

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

Case No. IT-04-84-A

BEFORE THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Andrézia Vaz
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Date filed: 19 July 2008

The Prosecutor

-v-

**Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ**

PUBLIC

APPEAL BRIEF ON BEHALF OF LAHI BRAHIMAJ

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II. INTRODUCTION

1. The Prosecutor charged the First Defendant, Ramush Haradinaj, the Second Defendant, Idriz Balaj and the Third Defendant, Lahi Brahimaj with 37 counts of Crimes Against Humanity and War Crimes pursuant to the Fourth Amended Indictment (“the Indictment”).
2. The Trial Chamber delivered its Judgement on 3 April 2008.¹ The first two Defendants were acquitted on all counts. Mr Brahimaj was convicted of the war crimes of torture and cruel treatment in relation to two witnesses² who testified in respect of Counts 28 and 32 of the Indictment. He was acquitted on all other Counts and further acquitted in respect of all but one of the individuals named as victims in Count 32.
3. The Trial Chamber sentenced Mr Brahimaj to a single sentence of six years of imprisonment.
4. The Defence for Mr Brahimaj filed a timely Notice of Appeal against conviction and sentence.³ In that Notice, we identified a number of respects in which the Trial Chamber had failed in its Judgement to apply appropriately the correct legal standards relating to burden and standard of proof (errors of law). We further identified those respects in which the Trial Chamber failed to set forth a sufficiently reasoned factual basis upon which it grounded the convictions in relation to Witness 3 and Witness 6 (errors of fact).
5. Although this appeal brief addresses a number of issues, it may be helpful to the Appeals Chamber if we make clear at the outset that the core of this appeal concerns the two principal witnesses against Mr Brahimaj, Witness 3 and Witness

¹ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, IT-04-84-T, Trial Judgement, 3 April 2008, hereinafter “*Haradinaj* Trial Judgement”.

² Witness SST7/06 (Count 28) and Witness SST7/03 (Count 32), hereinafter respectively “Witness 6” and “Witness 3”.

³ *Brahimaj* Notice of Appeal, 5 May 2008.

6. It is safe to say that, but for their testimony, Mr Brahimaj 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.
6. Mr Brahimaj has not yet had the opportunity to read the final trial judgement in his native Albanian language because, as at the time of filing this Appeal Brief, the translation has not been completed by the Tribunal. If, once the translated judgement is provided to him, it becomes clear that he wishes to raise further issues, an application will be made on his behalf to amend the Grounds of Appeal and / or this Appeal Brief. For these reasons, those representing Mr Brahimaj wish to reserve his position in this regard.

III. STANDARD OF APPELLATE REVIEW

A. The Statute of the Tribunal

7. Article 23 of the Statute requires, *inter alia*, that the Trial Chamber provide “a reasoned opinion in writing.”
8. Article 25 of the Statute provides for the right of appeal from the Trial Chamber to the Appeals Chamber on the grounds of:
 - 8.1. An error on a question of law invalidating the decision (hereinafter “an error of law”); or
 - 8.2. An error of fact which has occasioned a miscarriage of justice (hereinafter “an error of fact”).
9. These criteria have been adopted and applied by the Appeals Chambers of both the ICTY⁴ and the ICTR.⁵

B. Errors of Law

10. Where a party’s arguments are insufficient to support the contention of an error, the Appeals Chamber may nevertheless conclude for other reasons that there is an error of law.⁶
11. The Appeals Chamber reviews the Trial Chamber’s findings of law to determine whether they are correct.⁷ Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard

⁴ *Stakić* Appeal judgement, § 7; *Kvočka et al* Appeal Judgement, § 14; *Vasiljević* Appeal Judgement §§ 4 – 12; *Kunarac et al* Appeal Judgement §§ 35 – 48; *Čelebići* Appeal Judgement §§ 434 – 435; *Furundžija* Appeal Judgement §§ 34 – 40; *Tadić* Appeal Judgement § 64.

⁵ *Kajelijeli* Appeal Judgement § 5; *Semanza* Appeal Judgement, § 7; *Musema* Appeal Judgement § 15; *Akayesu* Appeal Judgement, § 178, *Kayishema and Ruzindana* Appeal Judgement, §§ 177, 320.

⁶ *Kupreškić et al* Appeal Judgement § 26.

⁷ *Stakić* Appeal Judgement § 25.

and review the relevant factual findings of the Trial Chamber accordingly.⁸ In doing so, the Appeals Chamber corrects the legal error and also applies the correct legal standard to the evidence contained in the trial record in order to determine whether it is convinced beyond reasonable doubt that the factual finding challenged by the Defence should be confirmed on appeal.⁹

1. Lack of Reasoned Opinion

12. An appellant claiming an error of law because of a lack of a reasoned opinion must identify the specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and must explain why this omission invalidated the decision.¹⁰ The right to a reasoned opinion is one of the elements of a fair trial requirement embodied in Articles 20 and 21 of the Statute.¹¹
13. 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 judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence submitted on appeal.¹²

2. Identification Evidence

14. The requirement to provide reasons is more rigorous where identification is at issue. In *Kupreškić et al*, the Appeals Chamber stated:

“...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’. In particular, a reasoned opinion must 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.”¹³

⁸ Blaškić Appeal Judgement § 15.

⁹ Blaškić Appeal Judgement § 15.

¹⁰ *Limaj et al* Appeal Judgement §9, *Kvočka et al* Appeal Judgement § 25.

¹¹ *Furundija* Appeal Judgement § 69; *Naletilić et al* Appeal Judgement § 603; *Kunarac et al* Appeal Judgement § 41; and *Hadžihasanović* Appeal Judgement § 13.

¹² *Limaj et al* Appeal Judgement §10; *Brđanin* Appeal Judgement §15; *Galić* Appeal Judgment, § 8; *Stakić* Appeal Judgement § 9.

¹³ § 39.

C. Errors of Fact

15. The Appeals Chamber will presume that a Trial Chamber took into consideration all the relevant evidence unless there is an indication that the Trial Chamber completely disregarded any piece of evidence. This may be the case where the Trial Chamber's reasoning fails to address evidence that is clearly relevant to its findings.¹⁴
16. It is well settled by the jurisprudence of the Tribunal that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved beyond a reasonable doubt each element of that crime and the applicable mode of liability as well as any fact indispensable for entering the conviction.¹⁵ This applies both to findings of fact based on direct evidence, and to those based on circumstantial evidence.¹⁶

1. Wholly Erroneous

17. The Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber.¹⁷ It will give a margin of deference to a finding of fact reached by the Trial Chamber.¹⁸ Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.¹⁹
18. Under Article 25(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate "an error of fact that occasioned a miscarriage of justice." For the

¹⁴ *Kvočka et al* Appeal Judgement § 23.

¹⁵ *Stakić* Appeal Judgement, § 219; *Kupreškić* Appeal Judgement, § 303; *Kordić and Čerkez* Appeal Judgement, § 834; *Ntagerura et al* Appeal Judgement §§ 174 – 175.

¹⁶ *Limaj et al* Appeal Judgement §12; *Čelebići* Appeal Judgement § 458, *Brđanin* Appeal Judgement § 13.

¹⁷ *Blagojević and Jokić* Appeal Judgement §9; *Galić* Appeal Judgment, § 9; *Stakić* Appeal Judgement § 10.

¹⁸ *Limaj et al* Appeal Judgement §12; *Kupreškić* Appeal Judgement, § 30.

¹⁹ *Limaj et al* Appeal Judgement §10;

error to be one that occasioned a miscarriage of justice, it must have been “critical to the verdict reached.”²⁰

19. However, an important distinction arises on appeal between the burden on the Prosecution and the burden on the accused. As the Appeals Chamber noted in *Limaj*:

“Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber’s factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused’s guilt has been eliminated.”²¹

2. Conclusions Drawn from the Evidence

20. All conclusions must be established beyond a reasonable doubt. A conclusion must be the *only* reasonable conclusion available from the evidence. If there is another conclusion that is also reasonably open from the evidence and which is consistent with the evidence of the accused, he must be acquitted.²² This principle is also referred by the Latin maxim: *in dubio pro reo*.²³ As set out by the Appeals Chamber in the *Čelebići* case:

“A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him ... Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably

²⁰ *Limaj et al* Appeal Judgement §13; *Kupreškić* Appeal Judgement, § 29.

²¹ *Limaj et al* Appeal Judgement §13, citing with approval: *Rutaganda* Appeal Judgement § 24; *Bagilishema* Appeal Judgement § 13-14; *Blagojević and Jokić* Appeal Judgement § 9; and *Brđanin* Appeal Judgement § 14. See further: *Galić* Appeal Judgment, § 9; *Stakić* Appeal Judgement § 220; *Blaškić* Appeal Judgement § 16; *Aleksovski* Appeal Judgement § 63; *Tadić* Appeal Judgement § 64, *Hadžić* Appeal Judgement § 12.

²² *Čelebići* Appeal Judgement § 458. *Limaj* Appeal Judgment, § 21, *Tadić* Decision on Appellant’s Motion for Extension of Time Limit and Admission of Further Evidence, 15 October 1998, § 73 *Naletilić* Appeal Judgement, § 120;

²³ “When in doubt, in favour of the accused.”

open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.”²⁴

IV. GROUNDS OF APPEAL RELATING TO CONVICTION

A. First Ground of Appeal

21. Extensive submissions relating to Witness 6’s credibility were set out in the Final Trial Brief of Mr Brahimaj. However, the only indication that the Trial Chamber considered Witness 6’s credibility was at § 391 where it stated that it considered him to be a “credible witness”. There were a number of fundamental issues relating to the assessment of his credibility which the Trial Chamber failed to take into account, or alternatively failed to give any, or any proper, reasons for rejecting.

1. Failure to Disclose Rule 68 Exculpatory and Other Relevant Material

22. The Final Trial Brief for Mr Brahimaj specifically adopted²⁵ the submissions of the Final Trial Brief for Mr Balaj²⁶ relating to the violations of Rules 66 and 68 amounting to a deprivation of rights under Article 21 of the Statute.²⁷

23. Witness 6 testified on the 31 May 2007 and 1 and 4 June 2007. The Trial Chamber sat from 9.00 am to 2.00 pm on 4 June 2007.

24. During cross-examination, Witness 6 expressly denied that he was in the police reserve,²⁸ denied that he knew a lot of police officers²⁹ and stated that he had nothing to do with either the police or the army.³⁰

²⁴ § 458.

²⁵ At § 16.

²⁶ At §§ 37 to 55.

²⁷ In particular Article 21(4)(e), the right to cross-examine.

²⁸ 5305:8 – 5305:13.

²⁹ 5354:7 – 5354:8.

³⁰ 5399:19 – 5399:11.

25. At 1:00 pm on 4 June 2007, as counsel for Mr Brahimaj was reaching the end of his cross-examination of Witness 6,³¹ the Prosecution disclosed a batch of documents described as having been received from the authorities of Serbia and Montenegro relating to the investigation of the defendants. This included an English translation of a document that directly suggested that, contrary to his evidence, Witness 6 was either a police officer or at the very least directly involved in police activities.³² In the context of the Indictment period, if Witness 6 were involved in police activities, counsel would have been entitled to explore whether he was taking an active part in hostilities. In the absence of such cross-examination, the Trial Chamber expressly concluded that Witness 6 was not taking an active part in hostilities.³³ Defence counsel was thus deprived of a line of cross-examination of Witness 6 and an opportunity to challenge his credibility on an important issue. This was a clear breach of the Prosecution's obligation to disclose under Rule 68.
26. Rule 68 *bis* of the Rules of Procedure and Evidence specifically provides for a power for the Trial Chamber to decide on a sanction to be imposed on a party that does not comply with its disclosure obligations.
27. Both the Final Trial Brief of Mr Brahimaj,³⁴ and the Final Trial Brief for Mr Balaj³⁵ urged the Trial Chamber to take into account this failure when assessing the credibility of Witness 6.
28. The Trial Chamber failed to consider the submissions of the Brahimaj and Balaj Defence Teams in this regard and / or failed to give any, or any proper reasons, for not considering these submissions.
2. Witness 6's "Blood Feud" with Nazmi Brahimaj and the Brahimaj Family

³¹ 5357:1 – 5357:5.

³² 5474:25 – 5475:12.

³³ *Haradinaj et al.*, Judgement §393.

³⁴ At § 16.

³⁵ At § 47.

29. It was submitted on behalf of Mr Brahimaj that Witness 6 demonstrated a hostile *animus* towards the accused's brother Nazmi Brahimaj and towards the Brahimaj family generally, and that this should be taken into account when assessing his credibility.³⁶
30. In summary, it was pointed out on behalf of Mr Brahimaj that Witness 6 demonstrated particular animosity towards his brother Nazmi. Witness 6 owned an expensive Mercedes, which he valued at 30,000.00 Swiss Francs;³⁷ a huge amount for a poor man³⁸ who worked as a farmer.³⁹ When his car and pistol⁴⁰ were requisitioned by KLA soldiers, together with his identity card, driver's licence and wallet, Witness 6 accepted that he was angry.⁴¹ When Nazmi Brahimaj provided him with requisition slips for the car and pistol on his release, Witness 6 threatened: "there will be bloodshed because of this car."⁴²
31. Witness 6 showed a similar hostility towards the KLA, describing them as "arrogant"⁴³ and as "soldiers that pretend they are fighting".⁴⁴
32. Finally, Witness 6 specifically asked the Trial Chamber where he should seek compensation for the loss of his car.⁴⁵

3. Implausibility of Witness 6's Relations with the Serbian Security Services

33. The Defence for Mr Brahimaj set out at length its submissions relating to the implausibility of Witness 6's account of his relations with the Serbian Security Services and how this demonstrated that Witness 6 was not credible.⁴⁶

³⁶ See at §§ 87 to 91 of the Final Trial Brief of Mr Brahimaj.

³⁷ 5378:13.

³⁸ 5378:25.

³⁹ 5352:5.

⁴⁰ 5194:17.

⁴¹ 5378:16; 5379:7.

⁴² 5256:5.

⁴³ 5263:9.

⁴⁴ 5208:5.

⁴⁵ 5403:5.

⁴⁶ See Brahimaj Final Trial Brief §§ 92 to 100 and 157 to 160.

34. The Defence for Mr Brahimaj pointed out that Witness 6 met Sretan Camović,⁴⁷ the head of Serbian State Security in Djakovica/Đakovë⁴⁸ a few days after leaving Jablanica/Jabllanicë. He said he had known for Camović 20 years.⁴⁹ He testified that Camović knew Witness 6 had been detailed in Jablanica/Jabllanicë yet apparently asked him nothing whatsoever about his experiences there, neither did he ask him who else was there, whether KLA soldiers or other alleged detainees.⁵⁰ Witness 6 also saw police officer Pavle Zuvic who asked him how it was in Jablanica/Jabllanicë⁵¹ and police officer called “Zokan Kuqi” with whom he discussed events.⁵² The Serb authorities therefore knew he had been in Jablanica/Jabllanicë.
35. Witness 6 also claimed in his testimony that he had been detained by the KLA at the same time as a Serb police officer named Nenad Remistar. Nevertheless, he asserted that Camović showed no interest in the fate of his officer.
36. Jablanica/Jabllanicë was a KLA stronghold.⁵³ Exhibit D81 showed that between 25 July and 6 August 1998 – exactly the time when Witness 6 claimed to have had contact with Camović – Serbian JSO and VJ were seeking to overrun Jablanica/Jabllanicë.⁵⁴ This offensive resulted in widespread arrests, detentions, interrogations and torture as the Serb Authorities sought to obtain any useful information against the KLA and its adherents.

⁴⁷ 5301:7.

⁴⁸ 5301:15.

⁴⁹ 5301:1.

⁵⁰ 5302:5.

⁵¹ 5304:18 – 5305:7.

⁵² 5354:22.

⁵³ See, eg 92^{ter} Statement of Zoran Stijovic, at § 23: “Starting in 1996, the KLA had a visible presence in Jablanica in the form of guards, checkpoints and the imposition of a kind of curfew. The MUP avoided entering the area and moving through it. Their presence was tolerated and armed clashes with the KLA members were avoided.”

⁵⁴ 4654.

37. Zoran Stijović, Analytical Department Head of RDB Pristina Centre, confirmed that if anybody had been detained and beaten in Jablanica/Jabllanicë, that would have been taken down in statement form by the RDB.⁵⁵ If what Witness 6 claimed to have happened was true, this was vital intelligence for the Serb forces at that time.
38. It was therefore wildly improbable that the head of Serbian State Security in Djakovica/Đakovë, would not have questioned Witness 6 if he knew he had just been in Jablanica/Jabllanicë. Witness 6's attempts to explain this were equally unconvincing. Witness 6 first claimed that Camović knew the *people* there better than Witness 6,⁵⁶ then said Camović knew the *terrain* and *villages* better.⁵⁷ The claim that Camović was not interested in KLA activities⁵⁸ was not credible. Witness 6 also said the reason he did not tell the SUP anything was that the war started so he did not have time,⁵⁹ though he did have time to go to the SUP offices for a driving licence and ID card two days later,⁶⁰ and still did not report anything.⁶¹ His explanation was that there were only women working there.⁶²
39. The Defence for Mr Brahimaj also pointed out that it was highly improbable that the Serbian police would not have asked Witness 6 about their missing colleague, whom Witness 6 claims to have been imprisoned with.⁶³
40. For those and other reasons, the Defence for Mr Brahimaj submitted that Witness 6's story of his relations with the Serbian Security Services was untruthful.
41. There is no indication in the Trial Chamber's Judgement that they addressed any of these arguments.

⁵⁵ 9247:7 – 9247:25.

⁵⁶ 5305:22 – 5305:25.

⁵⁷ 5307:11 – 5307:14.

⁵⁸ 5703:23 – 5703:25, 5308:16 – 5308:18, 5708:21 – 5709:6, 5709:8 – 5709:13.

⁵⁹ 5310:7.

⁶⁰ 5309:17 – 5309:20.

⁶¹ 5310:2.

⁶² 5309:23.

⁶³ See Brahimaj Final Trial Brief §§ 157 to 160.

4. Shortcomings in Witness 6's Purported Identifications.

42. It was submitted by the Defence for Mr Brahimaj that the numerous shortcomings in the identifications purportedly made by Witness 6 raised serious concerns about his credibility as a witness.⁶⁴
43. In summary, Witness 6 did not know the names Lahi Brahimaj, Nazmi Brahimaj or "Hamz" during his detention and said he found these out after he was released.⁶⁵ Witness 6 said Nazmi Brahimaj⁶⁶ was the deputy commander,⁶⁷ though his source for this belief may simply have been the two pieces of paper given to him signed "Nazmi Brahimaj, Deputy Commander."⁶⁸ He was unable to identify the main commander,⁶⁹ any other commanders or indeed whether Lahi Brahimaj was a commander at all.⁷⁰
44. OTP investigators asked Witness 6 about a number of individuals allegedly detained in Jablanica/Jabllanicë at the same time as himself. The only individual Witness 6 was able to identify was Pal Krasniqi.⁷¹ However, an investigative judge had asked Witness 6 about Pal Krasniqi,⁷² so he visited Krasniqi's parents' home⁷³ where he was shown the *same photograph* of Pal Krasniqi that the OTP later used when asking Witness 6 to identify him.⁷⁴ When the Prosecution again showed Witness 6 the photograph in court, the words "Pal Krasniqi" were written on the photograph for Witness 6 to read.⁷⁵
45. When he was told the name "Skender Kuqi" he did not recognise it.⁷⁶ Witness 6 never saw Naser Lika at Jablanica/Jabllanicë and did not identify him when an OTP investigator showed him his photograph and gave him his name.⁷⁷

⁶⁴ See Brahimaj Final Trial Brief §§ 101 to 107 and 149 to 154.

⁶⁵ 5218:5 – 5218:11.

⁶⁶ For example: 5208:24, 5211:3, 5219:13, 5380:21.

⁶⁷ 5245:20.

⁶⁸ 5254:17 – 5254:22, 5380:11 and P335.

⁶⁹ 5245:25.

⁷⁰ 5245:14.

⁷¹ 5233:1 and 5237:13.

⁷² 5251:12.

⁷³ 5250:25. The evidence of Pal Krasniqi's father, Ded Krasniqi, confirms this: 4790:9.

⁷⁴ 4249:11 – 4249:15.

⁷⁵ 5248:2 – 5248:5.

⁷⁶ 5368:22.

46. Witness 6 asserted that one “Hamz Brahimaj” was responsible for beatings at the barracks,⁷⁸ but **misidentified him**; the photo he identified as being “Hamz” was in fact a person called “Myftar”.⁷⁹

47. There is no evidence in the Trial Chamber’s judgement that any of these failed or mistaken identifications were taken into account in assessing Witness 6’s credibility and reliability, despite it being specifically urged upon them by the Defence for Mr Brahimaj.⁸⁰

5. The Inconsistency Between Witness 6’s Injuries Compared to the Seriousness of His Alleged Treatment

48. The Defence for Mr Brahimaj pointed out to the Trial Chamber that there was a fundamental inconsistency between the mistreatment described by Witness 6 and his reported injuries.⁸¹

49. In summary, Witness 6 said he was beaten unconsciousness⁸² with a baseball bat⁸³ by Nazmi Brahimaj,⁸⁴ causing fractures and bruises.⁸⁵ For four weeks thereafter he said he was regularly⁸⁶ beaten and tortured⁸⁷ with baseball bats and fists.⁸⁸ It was submitted that this was not consistent with the record of injuries sustained. Dr Shkelzen Zajmi examined Witness 6 on 30 July 1998 shortly after he left Jablanica/Jabllanicë and took an X-ray. The only injury detected was a left wrist fracture, which had healed, *mala sanata*.⁸⁹ The X-ray was not produced and there was only the witness’s word as to when the injury was caused.

⁷⁷ 5368:3, 5382:1 – 5282:13. *See*, Haverinen at 6342:10-23; 6344:2 – 6.

⁷⁸ 5208:24, 5209:9.

⁷⁹ *See* Pekka Haverinen at 6344:22 – 6345:7; 6347:1 – 6347:8.

⁸⁰ *See* Brahimaj Final Trial Brief §§ 101 to 107.

⁸¹ At Brahimaj Final Trial Brief §§ 108 to 112.

⁸² 5209:25, 5324:19.

⁸³ 5210:5.

⁸⁴ 5209:23.

⁸⁵ 5210:8.

⁸⁶ 5218:4.

⁸⁷ 5217:11 – 5217:14.

⁸⁸ 5220:6.

⁸⁹ P336.

50. It was submitted that the lack of any serious injuries other than the possible fracture casts substantial doubt on Witness 6's story that he was regularly beaten with baseball bats over a period of 4 weeks following his arrival at the Jablanica/Jabllanicë barracks.

6. No Explanation for Change in Witness 6's Circumstances

51. A further point made by the Defence for Mr Brahimaj relating to Witness 6's lack of credibility was his inability to explain his claim that the conditions of his alleged detention improved.⁹⁰

52. In summary, it was pointed out that Witness 6 said that after four weeks of sustained mistreatment, his captors suddenly permitted him to move around the meadow outside the barracks,⁹¹ where one could see around for several thousand metres;⁹² he wandered around the yard and washed dishes;⁹³ and he even had the opportunity to escape or leave of his own accord,⁹⁴ but chose not to do so.⁹⁵ Witness 6 was unable to explain this fundamental change of circumstances.⁹⁶

53. On behalf of Mr Brahimaj, it was submitted that the only credible explanation for this alleged change of circumstances was that Witness 6 was not subject to an extended period of sustained mistreatment. The change of circumstances is only explicable on the basis that after an initial brief period of detention as a suspected spy or collaborator (during which some mistreatment may conceivably have occurred) he was required to prove his loyalty by working in the kitchens, as his own father's *92quater* statement reflected.⁹⁷

54. Witness 6's failure to provide a reliable and credible explanation of his otherwise inexplicable change of fortunes lends further strength to the defence assertion that he was prone to exaggeration, distortion and lies. At the very least, this and other

⁹⁰ At Brahimaj Final Trial Brief §§ 113 and 114.

⁹¹ 5231:5, 5232:4.

⁹² 5341:5.

⁹³ 5391:11.

⁹⁴ 5349:22.

⁹⁵ 5243:3.

⁹⁶ 5241:19, 5242:3.

⁹⁷ P1248, Witness 7 Witness Statement, 28 April 2004, § 28.

deficiencies in his testimony called for a clear reasoned opinion from the Trial Chamber to explain the basis on which they based a finding of guilt beyond a reasonable doubt.

7. Other Inconsistencies Within Witness 6's Evidence

55. The Final Trial Brief of Mr Brahimaj pointed out numerous inconsistencies that were relevant to Witness 6's credibility.⁹⁸

56. Witness 6 went to great lengths to claim he could not tell day from night during his claimed detention,⁹⁹ saying that the window was barred with wooden planks¹⁰⁰ that were covered with another cover,¹⁰¹ that he never needed to go out to the toilet because he was not given anything to eat or drink¹⁰² and that his watch was taken away.¹⁰³ Despite this, he surprisingly claimed that other alleged detainees were taken away at *about 10:00 pm*.¹⁰⁴ In relation to food and drink, Witness 6 later contradicted himself, saying that he *was* brought water¹⁰⁵ and daily bread.¹⁰⁶ At first he denied giving the Serb SUP police a statement in 2000 in which it was recorded that he was given salami, bread and beans.¹⁰⁷ He then said he had been given bread and marmalade,¹⁰⁸ and then that he was given bread and beans.¹⁰⁹

57. Witness 6 first said he had seen *pictures* of Nazmi Brahimaj and Lahi Brahimaj and found out their names,¹¹⁰ and then he immediately denied seeing pictures of them.¹¹¹

⁹⁸ See Brahimaj Final Trial Brief §§ 118 to 122 and 155 to 156.

⁹⁹ 5325:14.

¹⁰⁰ 5325:20.

¹⁰¹ 5326:14.

¹⁰² 5326:11.

¹⁰³ 5326:24.

¹⁰⁴ 5230:22.

¹⁰⁵ 5327:7.

¹⁰⁶ 5327:21.

¹⁰⁷ 5327:22 – 5328:2.

¹⁰⁸ 5329:6.

¹⁰⁹ 5329:7.

¹¹⁰ 5295:21.

¹¹¹ 5296:21, 5297:16.

58. When asked the meaning of the phrase: “His release is conditional. If the mistake is repeated the accused [Witness 6] will face criminal charges” in the document given to him on his release,¹¹² he claimed this meant he should “not go to Djakovica/Đakovë for personal reasons.”¹¹³ This totally improbable reply, in the face of the fact that the KLA had confiscated his pistol, belies the obvious explanation, namely that he was being warned not to carry a weapon when not a member of the KLA. Again, his response is not that of a frank and truthful witness of fact.

59. Witness 6 also gave differing accounts of who mistreated four unidentified people. First he said that he *did not know who was present* when it took place¹¹⁴ and that he *could not describe the perpetrators*,¹¹⁵ later he claimed that “Nazmi and Hamza” were there.¹¹⁶

60. It was submitted that all these matters were relevant to the Trial Chamber’s assessment of Witness 6’s credibility.

8. Inconsistencies Between the Evidence of Witnesses 6 and 3

61. Highly relevant to the assessment of Witness 6’s credibility was the corroboration, or lack of it, with other witnesses. There were serious and fundamental conflicts between the evidence of Witnesses 6 and 3 that were pointed out in the Final Trial Brief of Mr Brahimaj.¹¹⁷

62. The inconsistencies are dealt with in detail in this Appeal Brief below at §§ 75 to 88.

63. However, the Trial Chamber did not provide a reasoned opinion in which it demonstrated that it had taken any account of the inconsistencies that were clearly notified to it by the Defence when assessing Witness 6’s credibility.

¹¹² P335.

¹¹³ 5255:17.

¹¹⁴ 5330:25.

¹¹⁵ 5331:5.

¹¹⁶ 5228:25.

¹¹⁷ See Brahimaj Final Trial Brief §§ 190 to 197.

9. Summary

64. In the circumstances, it is respectfully submitted that the failure to address any of the above factors when assessing Witness 6's credibility, or alternatively to provide any, or any proper reasoned grounds for dismissing them, amounted to errors of fact and / or law.

B. Second Ground of Appeal

65. At § 392, the Trial Chamber concluded 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 for those reasons that he had been subjected to torture.

66. The reasons for the conclusion were also set out at § 392, namely:

66.1. “*[S]ome KLA soldiers* accused him of associating with and spying for the Serbs.”

66.2. “Witness 7 [Witness 6's deceased father, whose untested *92quater* statement was admitted] and Witness 16 [a co-villager whose untested *92bis* statement was admitted] testified that *a commander* at that Jablanica/Jabllanicë compound told them that Witness 6 had been convicted or sentenced, and spoke angrily against Ibrahim Rugova and those who did not fight.”

66.3. “When Witness 6 was released, he received a decision from *Nazmi Brahimaj* stating that, ‘[if] he repeats his mistakes [Witness 6] will be prosecuted.’”

67. It is immediately clear that the main rationale for the conclusion that Mr Lahi Brahimaj should have been convicted of torture, rather than cruel treatment, is on the basis of the conduct of others.

68. The only evidence relied upon by the Trial Chamber for the conclusion that Mr Lahi Brahimaj displayed an intention to punish Witness 6 for his perceived collaboration with the Serbs appears at § 382, repeated at § 395 of the judgement:

“KLA soldiers including Lahi and Nazmi Brahimaj accused Witness 6 of associating with or spying for the Serbs.”

And repeated as follows:

“Witness 6 also testified that Lahi Brahimaj was among those who accused him of associating with and spying for the Serbs.” (footnotes omitted).

69. By contrast, the Trial Chamber does not refer to any evidence that Lahi Brahimaj ever evinced an intention to discriminate against Witness 6 on political grounds. Although there is reference in §§ 389 and 390 to a “Commander Maxhupi”, the Trial Chamber did not conclude that this person was Lahi Brahimaj.

70. The Trial Chamber’s reasoning that Witness 6 was mistreated on political grounds presumably refers to the fact that he was from a village that supported the LDK and Ibrahim Rugova rather than the KLA. See for example §§ 388 to 390 and 392. However, it is noteworthy that when a number of other members of Witness 6’s village, who were known to support both the LDK and Rugova, visited Jablanica/Jabllanicë and the barracks, they were not abducted, imprisoned or mistreated in any way.

71. Of particular concern is other evidence from witnesses testifying that they did not know why Witness 6 was abducted or mistreated:

71.1. As recorded by the Trial Chamber at § 390, Witness 7, the father of Witness 6, stated that he did not know why Witness 6 had been abducted.¹¹⁸

71.2. Witness 6 testified that when he was first detained, he was asked questions but that nobody explained why he was being beaten.¹¹⁹ This is noted by the Trial Chamber at § 382.

¹¹⁸ P1248, Witness 7 Witness Statement, 28 April 2004, §§ 40 – 41.

71.3. The Trial Chamber also recorded at § 384 that Witness 6 stated that he was never told why he was detained.¹²⁰

71.4. Although the Trial Chamber concluded that the document given to Witness 6 by Nazmi Brahimaj on his release (as set out above at § 66.3 above) was evidence of his perceived collaboration with Serbs or discrimination on the basis of political grounds, Witness 6 did not give evidence to this effect. Rather, he stated the following:

“... This document tells me that I need not go to Gjakove, must not go to Gjakove for *personal reasons*...”¹²¹ (emphasis added)

71.5. Furthermore, although Witness 6 gave evidence that he was accused of spying for Serbia, his evidence indicates that this was not the reason for any mistreatment:

“Q. Okay. And what precisely did they say to you about you being a spy of Serbia? Can you recall any more detail?”

“A. They just said -- they were kind of trying to make fun of me. I don't know why.”¹²²

72. It is therefore clear that none of the witnesses who gave evidence and who were present at the time were sure of the reasons for the mistreatment alleged.

73. Furthermore, there was clearly another reason why Witness 6 may have been detained and mistreated, namely the fact that he was carrying a gun that was not authorised by the KLA. Evidence of this is:

73.1. The evidence of Witness 6¹²³ that he had a police-issued pistol, as recorded by the Trial Chamber at § 381;

¹¹⁹ 5210:10 – 14.

¹²⁰ 5252

¹²¹ 5255:16

¹²² 5400:17 – 20.

¹²³ 5194:17 – 22, 5352:6 – 12 and 5353:3 – 14.

73.2. The evidence of Witness 6's wife, Witness 23, that Witness 6 was questioned about the gun he was carrying.¹²⁴ This was recorded by the Trial Chamber at § 387.

73.3. When Witness 6 was released he was given two documents at the same time by Nazmi Brahimaj. While one warned him of the consequences of repeating his mistakes,¹²⁵ the other confiscated the gun that he had been found carrying.¹²⁶ See Trial Chamber judgement at § 384.

74. The Trial Chamber therefore fell into a number of different sub-errors.

74.1. Firstly, it imputed the intention of unidentified KLA soldiers, an unidentified commander and Nazmi Brahimaj to Lahi Brahimaj without giving reasons for doing so.

74.2. Second, it found that Lahi Brahimaj intended to discriminate against Witness 6 on political grounds when it did not find that there were any occasions when Lahi Brahimaj indicated an intention to so discriminate.

74.3. Thirdly, no reasonable tribunal could have found that Lahi Brahimaj intended to mistreat Witness 6 because of his association with the Serbs and in order to discriminate against him on political grounds when:

74.3.1. No witness who was present at the relevant time was able to say why Witness 6 was mistreated;

74.3.2. Other individuals from the same village as Witness 6 who also were known to support the LDK and Ibrahim Rugova visited Jabllanicë and the barracks at the same time and were not mistreated on political grounds.

¹²⁴ 10540:5 – 9 and 10540:21 – 10541:8.

¹²⁵ P335.

¹²⁶ P335 CHECK – ARE THESE THE SAME?

74.4. Fourthly, the Trial Chamber ignored a likely reason for Witness 6's detention and mistreatment in that he was found to be travelling around with a firearm that was not authorised.

74.5. Fifthly, although there was evidence that at some point some KLA soldiers including Lahi Brahimaj 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.

C. Third Ground of Appeal

75. We turn now to the evidence concerning Witness 3. However, as will be seen, this evidence also relates back to the issues of credibility and reliability in relation to Witness 6.

76. The Trial Chamber concluded at § 445 that Witness 3 was beaten. There were only two witnesses who gave evidence about Witness 3's treatment inside the barracks: Witness 3 himself and Witness 6. The Tribunal was satisfied, at § 445, that Witness 6's reference to "a man from Grabanica" referred to Witness 3. The Tribunal noted, also at § 445, that Witness 3 testified that on his arrival at the barracks, several persons beat him with baseball bats until he lost consciousness. However, as the Trial Chamber acknowledged (also at § 445): "Witness 6 also testified that Witness 3 was *not beaten*, which appears to contradict the evidence of Witness 3." (Emphasis added)

77. The Trial Chamber went on to state, still at § 445, that it considered both Witness 3 and Witness 6 to be credible, without giving any reasons for this view and continuing to ignore the stark conflict between the two testimonies. Rather, it chose to re-interpret Witness 6's testimony "to mean that he was not aware of Witness 3 being beaten." In the face of Witness 6's clear and unequivocal evidence on this point – which was never challenged by the Prosecution – the

Trial Chamber performed feats of mental gymnastics in attempting subsequently to justify this conclusion.

78. We submit that the Tribunal ought instead to have considered each and every separate element of the crime charged, rather than trying to fit the evidence to a preconceived view that contradicted a witness whom they were at pains to describe as credible.

79. Illustrative of the Tribunal's erroneous approach is the following:

79.1. The Tribunal stated at § 445: "The evidence does not indicate that Witness 6 saw the initial beating of Witness 3." This statement presumes that Witness 3 was in fact beaten on his arrival at the barracks, when it was the clear evidence of Witness 6, and the case for Mr Brahimaj, that Witness 3 was not beaten. The evidence is equally consistent with there being no beating. Neither the Prosecution nor the Trial Chamber questioned Witness 6 about whether Witness 3 could have been beaten without Witness 6's knowledge. To draw such a conclusion, in the absence of evidence, is contrary to the settled jurisprudence of the Tribunal¹²⁷ and fundamentally unfair to Mr Brahimaj;

79.2. The Tribunal also stated at § 445: "The evidence does not indicate that Witness 6 ... entered [Witness 3]'s room when bringing food and water." This statement flatly contradicts the very facts found by the Trial Chamber. At § 418, the Trial Chamber noted that Witness 6 brought food and water to the room where Pal Krasniqi was kept and described his clothes and his condition. At § 427 the Trial Chamber recorded that Witness 6 brought food and water to an unknown man from Zahaq and Witness 6 described his physical condition. At § 443 the Trial Chamber recorded that Witness 6 took food and water to Witness 3's room. At §§ 418, 427 and 443, the Trial Chamber recorded that Witness 6 saw the unknown man from Zahaq, Pal Krasniqi and the man from Grabanica escape together. The evidence of

¹²⁷ "In dubio pro reo." As set out above at § 20. See further *Limaj* Appeal Judgment, § 21; *Čelebići* Appeal Judgement § 458.

Witness 6 was clear that he did enter the room that Witness 3, Skender Kuci and Pal Krasniqi were in. For example:

“Q. And what about the man from Grabanice, where was he?

A. In the same room as Pal and the one from Zahaq.

Q. And was the man from Grabanice beaten as well?

A. No.”¹²⁸

“Q. How many days in all did the man from Zahaq stay at Jabllanice?

A. Two days.

Q. When he arrived, could you see what condition he was in?

A. Yes.

Q. Was he able to stand?

A. No. He was lying down on the floor in the room.”¹²⁹

“Q. When you said that he was not able to stand, the man from Zahaq, he was lying down in the room on the other side of the front door. Is that right?

A. Sometimes I was ordered to give him some water to drink.”¹³⁰

“Q. Now, you knew Pal from before, didn't you?

A. No.

Q. How did you learn his name?

A. When I took bread and water to him, I asked him what his name was and where he was from.

Q. And was he in the same room as the man from Zahaq?

A. Yes...”¹³¹

“Q. And you went into that room and saw what condition the man from Zahaq was in; right?

A. Only when I took him some water to drink, I could see him.

Q. Was he able to drink the water?

A. No, I had to give it to him.”¹³²

“Q. Okay. And can you just tell the Trial Chamber what the physical condition of the person from Grabanica was like compared to that of the man from Zahaq who arrived in the Mercedes and in the boot of the Mercedes and Pal Krasniqi. How did he compare to the other two?

A. Pal Krasniqi and the person from Zahaq were in a critical state, while the person from Grabanica was not beaten, he was only kept prisoner. He opened the window for the other two because

¹²⁸ 5336:4 – 7.

¹²⁹ 5332:22 – 5333:2.

¹³⁰ 5333:18 – 21.

¹³¹ 5335:6 – 14.

¹³² 5336:8 – 22.

they were not in a situation to go through the window themselves. So he helped them go through the window.

Q. And how do you know that? Is that something you saw or something you have concluded or something you were told?

A. No, I saw this myself.”¹³³

No reasonable tribunal, faced with such evidence, could conclude otherwise than that, in order to make the observations he claimed to have made, Witness 6 must have entered the room in which Witness 3 and other detainees were housed. The Trial Chamber attempted to resolve the contradictions between Witness 6 and Witness 3 by saying, in effect, that since nobody asked Witness 6 specifically if he actually *entered* the room, rather than just bringing food and water *to the door* of the room, the latter interpretation is to be preferred even though there is no evidence to support it. This is frankly disingenuous. The Trial Chamber thus ignored, or failed to take proper account of the clear and unchallenged evidence of Witness 6.

79.3. The Trial Chamber also stated at § 445: “It is further not clear that Witness 6 saw Witness 3 as he escaped from his room.” This statement does not reflect the evidence:

“Q. And, Witness, you probably heard that, so we'd like to know if you actually saw these men escape or what you saw that leads you to say to this Trial Chamber that they tried to escape. So tell us what you know and how you know it.

A. *I saw it*, together with Gani Brahimaj. We were sitting in a makeshift kitchen, and he said, "The prisoners are trying to escape. Let's go and stop them." I didn't run to stop them, but he did. They were not able to escape. The third person who was not beaten, he tried to escape through the window. This was at about 1.00 a.m. (Emphasis added)

THE INTERPRETER: “P.M., correction.”¹³⁴

“Q. Well, did you see the men leave through a window? Do I -- or was it only the third person who got through the window?

A. No. *We saw this* -- the third person running through the meadows...” (Emphasis added)¹³⁵

¹³³ 5237: 16 – 5238:2.

¹³⁴ 5236:19 – 5237:3.

¹³⁵ 5237:5 – 7.

- “A. Pal Krasniqi and the person from Zahaq were in a critical state, while the person from Grabanica was not beaten, he was only kept prisoner. He opened the window for the other two because they were not in a situation to go through the window themselves. So he helped them go through the window.
- Q. And how do you know that? Is that something you saw or something you have concluded or something you were told?
- A. No, *I saw this myself.*”¹³⁶ (Emphasis added.)

80. In the circumstances, the Trial Chamber’s conclusion, at § 445, that “The Trial Chamber therefore considers that Witness 6 was not in a position to ascertain whether or not Witness 3 was beaten, and interprets his evidence to mean that he was not aware of Witness 3 being beaten” is fatally flawed.

81. The conclusive proof – if further proof were needed – that the Trial Chamber’s conclusion is demonstrably wrong, lies in the answers given by Witness 6 as to the reasons why Witness 3 was *not* beaten. It is not simply a question of whether Witness 6 was in a position to observe directly or learn indirectly whether there was a beating. He explained clearly that there was a good reason why Witness 3, the man from Grabanica, was not beaten:

- “Q. And what about the man from Grabanice, where was he?
- A. In the same room as Pal and the one from Zahaq.
- Q. And was the man from Grabanice beaten as well?
- A. No.
- ...
- Q. How do you know?
- A. *Because he was married to someone from Jabllanice, and his wife's family came and intervened and he was not beaten.*”¹³⁷ (Emphasis added.)

82. It is submitted that the conclusion of the Trial Chamber is so totally in conflict with the evidence that no reasonable tribunal could have come to it. Insofar as it might be argued that there was more than one conclusion reasonably open on the evidence, the principle *in dubio pro reo* left the Trial Chamber with no alternative but to draw the available conclusion that was consistent with the innocence of Mr Brahimaj.¹³⁸

¹³⁶ 5237:20 – 5238:2.

¹³⁷ 5336:4 – 13.

¹³⁸ See *Limaj* Appeal Judgement § 21; *Naletilić and Martinović* Appeal Judgement § 120; *Čelebići* Trial Judgement § 412, Fn. 1100

83. However, for the reasons set forth below, the defence for Mr Brahimaj maintains that the adverse conclusion drawn by the Trial Chamber was not, in fact, open to it.

D. Fourth Ground of Appeal

84. Whereas the Trial Chamber noted the fundamental conflict between Witness 6 and Witness 3 as to whether Witness 3 was beaten (see above at §§ 75 to 82), the Trial Chamber failed to note or address a further conflict of evidence between them, despite the fact that it was put forward in the Final Trial Brief on behalf of Mr Brahimaj.¹³⁹ This was the material and irreconcilable conflict in evidence between Witness 6 and Witness 3 as to the length of time Witness 3 was in the barracks.

85. Witness 3 gave evidence, duly noted by the Trial Chamber at § 446, that after he was brought to the Jablanica compound he spent the next two nights and three days in the same room. At § 443, the Trial Chamber also noted the evidence of Witness 6 to the effect that Witness 3 escaped within hours of his arrival, having arrived two to three hours after Pal Krasniqi and then escaped the same day around 1 pm.

86. Witness 6 in fact repeated on a number of occasions that Witness 3 was only at the barracks for a few hours:

“Q. ...
Then on day two, the next day, the other two men arrive. Is that correct?

“A. Correct.

“Q. And was the *escape attempt on the same day that they arrived* or was it a day or two after that?

“A. *On the same day*, in the afternoon, after they were imprisoned, the third person opened the window and they got out of that window, together with Pal Krasniqi and the one from Zahaq.”¹⁴⁰

¹³⁹ At § 193.

¹⁴⁰ 5389:5 – 13.

“Q. And so, for example, *the man from Grabanica was only ever at Jabllanice for a matter of hours between his arrival and his escape*. Is that right? Shall I put the question again? Is it --

“A. Yes.”¹⁴¹

“Q. ... Does it follow from your evidence, as you recall the event, that *the man from Grabanica was only at Jabllanice for a matter of hours* between his arrival and his escape, as far as you recall. Is that correct?

“A. *They stayed there for a couple of hours*, then through the window they left, the three of them, but he was not beaten, so he was capable of walking and leaving.”¹⁴² (Emphasis added.)

87. If Witness 3 was only at the barracks for a very short period, this would explain the fact that he was unaware of the name or religion of the third person he was supposedly imprisoned with for 3 days. The only information that Witness 3 was able to give from that time was a short description and details of the third person’s clothing.¹⁴³

88. This evidence, and the further conflict in evidence between Witness 6 and Witness 3, is clearly relevant to both the assessment of the credibility of Witness 3 and his description of events forming the basis of Lahi Brahimaj’s conviction for torture and mistreatment of Witness 3. The Trial Chamber’s failure to address this issue in the judgement is both worrying in the context of other serious concerns in relation to Witness 3’s credibility (see below at §§ 89 to 119) and of itself amounts to an error of fact.

E. Fifth Ground of Appeal

89. Defence submissions on the lack of credibility of Witness 3 were dealt with in detail in the Final Trial Brief of Lahi Brahimaj.¹⁴⁴ However, the Trial Chamber addressed these issues in a single sentence, absent any reasoning: “The Trial Chamber considers ... Witness 3 ... to be a credible witness.”¹⁴⁵

¹⁴¹ 5389:20 – 23.

¹⁴² 5390:9 – 17.

¹⁴³ 7947:7 – 7948:5.

¹⁴⁴ See Final Trial Brief of Lahi Brahimaj at §§ 182 to 216

¹⁴⁵ At § 445.

90. It is important to note carefully the approach which the Trial Chamber stated it adopted in evaluating *viva voce* testimony. At § 13, the Judgement records:

“When evaluating the evidence given *viva voce*, the Trial Chamber considered the demeanour of witnesses. It further considered the individual circumstances of a witness, including his or her *possible involvement in the events* and *fear of self-incrimination*, the witness’s relationship with any of the Accused, and whether the witness would have an *underlying motive to give a certain version of the events*. The Trial Chamber also assessed the internal consistency of each witness’s testimony and other features of his or her evidence, as well as *whether there was any corroborating evidence*.” (Emphasis added).¹⁴⁶

91. Although there is no legal requirement for corroboration, as the Chamber itself apparently recognised, it should have been relevant to its assessment of credibility that Witness 3’s evidence of alleged mistreatment was not corroborated by any other witness.

92. The Trial Chamber failed to consider, or failed to give reasons for dismissing, serious and fundamental concerns about Witness 3’s reliability and credibility.

1. Conflicts Between the Evidence of Witness 3 and Witness 6

93. Our arguments in relation to the fundamental conflicts between Witness 3 and Witness 6 are already set out above at §§ 75 to 88 and will not be repeated here.

94. In the context of its own criteria for assessing *viva voce* testimony, however, it is important to note that the Trial Chamber failed to give any or any sufficient consideration to the fact that the only witness who was present and who could have corroborated Witness 3’s testimony not only failed to corroborate it but gave clear and cogent reasons for flatly contradicting it. The Trial Chamber gave no reasoned opinion for dismissing such a material failure of proof.

2. Conflicts Between the Evidence of Witness 3 and Fadil Fazliu

¹⁴⁶ *Haradinaj et al.* Trial Judgement, § 13.

95. At § 454 of the judgement, the Trial Chamber noted the evidence of Fadil Fazliu in relation to Count 34, and at § 455, the Trial Chamber noted the evidence of Witness 3 in this regard. At § 457, the Trial Chamber noted the fundamental conflict between the evidence of Fadil Fazliu and Witness 3. However, at no point did the Trial Chamber indicate that it took this conflict into account when assessing Witness 3's credibility.

3. Witness 3's Motive to Fabricate Evidence

96. At §§ 183 to 186 of the Final Trial Brief of Mr Brahimaj, detailed submissions on Witness 3's credibility were set out. In summary, we submitted 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.

97. The evidence showed that in early 1998, Witness 3 was a subsistence farmer, farming his own land to look after his family.¹⁴⁷ He was married with five children.¹⁴⁸ The Office of the Prosecutor had interviewed him in 2004 and explained protective measures to him.¹⁴⁹ When asked whether he was aware that in order to obtain relocation for himself and his family, he had to spin a pretty spectacular story about how important he was in terms of the Prosecution's case that he and others were detained in Jablanica/Jabllanicë, he accepted that "maybe it is important".¹⁵⁰ Notably, as soon as he was informed of the possibility of OPT assistance to relocate, Witness 3 demanded that his family be moved away from Kosovo.¹⁵¹ He made this demand despite conceding that he had no problems with Lahi Brahimaj or his family before¹⁵² or after the war.¹⁵³ Witness 3 said that after the war he met Lahi Brahimaj and: "we had normal social conversation, which was far from being a hostile one."¹⁵⁴ He added that when they met together in a restaurant, he accepted a cigarette from Mr Brahimaj¹⁵⁵ and on other occasions

¹⁴⁷ 7892:2, 7985:5.

¹⁴⁸ 7892:1.

¹⁴⁹ 8022:7.

¹⁵⁰ 8022:20.

¹⁵¹ 8022:10.

¹⁵² 7977:1.

¹⁵³ 7977:8.

¹⁵⁴ 7977:9 - 7977:10.

¹⁵⁵ 7977:18.

they had coffee together.¹⁵⁶ Witness 3 also said that he did not have problems with his fellow villagers, or anybody else.¹⁵⁷

98. The evidence heard by the Trial Chamber was that, before relocation, Witness 3 was living in Italy but his family had been unable to join him there as he desired, because his income was too low and the house he lived in was deemed unsuitable.¹⁵⁸
99. Because of Witness 3's insistence, the Prosecution subsequently organised for Witness 3 and his family to be relocated to a third country which he confirmed had one of the highest standards of living in the Western World and that he was "very happy to be living in that country".¹⁵⁹ Witness 3 continues to live there together with the rest of the family and has thus secured considerable financial and other advantages in return for his testimony.¹⁶⁰
100. Despite the fact that defence for Lahi Brahimaj strongly urged that in these circumstances, and in the absence of reliable corroboration for his evidence, it would be unsafe to convict on the basis of his testimony, the Trial Chamber failed to apply its own appropriate standards of scrutiny to Witness 3's testimony and / or failed to give any reasons for rejecting these arguments.

4. Other Conflicts

101. At §§ 187 to 189 of the Final Trial Brief of Lahi Brahimaj, further issues relevant to the assessment of Witness 3's credibility were set out. Again, there is no evidence that the Trial Chamber considered these to any degree or at all. For the assistance of the Appeals Chamber, these issues were as follows:
102. Witness 3 had claimed that the reason he was detained was because Lahi Brahimaj wanted him "to become his soldier."¹⁶¹ It was pointed out that this

¹⁵⁶ 7977:4.

¹⁵⁷ 8022:15.

¹⁵⁸ 8023:12.

¹⁵⁹ 8023:16.

¹⁶⁰ 8023:18.

¹⁶¹ 7943:14.

made no sense whatsoever. Witness 3 was hardly an ideal soldier: he was a young subsistence farmer at the time¹⁶² with no military training,¹⁶³ who did not own a gun¹⁶⁴ and did not even know how to fire one.¹⁶⁵ Additionally, Witness 3 gave evidence that he *did* in fact support the KLA, had been a member of his village guard,¹⁶⁶ that he wanted to join the KLA¹⁶⁷ and that he had been involved in fighting in Grabanicë.¹⁶⁸ There could be no earthly reason to *detain* a person to make him a KLA soldier if he had already fought alongside the KLA and wanted to join, as Witness 3 claimed.

103. Witness 3's additional claim, that he was taken to the Jablanica/Jabllanicë barracks because the villagers from Grabanicë had failed to stay and fight but had retreated in the face of the Serb attack,¹⁶⁹ also defied logic. The retreat from Grabanicë took place on 21 May 1998,¹⁷⁰ yet Witness 3 said he had no problems with either the KLA or Lahi Brahimaj for almost *two months* thereafter. By way of example, Witness 3 said that shortly after the retreat from Grabanicë, he was

104. staying in Jabllanicë at Selim Ademi's house,¹⁷¹ not 150 metres from Lahi Brahimaj's house.¹⁷² The KLA knew he was there¹⁷³ yet took no measures against him. Shortly after 21 May 1998, Witness 3 had returned voluntarily to Grabanicë¹⁷⁴ together with Sadri Berisha, a KLA commander from Grabanicë.¹⁷⁵ Witness 3 then went to Lahi Brahimaj's house and provided a machine gun, a "Zolja"¹⁷⁶ and an ammunition box from Grabanicë, apparently with no difficulties whatsoever.¹⁷⁷ Shortly thereafter, when he was in the neighbouring village at Tal Zeka's house with Sadri Berisha's brothers, Brahimi and Lami,¹⁷⁸ Sadri Berisha

¹⁶² 7985:5.

¹⁶³ 7985:12.

¹⁶⁴ 7985:15.

¹⁶⁵ 7985:17.

¹⁶⁶ 7894:5.

¹⁶⁷ 7897:5.

¹⁶⁸ 7917:1.

¹⁶⁹ 7934:16.

¹⁷⁰ 7921:15 – 7922:10.

¹⁷¹ 8006:7.

¹⁷² 8006:10.

¹⁷³ 8006:21.

¹⁷⁴ 7929:4.

¹⁷⁵ 7897:3.

¹⁷⁶ An anti-tank weapon.

¹⁷⁷ 7929:24.

¹⁷⁸ 8008:13.

came to the house, saw Witness 3, but did not take any steps against him.¹⁷⁹ Thereafter, Witness 3 continued to live at the house of Tal Zeka for some time without any difficulties and without being visited again.¹⁸⁰

105. Despite the Trial Chamber having heard detailed evidence on these issues, and having the benefit of detailed submissions from defence counsel, there is no indication that the Trial Chamber considered them or, if they did consider them, the Trial Chamber gave no reasons whatsoever for dismissing them.

106. The Defence for Lahi Brahimaj also pointed out numerous bizarre inconsistencies which clearly indicated that Witness 3 was not a credible witness. These were set out at §§ 198 to 201 of the Final Brief on behalf of Lahi Brahimaj. Again for the assistance of the Appeals Chamber, these are set out below. It should be noted that Witness 3 confirmed that his statement to the Prosecution of the 8 May 2004¹⁸¹ was read back to him in Albanian, his native language, so he could check it.¹⁸² As at the time he signed a later statement, on 7 October 2005, his first statement had been translated into Albanian so he could check the written translation.¹⁸³ He made some alterations, but otherwise signed that the statement was correct.¹⁸⁴ In particular, § 9 of that statement read “I’ve reviewed the Albanian translation of my statement and the only further correction I have is in paragraph 12, other than that – other than this and the corrections above this statement is accurate.”¹⁸⁵ A third statement of Witness 3 was also read back to him in Albanian the week before he testified, and he agreed that it was correct.¹⁸⁶

107. Following such careful checking in Witness 3’s native language, the Defence for Lahi Brahimaj submitted that it was puzzling that Witness 3’s statement appeared subsequently to be full of “mistakes”. For example:

¹⁷⁹ 8008:5 – 8008:16.

¹⁸⁰ 8008:19.

¹⁸¹ 7975:20.

¹⁸² 7976:8.

¹⁸³ 7976:16.

¹⁸⁴ 7976:16.

¹⁸⁵ 8015:3.

¹⁸⁶ 7976:20.

- 107.1. When Witness 3 was confronted with a section within his witness statement that made the distinct claim that *Lahi Brahimaj had stolen Witness 3's shoes*, Witness 3 denied this and claimed that it must have been a mistake by the translator.¹⁸⁷
- 107.2. Similarly, the notable claim in Witness 3's first statement that *Selim Ademi had gone to Lahi Brahimaj's house with the intention to kill him but that Lahi had escaped* was claimed to be another mistake by the translator¹⁸⁸ despite the fact that Witness 3 had checked the statement himself twice in Albanian.¹⁸⁹
108. It was therefore submitted by the Defence that these major changes of story could not be explained as mistakes by translators and instead demonstrated a lack of honesty and a willingness by Witness 3 to colour his evidence and invent allegations against Lahi Brahimaj out of a desire to seek relocation in a Western country and for reasons of personal hostility wholly unconnected with the crimes alleged in the Indictment.
109. Moreover, there was yet another conflict between the evidence of Witness 3 and Witness 6 in relation to Witness 3's escape from the barracks.¹⁹⁰ Witness 3 claimed that there was heavy shooting as he escaped¹⁹¹ which was so severe it caused branches to fall from the trees.¹⁹² Witness 6 gave a very different account. Witness 6 told the Tribunal that he was sitting in the makeshift kitchen with Gani Brahimaj, the cook, when they saw the escape. Gani Brahimaj suggested that they try to stop them. Witness 6 declined, but the cook ran after them.¹⁹³ Witness 6 did not report any shooting and he failed completely to corroborate the colourful and self-dramatised account given by Witness 3.

¹⁸⁷ 8011:9.

¹⁸⁸ 8013:5.

¹⁸⁹ 8013:6 – 8013:13.

¹⁹⁰ See Brahimaj Final Trial Brief § 207.

¹⁹¹ 7957:12.

¹⁹² 7957:15.

¹⁹³ 5236:23.

110. Finally, Witness 3's family were apparently unaware of his second alleged abduction,¹⁹⁴ despite his claim that a close relative witnessed it. The Final Trial Brief of Mr Brahimaj pointed out¹⁹⁵ that Witness 3's claim to have been abducted a second time, some 10-12 days after the first occasion was not corroborated by any other account. Witness 3 claimed that Lahi Brahimaj pointed a gun at him¹⁹⁶ and abducted him in front of the house of Selim Ademi¹⁹⁷ and that his brother-in-law "Aziz," who had come to pick Witness 3 up using a horse and cart saw this.¹⁹⁸ Witness 3 clearly stated that Aziz and Mr Brahimaj talked; the former asking the latter where he was taking Witness 3.¹⁹⁹ No evidence was heard from either Selim Ademi or Aziz. However, the crucial point urged on the Trial Chamber by the Defence for Mr Brahimaj²⁰⁰ was that if Witness 3 had in fact been abducted, in broad daylight, with a close family member as a witness, it is inconceivable that his family would have been unaware of it. However, when confronted with the fact that Witness 3's own mother's statement made no mention of this alleged abduction, Witness 3 tried to explain this by claiming unconvincingly that her statement was "not valid"²⁰¹ and later that he "didn't want to cause pain to [his] mother because she was suffering from her heart and [he] didn't want to upset her."²⁰² This "explanation" reeks of fabrication. In the highly charged atmosphere of Kosovo at the time, it is inconceivable that his mother would never have heard of his alleged gunpoint abduction or that his entire family would have been unaware of his disappearance.

111. Similarly and equally urged on,²⁰³ but ignored by, the Trial Chamber, was the fact that Witness 3 had not mentioned his second alleged "abduction" when he was interviewed by the Kosovo Police Service ("KPS") in 2002 where he was himself treated as a victim.²⁰⁴ Witness 3 was confronted directly with the fact that

¹⁹⁴ 8026:6.

¹⁹⁵ At § 202.

¹⁹⁶ 7961:23.

¹⁹⁷ 8026:3.

¹⁹⁸ 7961:4.

¹⁹⁹ 7961:18.

²⁰⁰ Brahimaj Final Trial Brief § 203.

²⁰¹ 8025:14.

²⁰² 8025:21.

²⁰³ Brahimaj Final Trial Brief § 204.

²⁰⁴ 8024:3.

he had not mentioned this incident to the KPS.²⁰⁵ His response was first “you can’t say every single detail over the phone”²⁰⁶ and then that “someone might hear you on the telephone”²⁰⁷ and finally that it was “a brief phone conversation.”²⁰⁸ None of these answers provided an adequately explanation for the notable omission.

112. In the circumstances, the Trial Chamber failed properly to assess the credibility of Witness 3 and failed to consider any of the numerous factors relevant to the assessment of his credibility and / or failed to give any, or any adequate reasons for assessing Witness 3 as credible.

F. Sixth Ground of Appeal

113. At § 442, the Trial Chamber stated that after Witness 3 escaped from Jablanica/Jabllanicë, he wandered from village to village but people were afraid to help him as he was a wanted fugitive, then he returned to Jablanica/Jabllanicë. In attempting to seek an explanation for what might be thought such an unconvincing explanation for his return that would cast serious doubts on Witness 3’s credibility, the Trial Chamber failed to properly reflect the evidence. The Trial Chamber stated that Witness 3 thought that it was safe to return to Jablanica/Jabllanicë because the Kalashnikov rifle that he had taken from a wounded fighter during the battle of Grabanica had been returned to the rightful owner so he felt he was not in danger. However, this misrepresents the evidence that was heard.

114. Witness 3’s decision to return to the same village that he had escaped from has to be seen in the context of his story. He told the Trial Chamber that while he was going from village to village he met someone called Florim Zeneli in Bucan, who he thought was trying to kill him,²⁰⁹ but he managed to escape. Witness 3 claimed that news of his escape was spreading with orders that he should be captured or

²⁰⁵ 8024:7 – 8024:17.

²⁰⁶ 8024:18.

²⁰⁷ 8024:20.

²⁰⁸ 8024:23.

²⁰⁹ 7960:1.

killed,²¹⁰ as he claimed Zeneli had tried to do.²¹¹ However, despite the supposed mistreatment, the escape and the apparent orders for his murder, he decided to return to Selim Ademi's house in Jablanica/Jabllanicë, not 150m from where Lahi Brahimaj lived,²¹² where he continued staying for the next 10-12 days,²¹³ notwithstanding his testimony that Selim Ademi had told Lahi Brahimaj that Witness 3 was at his house.²¹⁴

115. On the face of it, Witness 3's decision to return seemed inexplicable if his story were to be believed. This certainly occurred to the Trial Chamber. His Honour Judge Orić specifically questioned Witness 3 on this issue:

“JUDGE ORIE: Yes. Before we continue, I would have one question. Witness 3, I would like to know the following: You escaped from Jabllanice prison. Then you came back to Jabllanice soon after that. Didn't you consider this to be --

“THE WITNESS: [Interpretation] Yes.

“JUDGE ORIE: -- a great risk? You had been beaten, you had seen other persons being beaten. Why was it that you decided to come back to Jabllanice?

“THE WITNESS: [Interpretation] Yes. 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 my in-laws 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.

“JUDGE ORIE: Thank you.

“THE WITNESS: [Interpretation] Because they had spread the news to whoever encounters this person should either arrest him or kill him, as was the case with Florim.”²¹⁵

116. This explanation strains credulity to breaking point and would otherwise have been a matter that would have cast further doubts on Witness 3's credibility. There was, incidentally, no evidence that the Serbian police wanted to kill Witness 3.

²¹⁰ 7960:5.

²¹¹ 7968:17.

²¹² 8012:3.

²¹³ 8026:6.

²¹⁴ 8015:23.

²¹⁵ 7967:25 – 7968:19.

117. However, rather than taking account of this inconsistency, the Trial Chamber provided their own explanation for Witness 3's behaviour. At § 442, the Trial Chamber stated that, contrary to Witness 3's evidence, the reason he decided to return to Jablanica/Jabllanicë was because a Kalashnikov rifle that he had taken from a badly wounded fighter during the battle of Grabanica had been returned.
118. Although evidence was heard that the reason the KLA wanted to ask Witness 3 about the missing Kalashnikov,²¹⁶ its return could not have explained his decision to return to Jablanica/Jabllanicë; first, because he did not himself give this as a reason, but secondly, because the evidence showed conclusively that he was not, and could not, have been aware of its return *until after* he arrived back in Jablanica/Jabllanicë.
119. As such, the Trial Chamber made a finding of fact for which there was no evidence and which ran contrary to the record. Alternatively, insofar as there were alternative conclusions available to be drawn from the evidence, the Trial Chamber failed to draw a conclusion that was consistent with the innocence of Mr Brahimaj.

G. Seventh Ground of Appeal

120. At §§ 440 to 451 The Trial Chamber described three different incidents of mistreatment of Witness 3. In summary these were:
- 120.1. A beating with baseball bats by unidentified individuals when Witness 3 was first at the barracks ("the initial beating");²¹⁷
- 120.2. An interrogation two days later by individuals including Mr Brahimaj ("the interrogation");²¹⁸ and
- 120.3. An abduction and mistreatment by Mr Brahimaj at least ten days later ("the abduction").²¹⁹

²¹⁶ See for example 7953:6, 7954:13, 7960:24 and 7961:1.

²¹⁷ See Judgement § 440.

²¹⁸ See Judgement § 441.

121. However, the Trial Chamber failed to give reasons in that it failed to state clearly whether they were also convicting Mr Brahimaj for mistreatment relating to the initial beating in addition to that relating to the interrogation and the abduction. This ground of appeal overlaps with the eighth ground of appeal set out below at §§ 127 to 130.
122. At § 440, the Trial Chamber describes the initial beating being carried out by several unidentified persons with baseball bats. At § 445, the Trial Chamber concluded that the persons responsible for the beating were KLA soldiers or persons affiliated with the KLA.
123. At § 447 the Trial Chamber concluded that “the beatings” amounted to cruel treatment and torture against Witness 3 by KLA soldiers or person affiliated with the KLA.
124. At § 451, the Trial Chamber concluded that it was convinced beyond a reasonable doubt that Mr Brahimaj committed the “above-mentioned” cruel treatment and torture under Count 32. However, in reaching this conclusion, the Trial Chamber failed to specify whether or not this included the initial beating.
125. At § 481, under the title “cumulative convictions”, the Trial Chamber found that under Count 32, it had found “*two* incidents of criminal conduct which were separate in time and place” (Emphasis added). As the facts as found by the Trial Chamber relating to Witness 3 discussed *three* incidents of criminal conduct taking place on different days, this suggests that the Trial Chamber may have intended to convict Mr Brahimaj only for the later incidents of interrogation and abduction.
126. In the premises, the Trial Chamber’s findings are not clear and are in breach of the requirement to provide reasons.

²¹⁹ See Judgement § 442.

H. Eighth Ground of Appeal

127. If the Trial Chamber intended to convict Mr Brahimaj for the initial beating,²²⁰ it failed to give reasons for its decision²²¹ and committed errors of fact.
128. The Trial Chamber concluded²²² that the initial beating was carried out by unidentified persons who were either KLA soldiers or who were “affiliated with the KLA”. Although Mr Brahimaj brought Witness 3 to the barracks, he left prior to the alleged initial beating.²²³
129. The Trial Chamber found that Mr Brahimaj should be convicted on the basis of committing these acts,²²⁴ not on the basis of any form of Joint Criminal Enterprise as alleged by the Prosecution²²⁵ and not on the basis of planning, instigating or aiding and abetting as alleged by the Prosecution in the indictment.²²⁶ It was not alleged in the Indictment, and the Trial Chamber did not find, that at the relevant time Mr Brahimaj held a position as commander of the KLA Dukagjin Operative Staff. It is therefore not at all clear on what basis the Trial Chamber could have convicted Mr Brahimaj for the initial beating.
130. Because of the reasons set out above, *if* the Trial Chamber intended to convict Mr Brahimaj for committing the initial beating, it failed to give reasons for its decision and / or committed errors of fact.

I. Ninth Ground of Appeal

131. The only Prosecution allegation in the Fourth Amended Indictment 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.”²²⁷

²²⁰ As defined above at Judgement § 120.1.

²²¹ See further at Judgement §§ 120 to 126 above.

²²² At Judgement §§ 440 and 445.

²²³ See Judgement § 440.

²²⁴ See § 451 of the judgement.

²²⁵ See §§ 470 to 478 of the judgement.

²²⁶ See page 38 of the Fourth Amended Indictment.

²²⁷ See § 103 of the Fourth Amended Indictment.

132. As pointed out in the Final Trial Brief on behalf of Mr Brahimaj,²²⁸ in cross-examination, Witness 3 accepted that in fact he supported the KLA, wanted to join the KLA, had participated in combat and had had fought in Grabanica together with the KLA.²²⁹ The allegation that Witness 3 was mistreated because he refused to fight for the KLA could not, therefore, be sustained.
133. The only possible basis for a conviction for torture was the allegation that the mistreatment was because Lahi Brahimaj accused Witness 3 of being a Serbian spy. The Trial Chamber appears to have adopted this basis to conclude from the evidence, at § 441, that Mr Brahimaj accused Witness 3 of supporting the Serbian police and therefore, at § 451, that Mr Brahimaj intended to discriminate against Witness 3 on the basis of his perceived ties to Serbs. However, this selectively ignores the evidence relating to the Kalashnikov rifle.²³⁰ Witness 3 explained in evidence that he was actually accused of having an automatic weapon that he had not surrendered²³¹ and accepted that after the rifle was returned,²³² Selim Ademi agreed with the KLA on Witness 3's behalf that there were no more outstanding issues.²³³ This demonstrates that the only reason Witness 3 was questioned was because he had been asked to account for a Kalashnikov rifle.
134. In the circumstances, no reasonable Trial Chamber could have concluded that the reason for the mistreatment was because of Witness 3's perceived ties to Serbs.
135. Furthermore, the Trial Chamber's conclusion that the reason for Witness 3's mistreatment was instead to punish him for withholding a Kalashnikov rifle and therefore Mr Brahimaj should be convicted of the offence of torture amounted to an error of fact and / or law because this material fact was not alleged in the indictment and Mr Brahimaj did not have adequate, or indeed any, notice of this alternative basis of conviction, either from the Prosecution or the Trial Chamber.

²²⁸ At § 188.

²²⁹ 7894:5, 7897:5 and 7917:1.

²³⁰ See 8002:15 to 8005:14.

²³¹ 7953:6.

²³² 7960:24.

²³³ 7961:1.

136. Further, or in the alternative, based on the foregoing, in relation to Witness 3 the Prosecution has 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.

V. GROUNDS OF APPEAL RELATING TO SENTENCE

137. The Trial Chamber considered a number of factors as aggravating the seriousness of the offences of which it found Mr Brahimaj guilty. As is the common practice of the Tribunal, sentence was passed without giving the accused the opportunity to address the Trial Chamber as to whether sufficient evidential basis existed for such factors properly to be given consideration. For the reasons set forth below, we submit that the sentence of six years was predicated on findings of fact which were contradicted by credible testimony from a variety of sources.

J. Tenth Ground of Appeal

138. At § 491, the Trial Chamber discussed *past* positions of authority held by Mr Brahimaj. While recognising that Mr Brahimaj was not the Deputy Commander when most of the crimes were committed, the Trial Chamber nonetheless stated that these previously held positions amounted to an aggravating factor.

139. It is well recognised by the jurisprudence of the Tribunal that an accused's role as a commander or superior may amount to an aggravating factor.²³⁴ However, there is no basis in law or reason for considering status previously but no longer possessed by an accused as an aggravating factor. The Trial Chamber's reasoning amounts to an error of law.

²³⁴ See for example *Prosecutor v Blaškić* Trial Chamber Judgement 3 May 2000 at § 789, *Prosecutor v Kordić and Čerkez* Trial Chamber Judgement 26 February 2001 § 853 and *Prosecutor v Krnojelac*, Trial Chamber Judgement 15 March 2002 § 514.

K. Eleventh Ground of Appeal

140. The Trial Chamber, at § 491, stated that Mr Brahimaj's membership of the KLA General Staff amounted to a high-ranking position within the KLA and an aggravating factor.

It should be noted that it was not alleged by the Prosecution that Mr Brahimaj held a high-ranking position in the KLA. At no point in the Fourth Amended is it alleged that those who are said to have engaged in misconduct were Mr. Brahimaj's subordinates.

141. The Prosecution only alleged that Mr Brahimaj was appointed Deputy Commander of the Dukagjin Operative Staff from the 23 June 1998 to the 5 July 1998.²³⁵ It does not allege that any position held by him encouraged subordinates to commit criminal conduct. As such, it appears that the Trial Chamber made a material finding of fact that was not alleged in the Fourth Amended Indictment and for which there was no supporting evidence.

142. The Trial Chamber furthermore made material mistakes of fact.

143. The evidence before the Trial Chamber demonstrated that Mr Brahimaj was a *staff officer* on the KLA's General Staff, responsible for its finances, rather than a *command officer* responsible for training, supervising or disciplining soldiers in the field. The Trial Chamber failed to take account of, or failed to appreciate, this fundamental difference. Jakup Krasniqi, the General Staff's spokesman at the material time, testified as follows in relation to Mr Brahimaj:

“Q. Well, I want to explore what you mean by "responsible for the area." [Lahi Brahimaj] was, of course, a staff officer on the General Staff; is that correct?

A. Yes.

Q. And as a staff officer on the General Staff, would you agree he was not in a position to be a command officer on the ground in the Dukagjin Zone at the same time?

²³⁵ See § 12 of the Fourth Amended Indictment.

A. Yes.”²³⁶

144. Bislim Zyrapi, another senior commander on the KLA General Staff at the time and who later became Director of the General Staff, also confirmed that Lahi Brahimaj’s role was Chief of the Finance Division:

“Q. Can you tell the Trial Chamber where -- when you first met [Lahi Brahimaj]?”

A. For the first time? I saw him in July in the General Staff.

Q. And where -- where precisely was that?

A. In the General Staff, I said, in Berisha Mountain. That was where part of the General Staff was located.

Q. Apart from that meeting in the Berisha Mountains, did you see him again?

A. Yes, I saw him frequently, because he was in the staff.

Q. Did you see him during this trip in July that you're talking about?

A. Yes, because he was a member of the staff.

Q. And again, if you would just be so kind as to clarify which particular staff you are talking about.

A. At this moment, I'm talking -- because when I first met him, he was *chief of the finance division*, but he was a member of the General Staff. And as such in this capacity, we went together to the Dukagjini Zone.”²³⁷
(Emphasis added.)

And

“Q. At that time, of course, Lahi Brahimaj was a serving member of the General Staff; correct?”

A. For the time when I was informed of the situation, when I was given the task of director, I saw Lahi, and he was introduced to me as *director of the finance department in the General Staff*.

Q. All right. At the time you were given your responsibilities, he was already there serving as director of finances; correct?

A. Yes, correct, this is what I was told.

Q. You didn't know how long he'd been in that position, but he was certainly already in that position when you arrived?

A. Yes. I don't know when exactly he was given that responsibility, but I found him there when I went to the General Staff.” (Emphasis added.)

145. The Trial Chamber also failed to take into account the fact that the role and responsibilities of the General Staff within the Dukagjin Zone were extremely limited during the relevant period. Bislim Zyrapi explained in evidence that the

²³⁶ 5077:4 – 5077:11.

²³⁷ 3212:4 – 3212:20.

General Staff was split between Albania and Kosovo,²³⁸ that none of them had any military training or experience,²³⁹ there was no regular communication between them,²⁴⁰ they could not make unified decisions²⁴¹ and did not either meet with the zone commanders²⁴² or authorise combat operations²⁴³. He summarised the position by saying that they did not constitute a General Staff in the proper sense of the word:

“In normal armies, the General Staff would have the possibility to contact troops and the commanders. But this was an army that was still a fledgling army, under development. So there wasn’t a possibility to do all those things”.²⁴⁴

146. Jakup Krasniqi confirmed that in 1997, he was a member of the General Staff but did not know the identity of many of the other members²⁴⁵ who were dispersed between Kosovo, Albania, and the diaspora.²⁴⁶ This continued during the first half of 1998²⁴⁷ and the General Staff was only properly organised in November, after the end of the Indictment period.²⁴⁸

147. Rrustem Tetaj,²⁴⁹ Shemsedin Çekaj²⁵⁰ and Cufe Krasniqi²⁵¹ were all local commanders in the field. Each of them testified that they had no contact with the General Staff and that it had no impact on their decision making.

148. At a meeting on 23 June 1998 when the Dukagjini Plain Operative Staff was established and Ramush Haradinaj was elected,²⁵² he is recorded in the minutes of the meeting as saying that the General Staff “is not providing us with the orders

²³⁸ 3283.

²³⁹ 3299:19 – 23.

²⁴⁰ 3292.

²⁴¹ 3291 – 3293.

²⁴² 3292.

²⁴³ 3291.

²⁴⁴ 3293.

²⁴⁵ 5025, 5027.

²⁴⁶ 4951.

²⁴⁷ 5029.

²⁴⁸ 5029.

²⁴⁹ 3619, 3659, 3821.

²⁵⁰ 4510.

²⁵¹ 5846 – 5847.

²⁵² 5157:10.

that we require, it is absent.”²⁵³ Bislim Zyrapi testified that this was “a pretty fair reflection of the reality on the ground” during the Indictment period²⁵⁴ and that the General Staff provided no effective leadership in the Dukagjin area.²⁵⁵

149. Although the Trial Chamber appears to have recognised this at § 68 where it described the KLA General Staff as “hardly involved with the above-mentioned developments on the ground in early 1998”, it seems for the purposes of sentencing to have considered the General Staff as a body exercising great authority within the Dukagjin Zone in the first half of 1998.

150. The Trial Chamber failed to take account of the fact that the General Staff operated clandestinely and that few individuals within the Dukagjin Zone were even aware that Mr Brahimaj was a member of the General Staff. This is clear from the notes of a meeting on the 23 June 1998:

“Agron: Lahi was a 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.”²⁵⁶

151. In the circumstances, the Trial Chamber’s conclusion that Mr Brahimaj held a “high ranking position within the KLA” was not based on the facts and was one which no reasonable tribunal could have come to.

L. Twelfth Ground of Appeal

152. The Trial Chamber concluded, at § 491, that Mr Brahimaj’s previous appointment as Deputy Commander of the Dukagjin Zone amounted to a high ranking position within the KLA and was thus an aggravating factor.

153. There was no evidence, other than the formal appointment of Mr Brahimaj on the 23 June 1998²⁵⁷ that Mr Brahimaj ever exercised the responsibilities of Deputy

²⁵³ P141.

²⁵⁴ 3323:19 – 22.

²⁵⁵ 3290

²⁵⁶ P141 page 6.

²⁵⁷ See P141.

Commander. In fact the evidence demonstrates the contrary. On 4 July 1998 Ramush Haradinaj warned Mr Brahimaj for repeated absences from his zone of responsibility.²⁵⁸

154. Furthermore, the Trial Chamber appears to have taken no account of the extremely short period of time Mr Brahimaj nominally held the position, namely from the 23 June 1998²⁵⁹ to the 5 July 1998²⁶⁰ when Mr Haradinaj replaced him with Nazmi Brahimaj. As set out in the preceding paragraph, even during this short period, Lahi Brahimaj was warned for repeated absences from the zone. It should be noted that this period of nominal command lasted a mere 12 days out of an indictment period of some 214 days. In the circumstances, there is no evidence that he ever exercised the function of Deputy Commander at any time.

M. Thirteenth Ground of Appeal

155. At § 491 the Trial Chamber made a finding of fact that Mr Brahimaj's presence "cannot but have had an encouraging effect on the soldiers to commit or continue to commit such crimes."

156. A Trial Chamber is required to find acts proved beyond a reasonable doubt.²⁶¹

157. In the present case, the evidence did not show that Mr Brahimaj held a position as commander at the time of the offences for which he was convicted, or that any other individuals who may have been present were aware or thought that he held a position as commander. There was therefore no basis for the Trial Chamber to conclude that Mr Brahimaj's status had an encouraging effect on soldiers to commit crimes. Furthermore, if the Trial Chamber was intending to conclude that any "high ranking" command position previously held by Mr Brahimaj caused soldiers to commit crimes subsequently, there was no evidence whatsoever to this effect and it would amount to speculation.

²⁵⁸ See P 161.

²⁵⁹ See P141.

²⁶⁰ See P168.

²⁶¹ *Prosecutor v Delalić et al*, Appeal Judgement 20 February 2001, § 763.

158. In the circumstances, the Trial Chamber made material mistakes of fact and law including the misapplication of the burden and standard of proof.

N. Fourteenth Ground of Appeal

159. At § 491 the Trial Chamber concluded that Mr Brahimaj committed the offences in the presence of lower ranking KLA soldiers.

160. As set out above, the Prosecution did not allege in the Fourth Amended Indictment that Mr Brahimaj committed offences in the presence of lower ranking soldiers.²⁶²

161. In relation to the first offence for which Mr Brahimaj was convicted, namely the torture of Witness 6, there was no evidence heard by the Trial Chamber as to the presence of anybody lower ranked at the same time as Mr Brahimaj. Witness 6 only gave evidence of the presence of somebody of *higher* rank than Mr Brahimaj. He described the presence of Nazmi Brahimaj who was referred to as “deputy commander”.²⁶³

162. Equally, in relation to the second offences for which Mr Brahimaj was convicted, namely the torture and cruel treatment of Witness 3, no evidence was heard by the Trial Chamber as to the presence of anybody lower ranked at the same time as Mr Brahimaj. One person described as present, though not at the same time as Mr Brahimaj, was Nazmi Brahimaj.²⁶⁴ He was certainly of higher rank than Mr Brahimaj at this time.²⁶⁵

163. Other incidents described by Witness 3 do not show a difference in rank between Mr Brahimaj and others alleged to have been present. In relation to the interrogation,²⁶⁶ Witness 3 described four individuals all wearing identical black

²⁶² See § 0 above.

²⁶³ 5245:20.

²⁶⁴ 7949:2 – 7949:19.

²⁶⁵ See P168.

²⁶⁶ As defined above at § 120.2.

uniforms.²⁶⁷ In relation to the abduction, after the material events, Witness 3 described the presence of Nazmi Brahimaj²⁶⁸ and an unidentified commander,²⁶⁹ both of whom would have been of a higher rank than Mr Brahimaj.

164. It is therefore submitted that the Trial Chamber made material errors of fact and law and failed to apply correctly the burden and standard of proof in concluding that Mr Brahimaj committed the offences in the presence of lower ranking soldiers.

O. Fifteenth Ground of Appeal

165. The Trial Chamber found, at § 492, as an aggravating factor the special vulnerability of Witness 3 and Witness 6 who were deprived of their liberty and detained under such conditions that left them at the complete mercy of their captors.

166. It should be noted that both Witness 6 and Witness 3 were both of Albanian origin, male, previously armed²⁷⁰ and were visited at the barracks by family members and villagers who knew they were there.²⁷¹ Witness 3 was a combatant who had previously fought with the KLA in Grabanica.²⁷² It is submitted that their “vulnerability” was therefore extremely limited. They were in a very different category from the vulnerability of victims in cases referred to by the Trial Chamber such as *Prosecutor v Kunarac*²⁷³ for example, the rape of women and girls under the age of 18.

167. In this respect, it is also noteworthy that Mr Brahimaj was not convicted of the offence of imprisonment.²⁷⁴

²⁶⁷ 7952:6 – 7952:7.

²⁶⁸ 7964:5 and 7967:17.

²⁶⁹ 7966:25 – 7967:12.

²⁷⁰ 5194:17, 5352:6, 5353:3 – 5353:10, 8002:10 – 8005:25.

²⁷¹ 5252:6 – 5252:24, 5336:12.

²⁷² 7917:1 – 7917:17.

²⁷³ IT-96-23 and IT-96-23/1-A.

²⁷⁴ Although the Defence for Lahi Brahimaj maintains, as asserted in his Final Trial Brief at §§ 60 to 77 that the Tribunal does not have jurisdiction for the crime against humanity of imprisonment.

P. Sixteenth Ground of Appeal

168. At § 492, the Trial Chamber considered the physical trauma “still being felt” by Witness 6 as an aggravating factor. Although 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. The Defence for Lahi Brahimaj also refers to the submissions above relating to Witness 6’s credibility.²⁷⁵

169. The only physical injury noted by the doctor who examined Witness 6 on the 30 July 1998, immediately after his departure from Jablanica/Jabllanicë, was a fractured wrist that had healed and did not require treatment.²⁷⁶ Although Witness 6’s wife, Witness 23, claimed in evidence that the X-ray was at the family home as at the time they gave statements,²⁷⁷ it was never produced either to the Trial Chamber or to the Defence.

170. In 1998, the only medication prescribed to Witness 6 was a painkiller.²⁷⁸ No evidence was given about any medication Witness 6 claimed to have taken at any time since 1998, still less when he was testifying in 2007 and no independent medical evidence was provided to the Trial Chamber that could support the claim of any continuing physical or psychological pain or suffering.

171. It is submitted that this amounts to a mistake of fact by the Trial Chamber.

Q. Seventeenth Ground of Appeal

172. The Trial Chamber stated at § 492 that Witness 3 was still suffering physical and mental trauma.

²⁷⁵ At §§ 21 to 64.

²⁷⁶ P336.

²⁷⁷ 10552:13 – 10552:24.

²⁷⁸ 5269:2

173. There was no evidence heard by the Trial Chamber to this effect and there was no independent medical evidence provided to the Trial Chamber that could have supported the claim of any continuing physical or psychological pain or suffering on the part of Witness 3.

174. It is submitted that this amounts to a mistake of fact.

R. Eighteenth Ground of Appeal

175. The Trial Chamber concluded at § 492 that when Witness 6 learned of the death of Skender Kuci after he was taken for medical treatment, this must have added to his fear for his life and this was an aggravating factor for sentencing purposes.

176. It should be noted at the outset that the Trial Chamber did not find Mr Brahimaj responsible for any mistreatment in relation to Skender Kuci.²⁷⁹ It is therefore difficult to see on what basis Mr Brahimaj should receive a heavier sentence for this factor.

177. Furthermore, the Trial Chamber did not hear evidence that learning of the death of Skender Kuci after the latter was taken for medical treatment caused Witness 6 to fear for his life. This amounts to speculation on the part of the Trial Chamber.

178. It does not appear that the Trial Chamber took into account the fact that at the time Witness 6 heard of the death of Skender Kuci, he was free to move around the meadow outside the barracks,²⁸⁰ where one could see around for several thousand metres,²⁸¹ was wandering around the yard and washing dishes²⁸² and had the opportunity to escape or leave of his own accord²⁸³ chose not to.²⁸⁴ In these

²⁷⁹ See §§ 437 and 470 to 478 of the Trial Chamber Judgement.

²⁸⁰ 5231:5, 5232:4.

²⁸¹ 5341:5.

²⁸² 5391:11.

²⁸³ 5349:22.

²⁸⁴ 5243:3.

circumstances there was no evidence from which it could be concluded that he was in fear of his life.

179. For these reasons, it is submitted that taking this matter into account amounted to a mistake of fact and law by the Trial Chamber.

S. Nineteenth Ground of Appeal

180. It is submitted that in sentencing Mr Brahimaj to a sentence of 6 years' imprisonment, the Trial Chamber failed to correctly exercise its discretion in that the sentence imposed was manifestly excessive in all the circumstances. In addition to the errors of law and fact set out above, these circumstances include:

180.1. Mr Brahimaj was found guilty of the torture / cruel treatment two individuals, Witness 6 and Witness 3. As such, the wrongdoing for which he was held responsible was neither systematic nor widespread;

180.2. Both Witness 6 and Witness 3 shared with Mr Brahimaj the same Albanian ethnicity;

180.3. Both Witness 6 and Witness 3 were male and were either armed or had participated in combat. Witness 6 was in possession of an unauthorised firearm.²⁸⁵ Witness 3 was a combatant who had fought with the KLA in Grabanica²⁸⁶ and who was in possession of a Kalashnikov rifle;

180.4. The Trial Chamber did not find that Mr Brahimaj was responsible for establishing or operating the barracks at which Witnesses 6 and 3 were held;

180.5. The Trial Chamber did not find that Mr Brahimaj held a command role at the barracks;

²⁸⁵ 5194:17 – 22, 5352:6 – 12, 5353:3 – 14, 10540:5 – 9 and 10540:21 – 10541:8, P335. See also Trial Chamber judgment at § 387.

²⁸⁶ 7894:5, 7897:5 and 7917:1.

180.6. There were grounds for detaining or questioning both 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 that belonged to a co-villager;²⁸⁷

180.7. Other than bruising, neither Witness 3 nor Witness 6 claimed that Mr Brahimaj caused them physical injury. While it is not accepted that there is sufficient proof that Witness 6's fractured wrist was caused during his detention,²⁸⁸ Witness 6 gave evidence that the fracture was caused by soldiers when he first arrived at the barracks.²⁸⁹ Witness 6 gave evidence that only Nazmi Brahimaj, not Lahi Brahimaj was present at that time.²⁹⁰

180.8. Neither Witness 6 nor Witness 3 were especially vulnerable because of their detention. Witness 6's family and co-villagers were aware he was at the barracks and were allowed to visit him. Witness 3's family were aware he was at the barracks and intervened on his behalf.

²⁸⁷ See 8002:15 to 8005:14.

²⁸⁸ As set out at § 169 above.

²⁸⁹ 5209:22 – 5210:9.

²⁹⁰ 5209:13 – 5209:23.

VI. RELIEF SOUGHT

181. In conclusion, we respectfully submit on the basis of the foregoing that the Appeals Chamber should reverse the convictions of Lahi Brahimaj in relation to torture and cruel treatment of Witness 6 and Witness 3.

182. Further, or in the alternative, we submit that the evidence did not support the “aggravating factors” which the Trial Chamber found against Mr. Brahimaj and his sentence should be reduced accordingly.

Dated: 19 July 2008

Respectfully submitted:



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Word Count: 14,929

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