evidence on the beatings and the interrogation establishes […] that Lahi Brahimaj brought Witness 3 to a room in the Jablanica/Jabllanicë compound. KLA soldiers or persons affiliated with the KLA shortly afterwards arrived in that room with baseball bats and beat Witness 3. The evidence also establishes that Witness 3 was held in the same room until Lahi Brahimaj took him to another room and interrogated Witness 3 while others beat him. The Trial Chamber finds that Lahi Brahimaj's role in the interrogation establishes his intent, upon Witness 3's arrival at the Jablanica/Jabllanicë compound, to inflict serious physical suffering on Witness 3 for the purposes of punishing him for withholding a weapon and discriminating against him on the basis of his perceived ties to Serbs. For these reasons, the Trial Chamber is convinced beyond a reasonable doubt that Lahi Brahimaj committed the above-mentioned cruel treatment and torture under Count 32.[648]

The Trial Chamber thus found two motivations for torture: punishment for withholding a weapon and discrimination on account of Witness 3's perceived ties to Serbs. The Appeals Chamber finds that, considering the evidence adduced at trial, the Trial Chamber's findings were reasonable. There is therefore no merit in Lahi Brahimaj's argument that the Prosecution failed to prove that he had the requisite intent for a torture conviction.

293. The Appeals Chamber accordingly dismisses Lahi Brahimaj's argument.

2. Whether the Trial Chamber erred in concluding that Lahi Brahimaj intended to discriminate against Witness 3 on the basis of his perceived ties to Serbs

294. Lahi Brahimaj submits that the only allegation that "could have amounted to an 'aim' of the alleged mistreatment and therefore the basis of a conviction for torture was that Witness 3 was a Kosovar Albanian who refused to fight for the KLA."[649] According to Lahi Brahimaj, however, the evidence did not demonstrate that Witness 3 refused to fight for the KLA.[650] Lahi Brahimaj claims that the Trial Chamber instead seems to have based the torture conviction on Witness 3's perceived ties to Serbs.[651] In adopting this alternative basis for the torture conviction, Lahi Brahimaj asserts that the Trial Chamber ignored evidence relating to the Kalashnikov rifle that Witness 3 had retained. He further submits that "the only reason Witness 3 was questioned was because he had

[645] Trial Judgement, para. 441 (citing Witness 3, T. 7953-7954 (4 September 2007) (Private Session)).
[646] Trial Judgement, para. 441 (citing Witness 3, T. 7954 (4 September 2007) (Private Session)).
[647] Trial Judgement, para. 441 (citing Witness 3, T. 7955-7956 (4 September 2007) (Private Session)).
[648] Trial Judgement, para. 451.
[649] Brahimaj's Appeal Brief, para. 131.
[650] Brahimaj's Appeal Brief, para. 132.
[651] Brahimaj's Appeal Brief, para. 133.

been asked to account for a Kalashnikov rifle."[652] Lahi Brahimaj states that "no reasonable Trial Chamber could have concluded that the reason for the mistreatment [of Witness 3] was because of Witness 3's perceived ties to Serbs."[653]

295. In response, the Prosecution claims that the Trial Chamber acted reasonably when it found that Lahi Brahimaj accused Witness 3 and others of being traitors for leaving their positions after their failed attempt to defend Grabanica/Grabanicë against Serbian forces. The Prosecution also points out that Lahi Brahimaj interrogated Witness 3 and accused him of supporting the Serbian police and withholding an automatic weapon.[654] The Prosecution adds that the two reasons for torture—supporting the Serbian police and punishment for withholding an automatic weapon—are intertwined, since Lahi Brahimaj "would not have allowed a valuable weapon to be kept from him by a person who[m] he considered as a supporter of the Serb police against the Albanian population."[655]

296. Lahi Brahimaj accused Witness 3 of being a traitor and of collaborating with Serbs. The Trial Judgement explicitly lays out the evidence adduced leading up to the incident during which Witness 3 was detained for two to three days and severely beaten. The Appeals Chamber recalls the evidence on the record specifically relating to a discriminatory motive. When describing his first encounter with Lahi Brahimaj after fleeing the village, Witness 3 stated, "[B]efore going to Gllogjan, Lahi and Alush came and told us that we were traitors, LDK members who were traitors because we had left our positions."[656] Witness 3 noted that Lahi Brahimaj was "very nervous, very angry at us for giving up our positions and withdrawing from the village"[657] and "swore at us all the time".[658] Witness 3 also explained that after he fled his village, he had difficulty finding shelter because "it was known around Jabllanice that whoever was giving shelter to the men of Grabanice should return them to the staff, so they could be returned to the village of Grabanice to defend the village."[659]

297. Witness 3 also recounted the details of his detention in the KLA staff building in Jablanica/Jabllanicë. He explained that Lahi Brahimaj brought him to the KLA staff building in a car, took him to a room, and then left.[660] Shortly after, Witness 3 was beaten unconscious with

[652] Brahimaj's Appeal Brief, para. 133.
[653] Brahimaj's Appeal Brief, para. 134.
[654] Prosecution's Response Brief, para. 63.
[655] Prosecution's Response Brief, para. 63.
[656] Witness 3, T. 7923 (4 September 2007) (Private Session).
[657] Witness 3, T. 7924 (4 September 2007) (Private Session).
[658] Witness 3, T. 7923 (4 September 2007) (Private Session).
[659] *See* Trial Judgement, para. 439; Witness 3, T. 7935 (4 September 2007) (Private Session).
[660] Trial Judgement, para. 440 (citing Witness 3, T. 7943-7945 (4 September 2007) (Private Session)).

baseball bats.[661] Witness 3 was later taken to another room by Lahi Brahimaj, at which point Brahimaj interrogated him and accused him of participating in a rally and supporting the Serb police against the Albanian population.[662]

298. The other individual in the room during the interrogation also accused Witness 3 of collaborating with Serbs, telling Witness 3 to "[a]dmit what [he had] done."[663] He threatened Witness 3 by telling him, "We are going to raise the flag and then when we come back, I will cut your throat and then you have to admit everything."[664] This is why Witness 3 decided to attempt an escape.

299. The evidence that was accepted by the Trial Chamber establishes that Lahi Brahimaj exhibited derision and contempt for Witness 3 on account of his perceived ties to Serbs over an extended period of time and throughout a series of incidents. The record consistently demonstrates that Lahi Brahimaj had the motive to mistreat Witness 3, at least in part, because he perceived him to have collaborated with the Serbs. Accordingly, the Appeals Chamber rejects Lahi Brahimaj's contention that no reasonable Trial Chamber could have concluded that the reason for the mistreatment was because of Witness 3's perceived ties to Serbs.

300. The Appeals Chamber accordingly dismisses Lahi Brahimaj's argument.

3. Whether the Trial Chamber ignored evidence relating to the Kalashnikov rifle

301. The Appeals Chamber notes at the outset that Lahi Brahimaj's blanket statement that the Trial Chamber "ignore[d] the evidence relating to the Kalashnikov rifle" [665] is at odds with the plain text of the Trial Judgement. The Trial Judgement provides two reasons for its findings on the motivations behind the mistreatment of Witness 3 and the resulting torture conviction, one of those reasons being "the beatings of Witness 3 were aimed at punishing him for withholding a weapon".[666]

302. Lahi Brahimaj claims that "Witness 3 explained in evidence that he was actually accused of having an automatic weapon that he had not surrendered and accepted that after the rifle was returned, Selim Ademi agreed with the KLA on Witness 3's behalf that there were no more

[661] Trial Judgement, para. 440 (citing Witness 3, T. 7943, 7945-7946, 7948 (4 September 2007) (Private Session), T. 8009 (5 September 2007) (Private Session)).
[662] Witness 3, T. 7951-7952 (4 September 2007) (Private Session).
[663] Witness 3, T. 7955 (4 September 2007) (Private Session).
[664] Witness 3, T. 7955 (4 September 2007) (Private Session).
[665] Brahimaj's Appeal Brief, para. 133.
[666] Trial Judgement, para. 447.

outstanding issues." Lahi Brahimaj submits that this evidence indicates that Witness 3 was only questioned because of the Kalashnikov rifle.[667]

303. The Appeals Chamber reiterates that a Trial Chamber "does not necessarily have to refer to the testimony of every witness and to every piece of evidence on the record and failure to do so does not necessarily indicate lack of consideration."[668] Nevertheless, the Appeals Chamber will address Lahi Brahimaj's arguments on this point.

304. The evidence that Lahi Brahimaj points to consists of testimony by Witness 3 about a conversation he had after his detention at the KLA staff building in Jablanica/Jabllanicë with an individual called Selim Ademi, who had spoken with Lahi Brahimaj concerning the Kalashnikov rifle. Witness 3 testified that:

> Selim Ademi went to have a word with Lahi, to the effect that I was not to have any problems with him any more. And so they agreed that there was no outstanding issues now that the automatic rifle had been returned.[669]

Witness 3 then testified that, soon after, Lahi Brahimaj confronted Witness 3, called him a "traitor", and directed Witness 3 to follow him, holding a gun behind his head.[670] This evidence indicates that when Witness 3 described this statement that there were to be "no outstanding issues", he did not in fact "accept that there were no more outstanding issues." Rather, he was simply describing a conversation in which it was relayed to him that there would be no outstanding issues. Witness 3's description of this conversation was in the context of explaining that, soon after, he was again taken by Lahi Brahimaj, despite the assurances he received from Selim Ademi. In fact, in cross-examination, when asked whether his return of the rifle had resolved the matter, Witness 3 responded, "That's what I thought it should be, but it did not turn out to be that way."[671]

305. Further, the Appeals Chamber does not find that this evidence vitiates the evidence concerning the comments and accusations made by Lahi Brahimaj as regards Witness 3's perceived involvement with Serbs. The Trial Chamber evaluated all of the evidence surrounding Witness 3's detention at the KLA staff building in Jablanica/Jabllanicë, which included the testimony regarding the issue of Witness 3's perceived ties to Serbs as well as testimony on the subject of the Kalashnikov rifle. The Trial Chamber concluded that there were two motives for the torture of Witness 3: punishment for the retention of the rifle and discrimination for alleged ties to the Serbs.

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[667] Brahimaj's Appeal Brief, para. 133.
[668] *Strugar* Appeal Judgement, para. 24.
[669] Witness 3, T. 7960-7961 (4 September 2007) (Private Session).
[670] Witness 3, T. 7961 (4 September 2007) (Private Session).
[671] Witness 3, T. 8012 (5 September 2007) (Private Session).

306. The Appeals Chamber therefore dismisses Lahi Brahimaj's arguments on this point.

4. Whether Lahi Brahimaj had adequate notice of the "alternative basis" for conviction

307. Lahi Brahimaj avers that the Trial Chamber made an error in convicting him of torture when it concluded that the reason for Witness 3's mistreatment was to punish him for withholding a Kalashnikov rifle, because this material fact was not alleged in the Indictment and he therefore did not have adequate notice of this alternative basis of conviction.[672]

308. The Prosecution responds that the two reasons for the torture are intertwined and that Lahi Brahimaj's attempt to separate them is unfounded. The Prosecution also argues that Lahi Brahimaj would not have allowed a valuable weapon to be kept from him by a person whom he considered to be a supporter of the Serb police. As a result, the Prosecution submits that there was no reason to provide Brahimaj with specific notice relating to the "weapon motive".[673]

309. The Appeals Chamber first notes that Lahi Brahimaj mischaracterises the Trial Chamber's findings when he submits that the Trial Chamber convicted him of torture on the sole basis of his intent to punish Witness 3 for withholding the Kalashnikov rifle. The Trial Chamber did not find that torture was committed on the basis of only one motivation, but rather found that there were two motivations—punishment and discrimination. The Trial Chamber's decision to convict Lahi Brahimaj for torture on account of discrimination for Witness 3's perceived ties to Serbs has already been affirmed by the Appeal Chamber. The question before the Appeals Chamber is thus whether the punishment for withholding a weapon is a separate basis on which the Trial Chamber relied for the torture conviction or whether it was "intertwined" with the discrimination motivation. If it is indeed a separate basis, then the Appeals Chamber must determine whether the Trial Chamber erred in law by relying on a material fact that purportedly should have been pleaded in the Indictment.

310. The Appeals Chamber notes that Lahi Brahimaj is correct in his contention that the Indictment does not plead any facts directly related to Witness 3's withholding of the Kalashnikov rifle. The relevant portions of the Indictment allege the following:

> On or about 13 July 1998, Witness SST7/03, a Kosovar Albanian who refused to fight for the KLA, was asked by Lahi Brahimaj to accompany him to the Jablanica/Jabllanicë KLA headquarters. Upon his arrival at the KLA Jablanica/Jabllanicë headquarters, Lahi Brahimaj detained him with two other men. KLA soldiers beat SST7/03 until he lost consciousness.[674]

[672] Brahimaj's Appeal Brief, para. 135.
[673] Prosecution's Response Brief, para. 63.
[674] Indictment, para. 103.

> On or about 16 July 1998, Witness SST7/03 was taken to an office where Lahi Brahimaj, Idriz Balaj, and two female KLA soldiers were present. Lahi Brahimaj invited the female KLA soldiers to beat Witness SST7/03 which they did using instruments. Lahi Brahimaj and Idriz Balaj encouraged the beating. During the beating Idriz Balaj accused Witness SST7/03 of being a Serbian spy and threatened him. Lahi Brahimaj encouraged Witness SST7/03 to commit suicide. Witness SST7/03 subsequently escaped.[675]

311. The Appeals Chamber does not accept the Prosecution's position that the two motives for the torture of Witness 3 were legally intertwined. The Trial Chamber found that there were two different reasons for the torture—discrimination and punishment. Either reason on its own, if proved, would constitute a sufficient motivation to support a torture conviction. The punishment motive was found only in relation to the withholding of the Kalashnikov rifle, and was treated by the Trial Chamber as legally independent from the discrimination motive, as demonstrated by the Trial Chamber's finding that "Lahi Brahimaj's role in the interrogation establishes his intent […] to inflict serious physical suffering on Witness 3 for the purposes of *punishing him* for withholding a weapon and *discriminating against him* on the basis of his perceived ties to Serbs."[676]

312. The Appeals Chamber notes that pursuant to Article 18(4) of the Statute and Rule 47(C) of the Rules, an indictment must set out a concise statement of the facts and the crime or crimes with which the accused is charged. Furthermore, Articles 21(2), 21(4)(a), and 21(4)(b) provide that in the determination of the charges against him, an accused is entitled to a fair hearing, which includes the right to be informed of the nature and cause of the charges against him and to have adequate time and facilities to prepare his defence. The Appeals Chamber has interpreted these provisions as requiring the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved.[677] A material fact is "dependent on the nature of the Prosecution case", although a decisive factor determining the required degree of specificity is "the nature of the alleged criminal conduct charged".[678] A material fact must always be pleaded with sufficient precision so as to provide notice to the accused.[679] Moreover, where a verdict is "critically dependent" upon a fact, that fact is a material fact that must be pleaded in the indictment because its omission would be prejudicial to the fairness of the trial and the accused's opportunity to defend himself.[680]

313. The Appeals Chamber considers that the punishment motive was a material fact relating to the *mens rea* of the accused that the Prosecution was required to plead in the Indictment. However, the Appeals Chamber observes that the Prosecution failed to plead this fact in the Indictment and

[675] Indictment, para. 105.
[676] Trial Judgement, para. 451 (emphasis added).
[677] *Krnojelac* Appeal Judgement, paras 129-131; *Kupreškić et al.* Appeal Judgement, para. 88.
[678] *Kupreškić et al.* Appeal Judgement, para. 89.
[679] *Muvunyi* Appeal Judgement, para. 18.
[680] *Kupreškić et al.* Appeal Judgement, paras 99, 105.

that neither the Prosecution's Pre-Trial Brief nor its Final Trial Brief even mentions Witness 3's withholding of the Kalashnikov rifle. Consequently, the Appeals Chamber finds that Lahi Brahimaj was not given proper notice of the alternative basis for his torture conviction and that the Trial Chamber erred in convicting Lahi Brahimaj of torture on this basis.

314. Nevertheless, as noted above, the Trial Chamber based Lahi Brahimaj's conviction for torture not only on the punishment motive but also on the discrimination motive. Given that this separate discrimination ground for torture has been affirmed by the Appeals Chamber, the torture conviction stands.

5. Conclusion

315. The Appeals Chamber therefore grants this ground of appeal in part, insofar as it argues that the Trial Chamber erred in finding that the reason for Witness 3's mistreatment was to punish him for withholding a Kalashnikov rifle and in convicting Lahi Brahimaj on this basis. The Appeals Chamber dismisses this ground of appeal in all other respects and upholds Lahi Brahimaj's conviction for torture under Count 32 of the Indictment. There is therefore no impact upon Lahi Brahimaj's sentence.

F. Appeal Against Sentence (Grounds 10-19)

316. As stated above, the Appeals Chamber has not construed the Prosecution's Ground of Appeal 1 as a request to quash the convictions of Lahi Brahimaj on Counts 28 and 32, and Lahi Brahimaj will therefore not be re-tried in relation to those two Counts. Moreover, the Appeals Chamber has affirmed Lahi Brahimaj's convictions under Counts 28 and 32. The Appeals Chamber therefore considers that his present grounds of appeal in relation to his sentence must be dealt with in this Judgement.

317. In the event that Lahi Brahimaj is convicted and sentenced on re-trial for additional counts, the Trial Chamber should carefully take into account the fact that he has already been sentenced to six years of imprisonment for Counts 28 and 32.

318. On appeal, Lahi Brahimaj submits that the Trial Chamber made numerous errors in determining this to be an appropriate sentence.[681]

319. He claims that the Trial Chamber erred: by finding that his previously held position was an aggravating factor (ground 10); by finding that his position as a member of the KLA General Staff

[681] Brahimaj's Notice of Appeal, paras 16-26; Brahimaj's Appeal Brief, paras 137-180.8.

was a high-ranking position and an aggravating factor (ground 11); by finding that his previous position of Deputy Commander of the Dukagjin Zone was a high ranking position within the KLA and an aggravating circumstance (ground 12); by finding that his status had an encouraging effect on soldiers to commit crimes (ground 13); by finding that he committed crimes in the presence of lower-ranking soldiers (ground 14); by finding the special vulnerability of Witness 6 and Witness 3 to be aggravating factors (ground 15); by finding the physical trauma "still being felt" by Witness 6 at the time of his testimony to be an aggravating factor (ground 16); by finding that Witness 3 still suffered physical and mental trauma from his torture and cruel treatment at the time of his testimony (ground 17); by finding that Witness 6's fear at learning of the death of Skender Kuqi augmented the fear for his own life and thus was an aggravating factor (ground 18); by failing to exercise its discretion in that the sentence imposed was manifestly excessive in all the circumstances.[682]

320. The Appeals Chamber takes note of the fact that the Trial Chamber found Lahi Brahimaj guilty of torture as a violation of the laws or customs of war, as charged in Count 28 of the Indictment, and torture and cruel treatment as violations of the laws or customs of war, as charged in Count 32 of the Indictment,[683] and found him not guilty under all other Counts in the Indictment.[684] The Trial Chamber then sentenced Lahi Brahimaj to a single sentence of six years of imprisonment.[685]

1. Standard of review

321. Appeals against sentence, as in the case of appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and not trials *de novo*.[686] Trial Chambers are vested with a broad discretion in determining an appropriate sentence.[687] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[688] It is for the party challenging

[682] Brahimaj's Appeal Brief, paras 137-180.
[683] Trial Judgement, paras 479-481, 504.
[684] Trial Judgement, para. 504.
[685] Trial Judgement, paras 501, 505.
[686] *Krajišnik* Appeal Judgement, para. 734 (citing *Kupreškić et al.* Appeal Judgement, para. 408; *Galić* Appeal Judgement, para. 393; *Bralo* Judgement on Sentencing Appeal, para. 9).
[687] *Krajišnik* Appeal Judgement, para. 734 (citing *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393); *Jokić* Judgement on Sentencing Appeal, para. 8.
[688] *Krajišnik* Appeal Judgement, para. 734 (citing *Blagojević and Jokić* Appeal Judgement, para. 321; *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 393).

the sentence to demonstrate that the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[689]

322. To demonstrate that the Trial Chamber committed a discernible error in exercising its discretion, an appellant is required to show that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or made a decision that was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to properly exercise its discretion.[690]

2. Alleged error in finding a previously held position to be an aggravating factor (Ground 10)

323. Lahi Brahimaj submits that the Trial Chamber erred when it determined that his previously held position of Deputy Commander of the Dukagjin Operational Staff amounted to an aggravating factor. He argues that, while an accused's role as a commander or superior may amount to an aggravating factor, there is no basis for considering a previously held position to be an aggravating factor.[691]

324. The Prosecution responds that the Trial Chamber did not err in finding that Lahi Brahimaj's former position as Deputy Commander was an aggravating factor.[692] It argues that Lahi Brahimaj misrepresents the Trial Chamber's findings and ignores other relevant findings.[693] The Prosecution asserts that, although the Trial Chamber found that Lahi Brahimaj was not a Deputy Commander when most of the crimes were committed, the Trial Chamber also found that he was a member of the KLA General Staff at the relevant time, and took both findings into account when concluding that Lahi Brahimaj held positions of authority.[694] The Prosecution further submits that the Trial Chamber's finding that Lahi Brahimaj "was 'not the Deputy Commander when *most* of the crimes were committed'" indicates that the Trial Chamber considered that Lahi Brahimaj was aware that *some* crimes were committed while he was Deputy Commander, and thus did not find that his previously held position constituted an aggravating factor.[695] Finally, the Prosecution argues that

[689] *Krajišnik* Appeal Judgement, para. 734 (citing *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393; *Čelebići* Appeal Judgement, para. 725).
[690] *Krajišnik* Appeal Judgement, para. 735 (citing *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 394; *M. Nikolić* Judgement on Sentencing Appeal, para. 95; *Babić* Judgement on Sentencing Appeal, para. 44).
[691] Brahimaj's Appeal Brief, paras 138-139.
[692] Prosecution's Response Brief, paras 66, 70.
[693] Prosecution's Response Brief, para. 67.
[694] Prosecution's Response Brief, para. 67.
[695] Prosecution's Response Brief, para. 68.

Lahi Brahimaj ignores the Trial Chamber's finding that he committed the crimes in the presence of lower-ranking KLA soldiers.[696]

325. In his Reply Brief, Lahi Brahimaj disagrees with the Prosecution that the Trial Chamber's finding that he was "not the Deputy Commander when most of the crimes were committed" means that "the Chamber was aware that Brahimaj committed *some* crimes during his tenure as Deputy Commander".[697] He argues:

> […] there was no evidence that he ever exercised the responsibilities of Deputy Commander or even that he was physically present at Jablanica/Jabllanicë, where the crimes were alleged to have been committed, at any time during the 12 day period between Ramush Haradinaj nominating him to that position on 23 June and then relieving him of it on 5 July as a result of his repeated absence from the Dukagjin Zone.[698]

326. The Appeals Chamber notes that the Trial Chamber first took into account as an aggravating factor the fact that Lahi Brahimaj held high-ranking positions in the KLA: he was a member of the KLA General Staff and was the Deputy Commander of the Dukagjin Operational Staff for some time in June and early July 1998, although he was not the Deputy Commander when most of the crimes were committed.[699] The Trial Chamber also took into account the fact that Lahi Brahimaj committed the crimes in the presence of lower-ranking KLA soldiers and was present when other soldiers behaved similarly.[700] Based upon this evidence, the Trial Chamber found that "this cannot but have had an encouraging effect on the soldiers to commit or continue to commit such crimes. High-ranking officials should be the first to refrain from the commission of crimes in order to prevent others from seeing this behaviour as permissible and imitating it."[701]

327. When the findings of the Trial Chamber are read as a whole, it is clear that the Trial Chamber was analysing the evidence in relation to whether Lahi Brahimaj abused his position of authority. In this regard, the Appeals Chamber recalls that a superior position, in and of itself, does not constitute an aggravating factor; rather, it is the abuse of such position that is considered to be an aggravating factor.[702] The Appeal Chamber is of the view that it was permissible for the Trial Chamber, in determining for sentencing purposes whether Lahi Brahimaj abused his authority, to look to one of his previously held positions of authority, in circumstances where he used the

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[696] Prosecution's Response Brief, para. 69.
[697] Brahimaj's Reply Brief, para. 14 (emphasis in original).
[698] Brahimaj's Reply Brief, para. 14 (emphasis in original).
[699] Trial Judgement, para. 491.
[700] Trial Judgement, para. 491.
[701] Trial Judgement, para. 491.
[702] *See D. Milošević* Appeal Judgement, para. 302; *Martić* Appeal Judgement, para. 350; *Simba* Appeal Judgement, paras 237-241, 284; *Stakić* Appeal Judgement, para. 411 (citing *Kayishema and Ruzindana* Appeal Judgement, paras 358-359; *Babić* Judgement on Sentencing Appeal, para. 80; *Kamuhanda* Appeal Judgement, para. 347; *Aleksovski* Appeal Judgement, para. 183; *Ntakirutimana* Appeal Judgement, para. 563; *Krstić* Trial Judgement, para. 709).

influence he derived from such a position to lend encouragement and approval to the commission of crimes.[703]

328. Consequently, the Appeals Chamber dismisses this ground of appeal.

3. Alleged error in finding that Lahi Brahimaj's position in the KLA General Staff was a high ranking position within the KLA and thus an aggravating circumstance (Ground 11)

329. Lahi Brahimaj submits that the Indictment did not allege that he held a high-ranking position in the KLA or that persons who engaged in misconduct were his subordinates.[704] He also asserts that the evidence did not support the Trial Chamber's conclusion that he held a high-ranking position, as it demonstrated that he was a staff officer within the KLA General Staff who was responsible for finances and not "a command officer responsible for training, supervising or disciplining soldiers in the field."[705] He further asserts that the Trial Chamber failed to consider that the General Staff was a clandestine organisation and that few persons in the Dukagjin Zone were aware that he belonged to it.[706]

330. In response, the Prosecution points out that the Indictment did indeed allege that Lahi Brahimaj held high-ranking positions.[707] The Prosecution argues that Lahi Brahimaj has misunderstood the Trial Chamber's findings and the jurisprudence upon which it relied. The Prosecution asserts that the Trial Chamber's findings were informed by the rank of Lahi Brahimaj relative to those present when he committed the crimes, which the Trial Chamber found had an encouraging effect. Moreover, the Prosecution argues that the Trial Chamber "alluded to the fact that Brahimaj's commission of the crimes of cruel treatment and torture in the presence of lower-ranking KLA soldiers constituted […] an abuse of his level of authority" and thus served as an aggravating factor.[708]

331. The Appeals Chamber considers that it was clearly alleged in the Indictment that Lahi Brahimaj held a high-ranking position in the KLA and that persons who engaged in misconduct were under his authority. In this regard, the Appeals Chamber notes that the Indictment alleged that Lahi Brahimaj was a member of the KLA at all times relevant to the Indictment;[709] ran the KLA detention facility at Jablanica/Jabllanicë Headquarters from at least April 1998 to about

[703] *See Aleksovski* Appeal Judgement, para. 183.
[704] Brahimaj's Appeal Brief, paras 140-141.
[705] Brahimaj's Appeal Brief, paras 142-145; *see also* Brahimaj's Reply Brief, para. 15.
[706] Brahimaj's Appeal Brief, paras 146-151.
[707] Prosecution's Response Brief, para. 70.
[708] Prosecution's Response Brief, paras 73-74.
[709] Indictment, para. 12.

5 July 1998;[710] and was appointed Deputy Commander of the Dukagjin Operative Staff from 23 June 1998 until 5 July 1998.[711] It also alleges that, when he was removed from the position of Deputy Commander, he continued to serve as "Finance Director of the KLA General Staff".[712] In addition, the Indictment alleged that Lahi Brahimaj condoned and encouraged the criminal conduct of other KLA soldiers, until mid-September 1998, including soldiers at the KLA detention facility at Jablanica/Jabllanicë and "military police and other persons who attacked and otherwise mistreated civilians in the Dukagjin Operational Zone".[713] Lahi Brahimaj's argument that the Indictment did not allege that he held a high-ranking position in the KLA or that persons who engaged in misconduct were under his authority is therefore without merit.

332. The Appeals Chamber also finds that there is ample evidence to support the Trial Chamber's finding that Lahi Brahimaj "held high-ranking positions in the KLA."[714] In this regard, the Appeals Chamber notes that Bislim Zyrapi, who was Director of the Operational Department,[715] testified that Lahi Brahimaj was a member of the KLA General Staff and Director of the Finance Department of the KLA General Staff.[716] Bislim Zyrapi also stated that, prior to taking up this position, Lahi Brahimaj was Deputy Commander of the Dukagjin Operational Zone,[717] that in mid-July 1998, Lahi Brahimaj conveyed to him an order from the General Staff to return to Rahovec, and that they went to Rahovec together.[718] Furthermore, Jakup Krasniqi testified that, when he required information about the "Dukagjini Zone" after the fighting had commenced, the first person he would speak to was Lahi Brahimaj, who was a member of the General Staff.[719] As regards Lahi Brahimaj's suggestion that his position in the KLA General Staff was not high-ranking because he was a "staff officer" in charge of finances rather than a "command officer",[720] the Appeals Chamber notes that the evidence demonstrated that Lahi Brahimaj was not only a member of the Finance Department of the KLA General Staff, but was its Director.[721] Based upon the above evidence, it was reasonable for the Trial Chamber to conclude that Lahi Brahimaj held a position of authority within the KLA General Staff.

333. In support of his argument that the Trial Chamber failed to consider that the General Staff was a clandestine organisation and that few persons in the Dukagjin Zone were aware that Lahi

[710] Indictment, para. 32.
[711] Indictment, para. 12.
[712] Indictment, para. 12.
[713] Indictment, paras 12 and 32.
[714] Trial Judgement, para. 491.
[715] Zyrapi, T. 3208 (23 April 2007) (Open Session).
[716] Zyrapi, T. 3212-3213 (23 April 2007) (Open Session).
[717] Zyrapi, T. 3213 (23 April 2007) (Open Session).
[718] Zyrapi, T. 3234-3235, 3239 (23 April 2007) (Open Session).
[719] Krasniqi, T. 5077-5078 (30 May 2007) (Open Session).
[720] Brahimaj's Appeal Brief, para. 143.
[721] Zyrapi, T. 3212-3213 (23 April 2007) (Open Session).

Brahimaj belonged to it, Lahi Brahimaj refers to Exhibit P141, which is a record of minutes from a working meeting of the Dukagjin Staff on 23 June 1998. The Appeals Chamber notes that the general topic of the meeting was the organisation of the KLA into "a regular army".[722] In the words of Ramush Haradinaj, "[t]he clandestine method [of the KLA] produced its own results," referring to the fact that the war was not the property of any one group, but rather was "about the liberation of the country by means of […] a general insurgency."[723] The Appeals Chamber notes that the minutes record that "Agron" stated: "Lahi was the representative of the Central Staff of the Plain of Dukagjin. Perhaps this was a secret. The staff has been in existence from 1993 until now."[724] The minutes also show that several people at the meeting knew Lahi Brahimaj and that it was decided, upon the proposal of Captain Tetaj, that Ramush Haradinaj would be made a Commander and "Lahi" his Deputy.[725] The Appeals Chamber has already found that the Trial Chamber's conclusion that Lahi Brahimaj held a high-ranking position was reasonable. The Appeals Chamber does not consider that whether the KLA operated clandestinely or the number of persons in the Dukagjin Zone who knew Lahi Brahimaj belonged to the KLA is relevant to determining whether Lahi Brahimaj held a high ranking position in the KLA. Thus, the Trial Chamber was not required to consider these factors, and Lahi Brahimaj has demonstrated no error on the part of the Trial Chamber.

334. Consequently, the Appeals Chamber dismisses this ground of appeal.

4. Alleged error in finding that Lahi Brahimaj's previous position of Deputy Commander of the Dukagjin Zone was a high ranking position within the KLA and thus an aggravating circumstance (Ground 12)

335. Lahi Brahimaj contends that there was no evidence, other than his formal appointment, that he ever exercised the responsibilities of Deputy Commander of the Dukagjin Zone and that, in fact, there was evidence to the contrary. He further argues that, in finding that he held high-ranking positions, the Trial Chamber did not take into account that he only held the post of Deputy Commander of the Dukagjin Zone for a relatively short period of time.[726]

336. The Prosecution responds to grounds of appeal 11 and 12 together, so its response to ground of appeal 12 can be found in the previous section.[727]

[722] P141 (Hand-written minutes of the work meeting, 23 June 1998, held in Jablanica/Jabllanicë), pp. 1-2.
[723] P141 (Hand-written minutes of the work meeting, 23 June 1998, held in Jablanica/Jabllanicë), p. 1.
[724] P141 (Hand-written minutes of the work meeting, 23 June 1998, held in Jablanica/Jabllanicë), p. 6.
[725] P141 (Hand-written minutes of the work meeting, 23 June 1998, held in Jablanica/Jabllanicë), p. 7.
[726] Brahimaj's Appeal Brief, paras 152-154. *See also* Brahimaj's Reply Brief, para. 14.
[727] Prosecution's Response Brief, paras 73-74.

337. Lahi Brahimaj cites Exhibit P161 in support of his argument that there was evidence to contradict the finding that he ever exercised the responsibilities of Deputy Commander of the Dukagjin Operational Staff. Exhibit P161 is a letter of reprimand from Ramush Haradinaj addressed to "Lahi Brahimaj, Deputy Commander of the Operational Headquarters of the Plain of Dukagjinit", dated 4 July 1998. The letter states:

> - Following our request for a working meeting that, due to your absence from the zone of responsibility to which you belong, failed to take place twice in a row, we address to you this reprimand from us, requesting you to carry out your work faithfully.
>
> - We ask for this behaviour not to be repeated.[728]

Lahi Brahimaj was discharged the following day.[729] Although the Trial Chamber did not discuss Exhibit P161 in the Trial Judgement, the Appeals Chamber finds that Exhibit P161 does not support Lahi Brahimaj's proposition that he never exercised the responsibilities of Deputy Commander. To the contrary, Exhibit P161 demonstrates that (a) Lahi Brahimaj exercised responsibility as Deputy Commander, given that he was required to attend a working meeting in his capacity of Deputy Commander; (b) was reprimanded for failing to attend the meeting; and (c) was called upon by Ramush Haradinaj to faithfully continue carrying out his responsibilities as Deputy Commander. The Appeals Chamber therefore finds that the evidence showing that Lahi Brahimaj was reprimanded for his absence from his zone of responsibility and then discharged the next day does not render the Trial Chamber's finding unreasonable.

338. Regarding Lahi Brahimaj's argument that the Trial Chamber did not take into account the fact that he only held his position for a short amount of time, the Appeals Chamber notes the Trial Chamber's finding that Lahi Brahimaj was the Deputy Commander of the Dukagjin Operational Staff "for some time in June and early July 1998", although he was not the Deputy Commander when most of the crimes were committed.[730] In drawing this conclusion, the Trial Chamber considered the evidence of Rrustem Tetaj that Lahi Brahimaj was appointed Deputy Commander at a meeting held on 23 June 1998 in Lahi Brahimaj's house and the evidence of Jakup Krasniqi that Lahi Brahimaj was a member of the General Staff in July 1998.[731] The Appeals Chamber therefore concludes that, contrary to Lahi Brahimaj's contention, the Trial Chamber explicitly considered the

[728] P161 (Reprimand signed by Ramush Haradinaj to Lahi Brahimaj, Deputy Commander of Dukagjin region for leaving his AOR without permission and for his failure to arrange a work meeting twice, 4 July 1998).
[729] P168 (Order signed by Ramush Haradinaj of dismissal of Lahi Brahimaj and appointment of Nazmi Brahimaj as Deputy Commander of Dukagjin Plain Operative Staff, 5 July 1998).
[730] Trial Judgement, para. 491.
[731] *See* Trial Judgement, para. 491, fn. 2442.

duration of time that Lahi Brahimaj held the position of Deputy Commander of the Dukagjin Operational Staff, as well as the nature of his position.[732]

339. The Appeals Chamber consequently dismisses this ground of appeal.

5. Alleged error in finding that Lahi Brahimaj encouraged soldiers to commit crimes (Ground 13)

340. Lahi Brahimaj submits that the Trial Chamber erred in concluding that his "status" had an encouraging effect on soldiers to commit crimes, because the evidence did not show that Lahi Brahimaj held a position of commander at the times of the offences or that any other individuals who may have been present were aware or thought that he held a position as a commander. He also argues that, if the Trial Chamber intended to find that any high-ranking command position that he previously held caused soldiers to commit crimes, there was no evidence to this effect and any such finding would amount to speculation.[733]

341. The Prosecution responds that Lahi Brahimaj's argument should be dismissed, as it challenges a finding on which the final conclusion of the Trial Chamber does not rely. The Prosecution argues that the purported finding of the Trial Chamber that Brahimaj's commission of crimes in the presence of lower-ranking soldiers cannot but have had an encouraging effect on their own commission of crimes can be regarded as the Trial Chamber's explanation for its previous finding that Lahi Brahimaj "committed the crimes in the presence of lower-ranking KLA soldiers and was present when other soldiers behaved similarly."[734]

342. The Appeals Chamber again recalls the findings of the Trial Chamber:

> The Trial Chamber also exercises its discretion in this respect because Brahimaj committed the crimes in the presence of lower ranking KLA soldiers and was present when other soldiers behaved similarly. The Trial Chamber finds that this cannot but have had an encouraging effect on the soldiers to commit or continue to commit such crimes. High-ranking officials should be the first to refrain from the commission of crimes in order to prevent others from seeing this behaviour as permissible and imitating it.[735]

The Appeals Chamber has already found that the Trial Chamber's conclusion that Lahi Brahimaj held a high-ranking position was reasonable. The argument made by Lahi Brahimaj is that the Trial Chamber erred in finding this to be an aggravating factor because it had not been established that crimes were committed at the time he held a command position. The Appeals Chamber recalls that the Trial Chamber held that Lahi Brahimaj, for some time in June and early July 1998, was Deputy

[732] Trial Judgement, para. 491.
[733] Brahimaj's Appeal Brief, para. 157.
[734] Prosecution's Response, para. 75.
[735] Trial Judgement, para. 491.

Commander of the Dukagjin Operational Staff.[736] The crimes against Witness 6 were committed on 13-14 June; he was held for about four weeks and was released on 25 July.[737] The crimes against Witness 3 were committed in early to mid-July during a period of three days. Witness 3 then escaped; and, ten days later, Lahi Brahimaj committed more crimes against him.[738] Based upon the fact that Lahi Brahimaj was a member of the KLA General Staff and was Deputy Commander of the Dukagjin Operational Staff for some time in June and early July 1998, the Trial Chamber held that, although he was not the Deputy Commander when most of the crimes were committed, he should still receive an aggravated sentence.[739] The Appeals Chamber notes that Lahi Brahimaj committed the crimes against Witness 6 during the time period when he was Deputy Commander. In respect of Witness 3, some of the crimes were committed during a time period substantially overlapping with the period when he was Deputy Commander, with more crimes being committed ten days later. Consequently, the Trial Chamber's conclusion was reasonable.

343. Accordingly, the Appeals Chamber dismisses this ground of appeal.

6. Alleged error in finding that crimes were committed in the presence of lower-ranking soldiers (Ground 14)

344. Lahi Brahimaj submits that the Trial Chamber erred when it concluded that he committed crimes in the presence of lower-ranking officers. He argues that there was no evidence of the presence of lower-ranking soldiers when the crimes against Witness 3 and Witness 6 were committed.[740] Lahi Brahimaj also argues that the Indictment did not allege that he committed offences in the presence of lower-ranking soldiers.[741]

345. The Prosecution responds that Lahi Brahimaj misrepresents the Trial Chamber's findings. It argues that a reading of the Trial Judgement shows the presence of lower ranking-soldiers when Lahi Brahimaj committed crimes against both Witness 3 and Witness 6.[742]

346. The Appeals Chamber has already held in ground of appeal 11 that the Indictment adequately pleaded that Lahi Brahimaj held a high-ranking position in the KLA and that persons who engaged in misconduct were under his authority.

[736] Trial Judgement, para. 491.
[737] Trial Judgement, paras 382-384, 391-395.
[738] Trial Judgement, paras 440, 443-451.
[739] Trial Judgement, para. 491.
[740] Brahimaj's Appeal Brief, paras 159-164.
[741] Brahimaj's Appeal Brief, para. 160.
[742] Prosecution's Response Brief, paras 76-83.

347. The Appeals Chamber has confirmed the Trial Chamber's finding that Lahi Brahimaj held high-ranking positions in the KLA. In addition, the Trial Chamber found that, during Witness 3's detention, Lahi Brahimaj brought him to his room in the KLA staff building in Jablanica/Jabllanicë.[743] Two women and another man were present in the room, all of them wearing black uniforms.[744] Lahi Brahimaj and the other man had the "PU" (military police) insignia on their sleeves.[745] Lahi Brahimaj interrogated Witness 3, accused him of supporting the Serbian police,[746] and told the women to "practice" on Witness 3, which they did by beating Witness 3 on his hands for five to ten minutes with a telescope.[747] Lahi Brahimaj then handed his revolver to Witness 3 and told him to kill himself.[748] Witness 3 took the revolver and laughed. One of the women then took the revolver and returned it to Lahi Brahimaj.[749] Witness 6 testified that, on his second day at the Jablanica/Jabllanicë compound (14 June 1998), he was moved to a room in a four-room, one-storey red-brick house in the middle of the yard.[750] He was detained there for the rest of his time in Jablanica/Jabllanicë.[751] Witness 6 testified that Lahi and Nazmi Brahimaj beat him in this room with their fists and baseball bats and were sometimes present when others beat him.[752]

348. The Appeals Chamber is of the view that the evidence shows that Lahi Brahimaj was clearly in control of the mistreatment of Witnesses 3 and 6, whether he was beating them himself, being assisted by others, or directing the actions of others. Based upon this evidence, as well as the evidence that Lahi Brahimaj was a high-ranking official in the KLA, it was reasonable for the Trial Chamber to conclude that the KLA soldiers who were present when Lahi Brahimaj committed crimes or who committed crimes in his presence were lower-ranking than Lahi Brahimaj.

349. Consequently, the Appeals Chamber dismisses this ground of appeal.

7. Alleged error in relation to the special vulnerability of Witnesses 3 and 6 (Ground 15)

350. Lahi Brahimaj submits that the Trial Chamber erred in law and fact in finding that Witness 3 and Witness 6 were especially vulnerable and that this vulnerability constituted an aggravating

[743] Trial Judgement, paras 440-441 (citing Witness 3, T. 7951, 7958 (4 September 2007) (Private Session); P914 (Photograph on which Witness 3 marked his escape route and Lahi Brahimaj's room)).
[744] Trial Judgement, para. 441 (citing Witness 3, T. 7952 (4 September 2007) (Private Session)).
[745] Trial Judgement, para. 441 (citing Witness 3, T. 8020 (5 September 2007) (Private Session)).
[746] Trial Judgement, para. 441 (citing Witness 3, T. 7952-7953 (4 September 2007) (Private Session)).
[747] Trial Judgement, para. 441 (citing Witness 3, T. 7953-7954 (4 September 2007) (Private Session)).
[748] Trial Judgement, para. 441 (citing Witness 3, T. 7954 (4 September 2007) (Private Session)).
[749] Trial Judgement, para. 441 (citing Witness 3, T. 7954-7955 (4 September 2007) (Private Session)).
[750] Witness 6, T. 5204-5205, 5216 (1 June 2007) (Open Session), T. 5316, 5324 (4 June 2007) (Open Session); P332 (Photo of Jablanica/Jabllanicë compound).
[751] Witness 6, T. 5205, 5213, 5216 (1 June 2007) (Open Session), T. 5316-5317, 5325, 5347 (4 June 2007) (Open Session).
[752] Witness 6, T. 5205, 5208-5209, 5213, 5216, 5219-5221 (1 June 2007) (Open Session), T. 5316-5317, 5325, 5347, 5372-5373 (4 June 2007) (Open Session).

factor.[753] Lahi Brahimaj argues that Witnesses 3 and 6 were both of Albanian origin, male, previously armed, and were visited at the barracks by family members and villagers who knew they were there. Lahi Brahimaj also points out that Witness 3 was a combatant who had previously fought with the KLA. He therefore submits that their "vulnerability" was "extremely limited" and that they were in a "very different category from the vulnerability of victims" in cases referred to in the Trial Judgement, such as *Kunarac et al.*, where women and girls under the age of 18 were raped.[754] Lahi Brahimaj also notes that he was not convicted for the offence of imprisonment.[755]

351. The Prosecution responds that Lahi Brahimaj has failed to show that no reasonable Trial Chamber would have found that these detained and disarmed men were particularly vulnerable at the time the crimes were committed.[756]

352. The Appeals Chamber notes that the Trial Chamber took the vulnerability of Witness 3 and Witness 6 into account when it assessed the gravity of the offences rather than as an aggravating factor. The Trial Chamber considered the special vulnerability of the witnesses who were held in confinement, stating that "[t]hey were not only deprived of their liberty but also detained under such conditions that left them at the complete mercy of their captors in Jablanica/Jabllanicë."[757] The Trial Chamber then concluded that "the vulnerability of the victims and the physical and mental trauma suffered by them" were "factors [that made] up the gravity of the offence and the totality of the conduct in this case."[758] Lahi Brahimaj's argument that this was taken into account by the Trial Chamber as an aggravating factor therefore reflects an incorrect reading of the Trial Judgement.

353. Consequently, the Appeals Chamber dismisses this ground of appeal.

8. Alleged error in finding that Witness 3 and Witness 6 still felt physical trauma at the time of their testimony (Grounds 16 and 17)

354. Lahi Brahimaj submits that the Trial Chamber erred when it concluded that Witness 3 and Witness 6 were still suffering physical and mental trauma at the time of their testimony and that such trauma constituted an aggravating factor.[759] Lahi Brahimaj argues that, "[a]lthough the Trial Chamber noted that Witness 6 gave evidence of chronic pain all over his body and an inability to perform physical work, the evidence did not support his story".[760] He asserts that the only physical

[753] Brahimaj's Appeal Brief, para. 165; Brahimaj's Notice of Appeal, para. 21.
[754] Brahimaj's Appeal Brief, para. 166.
[755] Brahimaj's Appeal Brief, para. 167.
[756] Prosecution's Response Brief, paras 84-85.
[757] Trial Judgement, para. 492 (internal citations omitted).
[758] Trial Judgement, para. 493.
[759] Brahimaj's Appeal Brief, paras 172-174.
[760] Brahimaj's Appeal Brief, para. 168.

injury noted by the doctor who examined Witness 6 immediately after his departure from Jablanica/Jabllanicë was a fractured wrist that had healed and did not require treatment. Moreover, the X-ray was never produced as evidence.[761] Lahi Brahimaj also contends that there was no evidence that Witness 6 was taking any medication from the time of his injuries, including in 2007 at the time of his testimony before the Trial Chamber.[762] Finally, Lahi Brahimaj points out that there was no independent medical evidence adduced to demonstrate Witness 6's continuing physical or psychological pain or suffering.[763] Lahi Brahimaj also re-asserts his challenge to Witness 6's credibility.[764]

355. With respect to Witness 6, the Prosecution responds that Lahi Brahimaj's argument is nothing more than a continued attack upon the Trial Chamber's finding that Witness 6 was credible; however, according to the Prosecution, Lahi Brahimaj has failed to supply sufficient reasons to doubt the Trial Chamber's credibility assessment.[765] With respect to Witness 3, the Prosecution responds that, although Witness 3 did not expressly state that he still felt physical pain and mental trauma from the cruel treatment, the Trial Chamber was entitled to infer the lasting impact, given the nature and extent of the beatings and torture.[766]

356. The Trial Chamber considered the "physical and mental trauma suffered and still being felt" by the two Witnesses.[767] In adopting such a broad approach, the Trial Chamber considered the lasting physical consequences from the beatings and related ongoing mental trauma. This conclusion lay within the bounds of the Trial Chamber's discretion. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in considering "the vulnerability of the victims and the physical and mental trauma suffered by them" as factors going to the gravity of the offences.[768]

357. The Appeals Chamber therefore dismisses these grounds of appeal.

9. Alleged error in finding that Witness 6's fear upon learning of Skender Kuqi's death augmented his fear for his own life and thus was an aggravating factor (Ground 18)

358. Lahi Brahimaj argues that the Trial Chamber erred in fact and law when it concluded that Witness 6's fear upon learning of Skender Kuqi's death augmented his fear for his own life and thus

[761] Brahimaj's Appeal Brief, para. 169.
[762] Brahimaj's Appeal Brief, para. 170.
[763] Brahimaj's Appeal Brief, paras 168-171.
[764] Brahimaj's Appeal Brief, para. 168.
[765] Prosecution's Response Brief, paras 86-87.
[766] Prosecution's Response Brief, paras 88-90.
[767] Trial Judgement, para. 492.

was an aggravating factor.[769] First, Lahi Brahimaj points out that he was not held responsible for any mistreatment of Skender Kuqi and therefore should not receive a higher sentence on this basis.[770] Second, he contends that the Trial Chamber did not hear any evidence that learning of Skender Kuqi's death caused Witness 6 to fear for his life.[771] Third, according to Lahi Brahimaj, "[i]t does not appear" that the Trial Chamber took into account the fact that, at the time Witness 6 heard of the death of Skender Kuqi, he was free to move around the meadow outside the barracks (where one could see around for several thousand metres), wandered around the yard, washed dishes, and chose not to escape, although he had the opportunity to do so.[772]

359. The Prosecution responds that, although Witness 6 did not testify that the fear he felt for his own life was heightened by his knowledge that a fellow detainee had been killed, it was nonetheless reasonable for the Trial Chamber to infer this fact based upon the available evidence.[773] The Prosecution contends that Witness 6 was detained for four weeks, during which he was regularly beaten and kicked, sometimes to the point of unconsciousness. It is also pointed out by the Prosecution that Witness 6 testified that Skender Kuqi had been beaten on the same day that he was beaten.[774]

360. The Trial Chamber held as follows:

> The Trial Chamber has considered the special vulnerability of Witness 3 and Witness 6 who were held in confinement. They were not only deprived of their liberty but also detained under such conditions that left them at the complete mercy of their captors in Jablanica/Jabllanicë. Finally, the Trial Chamber has considered the physical and mental trauma suffered and still being felt by the two victims. Witness 6 testified how he saw the beating of Skender Kuqi and later learned that Kuqi had been sent for treatment in Glodane/Gllogjan where he died. To learn about this fate of another detainee while remaining in detention and having been subjected to ill-treatment himself, must have added to Witness 6's fear for his life. […][775]

> The Trial Chamber has concluded that Lahi Brahimaj should be convicted of two instances of torture and one instance of cruel treatment. The Trial Chamber has considered the inherent seriousness of these crimes and that Lahi Brahimaj, who held high-ranking positions in the KLA, participated directly in the commission of them. The Trial Chamber has also considered the vulnerability of the victims and the physical and mental trauma suffered by them. All these factors make up the gravity of the offence and the totality of the conduct in this case.[776]

361. The Appeals Chamber notes that, contrary to Lahi Brahimaj's argument, the Trial Chamber did take into account the fact that Witness 6 had a certain amount of freedom within the

[768] Trial Judgement, para. 493. The Appeals Chamber notes that Brahimaj raises this error as an "aggravating factor" wrongly taken into consideration rather than a factor going to the gravity of the offence.
[769] Brahimaj's Appeal Brief, paras 175-179.
[770] Brahimaj's Appeal Brief, para. 176.
[771] Brahimaj's Appeal Brief, para. 177.
[772] Brahimaj's Appeal Brief, para. 178 (internal citations omitted).
[773] Prosecution's Response Brief, paras 91-92.
[774] Prosecution's Response Brief, para. 92.
[775] Trial Judgement, para. 492 (internal citations omitted).
[776] Trial Judgement, para. 493.

Jablanica/Jabllanicë compound and did not attempt to escape.[777] The Trial Chamber specifically recalled Witness 6's testimony that he did not try to escape because he "didn't want to take that chance".[778] Lahi Brahimaj is therefore mistaken when he claims that the Trial Chamber did not take this evidence into account. Moreover, the Appeals Chamber recalls that Witness 6 was a prisoner for four weeks and was severely beaten by Lahi Brahimaj personally and by others, which the Trial Chamber found constituted cruel treatment and torture.[779] The Appeals Chamber rejects Lahi Brahimaj's suggestion that a person in such circumstances did not fear for his life because he had a certain level of freedom of movement in the compound and did not try to escape.

362. As to Lahi Brahimaj's argument that his sentence should not be affected by the murder of Skender Kuqi because he was not held responsible for it, the Appeals Chamber notes that the Trial Chamber found that Skender Kuqi was murdered by KLA soldiers while in custody at the Jablanica/Jabllanicë compound.[780] The Trial Chamber did not take the murder of Skender Kuqi into account in determining the gravity of Lahi Brahimaj's offences, but rather the increased fear Witness 6 must have felt when he heard of Skender Kuqi's death in circumstances that were very similar to his own. Due to Lahi Brahimaj's role in the Jablanica/Jabllanicë compound and his active participation in beatings there, it was reasonable for the Trial Chamber to infer that hearing of the death of Skender Kuqi caused Witness 6's fear that he would suffer the same fate to increase.

363. The Appeals Chamber acknowledges that there was no direct evidence that learning of the death of Skender Kuqi caused Witness 6's fear to increase. However, considering the circumstances and the evidence as a whole, the Appeals Chamber finds that the Trial Chamber's conclusion in this regard was reasonable.

364. The Appeals Chamber therefore dismisses this ground of appeal.

10. Alleged error of the Trial Chamber in failing to correctly exercise its discretion given that the sentence imposed was manifestly excessive in all the circumstances (Ground 19)

365. Lahi Brahimaj submits that the Trial Chamber erred when it failed to correctly exercise its discretion, given that the sentence imposed was manifestly excessive in the circumstances of his case.[781] He enumerates eight sub-grounds of appeal.

[777] Trial Judgement, para. 383.
[778] Trial Judgement, para. 383 (citing Witness 6, T. 5243 (1 June 2007) (Open Session), T. 5349 (4 June 2007) (Open Session)).
[779] Trial Judgement, para. 395.
[780] Trial Judgement, paras 433-435.
[781] Brahimaj's Appeal Brief, paras 180-180.8.

366. The Prosecution responds that Lahi Brahimaj does not establish that the Trial Chamber's sentencing decision was one that no reasonable Trial Chamber could have made.[782] The Prosecution further contends that this ground contains allegations that are either repetitive or irrelevant.[783]

367. In sub-ground 19.1, Lahi Brahimaj argues that the torture and cruel treatment for which he was found guilty was neither systematic nor widespread.[784] The Appeals Chamber notes that Lahi Brahimaj was convicted of two counts of violations of the laws or customs of war under Article 3 of the Statute, but acquitted of all counts of crimes against humanity under Article 5 of the Statute.[785] Lahi Brahimaj appears to argue that he should receive a lighter sentence because he was acquitted of crimes against humanity. The Appeals Chamber recalls, however, that it has held:

> there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.[786]

Lahi Brahimaj's contention that he should receive a more lenient sentence because he was convicted for violations of the laws or customs of war, rather than crimes against humanity, is therefore incorrect as a matter of law. This sub-ground of appeal is accordingly dismissed.

368. In sub-ground 19.2, Lahi Brahimaj asserts that he shares the same Albanian ethnicity with Witnesses 3 and 6.[787] The Appeals Chamber summarily dismisses this sub-ground of appeal based on the fact that it is an undeveloped argument or alleged error.[788]

369. In sub-ground 19.3, Lahi Brahimaj submits that Witnesses 3 and 6 were male and were either armed or had participated in combat. He further submits that Witness 6 was in possession of an unauthorised firearm and that Witness 3 was a combatant who had fought with the KLA and who was in possession of a Kalashnikov rifle.[789] This sub-ground of appeal has already been dismissed above under ground 15.

370. In sub-ground 19.4, Lahi Brahimaj submits that the Trial Chamber did not find that he was responsible for establishing or operating the barracks at which Witnesses 3 and 6 were held.[790] The

[782] Prosecution's Response, para. 94.
[783] Prosecution's Response, para. 94.
[784] Brahimaj's Appeal Brief, para. 180.1.
[785] Trial Judgement, para. 504.
[786] *Tadić* Sentencing Appeal Judgement, para. 69.
[787] Brahimaj's Appeal Brief, para. 180.2.
[788] *Krajišnik* Appeal Judgement, para. 26; *Galić* Appeal Judgement, para. 297.
[789] Brahimaj's Appeal Brief, para. 180.3.
[790] Brahimaj's Appeal Brief, para. 180.4.

Appeals Chamber finds that this sub-ground of appeal is an undeveloped argument or alleged error.[791] This sub-ground of appeal is therefore summarily dismissed.

371. In sub-ground 19.5, Lahi Brahimaj submits that the Trial Chamber did not find that he held a command role at the barracks.[792] The Appeals Chamber has already addressed the issue of Lahi Brahimaj's level of authority at Jablanica/Jabllanicë under grounds 11, 12, and 13, which have been dismissed. Moreover, the Appeals Chamber finds that this sub-ground of appeal is an undeveloped argument or alleged error.[793] This sub-ground of appeal is therefore summarily dismissed.

372. In sub-ground 19.6, Lahi Brahimaj submits that there were grounds for detaining or questioning the individuals at the barracks: Witness 6 was found to be in the possession of an unauthorised firearm, and Witness 3 had given away a Kalashnikov rifle belonging to a co-villager.[794] The Appeals Chamber summarily dismisses this sub-ground of appeal based on the fact that it is an undeveloped argument or alleged error.[795]

373. In sub-ground 19.7, Lahi Brahimaj argues that Witnesses 3 and 6 did not claim that Lahi Brahimaj caused them physical injury other than bruising.[796] The Appeals Chamber considers that the Trial Chamber found that Lahi Brahimaj personally participated in the torture and cruel treatment of Witnesses 3 and 6;[797] moreover, the Trial Chamber clearly took this into account when it determined the gravity of Lahi Brahimaj's offences.[798] As such, no error has been demonstrated, and this sub-ground of appeal is dismissed.

374. In sub-ground 19.8, Lahi Brahimaj argues that neither Witness 3 nor Witness 6 was especially vulnerable because of their detention:[799] Witness 6's family and co-villagers were aware that he was at the barracks and were allowed to visit him, and Witness 3's family was aware that he was at the barracks and intervened on his behalf.[800] The Appeals Chamber has already addressed and dismissed this argument in ground 15. This sub-ground of appeal is therefore dismissed.

375. Based upon the foregoing, the Appeals Chamber concludes that Lahi Brahimaj has not succeeded in demonstrating that the Trial Chamber failed to correctly exercise its discretion by imposing a sentence that was manifestly excessive in all the circumstances.

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[791] *Krajišnik* Appeal Judgement, para. 26; *Galić* Appeal Judgement, para. 297.
[792] Brahimaj's Appeal Brief, para. 180.5.
[793] *Krajišnik* Appeal Judgement, para. 26; *Galić* Appeal Judgement, para. 297.
[794] Brahimaj's Appeal Brief, para. 180.6.
[795] *Krajišnik* Appeal Judgement, para. 26; *Galić* Appeal Judgement, para. 297.
[796] Brahimaj's Appeal Brief, para. 180.7.
[797] Trial Judgement, paras 395, 451.
[798] Trial Judgement, paras 492-493.
[799] Brahimaj's Appeal Brief, para. 180.8.
[800] Brahimaj's Appeal Brief, para. 180.8.

376. Consequently, the Appeals Chamber dismisses this ground of appeal.

V. DISPOSITION

377. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules,

NOTING the respective written submissions of the parties and the arguments they presented at the appeal hearing on 28 October 2009;

In respect to the Prosecution's appeal,

GRANTS Prosecution Ground of Appeal 1, Judge Robinson dissenting, and **QUASHES** the Trial Chamber's decisions to: (a) acquit Ramush Haradinaj and Idriz Balaj of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32, and 34 of the Indictment; (b) acquit Lahi Brahimaj of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 30, and 34 of the Indictment; (c) acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of individual criminal responsibility under Counts 24 and 34 of the Indictment; and (d) acquit Lahi Brahimaj of individual criminal responsibility under Count 26 of the Indictment, and **ORDERS** that Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj be retried on these counts;

DISMISSES Prosecution Ground of Appeal 2;

GRANTS, in part, and **DISMISSES**, in part, Prosecution Ground of Appeal 3 and **AFFIRMS** Idriz Balaj's acquittal under Count 37;

In respect of Lahi Brahimaj's appeal,

DISMISSES Lahi Brahimaj's Grounds of Appeal 1-8;

GRANTS, in part, and **DISMISSES**, in part, Lahi Brahimaj Ground's of Appeal 9 and **AFFIRMS** Lahi Brahimaj's conviction under Count 28;

DISMISSES Lahi Brahimaj's Grounds of Appeal 10-19;

AFFIRMS Lahi Brahimaj's sentence; and

PURSUANT TO Rules 64 and 107 of the Rules,

ORDERS the detention on remand of Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj and **ENJOINS** the Commanding Officer of the United Nations Detention Unit in The Hague to detain them until further order.

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

Judge Patrick Robinson, Presiding	Judge Fausto Pocar

Judge Liu Daqun	Judge Andrésia Vaz	Judge Theodor Meron

Judge Patrick Robinson appends a partially dissenting opinion.

Dated this nineteenth day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

VI. PARTIALLY DISSENTING OPINION OF JUDGE PATRICK ROBINSON

A. Introduction

1. The findings of the Majority in respect of ground 1 of the Prosecution's Appeal bring into question the limits of the trial and appellate functions. When the Appeals Chamber gets it wrong, as I, respectfully, submit it has in this case, the relationship between the two functions, the proper discharge by the Tribunal of its mandate to try persons for serious breaches of international humanitarian law, is gravely compromised.

2. In all legal systems, trial and appellate bodies have their own respective roles and provinces. In particular, there are boundaries for what an appellate body can do. The basic rules found in most legal systems limiting the appellate function are well-known and are reiterated regularly in decisions of the Appeals Chamber: an appeal is not a retrial;[1] a measured deference is given to Trial Chambers in their determination of facts, in particular, in determining the credibility of witnesses, since they have the advantage of observing the demeanour of witnesses in court;[2] the mere fact that the Appeals Chamber would have exercised a discretionary power differently is not a sufficient basis for invalidating the Trial Chamber's exercise of that discretion, provided the Trial Chamber has properly exercised the discretion;[3] a certain deference must be given to a Trial Chamber in issues relating to the management of the trial.[4]

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[1] *Mrkšić* Appeal Judgement, para. 352; *Krajišnik* Appeal Judgement, para. 734; *Martić* Appeal Judgement, para. 326; *Galić* Appeal Judgement, para. 393; *Kupreškić et al.* Appeal Judgement, paras 407-408.

[2] *Kupreškić et al.* Appeal Judgement, para. 32; *Čelebići* Appeal Judgement, para. 491; *Furundžija* Appeal Judgement, para. 37; *Ntakirutimana* Appeal Judgement, para. 12; *Niyitegeka* Appeal Judgement, para. 95.

[3] *See Prosecutor v. S. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision of 18 April 2002"), para. 4 ("Where an appeal is brought from the discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber"). *See also Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005 ("*Krajišnik* Decision of 25 April 2005"), para. 7; *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 7.

[4] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 6 ("*Karadžić* Decision of 13 October 2009"); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.8, Decision on Prosecution's Appeal Against the Trial Chamber's Order Regarding the Resumption of Proceedings, 16 September 2008 ("*Šešelj* Decision of 16 September 2008"), para. 3; *Krajišnik* Decision of 25 April 2005, para. 7; *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR73.6, Decision on Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and

3. It is easy to frame the question in this appeal, for it is a simple one: how many opportunities should a Trial Chamber give a party to produce a witness? If a Trial Chamber only gives a party one or two opportunities to produce a witness, has it acted improperly, having regard to its statutory duty to ensure a fair and expeditious trial? Has it abused its discretionary powers in the management of the trial? Must it extend the party's case four, five, or 50 times to allow the party an opportunity to produce a witness? But the most important question is the role of the Appeals Chamber in considering a ground of appeal that a Trial Chamber, which has in fact provided an opportunity for a party to produce a witness, has not done enough to secure the attendance of that witness.

4. The Majority concludes that the Trial Chamber erred when it "failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and the other witness" and that due to "the potential importance of these witnesses to the Prosecution's case, […] in the context of this case, the error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice."[5] It is to be observed, however, that the Trial Chamber extended the Prosecution's case on three separate occasions to give the Prosecution more time to secure the evidence of these witnesses and remained open to the possibility of granting a further extension upon demonstration of a dramatic change of circumstances. First, although the Trial Chamber initially designated 8 November 2007 as the final date for the presentation of the Prosecution's case,[6] on 31 October 2007, the Trial Chamber extended the Prosecution's case by eight days, to 16 November 2007, to enable the Prosecution to secure the testimonies of Kabashi and the other witness via video-conference link early that same week.[7] Second, on 15 November 2007, the Trial Chamber granted the Prosecution's request for a four-day extension of its case[8] to enable it to hear the evidence of Kabashi via video-conference link on 20 November 2007.[9] In granting this extension, the Trial Chamber was sensitive to the fact that Kabashi was, in its own words, "an important eye-witness to crimes charged in the indictment".[10] The Trial Chamber also noted that:

> […] on the 31st of October, 2007 it announced that it expected the Prosecution to close its case on the 16th of November 2007. However, the Prosecution has shown that it exhausted all reasonable

Preparation of the Defence Case, 20 January 2004 ("*Milošević* Decision of 20 January 2004"), para. 16; *Čelebići* Appeal Judgement, paras 291-293.
[5] Majority Opinion, para. 49.
[6] T. 9347-9348, 15 October 2007 (Open Session), T. 10798 (15 November 2007) (Open Session).
[7] T. 9984-9985, 31 October 2007 (Open Session).
[8] *See Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Prosecution's Application to Hear Shefqet Kabashi via Video Link on Tuesday 20 November 2007, 14 November 2007.
[9] T. 10893 (15 November 2007) (Open Session), T. 10954 (20 November 2007) (Open Session).
[10] T. 10120 (1 November 2007) (Open Session).

> efforts to secure the evidence of Mr. Kabashi by this date, and due to circumstances out of the Prosecution's control, this was not possible. The Chamber therefore decided to grant […] the Prosecution an extension of time to complete its case for the sole purpose of hearing Mr. Kabashi's evidence on the 20th of November, 2007.[11]

Third, on 20 November 2007, the Trial Chamber granted the Prosecution an additional seven-day extension of its case until 27 November 2007 in order to hear the testimony of the other witness, considering the Prosecution's argument "that it exhausted all reasonable efforts to secure the evidence of [the other witness] by the 16th of November but it was unable to do so for reasons beyond its control."[12] In rendering this decision, the Trial Chamber further considered "the expected importance of the evidence for the [Prosecution] case" and "the difficulties the [Prosecution] faced in obtaining his testimony."[13] In addition, as explained in detail below, after Kabashi refused to testify via video-conference link during the 20 November 2007 hearing, the Trial Chamber determined that it would consider a Prosecution application for an additional extension of time to hear Kabashi's testimony if the Prosecution could demonstrate that there had been a dramatic change in circumstances.[14] In light of this demonstrated extent to which the Trial Chamber went to secure the attendance of these witnesses, it is difficult to understand how it could be maintained that the Trial Chamber failed in its duty to assist the Prosecution in securing its evidence.

5. When the issues on appeal relate to trial management, as they do in this case, the Trial Chamber should be accorded a reasonable measure of deference by the Appeals Chamber. As recognised in the case law, such deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case".[15] Regrettably, the Majority Opinion has neglected to apply this standard of review. The rationale for the standard is that it is the Trial Chamber that has the responsibility for managing its trial, and it clearly makes sense for an appellate body to defer to Trial Chambers in issues relating to the detailed day-to-day management of the case, unless of course the Chamber has abused its discretion.

6. In the instant case, the Trial Chamber extended the time for the Prosecution to present its case not once, not twice, but thrice and remained open to granting a further extension should the Prosecution demonstrate a dramatic change in circumstances. It did so because it wanted to provide the Prosecution as much time as possible to secure the attendance of these important witnesses. It

[11] T. 10955 (20 November 2007) (Open Session).
[12] T. 10955 (20 November 2007) (Open Session).
[13] T. 10956 (20 November 2007) (Open Session).
[14] *See* Kabashi, T. 10961 (20 November 2007) (Open Session); T. 10977-10979 (26 November 2007) (Open Session).
[15] *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 4; *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9.

also did so because it was sensitive to the general atmosphere of fear and intimidation, which the Trial Chamber itself acknowledged to be pervasive. Had it not been sensitive to the difficulties experienced by the Prosecution in securing the attendance of these witnesses in the context of that general atmosphere of fear and intimidation, a question might then arise as to whether it had abused its discretion, having regard to its duty to ensure that the trial is expeditious and to assist a party in securing the testimony of its witnesses for the presentation of its case. But it did grant an extension, and then, following the inability of Kabashi to attend the video-conference link, it granted another, and finally, a third when the other witness failed to attend the video-conference link. Moreover, it indicated it was open to the possibility of granting a further extension upon the requisite showing by the Prosecution. How then, in those circumstances, can it be argued that the Trial Chamber "failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and the other witness"?[16]

7. The question of how many extensions to grant, whether one, two, or one hundred, or whether to stay or adjourn the proceedings, relates to the detailed day-to-day management of the case and is a matter best determined by the Trial Chamber in light of all the relevant circumstances. This is not a judgement for the Appeals Chamber to make. I would have granted more than three extensions or adjourned or stayed the proceedings, and the Majority itself might have done the same, but that is irrelevant. For it is not the appellate function to determine the sufficiency of the extensions granted by the Trial Chamber absent a clear indication of an abuse of the Trial Chamber's discretion. And were we to do so, we would simply be substituting our own exercise of discretion for that of the Trial Chamber without any proper basis.

8. It is well-established that it is only where a discernible error in the Trial Chamber's exercise of its discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of that exercised by the Trial Chamber.[17] Thus, the Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be: (a) based on an incorrect interpretation of governing law, which is inapplicable in this case; (b) based on a patently incorrect conclusion of fact, which is also inapplicable in this case; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[18] This last factor is what in my judgement would be the relevant criterion. However, the Majority Opinion does not demonstrate that any of the Trial Chamber's decisions were unfair or unreasonable.

[16] Majority Opinion, para. 49.
[17] *See supra* Partially Dissenting Opinion, fns 3-4; *see also Krajišnik* Decision of 25 April 2005, para. 7.
[18] *See Karadžić* Decision of 13 October 2009, para. 6; *Šešelj* Decision of 16 September 2008, para. 3; *Krajišnik* Decision of 25 April 2005, para. 7.

9. The error pointed out by the Majority—that the Trial Chamber "failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and the other witness"—is no error at all, because the Trial Chamber, by its grant of three extensions, and furthermore, its willingness to consider a Prosecution application for an additional extension of time to hear Kabashi's testimony upon demonstration of a dramatic change in circumstances, was entirely fair and reasonable under the circumstances, as the following analysis demonstrates.

B. Challenged Trial Chamber Decisions

10. In the interest of completeness, I briefly summarise the Prosecution's arguments below, although they are summarised in the Majority Opinion.

1. Decision of 31 October 2007

11. The Prosecution argues that the Decision of 31 October 2007, in which the Trial Chamber indicated that it had reviewed the time still available within the 125 hours allocated to the Prosecution for the presentation of its case and that it expected the Prosecution to close its case on 16 November 2007, demonstrates the Trial Chamber's inflexibility in varying the time it allotted the Prosecution to present its case, which precluded it from securing the evidence of Kabashi and the other witness.[19] It is ironic that, in this Decision, which the Prosecution faults as exemplifying the Trial Chamber's "error in choosing an expeditious trial over a fair one",[20] the Trial Chamber actually extended the Prosecution's case. As previously explained, in its Decision of 31 October 2007, the Trial Chamber extended the final date for the presentation of the Prosecution's case from 8 November 2007 to 16 November 2007. Furthermore, following the Decision of 31 October 2007, the Trial Chamber granted the Prosecution two additional extensions of its case to allow it time to secure the testimony of Kabashi and the other witness.[21] Furthermore, the Trial Chamber indicated that it was open to the possibility of granting a further extension to hear Kabashi's testimony should the Prosecution demonstrate a dramatic change of circumstances. Thus, contrary to the Prosecution's claim, these extensions of time granted by the Trial Chamber and the Trial Chamber's willingness to grant another extension upon the requisite showing, demonstrate that the Trial Chamber gave due consideration to the importance of securing the testimony of Kabashi and the other witness and maintained flexibility in the trial schedule in order to accommodate this testimony.

[19] *See* Majority Opinion, para. 20.
[20] Prosecution Appeal Brief, para. 17.
[21] *See supra* Partially Dissenting Opinion, para. 4.

2. Decision of 15 November 2007

12. Addressing the Prosecution's argument that, because the Trial Chamber was "fixated on time pressures", it would not accommodate the other witness's testimony on 15 November 2007 via video-conference link by sitting past 7:00 p.m. or sitting the following day, the Majority characterises the Trial Chamber's decision of 15 November 2007 as "the touchstone" of the Trial Chamber's failure to make efforts that could have resulted in obtaining the other witness's testimony. In this regard, the Majority states that:

> The Trial Chamber was informed that the other witness […] would have been available to testify by video-conference link at approximately 6:30 p.m. Nonetheless, and despite the other witness's known reluctance to testify and potential importance to the Prosecution's case, the Trial Chamber chose to significantly delay his testimony on the basis of objectively less important logistical considerations.[22]

It further points out the Trial Chamber's conclusion that:

> it's not only Thursday close to 7.00 but it's also 125 hours since the beginning of the presentation of the Prosecution's case. There's no way to further sit either on Friday or on Monday. […] Tuesday […] is reserved for another witness [and even] if [the other witness] would testify, there's a fair chance that we would not come any further than that he will not answer questions. There's another possibility that he starts answering questions. And then, of course, what follow-up to give, because there's no time.[23]

The Majority then concludes:

> The Trial Chamber's language and approach manifestly prioritised logistical considerations and the specific number of hours assigned to the Prosecution case over the much more significant consideration of securing the testimony of a potentially important witness who was finally available to testify.[24]

13. First, contrary to the Majority's assertion, the Trial Chamber, in its Decision of 15 November 2007, never stated with certainty that the other witness "would have been available to testify by video-conference link at approximately 6:30 p.m." Rather, it stated that:

> our latest information is that on [*sic*] from 6.30, [the other witness] would be available for examination through videolink, although this is not fully confirmed yet.[25]

Accordingly, in my view, it was not clear whether the Trial Chamber could have secured the testimony of the other witness by sitting past 7:00 p.m. More importantly, I observe that the Prosecution never requested the Trial Chamber to sit past 7:00 p.m. on 15 November 2007 or the following day to accommodate the other witness's delayed arrival to the video-conference link location. If the Prosecution considered such relief appropriate, it was incumbent upon the Prosecution to request it from the Trial Chamber. In my view, on this basis alone, the Prosecution's argument should have been dismissed since it is settled that a party cannot remain silent on a matter

[22] Majority Opinion, para. 43.
[23] *Ibid.*
[24] *Ibid.*
[25] T. 10876, 15 November 2007 (Private Session).

at trial only to return on appeal to seek a trial *de novo*.[26] Furthermore, as previously explained, on 20 November 2007, the Trial Chamber extended the Prosecution's case to 27 November 2007 for the purpose of hearing the other witness's testimony.[27] In such circumstances, I cannot support a conclusion that "the Trial Chamber chose to significantly delay" the testimony of the other witness or prioritised "logistical considerations" and the "specific number of hours assigned to the Prosecution case" over securing the other witness's testimony.

14. There are two comments to be made about the Majority's conclusion that "[t]he Trial Chamber's language and approach manifestly prioritised logistical considerations and the specific number of hours assigned to the Prosecution case over the much more significant consideration of securing the testimony of a potentially important witness who was finally available to testify".[28] First, as a matter of fact, it is inaccurate, since the claim of prioritisation is plainly contradicted by the action taken by the Trial Chamber in granting not one, not two, but three extensions to the Prosecution's case to enable it to secure the testimony and by remaining open to granting an additional extension, should the Prosecution demonstrate a dramatic change in circumstances. And it clearly did so because it was alive to the difficulties that the Prosecution was experiencing in securing the attendance of the witnesses, whom the Trial Chamber itself acknowledged to be important to the Prosecution's case.

15. But the more important critique to be made of this conclusion is that it has given to fair trial rights a hierarchical structure that finds no support in a proper interpretation and application of the Statute. Article 21(4) of the Statute expressly identifies the rights of the accused. The Statute of course does not address rights of the Prosecution in express terms. That is not surprising since Article 21(4) is inspired by the approach reflected in the European Convention on Human Rights and the International Covenant on Civil and Political Rights, where there is also no express provision for the rights of the Prosecution. This does not, however, mean that the Prosecution is without rights. Article 20(1) of the Statute provides: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The duty of the Trial Chamber under this Article to ensure a fair and expeditious trial is general in that it relates both to the Prosecution and the Defence. It is as a consequence of this duty that the Prosecution's interests are to be protected by a Trial Chamber,

[26] *Tadić* Appeal Judgement, para. 55; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, paras 18-19; *Kambanda* Appeal Judgement, paras 44-48.
[27] *See supra* Partially Dissenting Opinion, para. 4.
[28] Majority Opinion, para. 43.

with the result that the Prosecution has a similar right to the right of the Accused in Article 21(4)(e) of the Statute to obtain the attendance and examination of witnesses.

16. But, this right is qualified in Article 20(1) of the Statute. It is a right that is to be enjoyed "with full respect for the rights of the accused". The meaning is quite clear: the Prosecution cannot be given a level of assistance by the Trial Chamber in securing the attendance of its witnesses that would result in a right of the accused not being fully respected. If, for example, the level of assistance given is such that it will unduly interfere with the right of the accused under Article 21(4)(c) of the Statute to be tried without undue delay, then the Trial Chamber would be in breach of its statutory duty.

17. By virtue of the burden placed on the Prosecution to prove the guilt of the accused person beyond reasonable doubt, the position of the Prosecution is in many ways different from the position of the accused person. Thus, the Prosecution has duties, which the Defence does not have, and the Defence has rights, which the Prosecution does not have. Properly analysed, the relationship between the Prosecution and Defence is not symmetrical; it is, because of the aforementioned burden, asymmetrical.

18. This analysis supports the following conclusion: insofar as the Prosecution is entitled under Article 20 of the Statute, in the interests of fairness, to assistance from the Trial Chamber in securing the attendance of its witnesses in the presentation of its case, that right cannot be applied in a way that would unduly interfere with any of the rights of the accused set out in Article 21(4) of the Statute, including the right to be tried without undue delay. This is so because any fairness rights of the Prosecution under Article 20 of the Statute are to be applied "with full respect for the rights of the accused" under Article 21(4) of the Statute. It is therefore incorrect to assert, as the Majority does, that the "consideration of securing the testimony of a potentially important witness who was finally able to testify" is "much more significant" than the Trial Chamber's use of time management to secure an expeditious trial or a trial without undue delay. Thus it is clear that the Trial Chamber was discharging its statutory duties and so acted properly in adopting the time management measures that it did in protection of the right of the accused to be tried without undue delay under Article 21(4)(c) of the Statute. Significantly, the Trial Chamber did not ignore the fair trial rights of the Prosecution under Article 20(1) of the Statute. It exhibited an appropriate sensitivity to those rights by not only granting three extensions to the Prosecution's case but also by remaining open to the possibility of granting a further extension upon a showing by the Prosecution of a dramatic change in circumstances.

19. I also regret very much the label "logistical considerations", which has a derogatory ring to

it, when in fact a proper interpretation and application of the Statute shows that a concern with time and factors influencing the length of a party's case is no less important than concerns with other elements of fair trial rights.

3. Decision of 20 November 2007

20. The Prosecution asserts that, on 20 November 2007, when the Trial Chamber closed its case subject to the exceptional extension to 27 November 2007 to hear the evidence of the other witness, the Trial Chamber erred by failing to explore the possibility that Kabashi might testify in the future once he consulted with his lawyer, who was appointed to provide him with legal assistance in relation to possible contempt proceedings in the United States.[29] The Majority agrees, concluding that "following a 20 November 2007 video-conference link hearing in which he and his lawyer issued confused and equivocal refusals to speak on that particular occasion, the possibility remained that Kabashi might testify under different circumstances" and that "the Trial Chamber chose not to persevere in attempts to hear his testimony".[30] However, in rendering the Decision of 20 November 2007, the Trial Chamber explicitly considered that both Mr. Karnavas and the Trial Chamber itself had informed Kabashi of the consequences of his failure to testify and that Kabashi had nevertheless confirmed that he "would not answer any question that would be put to [him] as a witness" in the case. The Trial Chamber further determined that it would consider a Prosecution application for an additional extension of time to hear Kabashi's testimony if the Prosecution could demonstrate that there had been a dramatic change in circumstances.[31]

21. Thus, contrary to the Prosecution's assertion, the Trial Chamber carefully considered the likelihood that Kabashi would testify after consulting his lawyer before the Trial Chamber closed the Prosecution's case. It was in the reasonable exercise of the Trial Chamber's discretion when, considering Kabashi's consistent refusal to testify, it declined to extend the Prosecution case for the purpose of securing Kabashi's testimony, absent a dramatic change in circumstances. The Trial Chamber never ruled out the possibility of hearing Kabashi's testimony in the future. Rather, it adopted a flexible approach, giving effect to its obligation of ensuring that the Prosecution had sufficient time to present its case through its witnesses and that the trial was conducted expeditiously. In addition, contrary to the Majority's view, Kabashi's resolute refusal to answer any question put to him in the case was neither confused nor unequivocal, and certainly did not suggest that he was willing to testify under different circumstances. The Majority's conclusion that the Trial Chamber erred in rendering the Decision of 20 November 2007 is thus unsupported by the record.

[29] *See* Majority Opinion, para. 24.
[30] *See* Majority Opinion, para. 41.
[31] *See* Kabashi, T. 10961 (20 November 2007) (Open Session); T. 10977-10979 (26 November 2007) (Open Session).

4. Decision of 26 November 2007 in relation to Kabashi and Decision of 5 December 2007

22. The Prosecution contends that, in denying its 23 November 2007 motion for an extension of its case in order to secure Kabashi's testimony, the Trial Chamber disregarded the Prosecution's argument regarding the likelihood of securing Kabashi's testimony if he were informed that contempt proceedings could be initiated against him as a result.[32] Contrary to the Prosecution's assertion, as explained above, during the hearing of 20 November 2007, the Trial Chamber carefully considered this Prosecution argument before concluding that, because Kabashi remained unwilling to testify, the Trial Chamber would only extend the Prosecution's case to hear his testimony if the Prosecution demonstrated "a dramatic change in circumstances." Given that the Prosecution identified no change of circumstances, the Trial Chamber was justified in denying the 23 November 2007 motion. For the same reasons, the Trial Chamber was justified in denying the Prosecution's request for certification to appeal this decision in the Decision of 5 December 2007.

23. Moreover, there is no merit in the Prosecution's allegation that the Trial Chamber demonstrated its "rush to close the Prosecution case and to end the trial" when it stated that the Prosecution "seems not to have heeded the Chamber's instruction" at the hearing of 26 November 2007 and that the Prosecution had exceeded the 125 hours allotted to it at the beginning of the trial.[33] The Majority characterises this commentary as "underscor[ing] the Trial Chamber's preference for meeting its deadlines over assisting the Prosecution in overcoming attempts at witness intimidation."[34] In my view, however, it was within the Trial Chamber's discretion to remind the Prosecution that, as determined at the 20 November 2007 hearing, it would only entertain an application to extend the Prosecution's case to hear Kabashi if the Prosecution demonstrated a dramatic change in circumstances as well as to point out that the Prosecution had exceeded the time allocated to it by the Trial Chamber to present its case. Rather than demonstrating a haste to close the Prosecution's case and end the trial, the Trial Chamber's decision demonstrated its flexible approach in relation to the Prosecution's presentation of its case, which left open the possibility of extending the Prosecution's case to secure Kabashi's testimony upon a showing that Kabashi had changed his mind and was in fact willing to testify.

[32] *See* Majority Opinion, para. 26.
[33] *See* Majority Opinion, para. 26.
[34] Majority Opinion, para. 41.

5. Decision of 26 November 2007 in relation to the other witness and Scheduling Order of 30 November 2007

24. The Prosecution argues that the Trial Chamber erred in closing its case in relation to the other witness during the hearing of 26 November 2007 without allowing the Prosecution additional time to obtain information about his medical condition and to consider the possibility of securing his testimony.[35] The Prosecution further argues that the Scheduling Order of 30 November 2007, in which the Trial Chamber indicated that the Prosecution had concluded the presentation of its evidence and that its case was therefore closed, demonstrates the Trial Chamber's "unreasonable rush to judgement", given that two crucial Prosecution witnesses had yet to testify.[36] Addressing these arguments, the Majority concludes that:

> a reasonable Trial Chamber cognisant of the witness intimidation threatening the integrity of the trial would have ordered, *proprio motu*, the proceedings adjourned or stayed for a reasonable time to allow the Prosecution the opportunity to obtain information about the other witness's condition and to explore the possibility of securing his testimony upon his release from the hospital.[37]

25. The Prosecution has not referred to any application that it made to the Trial Chamber, during or after the 26 November 2007 hearing, for additional time to obtain information about the other witness's medical condition or to secure the other witness's testimony. In these circumstances, I cannot agree with the Majority's view that the Trial Chamber had a duty to order the proceedings adjourned or stayed absent a request to that effect from the Prosecution. Rather, if the Prosecution considered such relief appropriate, it was incumbent upon the Prosecution to request it from the Trial Chamber.

26. It is not clear why the Trial Chamber should, in a system that is adversarial and party-driven, take it upon itself to adopt a course not raised by either party. It is not as though the trial proceeded without the affected party, the Prosecution, making submissions to the Chamber for specific measures to be adopted to secure the testimony of the witnesses. The Prosecution did so on a regular basis, but on no occasion did it ask for the trial to be adjourned or stayed. Had the Prosecution made such a submission to the Trial Chamber, the accused would have had to be afforded a right to oppose any application for an adjournment or stay. Consequently, the net effect of allowing the Prosecution's appeal on this novel basis is that an accused who had been acquitted at trial now has the acquittal reversed on a ground that he had not been afforded any opportunity to contest during the trial. On that basis alone, this argument, raised for the first time by the Prosecution during the appeal, should be dismissed. It is of course open to the Appeals Chamber to

[35] *See* Majority Opinion, para. 28.
[36] *See* Majority Opinion, para. 20.
[37] Majority Opinion, para. 45.

consider a point that was not raised at trial, but in my view, it should be extremely careful in doing so when the point raised impacts adversely on the rights of an accused who has been acquitted at trial.

27. The Statute of the Tribunal has on occasion been criticised for granting the Prosecutor a right of appeal.[38] Such a right does not exist in many domestic jurisdictions because it is seen as being in breach of the principle of *non bis in idem*. Arguably, in light of the gravity of the crimes prosecuted at the Tribunal and the absolutely horrendous and horrific circumstances surrounding their commission, there is some justification for granting the Prosecutor a right of appeal. But the Appeals Chamber must have a clear and unequivocal basis for overturning an acquittal. In particular, when the Prosecution appeals an acquittal, and the appeal turns on, as it does in this case, the reasonableness of the exercise of a Trial Chamber's discretionary powers, the Appeals Chamber must be extremely careful about finding an error in the exercise of that discretion since the liberty of the acquitted person is involved—and even more particularly, when the effect of the Appeals Chamber's review is tantamount to merely substituting its own discretion for the discretion of the Trial Chamber.

28. Finally, it is inaccurate to suggest, as the Majority does, that the Trial Chamber was not cognisant of the witness intimidation. Indeed, the Trial Chamber itself made reference to the general atmosphere of witness fear and intimidation in the Trial Judgement,[39] and the measures that it took in granting extensions of the Prosecution's case not once, not twice, but thrice, must be seen as its way of responding to these circumstances.

6. Decision of 21 December 2007

29. The Prosecution asserts that the Trial Chamber erred when it denied its request to reopen its case after a United States district court judge indicated that, if the Trial Chamber were to schedule a date to hear Kabashi's testimony, the judge "would in *all likelihood* issue an order compelling Shefqet Kabashi to testify on that day."[40] The Majority agrees, stating that the Trial Chamber's decision "unjustifiably discounted an order by a United States District Court Judge stating that if the case were reopened and a date for Kabashi's testimony scheduled, he would 'in all likelihood' issue

[38] *See, e.g.,* Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 Tex. Int'l L. J. 111, 127, 141 (2002) (supporting the fact that Article 25 of the Statute allows the Prosecution to appeal from acquittals on questions of pure law and applied law, but criticising the fact that Article 25 allows the Prosecution to appeal questions of fact, because this is "inconsistent with the purposes of appellate review"); John Laughland, *The Anomalies of the International Criminal Tribunal are Legion. This is Not Victors' Justice in the Former Yugoslavia – In Fact, It is No Justice At All*, Times (UK), 17 June 1999; Michael P. Scharf, *A Critique of the Yugoslav War Crimes Tribunal*, 25 Denv. J. Intl L. & Poly 305, 307 (1997); Michele N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 Nordic J. Int'l L. 261, 267, 269 (1995).
[39] *See* Trial Judgement, para. 22.

an order compelling Kabashi to testify that day."[41] The Majority holds that this decision "failed to appreciate that Kabashi's physical presence in the United States would have directly exposed him to the contempt penalties wielded by United States federal courts, including imprisonment, should he refuse to testify."[42]

30. It should be recalled, however, that in denying the Prosecution Motion of 17 December 2007, the Trial Chamber considered that:

> [i]n its Decision of 26 November 2007, the Trial Chamber rejected the Prosecution's request for an extension of the case since it was based on the mere expectation that further contact between Mr Kabashi and his counsel, during which Mr Kabashi would be further informed as to his legal position, would lead him to change his mind about not testifying. However, Mr Kabashi had reiterated on several occasions that he was not willing to testify. Therefore, the Trial Chamber could not find any change of circumstance that would warrant an extension of the case. Similarly, with regard to the current Request, it is clear that Mr Kabashi is still not willing to testify and has given the Prosecution no reason to believe that this situation will change.[43]

The Trial Chamber further noted that:

> Mr. Kabashi was under an obligation to testify in the *Haradinaj et al.* case from the moment he was first called as a witness. He has repeatedly stated that he is unwilling to testify and, according to the information available to the Trial Chamber, remains unwilling. Mr Kabashi is also charged with contempt of the Tribunal as a result of his refusal to testify on 5 June 2007, and contempt proceedings will be initiated upon his arrest and transfer to The Hague.[44]

Based on the foregoing, the Trial Chamber concluded that the "mere possibility of contempt proceedings before a national court does not constitute new circumstances of such a nature that it would warrant a reopening of the *Haradinaj et al.* case."[45]

31. Thus, the Decision of 21 December 2007 was grounded in the Trial Chamber's determination, based on the evidence before it, that Kabashi remained unwilling to testify regardless of whether he faced contempt proceedings either at the Tribunal or before the United States district court. Given that Kabashi had consistently indicated that he would not testify even when faced with charges of contempt before the Tribunal and that he would rather face imprisonment than testify, it was reasonable for the Trial Chamber to conclude that the Prosecution had not demonstrated new circumstances that warranted a reopening of its case. At the hearing of 5 June 2007, after the Presiding Judge informed him of the consequences of a failure to testify, Kabashi stated:

> I cannot talk about the things you are asking me after so many things that have happened. If you want to force me, to take me to prison, I will go to prison. […] I'm not able to testify. I cannot, very briefly, I cannot, not because somebody forces me, not because I'm afraid of anybody. If you,

[40] Prosecution's Appeal Brief, para. 32 (internal citations omitted).
[41] Majority Opinion, para. 42.
[42] Majority Opinion, para. 42.
[43] Decision of 21 December 2007, para. 6.
[44] Decision of 21 December 2007, para. 7.
[45] Decision of 21 December 2007, para. 7.

> as Judges, compel me to do that, I can tell you that I'm not able. You can take your decision, but I'm asking you and asking the Prosecutors to release me, to allow me to go back to Kosova to see my children. If you want to send me to prison, there is nothing I can do.[46]

Furthermore, at the 20 November 2007 hearing, after having been indicted on charges of contempt before the Tribunal, Kabashi indicated that he remained unwilling to testify.[47] The Trial Chamber appropriately exercised its discretion when it held that it would not extend the Prosecution case for the purpose of securing Kabashi's testimony unless the Prosecution demonstrated a dramatic change of circumstances. Absent any evidence that Kabashi might change his stance, it was in the Trial Chamber's discretion to determine that it would not reopen the Prosecution's case.

C. Conclusion

32. In sum, respectfully, I do not agree with the Majority Opinion for the following reasons. First, the record shows that the Trial Chamber was sensitive to the importance of both witnesses' testimony for the Prosecution's case as well as the general atmosphere of fear and intimidation of witnesses, and it exhibited an appropriate sensitivity to these Prosecution concerns by extending its case not once, not twice, but thrice, and remaining open to the possibility of granting a further extension upon a showing by the Prosecution of a dramatic change in circumstances. In effect, the Majority approach the appeal by asking whether the Trial Chamber could have done more to assist the Prosecution in securing the attendance of its witnesses, when the relevant area of inquiry was whether, in light of all the circumstances, what it did was reasonable. Second, as a matter of law and principle, what the Majority Opinion amounts to is a substitution of its own discretion for the discretion exercised by the Trial Chamber, and that can only be done where a discernible error on the part of the Trial Chamber can be demonstrated. No error has been demonstrated, since the Trial Chamber addressed the Prosecution's concerns by granting the Prosecution three extensions of time to enable it to secure the testimony of these witnesses and by keeping open the possibility of granting a further extension upon demonstration by the Prosecution of a dramatic change in circumstances. There is a basic level below which a Trial Chamber's conduct must not fall. If it does, that constitutes an abuse of discretion. But if it meets that threshold, as it has in this case by granting several extensions and remaining open to the possibility of granting a further extension upon the requisite showing, a determination as to whether other extensions should be granted is a matter of detailed trial management in respect of which the Appeals Chamber must accord deference to the Trial Chamber. It is a matter better left to the Trial Chamber in accordance with the general principle whereby deference is accorded to a Trial Chamber in trial management issues, for

[46] Kabashi, T. 5441-5443 (5 June 2007) (Open Session).
[47] Kabashi, T. 10936, 10958 (20 November 2007) (Open Session).

the reasons so eloquently expressed in the *Milošević* case.[48] The Majority Opinion constitutes an overstepping by the Appeals Chamber of its boundaries, and in doing so, confuses the appellate with the trial function. This is a dangerous precedent, which militates against the proper discharge by the Tribunal of its mandate to try persons for serious breaches of international humanitarian law. Third, by prioritising the Prosecution's right to present its case through its witnesses over the right of the accused to an expeditious trial, the Majority has wrongly interpreted the relationship between Articles 20 and 21 of the Statute, completely ignoring the fact that the rights enumerated under Article 20 are to be applied "with full respect for the rights of the accused" under Article 21(4).

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

Done this nineteenth day of July 2010
at The Hague
The Netherlands

_____
Judge Patrick Robinson

[Seal of the Tribunal]

[48] *See supra* Partially Dissenting Opinion, fn. 3, quoting *Milošević* Decision of 18 April 2002, para. 4.

VII. ANNEX I: PROCEDURAL HISTORY

1. On 3 April 2008, Trial Chamber I issued its judgment, in which it found Ramush Haradinaj and Idriz Balaj not guilty on all counts as charged in the Indictment, and Lahi Brahimaj guilty only on Counts 28 and 32.[1] The Prosecution and Lahi Brahimaj filed respective appeals against the Trial Judgement.

A. Composition of the Appeals Chamber

2. On 6 May 2008, the President of the Tribunal assigned the following Judges to the Appeals Bench in this case: Judge Fausto Pocar, Presiding and Pre-Appeal; Judge Mohamed Shahabuddeen, Judge Andrésia Vaz, Judge Liu Daqun, and Judge Theodor Meron.[2]

3. On 9 February 2009, the President of the Tribunal appointed Judge Patrick Robinson to replace Judge Shahabuddeen. Judge Robinson was appointed Presiding Judge, while the Pre-Appeal Judge remained Judge Fausto Pocar.[3]

B. Appeal Briefs

1. The Prosecution appeal

4. On 2 May 2008, the Prosecution filed its Notice of Appeal and an attached confidential Annex to the Notice of Appeal.[4] On 16 July 2008, the Prosecution filed its confidential Appeal Brief.[5] The Prosecution filed a public redacted version and a Book of Authorities on 17 July 2008.[6] On that day, the Prosecution also filed an addendum to the confidential Appeal Brief in order to rectify an administrative oversight.[7]

5. On 25 August 2008, Idriz Balaj and Ramush Haradinaj filed their confidential responses to the Prosecution's Appeal Brief.[8] That same day, Lahi Brahimaj joined in Ramush Haradinaj's Response Brief.[9] Idriz Balaj and Ramush Haradinaj also filed public versions of their responses.[10]

[1] Trial Judgement, paras 502-504.
[2] Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge, 6 May 2008.
[3] Order Replacing a Judge in a Case Before the Appeals Chamber, 9 February 2009.
[4] Prosecution's Notice of Appeal; Confidential Annex to Prosecution's Notice of Appeal.
[5] Prosecution's Appeal Brief (Confidential).
[6] Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, 17 July 2008; Book of Authorities for Prosecution Appeal Brief, 17 July 2008.
[7] Addendum to Prosecution's Confidential Appeal Brief of 16 July 2008, 17 July 2008.
[8] Balaj's Response Brief (Confidential); Haradinaj's Response Brief (Confidential).
[9] Brahimaj's Response Brief.
[10] Haradinaj's Response Brief, 25 August 2008; Balaj's Response Brief, 29 August 2008.

On 29 August 2008, Idriz Balaj filed a corrigendum to his Response Brief in order to correct typographical errors.[11]

2. Lahi Brahimaj's appeal

6. Lahi Brahimaj filed his Notice of Appeal on 5 May 2008[12] and his Appeal Brief on 21 July 2008.[13] On 1 September 2008, the Prosecution filed its confidential Response to Lahi Brahimaj's Appeal Brief.[14] It filed the public redacted version on the same day.[15] Lahi Brahimaj filed his Reply to the Prosecution's Response on 15 September 2008.[16]

C. Prosecution and Defence Counsel

7. The Prosecution is represented by Mr. Peter Kremer, Mr. Marwan Dalal, and Ms. Elena Martin Salgado. Ramush Haradinaj is represented by Mr. Ben Emmerson and Mr. Rodney Dixon. Idriz Balaj is represented by Mr. Gregor Guy-Smith and Ms. Colleen Rohan. Lahi Brahimaj is represented by Mr. Richard Harvey and Mr. Paul Troop.

D. Status Conferences

8. Status Conferences, in accordance with Rule 65 *bis* of the Rules, were held on 22 August 2008, 24 November 2008, and 11 March 2009.[17]

E. Transfer of Idriz Balaj

9. On 3 April 2008, the Trial Chamber ordered the transfer of Idriz Balaj back to Kosovo, where he had been serving a 13-year sentence of imprisonment when he was indicted by the Tribunal.[18]

F. Provisional Release of Lahi Brahimaj

10. On 25 May 2009, Lahi Brahimaj was granted provisional release.[19]

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[11] Corrigendum to Idriz Balaj's Response to Prosecution's Appeal Brief, 29 August 2008.
[12] Brahimaj's Notice of Appeal.
[13] Brahimaj's Appeal Brief.
[14] Prosecution's Response Brief (Confidential).
[15] Notice of Filing of Public Redacted Version of Prosecution Response to Appeal Brief on Behalf of Lahi Brahimaj, 1 September 2008.
[16] Brahimaj's Reply Brief.
[17] Scheduling Order of 9 July 2008; AT. 1-4 (22 August 2008) Scheduling Order of 12 November 2008; AT. 5-10 (24 November 2008); Scheduling Order of 3 March 2009; AT. 11-15 (11 March 2009).
[18] Order on the Transfer of Idriz Balaj (Confidential).
[19] Decision on Lahi Brahimaj's Application for Provisional Release.

G. Appeals Hearing

11. The hearing on the merits of these appeals was held on 28 October 2009.[20]

[20] AT. 16-164 (28 October 2009).

VIII. ANNEX II: GLOSSARY

A. List of Tribunal and Other Decisions

1. ICTY

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BABIĆ

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal")

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement")

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BOŠKOSKI AND TARČULOVSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Boškoski and Tarčulovski* Appeal Judgement")

BRALO

Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Decision on Prosecution's Motion to Strike and on Appellant's Motion for Leave to File Response to Prosecution Oral Arguments, 5 March 2007

Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Judgement on Sentencing Appeal")

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

ČELEBIĆI

Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo, also known as "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

Prosecutor v. Zejnil Delalić, Zdravko Mucić (a.k.a. "Pavo"), Hazim Delić and Esad Landžo (a.k.a. "Zenga"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001

Prosecutor v. Stanislav Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement")

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement")

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement")

HARADINAJ et al.

Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-PT, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, 13 December 2006 ("Decision of 13 December 2006")

Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Decision on Motion for Videolink (Witness 30), 14 September 2007

Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Decision on Prosecution's Motion to Have Witness 25 Subpoenaed to Testify, 30 October 2007

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, T. 9984-9986 (31 October 2007) (open session) ("Decision of 31 October 2007")

Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Decision on the Prosecution's Request to Add Two Witnesses to its Witness List and to Substitute one Witness for Another, 1 November 2007

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, T. 10876 (15 November 2007) (private) ("Decision of 15 November 2007")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, T. 10935-10936, 10956 (20 November 2007) (open session) ("Decision of 20 November 2007")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, T. 10975-10978 ("Decision of 26 November 2007 in relation to the other witness")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, T. 10977-10979 ("Decision of 26 November 2007 in relation to Kabashi")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Decision on Prosecution's Motion to Admit Five Hearsay Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater* With Confidential Annex, 28 November 2007

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Scheduling

Order for Final Trial Briefs and Closing Arguments, 30 November 2007 ("Scheduling Order of 30 November 2007")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision Concerning Shefqet Kabashi ("Decision of 5 December 2007")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Decision on Prosecution's Request to Reopen its Case to Hear Evidence of Shefqet Kabashi and for a Judicial Representation to the Authorities of the United States of America, 21 December 2007 ("Decision of 21 December 2007")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Judgement 3 April 2008 ("Trial Judgement")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Order on the Transfer of Idriz Balaj (Confidential), 3 April 2008 ("Order on the Transfer of Idriz Balaj")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge, 6 May 2008 ("Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Scheduling Order, 9 July 2008 ("Scheduling Order of 9 July 2008")

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Scheduling Order, 12 November 2008 ("Scheduling Order of 12 November 2008")

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JOKIĆ

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Judgement on Sentencing Appeal")

KARADŽIĆ

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009 ("*Karadžić* Decision of 13 October 2009")

KORDIĆ AND ČERKEZ

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KRAJIŠNIK

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KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

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Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA et al.

Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

LIMAJ et al.

Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-A, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

MARTIĆ

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement")

D. MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*D. Milošević* Appeal Judgement")

S. MILOŠEVIĆ

Prosecutor v. Slobodan Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision of 18 April 2002")

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Decision of 20 January 2004")

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004

MILUTINOVIĆ et al.

Prosecutor v. Milan Milutinović, *Nikola Šainović*, *Dragoljub Ojdanić*, *Nebojša Pavković*, *Vladimir Lazarević and Sreten Lukić*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007

MRKŠIĆ AND ŠLJIVANČANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement")

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

M. NIKOLIĆ

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 ("*M. Nikolić* Judgement on Sentencing Appeal")

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement")

PRLIĆ et al.

Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007

Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007

ŠEŠELJ

Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006

Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-AR73.8, Decision on Prosecution's Appeal Against the Trial Chamber's Order Regarding the Resumption of Proceedings, 16 September 2008 ("*Šešelj* Decision of 16 September 2008")

SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement")

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

STRUGAR

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement")

TADIĆ

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

Prosecutor v. Duško Tadić, Case Nos. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement")

TOLIMIR et al.

Prosecutor v. Zdravko Tolimir, *Radivoje Miletić and Milan Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

KAMBANDA

Jean Kambanda v. The Prosecutor, Case No. ICTR 97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement")

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement")

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement")

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-2001-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement")

NDINDABAHIZI

The Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement")

NIYITEGEKA

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

NSHOGOZA

Léonidas Nshogoza v. The Prosecutor, Case No. ICTR-07-91-A, Judgement, 15 March 2010, ("*Nshogoza* Appeal Judgement")

NTAGERURA et al.

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement")

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement")

ZIGIRANYIRAZO

Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement")

3. European Court of Human Rights

Van de Hurk v. The Netherlands

Van de Hurk v. The Netherlands, 19 April 1994, § 61, Series A no. 288

4. Other

Additional Protocol II

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609

African Charter of Human and Peoples' Rights

African Charter of Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, entered into force 21 October 1986

Common Article 3

Article 3 of Geneva Conventions I to IV

ICCPR

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, 993 U.N.T.S. 3, entry into force 3 January 1976

Inter-American Convention of Human Rights

American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978

Third Geneva Convention

Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135

Universal Declaration of Human Rights

Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948

B. List of Abbreviations, Acronyms and Short References

According to Rule 2(B) of the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

a.k.a.
Also known as

AT.
Transcript page from hearings on appeal in the present case

Balaj's Response Brief
Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Idriz Balaj's Response to Prosecution's Appeal Brief, 25 August 2008 (confidential)

Black Eagles
Unit within the KLA, which operated throughout the Dukagjin area as an Intervention Special Unit

Brahimaj's Appeal Brief
Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj,* Case No. IT-04-84-A, Appeal Brief on Behalf of Lahi Brahimaj, 21 July 2008

Brahimaj's Final Trial Brief
Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj,* Case No. IT-04-84-T, Final Trial Brief on Behalf of Lahi Brahimaj, 14 January 2008 (confidential) (public redacted version: 22 January 2008)

Brahimaj's Notice of Appeal
Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj,* Case No. IT-04-84-A, Notice of Appeal on Behalf of Third Defendant Lahi Brahimaj, 5 May 2008

Brahimaj's Reply Brief
Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj,* Case No. IT-04-84-A, Reply Brief on Behalf of Lahi Brahimaj, 15 September 2008

Brahimaj's Response Brief

Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj,* Case No. IT-04-84-A, Joinder to Response of Ramush Haradinaj to Prosecution's Appeal Brief, 25 August 2008.

Haradinaj's Response Brief

Prosecutor v. Ramush Haradinaj, *Idriz Balaj and Lahi Brahimaj,* Case No. IT-04-84-A, Respondent's Brief on Behalf of Ramush Haradinaj, 25 August 2008 (confidential)

ICTR

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994

Indictment

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Fourth Amended Indictment, 16 October 2007

JCE

Joint Criminal Enterprise

KLA

Kosovo Liberation Army – Ushtria Çlirimtare e Kosovës (UÇK)

P

Designates "Prosecution" for the purpose of identifying exhibits

Practice Direction on Formal Requirements for Appeals from Judgement

Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002

Prosecution

Office of the Prosecutor

Prosecution's Appeal Brief

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A,

Prosecution Appeal Brief, 16 July 2008 (confidential) (public redacted version: 17 July 2008)

Prosecution's Notice of Appeal

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Prosecution's Notice of Appeal, 2 May 2008 (public with confidential annex)

Prosecution's Pre-Trial Brief

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-PT, Prosecution's Pre-Trial Brief with Confidential Annexes, 29 January 2007

Prosecution's Response Brief

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Prosecution Response to Appeal Brief on Behalf of Lahi Brahimaj, 1 September 2008 (confidential) (public redacted version: 1 September 2008)

Rules

Rules of Procedure and Evidence of the Tribunal

SFRY

Socialist Federal Republic of Yugoslavia

SFRY Criminal Code

Adopted on 28 September 1976 by the SFRY Assembly at the Session of Federal Council, declared by decree of the President of the Republic on 28 September 1976, published in the official Gazette SFRY No. 44 of 8 October 1976, took effect on 1 July 1977

Statute

Statute of the International Criminal Tribunal for the Former Yugoslavia established by Security Council Resolution 827, adopted by S/RES 827 (1993), as amended by S/RES 1166 (1998), S/RES 1329 (2000), S/RES 1411 (2002), S/RES 1431 (2002), S/RES 1481 (2003), S/RES 1597 (2005), S/RES 1660 (2006), S/RES 1837 (2008)

T

Transcript page from hearings at trial in the present case

Trial Chamber

Trial Chamber I

Trial Judgement

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Judgement, 3 April 2008