

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

Case Number IT-04-84-T

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Date filed: 22 January 2008

THE PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**REDISTRIBUTION OF LAHI BRAHIMAJ'S PUBLIC FINAL TRIAL
BRIEF**

The Office of the Prosecutor

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I. INTRODUCTION

1. On 18 January 2008, the Defence for Lahi Brahimaj filed its public Final Trial Brief.¹
2. A further redaction to the public brief previously filed is required. Because of this, the Defence for Lahi Brahimaj requests that the previously filed redacted public brief be made confidential and be replaced in its entirety by the Revised Public Brief attached at Annex A to this notification.

DATED: 22 January 2008

Respectfully submitted



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Counsel for Lahi Brahimaj



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WORD COUNT: 196

¹ *Prosecutor v. Haradinaj et al*, IT-04-84-T, “Final Trial Brief on Behalf of Lahi Brahimaj”, Public, 18 January 2008.

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ANNEX A

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Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Date filed: 14 January 2008

The Prosecutor

-v-

**Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ**

PUBLIC

FINAL TRIAL BRIEF ON BEHALF OF LAHI BRAHIMAJ

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II. INTRODUCTION

1. The Defence for Lahi Brahimaj respectfully files this Closing Brief. The Trial Chamber has agreed that the three co-Accused may allocate between them the total number of words allotted to the Defence. The Brahimaj Defence expressly adopts and incorporates by reference all legal and factual arguments advanced in the Haradinaj and Balaj Final Trial Briefs which may be applicable to Mr Brahimaj and entitle him to relief.
2. Lahi Brahimaj has consistently asserted his innocence of all charges and, as the Defence have demonstrated throughout the trial, the Prosecution has failed to meet the required burden of proof in relation to each and every allegation in the Indictment.
3. The evidence has shown that throughout the Indictment period Lahi Brahimaj was chief of the finance section of the General Staff of *Ushtria Çlirimtare e Kosovës* (UÇK), the Kosovo Liberation Army (KLA). During the spring and summer of 1998, following the Serb forces' massacres at the Ahmeti and Jashari family compounds, Kosovar Albanians came under increasingly brutal attacks. These intensified in the Dukagjin area, starting with the assault on the Haradinaj compound on 24 March 1998.
4. Lahi Brahimaj makes no apology for helping to arm defenceless villagers and he maintains the right of the people of Kosovo to struggle for freedom and independence and to defend themselves against aggression. These are not crimes at international law. At all times he fought to defend the honour of the people of Kosovo and opposed all forms of ethnic, political and religious discrimination.
5. We deal briefly here with certain principles of evidence and points of law, having every confidence that this Trial Chamber takes fully into account each and all issues raised in the Haradinaj and Balaj Briefs and recognises that the Brahimaj Defence asserts that these apply with equal force to the issues addressed below.

6. This Brief will address primarily:
 - 6.1. Certain principles of evidence and law particular to Lahi Brahimaj's case;
 - 6.2. The specific factual allegations against Lahi Brahimaj, in particular Counts 23 through 34 of the 4th Amended Indictment (hereinafter "Indictment") insofar as these are not dealt with in the briefs of other co-Accused; and
 - 6.3. Legal and factual considerations in relation to the alleged Joint Criminal Enterprise ("JCE");

III. PRINCIPLES OF EVIDENCE

A. Weight

7. We adopt our colleagues' legal analyses concerning burden and standard of proof; principle of *in dubio pro reo*; special considerations where there are multiple accused; Article 21(4)(g) right to silence; circumstantial and hearsay evidence; *viva voce* rather than written testimony; and principles applicable to admissibility of, as opposed to weight to be attached to, particular pieces of evidence.
8. The comparatively low threshold for admissibility may occasionally require the Defence to address certain evidence to which the Trial Chamber may already have decided to attach little or no weight. The space devoted to such matters does not necessarily reflect the weight we believe should be attached to them.

B. Credibility of Witnesses

9. There are special reasons for exercising caution in reviewing the uncorroborated testimony of certain witnesses against Lahi Brahimaj:
 - 9.1. In Common Law jurisdictions judges have a duty: "to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive."¹ Care must be taken in evaluating the evidence of a witness whose evidence may be coloured by "motives of jealousy, spite, levelling of an old score, hope of financial advantage."²
 - 9.2. For example, where a witness had been called by the Prosecution although part of his evidence was not regarded by them as reliable, and where he had been a party to the crime alleged, was of bad character and an admitted liar in the past, the Court of Appeal for England and Wales held the trial judge was correct in giving a strong warning to the jury as to his reliability and potential motives.³

¹ See, eg, *R. v Beck*, 74 Cr App R 221, CA (Court of Appeal for England & Wales), at p 228.

² Commentary in *Archbold, Criminal Pleading and Evidence*, at §4-404o.

³ See, *R. v Cairns, Zaidi and Chaudhary* [2003] 1 Cr App R 38, CA.

9.3. The requirement to exercise caution before accepting such testimony – particularly when not corroborated from any other more reliable source – is no more than common sense. In the present case, we urge special caution to a witness with an ulterior motive against one of more of the Accused. In the special cultural context of Kosovo, “jealousy, spite, levelling of an old score,” referred to above, would include the possible existence of a blood feud; an example *par excellence* of the need for special caution.

9.4. The Trial Chamber received evidence from a number of sources concerning the prevalence and effect of blood feuds in Kosovar society, including the impact on and responsibilities expected of other family members once a blood feud is declared.⁴ Zoran Stijovic testified that a revenge motive or a blood feud was a “very good tool for recruiting a person” to be an informant for the MUP.⁵

9.5. Special caution is required in relation to at least the following:

9.5.1. Witness 6 who, in addition to numerous other indicia that he was an unreliable witness, made threats indicative of declaring a blood feud against Nazmi Brahimaj and his family⁶;

[REDACTED]

[REDACTED]

9.5.3. Witness 37 who is named in the Indictment as part of the alleged JCE and may thus have a motive to minimise his own role or attribute falsely to others responsibility for his own actions.

⁴ See, eg testimony of Witness 62 generally, 5555 – 5569; 5573 – 5642; and Witness 62’s 92^{ter} summary, 5965:5 – 5965:9; Rrustem Tetaj, 3783 – 3785.

⁵ 8889:10 – 11.

⁶ 5256:9.

C. 92bis, 92ter, and 92quater Evidence

10. The Brahimaj Defence adopts the arguments advanced by the Balaj Defence on the relative weight to be attached to statements obtained pre-trial by agents of the Prosecution from witnesses not made available for questioning by the Defence or for questioning and observation by the Trial Chamber. These arguments have equal force, regardless whether the Defence agreed to testimony being given pursuant to those subsections.
11. Witnesses who fall into this category in relation to Lahi Brahimaj are Witnesses 7, 16 and 73.

D. Documentary Evidence

12. The Brahimaj Defence is concerned in particular with the authenticity of documents from Serbian intelligence sources. There is ample evidence of the routine use of torture, inhuman and degrading physical and psychological treatment and of threats and inducements by members of the various branches of Serbian forces, such that any statement purporting to be a voluntary confession must be regarded as inherently suspect.
13. At their lowest, such statements require corroboration from reliable independent sources before they can be regarded as having any evidential value at all. The Trial Chamber must be satisfied that it can rule out all possibility that police officers may have put words into the mouth of one witness to induce him or others to make statements which are, in reality, fabrications by officers designed to support their own theories or suspicions.
14. The principle that a statement must be truly voluntary is fundamental to its being accepted as evidence. If it is or may have been obtained by oppressive conduct,⁷ it is worthless and should properly be ignored.⁸

⁷ As Lord Chief Justice Lane noted in *R. v Fulling* [1987] QB 426,85 Cr App R 136 “The Oxford English Dictionary as its third definition of [oppression] runs as follows: ‘exercise of authority or

15. Where a document purports to be the confession of a person who is available to the Prosecution as a witness but whom the Prosecution decline to call at trial, then its contents are doubly suspect and cannot be used as evidence of truthfulness for any purpose in these proceedings.

E. Violation of Rule 68 Resulting in Denial of Article 21 Rights

16. The Brahimaj Defence adopts the analysis in the Balaj Brief of the Prosecutor's violations of Rules 66 and 68 as they relate to Witness 6. The failure to disclose a document relevant to cross-examination until a point where it was too late for Mr Brahimaj's counsel to question this witness on crucial issues of credibility has deprived Mr Brahimaj of his rights under Article 21 of the Statute in relation to an important witness against him.⁹

power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc., or the imposition of unreasonable or unjust burdens”.

⁸ See, eg, Mr Emmerson's cross-examination of Nebojsa Avramović, 3 July 2007; and of Radovan Zlatković, 16 and 17 July 2007, demonstrating in detail the clear lack of authenticity and total unreliability of both the form and content of the alleged confession statements of Zenelj Alijaj and Bekim Kalimashi.

⁹ See concerns raised by Mr Brahimaj's counsel at 5454:25 – 5475:12.

IV. LAHI BRAHIMAJ AND JABLLANICË

A. Introduction

1. Early Days of the KLA

17. By 1998, when Lahi Brahimaj was aged 28, he was already a member of the KLA's General Staff working inside the country while many of those who went on to become leaders of the KLA were living abroad, working to raise money to finance the resistance and planning the strategy for the emerging *Ushtria Çlirimtare e Kosovës* ("UÇK") or Kosovo Liberation Army ("KLA").¹⁰

2. Membership of and Responsibilities in Central/General Staff

18. The Central/General Staff necessarily operated under conditions of extreme secrecy¹¹ and, especially in the period up to and including the time-frame of the indictment, it was still very much in its early stages of formation.¹²

19. Jakup Krasniqi testified those members of the General Staff inside Kosovo were split up and worked separately.¹³ He was appointed spokesperson for the KLA in June 1998, prior to which time he had no knowledge of Lahi Brahimaj.¹⁴ At that time: "the KLA was functioning mainly in units with limited communication between them, this being a security measure where units could act as independent cells."¹⁵ Mr Krasniqi confirmed that members of the General Staff operated in secret, meeting irregularly at a variety of separate villages in the Berisha Mountains in Drenica.¹⁶

20. From mid-June to mid-July 1998, Jakup Krasniqi said Lahi Brahimaj was staying for a longer time in Drenica as they were trying to consolidate the General Staff.¹⁷

¹⁰ Bislim Zyrapi testified that until 28 May 1998 he, Hashim Thaci and others who were to become prominent members of the General Staff were operating outside Kosovo: 3202.

¹¹ Jakup Krasniqi testified that in 1997 he did not know the names of five of his nine other colleagues on the General Staff as they were dispersed in Kosovo, Albania and other European countries: 4951, 5025, 5027.

¹² 3283, 3290 – 3293.

¹³ 5029.

¹⁴ 5070 – 5071.

¹⁵ 5056.

¹⁶ 5072 – 5073.

¹⁷ 5074.

He confirmed that Lahi Brahimaj was a staff officer and, as such, not in a position to be a command officer over soldiers in the Dukagjin area.¹⁸

21. In answer to Prosecution questioning, Bislim Zyrapi told the Chamber that Lahi Brahimaj's responsibilities within the General Staff were as Chief of Finance.¹⁹
22. Jakup Krasniqi confirmed that, during 1998, the General Staff never communicated procedures that were to be followed to determine who was a collaborator.²⁰ There were no courts or judges operating under the aegis of the KLA during that period.²¹ The General Staff did not at any time hold any meetings to discuss any system, plan to organise detentions or arrests of innocent citizens.²²

B. Jabllanicë

23. Lahi Brahimaj's home village was strategically located on the safest supply route from the Albanian border through to the original focal point of Kosovan Albanian resistance to Belgrade rule; Adem Jashari's centre of operations in Drenica, particularly in Prekaj and Likoshan.²³
24. A number of witnesses testified that well before the indictment period the Serb military and paramilitary forces had come to consider Jabllanicë as a "no-go" area.²⁴ [REDACTED] testified that it was only possible to go there if the area was secured by police or military.²⁵ The maps show that Jabllanicë was situated in hilly and wooded terrain, at a distance from the main routes connecting major towns and cities in the Dukagjin area.²⁶

¹⁸ 5077.

¹⁹ 3212, 3394, 5075, 5947.

²⁰ 5088.

²¹ 5089.

²² 5090.

²³ See Zoran Stijovic, 9004:19 – 9005:10.

²⁴ See *Ibid*, 9005:10; 9875.

²⁵ 9904.

²⁶ Map 7, P10 shows Jabllanicë above the 400m contour and connected to neighbouring villages by dirt roads.

25. In consequence, it became difficult for Serb forces to obtain reliable intelligence on activities in and around Jabllanicë but the Brahimaj family became, in the eyes of the Serb forces, a stopping-off point on the underground supply route from Albania to Drenica.²⁷ Jabllanicë's clinic (*ambulancë*) became a place of refuge for wounded resistance fighters, *eg*, from Grabanicë in the wake of the Serb offensive in May 1998.²⁸

C. Jabllanicë not in Control of District

26. The villages in the neighbourhood of Jabllanicë were protected by independent self-defence groups.²⁹ These arose organically out of each village's need to protect itself from attacks by the military and paramilitary police forces of the occupying Serbs. There is no evidence to support the claim that they were controlled from or subordinated to the defenders of Jabllanicë; indeed, they were not by any means uniformly supportive of the emergent KLA.³⁰ Some, like Zhabel, appear over time to have developed an alignment with the KLA while others, like Grabanicë, remained more closely aligned with the LDK. However, when those villages came under attack they helped each other regardless of political affiliation.

27. When neighbouring villagers were wounded or their entire villages overrun during Serb attacks, Jabllanicë was one village, but not the only one, to provide safe haven for refugees.³¹

28. Any attempt by the Prosecutor to suggest that KLA members in Jabllanicë exercised authority or control over their neighbours founders on the testimony of Fadil Fazliu and even on that of Witness 6, Witness 3 and Witness 17, as shown in more detail below.

²⁷ Zoran Stijovic, 9004:19 – 9005:10; 9015:9 – 9015:13, P957.

²⁸ Fadil Fazliu, 7484:20 – 7484:21: [REDACTED]

[REDACTED] Witness 3, 7995:5 – 7995:11.

²⁹ *See, eg*, Jakup Krasniqi on *ad hoc* nature of village defence: 5008:1 – 5008:22; 5047:7 – 5048:2; 5048:12 – 5048:16.

³⁰ *Ibid*, 5008:1 – 5008:22.

³¹ Fadil Fazliu, Witness 6 and [REDACTED] all relied on family and friends in neighbouring villages for refuge.

V. OFFENCES

A. Crimes Against Humanity

1. Requirement that Victim be a Civilian

29. The Tribunal has established that, in addition to being part of a widespread or systemic attack on a civilian population, an individual victim of a crime against humanity must also be a civilian: *Mrkšić* Trial Chamber judgement, §§ 444 – 464, *Martić* Trial Chamber judgement, §§ 50 – 56. The evidence of heavily armed paramilitary police units and the role of even ordinary traffic police in manning roadblocks aimed at capturing KLA members created a situation in which police officers were not “civilians”. See: *Kayishema* § 127.³²

30. This still raises the question of who a civilian is in the context of this case.

2. “Collaborators”

31. The Prosecution indictment appears to proceed on the basis that the word “collaborator” refers to a civilian. This does not follow. Collaborators can be either combatants or civilians.

32. The word “collaboration” is not a term of art. If any meaning is to be assigned to the word “collaborator” in the context of this indictment, the starting point must be the normal meaning of the word.

33. Dictionary definitions of the verb “collaborate” include the following:

“... to cooperate with or willingly assist an enemy of one’s country and especially an occupying force.”³³

³² Judgement (Trial Chamber) ICTR 21 May 1999: “...a wide definition of civilian is applicable and, in the context of the situation of Kibuye Prefecture where there was no armed conflict, includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale.”

³³ Merriam-Webster Dictionary.

“... to cooperate traitorously with an enemy.”³⁴

34. During World War II, deeds considered “collaboration” included military actions, such as the Vichy regime’s raising of fighting units for Hitler’s armies with distinctive missions.³⁵ Individuals labelled collaborators and collaborationists spanned both military and civilian, with no single unifying mode of operation or motivating force: “there seem to have been almost as many collaborationisms as there were proponents or practitioners of collaboration.”³⁶

35. Fundamentally, the idea of collaboration is a “dynamic, instable and ‘constructed’ category [...] [t]he exact definitions are almost always ambiguous, based on moral and social rather than legal understandings, and change over time.”³⁷

36. In the Occupied Palestinian Territories, individuals considered collaborators include political collaborators, economic collaborators, military collaborators, land dealers and spies.³⁸ Similarly to Kosovo during the 1990s, a 1994 Israeli study reported that Israeli authorities recruited Palestinian collaborators via various methods, including making the provision of essential services and permits conditional on collaboration and promising individuals suspected or convicted of criminal offences that charges would be withdrawn or sentences reduced in exchange for cooperation and assistance.³⁹ Some collaborators would be deemed to have combatant status: “armed collaborators are also known to have assisted the security forces in operations to capture suspects and wanted individuals, impose closure and curfew, set up roadblocks and make arrests.”⁴⁰ Collaborators were regularly armed by the Israeli security services.⁴¹

³⁴ Oxford Compact English Dictionary.

³⁵ J G Shields, “Charlemagne’s Crusaders: French Collaboration in Arms, 1941-1945”, *French Cultural Studies*, Vol 18, No 1 (2007), pp 83-105.

³⁶ Stanley Hoffman, “Collaborationism in France during World War II”, *The Journal of Modern History*, Vol 40, No 3 (1968), pp 375-395 at 375.

³⁷ Ron Dudai and Hilel Cohen, “Triangle of Betrayal: Collaborators and Transitional Justice in the Israeli-Palestinian Conflict”, *Journal of Human Rights*, Vol 6, No 1 (2007) pp 37 – 58 at 42.

³⁸ Y Yizhar Be’er and Saleh Abdel-Jawad, *Collaborators in the Occupied Territories: Human Rights Abuses and Violations* (Jerusalem: B’Tselem, The Israeli Information Centre for Human Rights in the Occupied Territories, 1994) available at:

www.btselem.org/Download/199401_Collaboration_Suspects_Eng.doc.

³⁹ *Ibid* at 16.

⁴⁰ *Ibid* at 27.

⁴¹ *Ibid* at 31 to 36.

37. In the present case, there has been no evidence of an accepted meaning of the corresponding word or words in Bosnian / Croatian / Serbian or Kosovar Albanian in Kosovo, Serbia or the area of the Former Yugoslavia.
38. Jakup Krasniqi, a KLA spokesman, described his understanding of the term as a person who was actively recruited to work for the Serb security services or the ranks of the Serb military or police forces, and referred to the adoption of the foreign word used in Norway or France after the Second World War.⁴² His understanding of the term would be one that comprised combatants.
39. The ordinary meaning of the word “collaborator” must therefore include both civilians and combatants.
- (a) Burden of Proof Remains on Prosecution to Prove that attack on “Collaborators” amounts to attack on Civilians
40. If the term is used to mean both civilians and combatants, it is incumbent on the Prosecution to prove not only that there was an attack on collaborators, but also that any such attack was actually against civilians rather than combatants.
41. As the Trial Chamber pointed out in *Limaj*, the targeting of Kosovo Albanian individuals believed to be, or suspected of, collaborating with the Serbian authorities does not amount to an attempt to target a civilian population as such.⁴³ However, the Trial Chamber in that case then fell into error by relying on Article 50 of Protocol I to conclude that because there was doubt about the status of targeted collaborators, it was entitled to conclude that collaborators were entitled to civilian status.⁴⁴ In doing so, the Trial Chamber reversed the applicable burden of proof. The Appeal Chamber in *Blaskić* has confirmed that the approach adopted by the Trial Chamber in *Limaj* was essentially wrong, stating that the imperative “in case of doubt” in Article 50 is limited to the expected conduct of a member of the military. *However, where the latter’s criminal responsibility is at issue, the*

⁴² 5059:24 – 5050:11.

⁴³ At § 211.

⁴⁴ At § 224.

*burden of proof as to whether a person is a civilian rests on the Prosecution.*⁴⁵

Therefore, the burden of proof rests on the Prosecution to prove that an attack on collaborators was actually an attack on civilians notwithstanding Article 50.

(b) The Prosecution's Attempted Definition of Collaborators

42. Recognising that collaborators can include both civilians and combatants, the Prosecution have attempted to argue that those allegedly attacked by the KLA as collaborators were civilians and have stretched their definition to cover an extremely wide and diverse group.

43. The Prosecution fail to provide a definition of collaborator in the 4th Amended Indictment other than stating that those targeted were civilian collaborators:

“The civilian population against whom the attack was directed comprised ... civilians perceived to be collaborating with the Serbs or otherwise not supporting the KLA.”⁴⁶

44. This is an essentially meaningless definition in that it fails to define civilian collaborators with any specificity and falls foul of the requirement for specificity in indictments.

45. A more extensive attempt at a definition is included in the Prosecution Pre Trial Brief. The definition set out therein includes:

- 45.1. Supporters of the LDK;
- 45.2. Individuals who had Serb friends;
- 45.3. Individuals who were suspected of cooperating with the Serbian authorities;
- 45.4. Anybody who spoke or wrote anything critical of the KLA;
- 45.5. Kosovar Albanians who refused to join the KLA;
- 45.6. Anyone who had “put themselves in the service of the enemy *in one way or another*”;⁴⁷ and

⁴⁵ *Blaškić* Appeals Chamber judgement, § 111.

⁴⁶ § 15.

45.7. Kosovar Albanians who did not want to be controlled by the KLA but who “just wanted to get on with their lives.”⁴⁸

46. This attempted definition also is problematic in that it still includes those who may be combatants and it also is impossibly vague, again falling foul of the requirements of specificity.

47. A further problem with attempting to prove that the KLA was attacking such a wide, vague and loosely defined group is that it requires the Prosecution to additionally prove that there was a generally accepted definition of collaborator across the diverse range of individuals who were fighting under the banner of the KLA, which was also shared by Lahi Brahimaj.

(c) Burden on Prosecution to Prove that Measures against Suspected Collaborators Were Unlawful

48. Furthermore, even where suspected collaborators have civilian status, it is lawful to take measures against them. For example, it is lawful in accordance with Articles 42 and 43 of the Fourth Geneva Convention and Article 5 of Protocol II⁴⁹ to detain civilians / protected persons who are suspected of acts hostile to a party to the conflict. It is therefore incumbent on the Prosecution to prove that collaborators who were civilians were targeted in an unlawful manner.

(d) Attack on Collaborators Does Not Amount to Attack on Civilian Population

49. Finally, the Brahimaj Defence maintains that an attack on collaborators does not amount to an attack on a civilian population because collaborators do not amount to an identifiable section of the population and the reason for any attack would, by definition, be because of their suspected or actual hostile acts rather than because of their civilian status.⁵⁰

⁴⁷ Emphasis in the original.

⁴⁸ § 66.

⁴⁹ Set out below at § 74.

⁵⁰ See *Limaj* Trial Chamber judgement, §§ 216 – 217.

3. Elements of Individual Offences

(a) Persecution

50. The Tribunal has jurisdiction to consider the crime against humanity of persecution by virtue of Article 5(h) of the Statute. The *Tadić* Trial Chamber judgement set out the elements of persecution as “the occurrence of a persecutory act or omission and a discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion or politics... [T]he persecutory act must be intended to cause, and result in, an infringement on an individual’s enjoyment of a basic or fundamental right. The notion of persecutory act provides broad coverage, including acts mentioned elsewhere in the Statute as well as acts which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken.”⁵¹

51. In the *Kupreškić* judgement, the Trial Chamber set out the requirements of the *actus reus* of persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.”⁵² As further delineated by the *Krnjelac* Trial Chamber and accepted as the preferred wording by the *Kvočka* Appeals Chamber:

“[T]he crime of persecution consists of an act or omission which: 1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).”⁵³

52. The requirement of “discriminatory intent is what sets the crime of persecution apart from other Article 5 crimes against humanity.”⁵⁴ In addition to the specific intent to commit the underlying act, the requisite discriminatory intent consists of

⁵¹ At § 715.

⁵² At § 621.

⁵³ *Krnjelac* Trial Chamber judgement, § 431, *Krnjelac* Appeals Chamber judgement, § 185, *Kvočka* Appeals Chamber judgement, §§ 319-320.

⁵⁴ *Kordić and Cerkez* Trial Chamber judgement, §§ 212.

“specific intent to cause injury to a human being because he belongs to a particular community or group.”⁵⁵ The accused “must consciously intend to discriminate”: mere awareness that he is acting in a discriminatory manner is insufficient.⁵⁶ The relevant grounds are limited to race, religion or politics: *Prosecutor v Tadić*, Trial Chamber judgement § 715. In order to show discriminatory intent, the Prosecution must prove discriminatory intent affirmatively for each act.⁵⁷ And whilst the required discriminatory intent “may be inferred from the context of the attack if it is substantiated by the surrounding circumstances of the crime”, it cannot be inferred from the general discriminatory nature of an attack characterised as a crime against humanity alone.⁵⁸

53. Equally, it is incumbent on the Prosecution to specify the discriminatory grounds. In the present case, the Prosecution, at § 21 of the Fourth Amended Indictment, alleges that the allegations of persecution were committed “with the intent to discriminate against the victims on the basis of religious, political or racial considerations, or a combination of these...” The alleged basis for discrimination is not particularised further. However, at § 15 of the Indictment, dealing with the issue of widespread or systematic attack on a civilian population, it is alleged that the target was the Serb civilian population and civilians perceived to be collaborating with the Serbs or otherwise not supporting the KLA. By contrast, in relation to individual counts within the Indictment, there are suggestions of other discriminatory grounds, for example: Orthodox or Catholic religion (Counts 23, 27, 29 and 31); Serb, Roma, Egyptian, Bosnian or Montenegrin race (Counts 23, 25 and 29); supporting the LDK political party (Count 33) and refusal to fight for the KLA (Count 31).

54. In the light of the broad definition of persecution, the Prosecution cannot rely on a general charge of “persecution” but must charge particular acts.⁵⁹ The indictment must be sufficiently clear to enable the accused to understand the nature and cause

⁵⁵ *Blaškić* Trial Chamber judgement, § 235, *Blaškić*, Appeals Chamber judgement, § 165, *Kordić and Čerkez* Appeals chamber judgement, § 111.

⁵⁶ *Simić, Tadić and Zarić* Trial Chamber judgement, § 51, *Brdjanin* Trial Chamber judgement, § 996.

⁵⁷ *Krnjelac* Appeals Chamber judgement, § 184.

⁵⁸ *Kvočka et al.*, Appeals Chamber judgement, § 366.

⁵⁹ *Kupresić* Trial Chamber judgement, § 626.

of the charges brought against him: *Prosecutor v Kanyabashi*.⁶⁰ The principle of legality mandates that the Prosecution charge particular acts with sufficient detail to enable the accused to fully prepare their defence.⁶¹ A general charge of persecution would be inconsistent with the concept of legality.⁶² Further, the status of persecution as a so-called “umbrella” crime does not excuse the Prosecution from specifically pleading the crime’s material aspects in the indictment with the same detail as other crimes.⁶³ “Persecution cannot, because of its nebulous character, be used as a catch-all charge.”⁶⁴ Moreover, “[p]ursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars.”⁶⁵

55. It is firstly submitted that if the Prosecution are seeking to allege that “perceived collaboration” falls within the ground of political belief, this is insufficiently clear from the Indictment. It would therefore be unfair on the Defence to attempt to divine a meaning behind the Prosecution’s use of the term.

56. Secondly, if, and insofar as the Trial Chamber will allow, the Prosecution to argue that individuals were targeted because they were “collaborators”, “collaboration” does not fall within the three recognised grounds for discrimination that the Tribunal has jurisdiction to consider. As explored above, it describes far too broad a category of persons to properly be considered akin to or synonymous with “political opinion.” In particular, there is the further difficulty that if the ground of discrimination alleged is collaborationism, this introduces an unworkable distinction in that it is impossible to distinguish between those targeted because of their religion, ethnicity or political view and those targeted because of their participation in hostilities or acts hostile to a party to the conflict.

(b) Murder

⁶⁰ Decision on Defence Preliminary Motion for Defects in the Form of the Indictment ICTR, 31 May 2000, § 5.1.

⁶¹ *Kupreškić* Trial Chamber judgement, § 626.

⁶² *Ibid* at § 626.

⁶³ *Kupreškić* Appeals Chamber judgement, § 98.

⁶⁴ *Ibid* at § 98.

⁶⁵ *Ibid* at § 98.

57. The elements of the crime of murder under Article 3 and Article 5 of the statute are identical, subject to the respective jurisdictional requirements.⁶⁶ It is necessary to prove the death of a victim, that the death was the result of an act or omission of the accused and that the act or omission was committed with intent to kill, or in the knowledge that death was a probable consequence of the act or omission.⁶⁷ Although there is no strict requirement that the relevant body be recovered, death can be established provided that it is the only reasonable inference available from the evidence.⁶⁸

58. The *mens rea* required is intent to kill or, in the absence of such intent, the knowledge that death was a probable consequence of the act or omission.⁶⁹ Knowledge of death as a possible consequence is insufficient.⁷⁰

(c) Imprisonment

59. The requirements for detention in an internal conflict in accordance with Protocol II are relatively few compared to under the law of international armed conflict and are set out in Article 5 of that Convention. See further below at § 74.

60. However, it is the position of the Defence for Lahi Brahijaj that the Tribunal does not have jurisdiction to consider the *crime against humanity* of imprisonment. The Tribunal does, however, have jurisdiction for the *war crime* of imprisonment where committed in an *international* armed conflict.

61. The statute of the Tribunal purports, at Article 5(e), to give jurisdiction for the crime against humanity of imprisonment “when committed in armed conflict, whether in international or internal in character.”

⁶⁶ *Kordić and Čerkez*, Trial Chamber judgement, §§ 229, 233 and 236, *Brđanin* Trial Chamber judgement, § 380, *Strugar* Trial Chamber judgement, § 236, *Orić* Trial Chamber judgement § 345, *Martić* Trial Chamber judgement, § 58.

⁶⁷ *Kvočka et al*, Appeals Chamber judgement, § 261.

⁶⁸ *Ibid* at § 260, *Brđanin* Trial Chamber judgement, §§ 383 to 385, *Krnjelac* Trial Chamber judgement, §§ 326 to 327, *Martić* Trial Chamber judgement, § 59.

⁶⁹ *Strugar* Trial Chamber judgement, §§ 235 to 236, *Limaj* Trial Chamber judgement § 241, *Martić* Trial Chamber judgement, § 60.

⁷⁰ *Strugar* Trial judgement, § 236, *Martić* Trial Chamber judgement, § 60.

62. In passing the resolution that created the Statute of the Tribunal, the UN Security Council was not acting as an international legislator, but was giving jurisdiction to the Tribunal to consider international crimes that pre-existed at that time. This can be contrasted with the Rome Statute for the International Criminal Court (“ICC”), which, by consent of its signatories, specifies additional crimes against humanity not contained in previous formulations such as the enforced disappearance of persons⁷¹ and apartheid.⁷² However, the ICC only has jurisdiction over crimes committed *after* the entry into force of the statute.⁷³

63. UNSC resolution 827 of 1993 enacted the Statute of the Tribunal. The same resolution approved the report of the UN Secretary General S/25704 and adopted the draft Statute that was annexed to the report.⁷⁴ This report states clearly:

“29. It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to “legislate” that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.”⁷⁵

And

“34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.”⁷⁶ (Emphasis in the original.)

64. The Secretary General’s explanation for applying international humanitarian law to both international and internal armed conflicts was expressed as follows:

⁷¹ Article 7(i).

⁷² Article 7(j).

⁷³ Article 11.

⁷⁴ Article 2.

⁷⁵ At page 8.

⁷⁶ At page 9.

“Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”⁷⁷ (Footnote in the original omitted.)

65. As authority for this proposition, the report referred to footnote 9, which read as follows:

“9/ In this context, it is to be noted that the International Court of Justice has recognised that the prohibitions contained in the common article 3 of the 1949 Geneva Conventions are based on ‘elementary considerations of humanity’ and cannot be breached in an armed conflict. Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Judgement of 27 June 1986: ICJ Reports 1986, p 114.”⁷⁸ (Emphasis in the original.)

66. Common Article 3 of the Geneva Conventions requires certain minimum conditions in cases of armed conflict not of an international character but the prohibition of imprisonment of civilians is not included. The reference therefore provides no support for the proposition in the report.

67. An important source of international humanitarian law was the Charter of the International Military Tribunal of 8 August 1945.⁷⁹ Article 6(c) defined crimes against humanity as follows:

“(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

68. There is no mention of imprisonment.

69. Subsequently, the UN General Assembly tasked the International Law Commission (“ILC”) both to formulate the principles of international law

⁷⁷ Page 13, § 47.

⁷⁸ Page 35.

⁷⁹ The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945. United Nations Treaty Series Vol 82 No 251.

recognised by the Charter of the Nuremberg Tribunal⁸⁰ and to promote the progressive development and codification of international law.⁸¹

70. In 1950, the ILC provided a report to the UNGA entitled “Principles of International Law Recognised by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal. This stated the following:

“Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

...

c. Crimes Against Humanity

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, such as when acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.”

71. The ILC only arrived at a definition and contents of crimes against humanity for a Draft Code of Crimes in 1996. However, the definition post-dated and borrowed from the definition contained in Article 5 of the Statute of the Tribunal. At no point prior to 1996 did any of the draft definitions of crimes against humanity proposed by the ILC include arbitrary imprisonment.

72. Equally, although the Geneva Conventions prohibit imprisonment of protected persons in international armed conflict unless certain conditions are met (see Arts 42 and 43 Geneva Convention IV), only common Article 3 has relevance for internal armed conflict. It is also odd that while the Tribunal has borrowed the definition of “imprisonment” from the Geneva Conventions, the formulation of “imprisonment” for the crime against humanity purportedly applies in potentially far wider situations as there is no requirement for an armed conflict: *Prosecutor v Kordić and Čerkez* appeal, § 115.

73. Protocol II to the Geneva Conventions of 1977, which has a higher threshold of applicability than common Article 3 in that it requires the dissident or organised armed groups to be under responsible command and to exercise such control over

⁸⁰ UNGA resolution 177, 21 November 1947.

⁸¹ UNGA resolution 174, 21 November 1947.

part of its territory as to enable them to carry out sustained and concerted military operations and to implement that protocol,⁸² does not specifically prohibit imprisonment. By contrast, it does explicitly prohibit the forced movement of civilians.⁸³

74. Rather, Article 5 regulates the conditions of detention, thereby implicitly accepting that imprisonment alone did not amount to a crime against humanity:

Art 5. Persons whose liberty has been restricted

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained;

- (a) the wounded and the sick shall be treated in accordance with Article 7;
- (b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
- (c) they shall be allowed to receive individual or collective relief;
- (d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
- (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

- (a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;
- (b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;
- (c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;
- (d) they shall have the benefit of medical examinations;
- (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with

⁸² Article 1.

⁸³ Article 17.

the generally accepted medical standards applied to free persons under similar medical circumstances.

3. *Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.*

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.” (Emphasis added.)

75. It is therefore difficult to consider how the law of armed conflict provides support for the crime of imprisonment existing as a crime against humanity as at the date of implementation of the Statute. Protocol II fundamentally conflicts with cases such as *Ntagerura et al* in the ICTR: See § 702. *Ntagerura* purports to establish that detention in breach of certain procedural rights, such as being informed of the reasons for the arrest, amount to a crime against humanity. As can be seen from the above, Protocol II requires no such thing.

76. Equally, although arbitrary imprisonment is prohibited by numerous human rights instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights (“ICCPR”), this alone is not sufficient to render imprisonment of civilians a crime against humanity. It should be noted in particular that the prohibition on arbitrary imprisonment can be derogated from in accordance with Article 4 of ICCPR. As such, it is the only crime against humanity contained in the Statute that is founded on a right subject to derogation.

77. Because of these reasons, it is submitted that the Tribunal does not have jurisdiction to consider the crime against humanity of imprisonment because that offence was not recognised as at the date of enactment of the Statute by the Security Council.

(d) Torture

78. The Trial Chamber in *Prosecutor v Kunarac et al* summarised the definition of torture as the infliction, by act or omission, of severe pain and suffering, whether

physical or mental, intentionally and with the aim of obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim of a third person.⁸⁴ What constitutes severe pain and suffering is a fact-specific inquiry and existing jurisprudence has not determined the absolute degree of pain necessary for an act to qualify as torture.⁸⁵ Nonetheless, the severity threshold at least requires that “‘only acts of substantial gravity may be considered to be torture;’ therefore, ‘[n]either interrogation by itself, nor minor contempt for the physical integrity of the victim, satisfies this requirement.’”⁸⁶

79. The intent required is to cause severe pain or suffering, whether physical or mental, to the victim in pursuance of one of the prohibited purposes of the crime of torture.⁸⁷

(e) Other Inhumane Acts

80. The Trial Chamber in *Kordić and Čerkez* stated that the crime of other inhumane acts is a residual category that encompasses other acts that are not specifically enumerated.⁸⁸ However, the acts alleged must be of similar gravity to the other acts listed in the preceding subparagraphs of Article 5 of the Statute and must in fact cause injury in terms of physical or mental integrity, health or human dignity: *Tadić* Trial Chamber Judgement, § 729. The victim must have suffered serious bodily or mental harm (assessed on a case-by-case basis) as a result of an act or omission of the accused or his subordinate and the accused must have been motivated by the intent to inflict serious bodily or mental harm on the victim: *Kordić and Čerkez* Appeals Chamber judgement, § 117. The requisite *mens rea* necessitates that the perpetrator intended to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or that the perpetrator acted or failed to act with knowledge that his act or omission was

⁸⁴ Judgement of the 22 February 2001, § 497, confirmed by Appeals Chamber 12 June 2002, §§ 146 to 148.

⁸⁵ *Brđanin* Trial Chamber judgement, § 483, *Brđanin* Appeals Chamber judgement, § 251, *Naletilić and Martinović* Appeal judgement, § 299.

⁸⁶ *Simić et al* Trial Chamber judgement, § 80.

⁸⁷ *Kunarac et al*, Appeals Chamber judgement, § 153.

⁸⁸ Trial Chamber judgement, 26 February 2001, § 269, affirmed by the Appeals Chamber, 17 December 2004 § 117.

likely to cause such suffering or amount to a serious attack on the human dignity of the victim.⁸⁹

B. War Crimes

1. Murder

81. As set out above, the Tribunal has established that the *actus reas* and *mens rea* for the underlying offence of murder are identical irrespective of whether the offence is charged under Article 3 or Article 5 of the Statute.⁹⁰ Additionally, under Article 3, the victim must have been a person taking no active part in the hostilities.⁹¹

2. Torture

82. Like the underlying offence of murder, it is also settled that the definition of torture is the same regardless of the article of the Statute under which the accused is charged.⁹²

3. Cruel Treatment

83. The war crime of cruel treatment under Article 3 of the Statute is an intentional act or omission that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity which is committed against a person taking no active part in the hostilities.⁹³ The *mens rea* required for cruel treatment consists of direct intent to commit cruel treatment, or indirect intent consisting of acting or failing to act with knowledge that cruel treatment was a probable consequence of the act or omission.⁹⁴

⁸⁹ *Blagojević and Jokić* Trial Chamber judgement, § 628.

⁹⁰ *Kordić and Čerkez*, Trial Chamber judgement, §§ 229, 233 and 236, *Brđanin* Trial Chamber judgement, § 380, *Strugar* Trial Chamber judgement, § 236, *Orić* Trial Chamber judgement § 345, *Martić* Trial Chamber judgement, § 58.

⁹¹ *Kordić and Čerkez* Appeals Chamber judgement, § 233.

⁹² *Brđanin* Trial Chamber judgement, § 482, *Krnjelac* Trial Chamber judgement §, 178, *Furndžija* Trial Chamber judgement, § 139.

⁹³ *Blaškić* Appeal Chamber judgement, § 595, *Limaj et al* Trial Chamber judgement, § 231, *Strugar* Trial Chamber judgement, § 261.

⁹⁴ *Limaj et al* Trial Chamber judgement, § 231.

84. Whether particular conduct constitutes cruel treatment is a question of fact to be determined on a case-by-case basis.⁹⁵ The Trial Chamber in *Limaj et al.* concluded that, in the circumstances of that case, unlawful seizure, unlawful detention for prolonged periods of time and interrogation did not amount to a serious attack on human dignity within the meaning of cruel treatment under Article 3 of the Statute.⁹⁶

⁹⁵ *Ibid* at § 232.

⁹⁶ *Limaj et al* Trial Chamber judgement, § 232.

VI. COUNTS 27 AND 28

A. Introduction

85. The Prosecution allege that Witness 6 was stopped by KLA soldiers, taken to Jabllanicë and severely beaten on or about the 13 June 1998. Thereafter, it is alleged that he was detained there until around the 25 July 1998 and during that time KLA soldiers including Lahi Brahimaj regularly beat him with baseball bats.

B. Witness 6 Not Credible

86. Witness 6 is the alleged victim of the crimes alleged in counts 27 and 28 and the main witness for counts 27 to 32. The Tribunal is invited to scrutinise his testimony carefully because it demonstrates in a variety of ways that he is not credible. See further below at §§ 149 to 160 and 190 to 197.

1. “There Will Be Bloodshed Because of This Car”

87. Witness 6 demonstrated a “blood feud” against Nazmi Brahimaj and he demonstrated a number of motives to exaggerate and lie against the Brahimaj family in his testimony. He demonstrated particular animosity towards Nazmi Brahimaj, a brother of Lahi Brahimaj. Witness 6 had an expensive Mercedes, valued by him at 30,000.00 Swiss Francs;⁹⁷ an enormous amount for a person who claimed that he was not wealthy⁹⁸ and was a farmer.⁹⁹ He also had a pistol.¹⁰⁰ When these were requisitioned or confiscated by Nazmi Brahimaj, together with his identity card, driver’s licence and wallet, he accepted that he was angry.¹⁰¹ However, when Nazmi Brahimaj refused to return his possessions to him on his release, Witness 6 threatened: “there will be bloodshed because of this car.”¹⁰² This is a clear declaration of the start of a blood feud against the Brahimaj family.

⁹⁷ 5378:13.

⁹⁸ 5378:25.

⁹⁹ 5352:5.

¹⁰⁰ 5194:17.

¹⁰¹ 5378:16; 5379:7.

¹⁰² 5256:5.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

89. Moreover, there are indications from his evidence that Witness 6 was motivated to testify, at least in part, by a desire for monetary compensation. At the end of his testimony, Witness 6 specifically asked to raise a matter with the Trial Chamber¹⁰⁶ and, when permitted to do so, asked where he should seek compensation.¹⁰⁷
90. The witness's grievance over the loss of his car is further evidenced by the fact that when Witness 6 was allowed to return home, it was the loss of his *car* that constituted his primary gripe, not the four-week sustained beating with baseball bats that he claims to have suffered. Rather than complaining about the alleged systematic beating, he complained only about the loss of his car. This further suggests his claimed mistreatment was either entirely fabricated or substantially less severe than claimed.
91. When Witness 6's hostile predisposition towards the Brahimaj family and the KLA are taken together with the numerous inconsistencies in his evidence set out below, it is submitted that the only conclusion that can be drawn is that Witness 6 is not credible because he was motivated by a desire other than to tell the truth.

2. Witness 6's Relations with the Security Services

¹⁰³ 5263:9.

¹⁰⁴ 5263:25 – 5264:5.

¹⁰⁵ 5208:5.

¹⁰⁶ 5403:1.

¹⁰⁷ 5403:5.

92. Witness 6's story of his relations with the Serbian Security Services is fundamentally improbable and the only safe conclusion that can be drawn is that he was not being truthful.

93. Following Witness 6's departure from Jabllanicë, he said he met Sretan Camović,¹⁰⁸ the Head of Serbian State Security, in Hotel Pastrok in Gjakova.¹⁰⁹ Sretan Camović and Witness 6 had known each other for some 20 years at that time¹¹⁰ and Camović apparently already knew that Witness 6 had been in Jabllanicë. Asked what he had said to Camović when he found him drinking coffee in Hotel Pastrok, Witness 6 replied:

“Nothing. He asked me, How was it in Jabllanicë? I told him that they took away my papers, and then he told me, come tomorrow, bring the necessary documents and you will get a copy of new papers.”¹¹¹

Witness 6 also saw a police officer called Pavle Zuvic shortly after his release who asked him how it was in Jabllanicë.¹¹² Witness 6 further said that he also discussed events with another police officer called “Zukan Kuqi”.¹¹³ It was therefore certain, according to Witness 6, that the Serb authorities were aware that he had been in Jabllanicë.

94. Jabllanicë at that time was a KLA stronghold, described by Serbian officials as a no-go area for at least two years by that point in 1998.¹¹⁴ According to D81, between 25 July (the very day when Witness 6 left Jabllanicë) and 6 August, Serbian JSO units, supported by VJ, were engaged in a massive push along a number of strategic axes, including Glllogjan village to Jabllanicë village.¹¹⁵ This offensive resulted in widespread arrests, detentions, interrogations and torture

¹⁰⁸ 5301:7.

¹⁰⁹ 5301:15.

¹¹⁰ 5301:1.

¹¹¹ 5302:5.

¹¹² 5304:18 – 5305:7.

¹¹³ 5354:22.

¹¹⁴ See, e.g. 92ter 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.”

¹¹⁵ 4654.

throughout that period as the Serb Authorities sought to obtain any information to use against the KLA.

95. Zoran Stijović, then head of the analytical department of the RDB Pristina Centre, confirmed that if any person claimed to have been detained in Jabllanicë and to have been beaten and to have seen others detained and beaten and killed, that is something that would definitely have been taken down in statement form by the RDB.¹¹⁶ Mr Stijović further confirmed that he would have been consulted about the plan to attack Jabllanicë at the beginning of August 1998. In other words, if what Witness 6 claimed to have happened was true, this would have been vitally important intelligence for those Serb forces at that particular time.
96. In all these circumstances, it is unthinkable that the head of Serbian State Security in Gjakova, even in a supposedly chance encounter with Witness 6, knowing that he had come directly from Jabllanicë at such a crucial time, would not have sought to obtain from him every scrap of information about numbers of KLA soldiers, their weaponry, commanders, defences, locations and resources.
97. If Witness 6 is to be believed, the Serbs were not interested in any information he might be in a position to provide. Further, it defies belief that the Serb Authorities would have been indifferent to the fate of a fellow Serb police officer, Nenad Remištar who, by the time of Witness 6's release, was presumably still missing.
98. Witness 6's reasons why the Serbs were not interested in the information that he might have possessed are particularly unconvincing. Witness 6 initially claimed that Sretan Camović knew every detail and the names of the *people* there better than Witness 6 did.¹¹⁷ When pressed on this in cross-examination, Witness 6 then changed his story, denying that he had said that, despite it clearly being on the record, and instead claiming that Camović in fact knew the *terrain* and *villages* better.¹¹⁸ Witness 6's claim that Camović did not ask and was not interested in the

¹¹⁶ 9247:7 – 9247:25.

¹¹⁷ 5305:22 – 5305:25.

¹¹⁸ 5307:11 – 5307:14.

alleged torture and crimes committed by the KLA¹¹⁹ is simply incredible. Witness 6 also claimed that the reason that he did not tell the SUP anything was that “the war started and I did not have time to tell them anything”.¹²⁰ This was despite the fact that he personally went to the offices of the SUP to apply for a driving licence and identification card two days later¹²¹ and yet did not report anything.¹²² His explanation for not reporting matters then was that “these were only women that were working in those offices. There were not officers.”¹²³

99. Witness 6 claims that the first statement that he gave the Serb authorities about the alleged offences was as late as 2006 when he went to the SUP in Jagodina, Serbia and was required to make a sworn statement.¹²⁴ He denied that he was in the pay of the Serb authorities but was not able to offer any other explanation as to why they were apparently only first interested in taking a statement from him some eight years after the events in question.¹²⁵

100. In the circumstances, Witness 6’s story of his relations with the Serbian Security Services is fundamentally implausible. The only inference that can be drawn is that it is an untruthful account. Furthermore, it is no part of the Defence function to explain why a witness may be motivated to lie, distort or exaggerate. In the overall context of this particular witness’s background and conduct, the Brahimaj Defence submits it is for the Prosecution to satisfy the Trial Chamber beyond a reasonable doubt that he is not still in the pay of the Serbian “Gjakova Headquarters” in Jagodina; that he is not lying about what, if anything, he said to the Serb authorities in Gjakova in 1998; and that he is not motivated by considerations of personal financial gain or by the code of the blood feud in his evidence concerning Lahi Brahimaj and the KLA barracks in Jabllanicë.

¹¹⁹ 5703:23 – 5703:25, 5308:16 – 5308:18, 5708:21 – 5709:6, 5709:8 – 5709:13.

¹²⁰ 5310:7.

¹²¹ 5309:17 – 5309:20.

¹²² 5310:2.

¹²³ 5309:23.

¹²⁴ 5277:17 – 5277:25.

¹²⁵ 5314:12.

3. Problems With Witness 6's Purported Identifications

101. Witness 6 purported to identify a number of alleged perpetrators and alleged victims who were in the barracks in Jabllanicë. However, these require careful examination.
102. Witness 6 testified that he did not know Lahi Brahimaj, Nazmi Brahimaj or the person he referred to as “Hamz” during the time of his alleged detention: “After I was released, I wanted to find out their names. I knew them by appearance.” He said they never introduced themselves to him.¹²⁶
103. Witness 6 identified Nazmi Brahimaj,¹²⁷ who he described as the “deputy commander,”¹²⁸ as the person responsible for beatings in the barracks. However, this cannot necessarily be considered a reliable identification: Witness 6 could equally have read this information from the two pieces of paper given to him on his release, and which he kept, that were signed: “Nazmi Brahimaj, Deputy Commander.”¹²⁹ This can be compared with, in particular, Witness 6 being unable to identify the main commander,¹³⁰ any other commanders and, most significantly, whether Lahi Brahimaj was a commander at Jabllanicë.¹³¹
104. Witness 6 claims also to have identified one of the alleged victims, Pal Krasniqi.¹³² However, this is the only alleged victim he was able to identify.¹³³ Even when he was specifically given the name of another alleged victim named in the Indictment, Skender Kuqi, he said that he did not recognise it.¹³⁴ Nor did Witness 6 recollect or have any knowledge about a person called Naser Lika, another alleged victim, despite being shown his photograph and prompted with his name.¹³⁵ There is an obvious explanation as to why Witness 6 was able to name Pal Krasniqi. Witness 6 stated that, after the war, an investigative judge asked him

¹²⁶ 5218:5 – 5218:11.

¹²⁷ For example: 5208:24, 5211:3, 5219:13, 5380:21.

¹²⁸ 5245:20.

¹²⁹ 5254:17 – 5254:22, 5380:11 and P335.

¹³⁰ 5245:25.

¹³¹ 5245:14.

¹³² 5233:1.

¹³³ 5237:13.

¹³⁴ 5368:22.

¹³⁵ 5368:3, 5382:1 – 5282:13. *See*, Haverinen at 6342:10-23; 6344:2 – 6.

about Pal Krasniqi¹³⁶ and in consequence Witness 6 had visited the Krasniqi family and Pal Krasniqi's mother and father.¹³⁷ The evidence of Ded Krasniqi confirms this.¹³⁸ In particular, Witness 6 stated that at the visit to the Krasniqi family home, he was even shown the *same photograph* of Pal Krasniqi that the OTP later used when asking Witness 6 to identify him.¹³⁹ The worthlessness of this "identification procedure" is demonstrated by the fact that when the Prosecution showed Witness 6 the photograph in court, the words "Pal Krasniqi" were clearly written on the photograph for Witness 6 to read.¹⁴⁰

105. Witness 6 also claimed that a person called "Hamz Brahimaj" was responsible for beatings at the barracks.¹⁴¹ However, when attempting to identify Hamz Brahimaj, Witness 6 misidentified him; the photo he said was of "Hamz" was actually somebody called "Myftar".¹⁴² Again, this misidentification is explained by Witness 6's subsequent visit to Ded Krasniqi. Ded Krasniqi gave evidence that he had visited Jabllanicë and spoken to somebody called Hamz who he knew from before.¹⁴³ The evidence records that Witness 6 and Ded Krasniqi had previously discussed a person called "Hamz" when they met each other.¹⁴⁴

106. A further concern is raised by the fact that Witness 6 was present when investigators of the OTP interviewed ██████████ Witness 7, including where the latter described commanders present in Jabllanicë.¹⁴⁵ Although Witness 7 apparently described a "commander Maxhupi" in his 92 *ter* statement, great caution should be used before relying on this as providing any form of corroboration. Witness 7 is deceased and has not been cross-examined. Furthermore, Prosecution investigators appear to have followed particularly poor procedure, specifically prompting other witnesses who also visited Jabllanicë by

¹³⁶ 5251:12.

¹³⁷ 5250:25.

¹³⁸ 4790:9.

¹³⁹ 4249:11 – 4249:15.

¹⁴⁰ 5248:2 – 5248:5.

¹⁴¹ 5208:24, 5209:9.

¹⁴² See Pekka Haverinen at 6344:22 – 6345:7; 6347:1 – 6347:8.

¹⁴³ 4777:2 – 4777:10.

¹⁴⁴ 4794:6 – 4794:9.

¹⁴⁵ See 92*quater* Statement of Witness 7, cover page: "Names of all persons present ... [Witness 6] Son of witness."

giving them the name “Maxhupi” (eg, Witness 16). However, Witness 16 gave evidence that he had only heard the name *subsequent* to visiting Jabllanicë.¹⁴⁶

107. The Brahimaj Defence adopts and incorporates by reference the arguments advanced by the Balaj Defence in connection with the failure of OTP investigators to follow their own guidelines on procedures to be followed with photoboard and other identification techniques. In particular, the admitted failures by investigator Pekka Haverinen to follow those procedures fall little short of attempted witness manipulation.¹⁴⁷

4. Witness 6’s Injuries Inconsistent with Seriousness of his Alleged Mistreatment

108. Witness 6 claims that when he first arrived at the barracks, he was beaten with a baseball bat¹⁴⁸ by Nazmi Brahimaj,¹⁴⁹ giving him fractures and bruises¹⁵⁰ and causing him to lose consciousness.¹⁵¹

109. Witness 6 also claims that thereafter, for a period of four weeks, on a regular basis¹⁵² he was beaten and tortured¹⁵³ with baseball bats and fists. “For two weeks I didn’t know much of myself, I didn’t know where my face was, where my neck was. I was all swollen up because of the beatings.”¹⁵⁴ It is submitted that this part of his story is not consistent with the record of injuries sustained.

110. Witness 7, who visited Witness 6 and spent two hours with him during the period he was at the barracks, makes no mention of any visible injuries in his statement admitted pursuant to Rule 92*quater*.¹⁵⁵ Equally, Witness 6’s [REDACTED], Witness 23 who visited him at the same time, stated that although he had lost weight,¹⁵⁶ she could not see any visible injuries at that time.¹⁵⁷ Further, even after

¹⁴⁶ 92 *bis* Statement 21 April 2007, § 18.

¹⁴⁷ See paragraphs 104 and 105 above.

¹⁴⁸ 5210:5.

¹⁴⁹ 5209:23.

¹⁵⁰ 5210:8.

¹⁵¹ 5209:25, 5324:19.

¹⁵² 5218:4.

¹⁵³ 5217:11 – 5217:14.

¹⁵⁴ 5220:6.

¹⁵⁵ 92*quater* Statement 28 April 2004.

¹⁵⁶ 10551:9 – 10551:11.

Witness 6's return home, the emphasis of the description provided by [REDACTED] was that he had lost a lot of weight¹⁵⁸ although [REDACTED] did state that his body was bruised.¹⁵⁹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. No Explanation for Witness 6's Alleged Change of Circumstances

113. A further factor that is more consistent with an isolated beating, rather than serious, consistent, sustained and systematic beating over a period of four weeks is Witness 6's inability to give any reasons whatsoever for the apparent change in the conditions in which he claims he was held. His evidence was that after four weeks, he was suddenly free to move around the meadow outside the barracks,¹⁶¹ where one could see around for several thousand metres¹⁶² where, to external appearances, he was wandering around the yard and washing dishes.¹⁶³ He was free to move around both the barracks and the meadow and even had the

¹⁵⁷ 10550:17.

¹⁵⁸ 10551:14 – 10551:18.

¹⁵⁹ 10559:17.

¹⁶⁰ P336.

¹⁶¹ 5231:5, 5232:4.

¹⁶² 5341:5.

¹⁶³ 5391:11.

opportunity to escape or leave of his own accord,¹⁶⁴ but did not.¹⁶⁵ When asked to explain what had caused this fundamental change of circumstances, Witness 6 was unable to do so.¹⁶⁶ When asked if it was because he was able to cook, Witness 6 replied that he was not.¹⁶⁷ It is submitted that this again is evidence of untruthfulness about a four-week period of sustained mistreatment and an indication that, while he may indeed have been detained initially as a suspected collaborator, he may well have gained relative freedom after only a day or two.

114. Other evidence supports the indication that Witness 6 had the freedom of the barracks for a much longer period than the two weeks he suggests. Witness 7's witness statement admitted pursuant to Rule 92*quater* states that 13 days¹⁶⁸ after Witness 6 disappeared, a commander at the barracks refused him permission to visit Witness 6.¹⁶⁹ Over the subsequent days, Witness 7 [REDACTED] [REDACTED] who told him that Witness 6 was working in the kitchen and serving food.¹⁷¹ He also expressed surprise that Witness 7 had not been allowed to visit Witness 6. This account indicates a further conflict with the evidence of Witness 6 and suggests that his mistreatment did not last for the four weeks as claimed.

6. Improbability of Systemisation of Mistreatment for One Person

115. Furthermore, according to Witness 6's own story, for the vast majority of the period he was at the barracks, he was the only person detained there. For the KLA in Jabllanicë to have had such a system of regular and sustained mistreatment over four weeks for a person who was immediately afterwards given the freedom to leave or wander around the barracks, including presumably access to weaponry, allowed to receive visitors from his family and later to return home, seems fundamentally improbable.

¹⁶⁴ 5349:22.

¹⁶⁵ 5243:3.

¹⁶⁶ 5241:19, 5242:3.

¹⁶⁷ 5242:7.

¹⁶⁸ § 19.

¹⁶⁹ § 23.

¹⁷⁰ § 27.

¹⁷¹ § 28.

116. Nor is it clear *why* Witness 6 might have been beaten so severely for so long. In evidence, he stated that on his *first night* he was accused of being a spy and asked questions,¹⁷² but he put forward no reason for any alleged treatment thereafter and never claimed to have been asked any further questions. This suggests that he may have been questioned on the first day and not thereafter.
117. A more likely scenario is that Witness 6 was required to prove his loyalty by making a positive contribution to life in the barracks, such as by washing up, rather than being subjected to a regime which would have occupied substantial time and resources of a guerrilla organisation with overstretched resources and which was focused on defending itself from Serb attacks.

7. Witness 6 As Inaccurate Historian

118. Serious inconsistencies in the details of Witness 6's evidence indicate that he is an inaccurate historian.
119. Witness 6 claimed first that he could not tell day from night.¹⁷³ In an attempt to justify this unlikely claim, he stated that the window was barred with wooden planks,¹⁷⁴ that the planks were covered with another cover;¹⁷⁵ that he never needed to go out to the toilet because he was not given anything to eat or drink;¹⁷⁶ and that his watch was taken away.¹⁷⁷ This conflicts with other testimony from Witness 6. At one point he stated that the Bosnian and 3 Montenegrins who he claims were present were taken away at *about 10:00 pm*.¹⁷⁸ In relation to the provision of food and drink, Witness 6 later changed his testimony. He subsequently stated that he was brought water in a jar, but it was dirty and not in a proper glass.¹⁷⁹ He also said that he was given bread on a daily basis.¹⁸⁰ After initially denying that he was given salami, bread and beans as recorded in his

¹⁷² 5400:13.

¹⁷³ 5325:14.

¹⁷⁴ 5325:20.

¹⁷⁵ 5326:14.

¹⁷⁶ 5326:11.

¹⁷⁷ 5326:24.

¹⁷⁸ 5230:22.

¹⁷⁹ 5327:7.

¹⁸⁰ 5327:21.

2006 statement to the SUP,¹⁸¹ on being questioned by Judge Orić, Witness 6 first said that he had been given bread and marmalade,¹⁸² and then that he was given bread and beans.¹⁸³

120. In relation to identifying Nazmi Brahimaj and Lahi Brahimaj, Witness 6 first said that he had seen *pictures* of them and found out their names.¹⁸⁴ Immediately after giving that answer, Witness 6 then denied seeing pictures of them.¹⁸⁵

121. Similarly, when questioned by the Prosecution about the phrase “[h]is release is conditional. If the mistake is repeated the accused [Witness 6] will face criminal charges” contained in the document given to him on his release,¹⁸⁶ his response was not credible. He claimed that this meant that he should “not go to Gjakove for personal reasons.”¹⁸⁷ This makes no sense. It is much more likely that it referred to the act of carrying a weapon when not a member of the KLA.

122. These are not the hallmarks of a truthful or accurate historian.

C. Requirement for Corroboration

123. Considering Witness 6’s strong motive to testify falsely against the Brahimaj family, combined with the numerous inconsistencies in his story, it is submitted that in order for the Tribunal to rely on his evidence, it should, at the very least, be corroborated by independent and credible testimony.¹⁸⁸ However, although there

¹⁸¹ 5327:22 – 5328:2.

¹⁸² 5329:6.

¹⁸³ 5329:7.

¹⁸⁴ 5295:21.

¹⁸⁵ 5296:21, 5297:16.

¹⁸⁶ P335.

¹⁸⁷ 5255:17.

¹⁸⁸ *Limaj et al* Trial Chamber judgement, § 21: “In some cases only one witness has given evidence on a fact material to this case. Of course, the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. Nevertheless, it has been the approach of the Chamber that any such evidence required particularly cautious scrutiny before the Chamber placed reliance upon it.” *Kordić and Cerkez* Appeals Chamber judgement, § 274: “The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence. In *Kupresić et al*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation. A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the

is evidence that Witness 6 was arrested and may have been present at the barracks for a period of approximately 6 weeks, there are no witnesses who corroborate what transpired during that period. Furthermore, there are no contemporaneous records made by Witness 6 whatsoever, such as a report to the police about his alleged mistreatment.

D. Crimes Against Humanity

1. Witness 6 Not Civilian

124. It is submitted that the Prosecution have not shown that Witness 6 is a civilian for the purposes of crimes against humanity. As set out in § 0, it is a requirement that, in addition to forming part of a widespread or systematic attack directed against a civilian population, any victim of a crime against humanity must be a civilian not taking a direct or active part in hostilities. The burden of proof is on the Prosecution to prove this beyond a reasonable doubt.¹⁸⁹

125. Witness 6's own evidence confirms that when he was stopped while driving, he was armed with a pistol.¹⁹⁰ He was further in possession of a photograph of himself in company with a uniformed Serb police officer.¹⁹¹ These factors alone are sufficient to demonstrate that Witness 6 may with good reason have been suspected of taking a direct or active part in hostilities. There may have been further information available at the time that evidenced Witness 6's participation in hostilities.

126. Furthermore, the treatment of those who were clearly civilians present on that occasion demonstrates that those arresting had the utmost respect for civilians.

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appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question.”

¹⁸⁹ See above at § 41.

¹⁹⁰ 5194:17.

¹⁹¹ 5355.

¹⁹² 10534:13.

[REDACTED]

[REDACTED] 194

2. Persecution

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

128. For reasons set out above at § 56, “collaboration” is not a recognised basis for alleging persecution.

129. Nor is the evidence clear as to the reasons for Witness 6 being at the barracks. Although Witness 6 stated that when he was first taken to the barracks, the soldiers said he was a spy of Serbia,¹⁹⁸ and that he was accused of staying with Serbs,¹⁹⁹ Witness 6 claimed that this was said a way of making fun of him and he did not know why.²⁰⁰

130. Furthermore, if Witness 6 was in fact suspected of being a spy, then there would be legitimate reasons to detain him and, correspondingly, his detention would not amount to persecution because the treatment would be because of his hostile activities and not because of his race, religion or politics.

¹⁹³ 92bis statement of Witness 23 dated 18 January 2003, page 2.

¹⁹⁴ *Ibid* at page 3, 10532:20.

¹⁹⁵ 92bis statement of Witness 23 dated 18 January 2003, page 3, 10532:20.

¹⁹⁶ 92quater statement of 28 April 2004.

¹⁹⁷ 92bis statement of 6 May 2004.

¹⁹⁸ 5400:15.

¹⁹⁹ 5352:3.

²⁰⁰ 5400:19.

3. Imprisonment

131. For the reasons set out above at §§ 60 and 77, the Brahimaj Defence submits that the Tribunal does not have jurisdiction to consider the crime against humanity of imprisonment of civilians.

132. If the Trial Chamber follows a more restrictive interpretation the Prosecution must prove that if Witness 6 was indeed imprisoned, there were no reasonable grounds to suspect that he was a threat to security.²⁰¹ There has been no evidence other than from Witness 6 as to the reasons for his alleged detention. If there were reasons for his detention, it would be unlikely that Witness 6 would have volunteered them in evidence because he would have been worried about how he would have been perceived by fellow Kosovar Albanians. Furthermore, Witness 6 was not a member of the KLA and was stopped while driving around with a pistol²⁰² and had a picture of himself with a uniformed police officer.²⁰³ Even if his own account were accepted, he was the only “prisoner” in the barracks for the majority of the time, which suggests that his presence there was security related, rather than being part of a widespread or systematic attack on a civilian population. Furthermore, when Witness 6 left the barracks, he was given a document stating that his release was “conditional” and that if the mistake were repeated he would “face criminal charges”.²⁰⁴ This also points to a reasonable suspicion of a security threat, most likely linked to the carrying of weapons by a non-KLA member.

4. Torture or Other Inhumane Acts

133. For the reasons set out above at §§ 86 to 123 and further below at §§ 149 to 160 and 190 to 197, the Prosecution have failed to discharge the burden of proof that Witness 6 is a credible witness that can be relied upon. There is a significant doubt that Witness 6 was subjected to the treatment that he claims.

²⁰¹ See above at § 59.

²⁰² 5194:17.

²⁰³ 5355:11.

²⁰⁴ P335.

134. Furthermore, even if Witness 6's story could be believed, the Prosecution are required to prove as an element of the offence of torture that the treatment was undertaken with the aim of obtaining information or a confession, or at punishing, intimidating or coercing, or discriminating.²⁰⁵ However, other than the alleged questioning that Witness 6 underwent on his first day at the barracks, there is no evidence whatsoever as to why Witness 6 was treated in the way that he claims to have been over the subsequent four weeks, if indeed he was.

E. War Crimes

135. For the same reasons as set out above, it submitted that the prosecution have failed to prove that the offences of cruel treatment or torture are made out.

F. Liability of Lahi Brahimaj

1. Committing

136. If the Trial Chamber accepts that the crimes alleged in Counts 27 and 28 were in fact committed, it is submitted that the evidence does not prove that Lahi Brahimaj participated in the *actus reus* or had the necessary *mens rea*.

137. There is no suggestion that Lahi Brahimaj was present when Witness 6 was stopped in his car. The evidence does not indicate that Witness 6 was mistreated in any way by the individuals who stopped him. Witness 6 further states that it was people other than those who stopped him and took him to the barracks who beat him.²⁰⁶ Witness 6 does not allege that Lahi Brahimaj was present when he was brought to the barracks.²⁰⁷ Rather, he stated that the person who beat him on his first day was Nazmi Brahimaj.²⁰⁸

138. Witness 6's description of Lahi Brahimaj's role thereafter is extremely vague. It should be borne in mind that he did not know Lahi Brahimaj by name and that

²⁰⁵ See above at § 78.

²⁰⁶ 5208:9.

²⁰⁷ 5372:13.

²⁰⁸ 5209:23.

he claims to have found out his name only “after I was released.”²⁰⁹ He described Lahi Brahimaj as one of the “initiators”²¹⁰ of the beatings who he saw there “continuously”²¹¹ and claimed that “two days would not pass” without seeing him there.²¹² He also stated that sometimes Lahi would “happen to be in the room”²¹³ when Nazmi or Hamz sent other soldiers to beat him²¹⁴ and that Lahi would usually come for 5 or 10 minutes.²¹⁵ However, there is no detail about what Lahi Brahimaj may have done and no evidence that he ever uttered a single word to Witness 6, still less asked him any questions or gave him any reason why he was being detained. It is submitted that Witness 6 was not in fact mistreated as he claimed, and that his evidence is too vague for the Tribunal to be sure that Lahi Brahimaj was responsible for any mistreatment he may have experienced.

139. Witness 6’s vagueness about who he says was responsible for his mistreatment raises another possibility, namely that opportunistic visitors may have been responsible for any alleged mistreatment. Large numbers of people would pass through Jabllanicë and the barracks on their way to and from Jabllanicë to obtain weapons. Witness 6 himself gave evidence that on such occasions, 100-200 people would come to eat at the barracks.²¹⁶ If any mistreatment may have occurred, such individuals staying at the barracks or passing through may equally have been responsible.

140. Further, Witness 6 gives no evidence that Lahi Brahimaj had any authority over the barracks. Rather, he said that it was Nazmi Brahimaj who was present when Witness 6 was first taken to the barracks,²¹⁷ Nazmi Brahimaj who authorised Witness 6’s family to visit him²¹⁸ and Nazmi Brahimaj who authorised Witness 6’s release.²¹⁹ Although Witness 6 described Nazmi Brahimaj as the Deputy Commander, he was unable to say what Lahi Brahimaj’s role may have

²⁰⁹ 5218:8.

²¹⁰ 5208:24.

²¹¹ 5218:14.

²¹² 5218:20.

²¹³ 5221:3.

²¹⁴ 5220:16.

²¹⁵ 5220:3.

²¹⁶ 5360:22.

²¹⁷ 5209:23.

²¹⁸ Witness 7, *92quater* statement 28 April 2004, § 36.

²¹⁹ 5254:2.

been, if any. The only KLA member from Jabllanicë to testify for the Prosecution, Pjetër Shala, gave evidence that the local headquarters commander was Nazmi Brahimaj.²²⁰

141. The Prosecution assertion that Lahi Brahimaj committed these crimes pursuant to the theory of JCE is considered at Part IX Joint Criminal Enterprise below.

2. Aiding and Abetting

142. Alternatively, the Prosecution contend that Lahi Brahimaj aided and abetted the alleged crimes described in Counts 27 and 28. It is not clear how Lahi Brahimaj aided and abetted the alleged conduct. There is no evidence that he was present when Witness 6 was stopped, or when he was taken to the barracks, or when he was released. Nor is there evidence from Witness 6 that shows that Lahi Brahimaj had any particular responsibilities at the barracks or that he was a commander for Jabllanicë. Considering the vagueness of Witness 6's allegations against Lahi Brahimaj, the Prosecution have failed to prove beyond reasonable doubt that Lahi Brahimaj was involved in any mistreatment as alleged.

²²⁰ 9954:1 – 9954:11.

VII. COUNTS 29 AND 30

A. Introduction

143. The Prosecution allege that on or about the 13 June 1998, Nenad Remištar, a Serbian Police officer was stopped by KLA soldiers between Kline and Gjakova, taken to Jabllanicë and severely beaten by soldiers including Nazmi Brahimaj²²¹ and that the following day he was taken from Jabllanicë. The Prosecution allege he was killed while in KLA custody.²²² The Prosecution further allege that between mid June 1998 and the end of July 1998, an unknown individual of Bosnian ethnicity and 3 unknown individuals of Montenegrin ethnicity were brought to Jabllanicë and detained for about 3 days, during which time they were beaten with baseball bats and stabbed with knives before being taken from Jabllanicë. It is not alleged that they were killed.²²³

144. The Prosecution do not claim that Lahi Brahimaj participated directly in any of the alleged crimes but instead that they were committed as part of an alleged JCE. This aspect of participation will be considered separately at below at Part IX Joint Criminal Enterprise.

B. General

145. Witness 6 describes hearing another car approach while he was stopped. Shots were fired. He was unable to say whether the shots were fired directly into the car or into the air.²²⁴ The other car was then brought to where Witness 6 was.²²⁵ However, by this time, the driver of the car was no longer inside, only the soldier who had come to ask Witness 6 about the car remained.²²⁶ Witness 6 says that he had not seen the driver of the other vehicle.²²⁷

²²¹ 4th Amended Indictment, § 96.

²²² *Ibid* at § 97.

²²³ *Ibid* at § 98.

²²⁴ 5195:17.

²²⁵ 5195:18.

²²⁶ 5196:4.

²²⁷ 5197:17.

146. Witness 23 confirms that shots were fired,²²⁸ that when the car was later brought to where she was, there was no driver in it²²⁹ and that they never saw who was in the vehicle.²³⁰

147. After the shooting, both Witness 6's car and the other car that had been stopped were driven away from Black Stone.²³¹ Witness 6 did not suggest that the original driver of the other vehicle was in either car at that time.²³² [REDACTED] Witness 23, stated that the original driver was not in either car at that time.²³³

C. Witness 6

148. Again, Witness 6 is the only witness to the events set out in Counts 29 and 30 that are alleged to have taken place at the barracks. For the reasons set out above at §§ 86 to 123, and further below at §§ 149 to 160, he is not a credible witness and his uncorroborated evidence ought not to be relied upon.

1. Identifications

(a) Purported Identification of Nenad Remištar

149. The identifications made by Witness 6 are again dubious. He claims to have recognised who the car belonged to from an album of photographs that was in the car that he looked through.²³⁴ This cannot be regarded as an accurate means of making an identification. Pekka Haverinen, who interviewed Witness 6 on a number of occasions, showed him a number of photo-boards and individual photographs, but never showed him any photographs of Nenad Remištar.²³⁵

150. Witness 6 was not able to give the family name of "Nenad" and says he never knew it.²³⁶ He was unable to give an ethnicity for him.²³⁷ In fact, he claims that

²²⁸ 10530:25.

²²⁹ 10531:23.

²³⁰ 92*bis* Statement of 18 January 2003, page 3.

²³¹ *Ibid.*, 5196:14.

²³² 5197:17.

²³³ 10534:16 – 10535:12.

²³⁴ 5196:23 – 5197:5.

²³⁵ P375, 92*ter* Statement of Pekka Haverinen.

²³⁶ 5295:3.

the Serb authorities told him the family name of the person concerned in 2006 when he went to the SUP in Jagodina.²³⁸

151. It is submitted that it is much more likely that any information that Witness 6 may have had about Nenad Remištar was in fact gleaned from the different conversations with the Serb police that he subsequently had after leaving Jabllanicë.²³⁹

152. Although Witness 6 claims that he was tied up with “Nenad” for 24 hours,²⁴⁰ he does not explain, if Nenad was brought to the barracks, how he arrived there.

(b) Purported Identification of a Bosnian and 3 Montenegrins

153. Witness 6’s story of witnessing a Bosnian and three Montenegrins being beaten with baseball bats and stabbed with knives is particularly unconvincing. It is inexplicable that Witness 6 claims to have shared a room with the four individuals for a period of three days²⁴¹ yet in that time did not even learn the names of any of them.²⁴² This is despite the fact that Witness 6 claims that the “Bosnian” spoke some Albanian with him.²⁴³ Witness 6 was wholly unconvincing in his attempt to explain why he never learned the names of any of the individuals: Witness 6 claims he could not understand him because he kept mixing Albanian and Serbian.²⁴⁴ Nor does Witness 6 explain how he knows the nationality of one of the individuals and the ethnicity of the other three when he could not even learn their names. It is submitted that the more likely explanation is that no such incident ever occurred.

154. It is noteworthy that there is no corroboration whatsoever of Witness 6’s story of the mistreatment of a Bosnian and three Montenegrins. No alleged victim or even a family member of an alleged victim has to date been identified. The

²³⁷ 5197:6 – 5197:7.

²³⁸ 5295:6.

²³⁹ See above at §§ 92 to 100.

²⁴⁰ 5210:18.

²⁴¹ 5228:3.

²⁴² 5227:9.

²⁴³ 5227:11.

²⁴⁴ 5330:2.

Prosecution are required to particularise the identity of the alleged victims unless it is impracticable, for reasons such as the where the conduct alleged takes place over a lengthy time period and involves a large number of victims.²⁴⁵ This count does not fall within this category and the Prosecution have failed to comply with their obligation.

2. Inconsistencies in Witness 6's Story

155. Witness 6 gives substantially differing accounts of the perpetrators of the mistreatment of the 4 unidentified people. At one point in evidence, he was asked who was present when the alleged incidents took place, and he answered clearly that he *did not know who was present* when it took place²⁴⁶ and then that he *could not describe the perpetrators*.²⁴⁷ However, at another point in his evidence, Witness 6's memory of this incident is the opposite: he claims that "Nazmi and Hamza" were there.²⁴⁸

156. Similarly, Witness 6 claims that when the Bosnian and 3 Montenegrins left the barracks, it was around 10:00 pm.²⁴⁹ This fundamentally conflicts with Witness 6's story that during his detention he was unable to tell night from day²⁵⁰ and that he had had his watch removed so that he could not tell the time.²⁵¹

3. Witness 6 and the Serbian Authorities

157. Witness 6's evidence of his discussions with the Serb authorities about "Nenad" demonstrates that his account cannot be truthful. He claimed in evidence that he was tied up and beaten with a policeman called Nenad at the Jablanicë barracks for 24 hours.²⁵² A policeman called Nenad Remištar went missing in

²⁴⁵ *Kupreškić* Appeals Chamber judgement, 23 October 2001, § 91.

²⁴⁶ 5330:25.

²⁴⁷ 5331:5.

²⁴⁸ 5228:25.

²⁴⁹ 5230:22.

²⁵⁰ 5325:14.

²⁵¹ 5326:24.

²⁵² 5210:17.

June 1998,²⁵³ he is still missing²⁵⁴ and his body has not been recovered.²⁵⁵ He therefore would have still been missing in July 1998 when Witness 6 claims to have spoken with the Serbian authorities. He spoke to a number of different people on different occasions. Witness 6 says he spoke to a Serb police officer called Pavle Zuvic on his way back from visiting the doctor²⁵⁶ on the 30 July 1998.²⁵⁷ He met the Serbian Chief of State Security, Sretan Camovic, shortly after leaving Jabllanicë²⁵⁸ and the latter knew that Witness 6 had been in Jabllanicë.²⁵⁹ Additionally, Witness 6 met another policeman called Zukan Kuqi who provided him with information about “Nenad”.²⁶⁰ However, Witness 6 claims that, thereafter, he had no further contact with the Serb police or security services until eight years later, in 2006.²⁶¹

158. In circumstances where a Serb policeman was still missing, it is not credible that Witness 6 had information about that same Serb policeman, and met three separate members of the Serb authorities and police, yet none of them were apparently interested in detaining him, questioning him or asking him for further information about their missing colleague. The witness gave the following answers on this point in cross-examination:

“ Q. You see, Witness, you have told this Tribunal about a number of people who were in Jabllanicë with you who were being systematically tortured, and you have mentioned Nenad, a police officer; you have mentioned a Bosnian who worked for Elektro in Decani; you have mentioned three Montenegrins; you have mentioned an Albanian Muslim who was fat, in his 40s, who was delivered in the trunk of a Mercedes and who came from Zahaq; you have mentioned Pal Krasniqi; you have mentioned another man, a Catholic Albanian from Grabanica.

Now, are you saying, sir, that Sret Camovic knew everything about all of those people?

A. No, no, he didn't ask me. And this person from Grabanica is not a Catholic.

²⁵³ Witness 73, 92bis Statement 13 November 2007, §§ 4 to 8.

²⁵⁴ Witness 73, 92bis Statement 13 November 2007, § 13.

²⁵⁵ 4th Amended Indictment, § 97.

²⁵⁶ 5304:22.

²⁵⁷ 5313:1.

²⁵⁸ 5301:13.

²⁵⁹ 5301:21.

²⁶⁰ 5354:19 – 5354:21.

²⁶¹ 5314:8 – 5314:12.

Q. Well, we'll come back to that. But what I'm trying to understand, sir, is how you could be talking with the head of State Security and he's not remotely interested in all of these people who you say were tortured in Jabllanice. Now, did you tell him that you saw anybody else being tortured there?

A. No, no. He didn't ask me about them.

Q. And you didn't think it was important to tell him?

A. It was important, but the situation was such that I did not tell him anything and he did not ask me.

Q. And was it the same day or some other day when you went to get your driving licence sorted out?

A. Two days later I went for the papers. I took the photos to the place and I got the driving licence and the ID card.

Q. And did you see any officers of the State Security when you went there for your driver's licence and ID card?

A. No, no. These were only women that were working in those offices. There were no officers.

Q. Did you attempt to speak to anybody from State Security when you went there two days later?

A. No.

Q. So, despite everything that had been done to you and everything that you say had been done to all of these other people, the only thing that you were interested in doing was renewing your driver's licence. Do we understand you correctly, sir?

A. The war started and I did not have time to tell them anything.”²⁶²

159. Witness 6's failure to report these alleged incidents to the authorities must also cast doubt on whether they ever really happened. Witness 6 insists that he never made a statement to the authorities until as late as 2006, some 8 years after the alleged incidents,²⁶³ despite claiming to have witnessed beatings and torture at the barracks. The reason cannot be that he did not have an opportunity to do so: Witness 6 spoke with several individuals in the authorities, including one in the

²⁶² 5308:21 – 5310:7.

²⁶³ 5314:8 – 5314:12.

most senior position, and even visited the offices of the state security to get his documents replaced.²⁶⁴ The fact that Witness 6 seemed more interested in speaking to the police about getting a replacement driving licence and identity card²⁶⁵ than any of the crimes against humanity or war crimes that he claims to have both suffered and witnessed, suggests that either the events did not happen as alleged, or that Witness 6 is greatly exaggerating.

160. Furthermore, the interactions between Witness 6 and the authorities cast further doubt on his evidence. He confirmed²⁶⁶ that he told OTP Investigators in a statement dated the 17 and 18 January 2003 that he had “heard from a Serb police [sic] that Nenad had been killed but his body was *not dumped in the lake of Radoniq as many others*, but maybe somewhere up in the mountains in the area surrounding Peje or Kline.”²⁶⁷ Witness 6 verified that this statement referred to the conversation that he had with Pavle Zuvic²⁶⁸ on the 30 July 1998²⁶⁹ and then confirmed a second time in evidence that Pavle Zuvic had told him this on that date.²⁷⁰ It is submitted that Witness 6 is again not being truthful and is embellishing his story, most probably with information later supplied to him by MUP officers in Jagodina.

4. Other Possibilities

161. If the other car stopped at Black Stone was being driven by Nenad Remištar, there is uncertainty as to what may have happened to him. Whereas when the car of Witness 6 and Witness 23 was stopped, no gunfire ensued; shooting took place as the other car approached.²⁷¹ Witness 6 was unable to say whether they were shots fired into the air or into the vehicle.²⁷² Witness 6 and 23 were some distance away from the other car when it was stopped and did not have a good view.²⁷³ In such circumstances, it is not possible to discern from the evidence who was doing

²⁶⁴ 5309:19.

²⁶⁵ 5309:17 – 5309:24.

²⁶⁶ 5312:11.

²⁶⁷ 5312:5 (emphasis added).

²⁶⁸ 5312:16.

²⁶⁹ 5313:1.

²⁷⁰ 5314:2 – 5314:7.

²⁷¹ 5195:17, 10530:25.

²⁷² 5195:17.

²⁷³ 10529:1, 5197:17.

the shooting, whether the driver, the soldiers or both. If the driver was the policeman Nenad Remištar, it is likely that he was armed. Absent witnesses, it is not possible to discern what happened to the driver in the shooting. It is certainly impossible to rule out that he was killed at the scene in a lawful military engagement (see further below at § 171).

162. Witness 73 states that ██████████ made some enquiries about Nenad Remištar after he went missing with some Albanians from Stupelj.²⁷⁴ They informed him that Nenad Remištar was in fact still alive and being protected by a KLA soldier called Ali Baraba.²⁷⁵ While this is unsubstantiated rumour and while Nenad Remištar appears not to have been seen alive since, the total combination of circumstances makes it impossible to conclude beyond reasonable doubt that he was killed by KLA soldiers at or from Jabllanicë.

5. Lack of Corroboration

163. In circumstances where the evidence of the only witness, Witness 6, is demonstrably unreliable, it is incumbent to look for corroboration of his story. In relation to Counts 29 and 30, there is no corroboration whatsoever for events that Witness 6 claims to have witnessed at the barracks.

D. Crimes Against Humanity

1. Requirement that Victims be Civilians

164. It is a requirement for crimes against humanity that the victims are civilians.²⁷⁶ The indictment alleges that first alleged victim of Counts 29 and 30 was Nenad Remištar, a Serbian police officer. As such, he does not qualify as a civilian, even if he was *hors de combat* at the relevant time.²⁷⁷

²⁷⁴ 92bis Statement 13 November 2007, § 9.

²⁷⁵ *Ibid* at § 11.

²⁷⁶ See above at § 0.

²⁷⁷ See above at § 0.

165. Equally, the burden is on the Prosecution to prove that the other alleged unidentified victims referred to in Counts 29 and 30 were not civilians. The fact that they may have not been in uniform²⁷⁸ is not decisive. All four were apparently men of fighting age.²⁷⁹ Little more is known of them, if in fact they were ever really present in the barracks, not even their names. Although Witness 6 said that the “Bosnian” was alleged to have been interrupting the power supply,²⁸⁰ this could have been evidence of either civilian employment, or of direct participation in hostilities, *eg.* by assisting Serbian forces in their attacks on perceived KLA strongholds such as Jabllanicë by cutting power at critical times.
166. For these reasons, it is submitted that there is no, or no sufficient, evidence to show beyond reasonable doubt that any of the offences alleged can amount to crimes against humanity.

2. Persecution

167. It is not clear from the indictment on what ground the Prosecution contend that the alleged victims of Counts 29 and 30 were persecuted.
168. Nenad Remištar was both a non-civilian and a Serb. There is no evidence as to the reasons for any alleged mistreatment. It is not therefore possible to infer the reasons why he may have been treated in the way alleged. These reasons could have been personal, because he was a Serb, because he was a policeman, because of actions taken against the KLA and ethnic Albanians or a combination of these.
169. In relation to the other four alleged victims, there is doubt as to their existence, their identity and the reasons for any alleged mistreatment. Although one is claimed to have been of Bosnian nationality and the three others of Montenegrin ethnicity,²⁸¹ there is no evidence as to their actual nationality or ethnicity and there is no indication how Witness 6 claims to have known their nationality or ethnicity when he did not talk to three of them and was unable to understand even the name

²⁷⁸ 5227:16.

²⁷⁹ 5227:24.

²⁸⁰ 5397:18.

²⁸¹ 4th Amended Indictment, § 98.

of the fourth.²⁸² There is no satisfactory evidence that any alleged mistreatment resulted from their nationality, politics or religion.²⁸³

3. Murder

170. The Prosecution allege that Nenad Remištár was killed while in KLA custody.²⁸⁴ It is not alleged that the four other alleged victims referred to in Counts 29 and 30 were killed.²⁸⁵

171. Because Nenad Remištár has not been seen since he disappeared, it may be a reasonable inference that he is no longer alive.²⁸⁶ However, if he is, there is no evidence as to the manner, date or circumstances of his death. There must be considerable doubt as to whether he was ever in the barracks at Jabllanicë at all. If he was in the car that was stopped at Black Stone, he could have been killed in the initial shooting. If that was, or may have been, the case, the Trial Chamber cannot rule out the possibility that he was killed while taking a direct part in hostilities, or alternatively as an act of self-defence on the part of those who sought to stop an armed policeman who may have fired his own weapon at those at a road-block. In the absence of any other reliable evidence, for these and other reasons given above, the Prosecution has failed to establish beyond a reasonable doubt that persons unknown committed the offence of murder.

4. Imprisonment

172. The Defence for Lahi Brahimaj refer to the section on law at §§ 60 and 77 in support of the submission that the Tribunal does not have jurisdiction to consider the crime against humanity of imprisonment.

173. Without prejudice to the above, it is submitted that the elements of imprisonment are not made out even on a standard definition of the offence. If a person was detained with Witness 6 in the barracks, and that prisoner was in fact

²⁸² 5330:10.

²⁸³ 5397:18.

²⁸⁴ 4th Amended Indictment, § 97.

²⁸⁵ 4th Amended Indictment, § 98.

²⁸⁶ See above at § 57.

Nenad Remištar, then this would not amount to the offence of imprisonment because there would have been grounds for detaining, namely the role of that person in the Serbian Security Services and his activities hostile to the KLA.

174. Furthermore, because the burden of proof is on the Prosecution to show that there were no reasonable grounds to suspect those detained of activities hostile to the imprisoning authority, and there is no evidence to say why a Bosnian and three Montenegrins may have been detained, the Prosecution have failed to discharge that burden.

5. Torture and Other Inhumane Acts

175. For the reasons set out above, it is contended that a conclusion cannot be drawn that the alleged mistreatment took place. However, in addition, for the specific offence of torture to be proven, it is necessary to show that any alleged mistreatment was carried out in with the aim of obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim of a third person.²⁸⁷ Because there is no information about why these individuals may have been treated in the way that they allegedly were, it is not possible to establish this necessary element of the offence of torture.

E. Liability of Lahi Brahimaj

176. It is not alleged that Lahi Brahimaj participated in any of the matters alleged in Counts 29 and 30. Nor does the evidence support the suggestion that he was present at any point. The Indictment asserts solely that the offences alleged in these two counts were committed as part of a JCE involving Lahi Brahimaj, his co-Accused and others named therein.²⁸⁸ This aspect of participation is considered at Part IX Joint Criminal Enterprise below.

1. Purely Personal / Opportunistic Visitors

²⁸⁷ See above at § 78.

²⁸⁸ 4th Amended Indictment, page 35.

177. Witness 6 was inconsistent in his evidence about responsibility for the alleged mistreatment of the Bosnian and three Montenegrins. At one point he claimed that Nazmi Brahimaj and the man he called Hamz Brahimaj were present for the beating.²⁸⁹ However, he also stated in evidence that he did *not know* who was present when it took place²⁹⁰ and then again later that he *could not describe the perpetrators*.²⁹¹ Witness 6 also gave evidence of many non-KLA members passing through Jabllanicë and using the barracks when they were travelling to source weapons from Albania. He described as many as 100 to 200 people being present in the barracks just to eat.²⁹² In these circumstances it is a reasonable possibility that any mistreatment was by people who were not KLA members.

²⁸⁹ 5228:25.

²⁹⁰ 5330:25.

²⁹¹ 5331:5.

²⁹² 5360:22.

VIII. COUNTS 31 AND 32

A. Introduction

178. The Prosecution allege that around the 10 July 1998, Pal Krasniqi went to Jabllanicë to join the KLA, remained there a few days and then was arrested as a spy and beaten.²⁹³ It is alleged that he was killed in KLA custody.²⁹⁴
179. The Prosecution further allege that Skender Kuqi was abducted by KLA soldiers around 11 July 1998 and taken to Jabllanicë where he was beaten.²⁹⁵ It is alleged that he was transferred to medical facilities in Irzniq for treatment where he died.²⁹⁶
180. Further, it is alleged that around 13 July 1998 Lahi Brahimaj detained Witness 3 with two others in Jabllanicë because he refused to fight for the KLA, he was beaten until he was unconscious²⁹⁷ and then beaten with the two others between the 13 and 16 July 1998.²⁹⁸ It is alleged that he was taken to an office on about the 16 July 1998 and beaten by two female KLA soldiers while Lahi Brahimaj and Idriz Balaj encouraged the beating. Idriz Balaj accused Witness 3 of being a spy and Lahi Brahimaj encouraged him to commit suicide. Witness 3 subsequently escaped.²⁹⁹
181. Finally, it is alleged that in late July 1998, Witness 3 was abducted by Lahi Brahimaj at gunpoint and taken to the latter's house where he was beaten. Lahi Brahimaj then took Witness 3 to the Jabllanicë headquarters and beat him before he was taken to the Glllogjane headquarters. It is alleged that Ramush Haradinaj subsequently released Witness 3.³⁰⁰

²⁹³ 4th Amended Indictment § 99.

²⁹⁴ *Ibid* at § 100.

²⁹⁵ *Ibid* at § 101.

²⁹⁶ *Ibid* at § 102.

²⁹⁷ *Ibid* at § 103.

²⁹⁸ *Ibid* at § 104.

²⁹⁹ *Ibid* at § 105.

³⁰⁰ *Ibid* at § 106.

B. Lack of Credibility of Witness 3

182. There are two principal witnesses to Counts 31 and 32: Witness 6 and Witness 3. The latter is both a witness and an alleged victim. For the reasons set out at §§ 86 to 123 and §§ 149 to 160, Witness 6 is demonstrably not a credible witness. Nor is Witness 3 a credible witness for the reasons set out hereinafter at §§ 183 to 216.

[REDACTED]

[REDACTED]

³⁰¹ 7892:2, 7985:5.
³⁰² 7892:1.
³⁰³ 8022:7.
³⁰⁴ 8022:20.
³⁰⁵ 8022:10.
³⁰⁶ 7977:1.
³⁰⁷ 7977:8.
³⁰⁸ 7977:9 - 7977:10.
³⁰⁹ 7977:18.
³¹⁰ 7977:4.
³¹¹ 8022:15.

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³¹² 8023:12.
³¹³ 8023:16.
³¹⁴ 8023:18.
³¹⁵ 7943:14.
³¹⁶ 7985:5.

[REDACTED]

[REDACTED]

[REDACTED]

³¹⁷ 7985:12.
³¹⁸ 7985:15.
³¹⁹ 7985:17.
³²⁰ 7894:5.
³²¹ 7897:5.
³²² 7917:1.
³²³ 7934:16.
³²⁴ 7921:15 – 7922:10.
³²⁵ 8006:7.
³²⁶ 8006:10.
³²⁷ 8006:21.
³²⁸ 7929:4.
³²⁹ 7897:3.
³³⁰ An anti-tank weapon.
³³¹ 7929:24.
³³² 8008:13.
³³³ 8008:5 – 8008:16.
³³⁴ 8008:19.

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

190. As already indicated (above at §§ 86 to 123 and §§ 149 to 160), Witness 6's testimony should be rejected as unworthy of credit. It is further submitted that there are fundamental and irreconcilable conflicts between the evidence of Witness 3 and Witness 6 such that neither account can be considered reliable.

[REDACTED]

[REDACTED]

[REDACTED]

³³⁵ 7945:25.

³³⁶ 7948:8.

³³⁷ 7948:10.

³³⁸ 7948:12.

³³⁹ 5334:15, 5335:2.

³⁴⁰ 5336:12.

³⁴¹ 7994:6.

³⁴² 5235:20.

³⁴³ 5336:7.

³⁴⁴ 5336:17.

³⁴⁵ 5336:12.

³⁴⁶ 7948:19.

³⁴⁷ 5389:23.

[REDACTED]

[REDACTED]

[REDACTED]

196. The accounts of the alleged escape attempt are very different. Witness 6 did not even mention the escape attempt in his statement to the Office of the Prosecution of November 2002.³⁵⁵ When confronted about this, his suggestion was that maybe he “forgot.”³⁵⁶ Both witnesses claim to have been present for the escape. Witness 6 claimed that all three who were in the barracks tried to

³⁴⁸ 5389:11.

³⁴⁹ 7946:16.

³⁵⁰ 8028:22.

³⁵¹ 5359:25 – 5360:5.

³⁵² 7949:1.

³⁵³ 7949:12.

³⁵⁴ 7949:24.

³⁵⁵ 5339:9.

³⁵⁶ 5339:12.

escape.³⁵⁷ [REDACTED]

[REDACTED].³⁵⁸

197. The differences between the accounts demonstrate that neither witness can be relied upon separately and that neither one corroborates the other. At best, both are attempting to pass off hearsay accounts as events witnessed by themselves first hand; at worst they are both lying for motives already discussed.

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
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³⁵⁷ 5236:9.

³⁵⁸ 7957:22.

³⁵⁹ 7975:20.

³⁶⁰ 7976:8.

³⁶¹ 7976:16.

³⁶² 7976:16.

³⁶³ 8015:3.

³⁶⁴ 7976:20.

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³⁶⁵ 8011:9.
³⁶⁶ 8013:5.
³⁶⁷ 8013:6 – 8013:13.
³⁶⁸ 8026:6.
³⁶⁹ 7961:23.
³⁷⁰ 8026:3.
³⁷¹ 7961:4.
³⁷² 7961:18.

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³⁷³ 8025:14.
³⁷⁴ 8025:21.
³⁷⁵ 8024:3.
³⁷⁶ 8024:7 – 8024:17.
³⁷⁷ 8024:18.
³⁷⁸ 8024:20.
³⁷⁹ 8024:23.
³⁸⁰ 7951:22.
³⁸¹ 8020:20.
³⁸² 8020:7.

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383 7957:12.
384 7957:15.
385 5236:23.
386 7960:1.
387 7960:5.
388 7968:17.
389 7960:6 – 7960:12.
390 8012:3.
391 8026:6.
392 8015:23.

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³⁹³ 7968:8 – 7968:15.
³⁹⁴ 7961:6.
³⁹⁵ 8029:9.
³⁹⁶ 7962:20 – 7963:2.
³⁹⁷ 8029:9 – 8029:15.
³⁹⁸ 7963:8.
³⁹⁹ 7963:14.
⁴⁰⁰ 7963:14.
⁴⁰¹ 7965:22.
⁴⁰² 7965:7.
⁴⁰³ 7964:5.
⁴⁰⁴ 7967:14.

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⁴⁰⁵ See above at §§ 202 to 204.

⁴⁰⁶ 8002:15.

⁴⁰⁷ 8002:19.

⁴⁰⁸ 8003:3.

⁴⁰⁹ 8003:7.

⁴¹⁰ 8003:18.

⁴¹¹ 8003:22.

⁴¹² 8004:1.

⁴¹³ 8004:16.

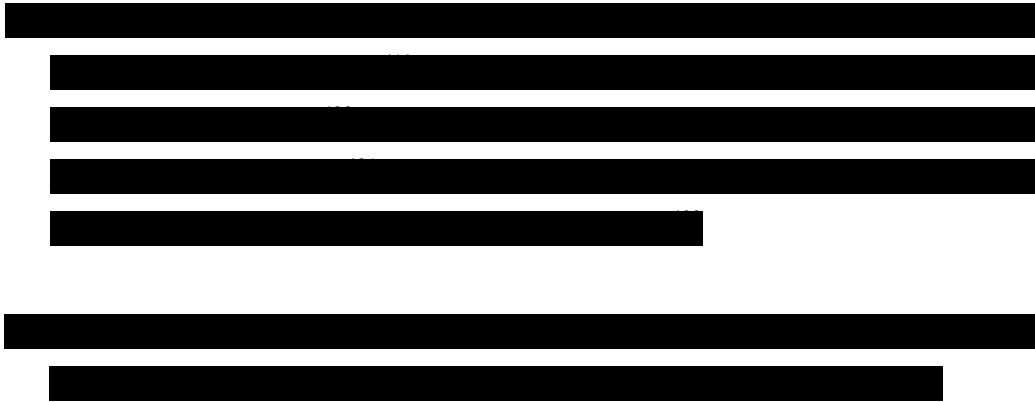
⁴¹⁴ 8004:20.

⁴¹⁵ 8004:22.

⁴¹⁶ 8004:25.

⁴¹⁷ 8005:3.

⁴¹⁸ 8005:14.



C. Pal Krasniqi / The Catholic Albanian

1. Identification

217. As set out above at § 104, the purported identification of Pal Krasniqi by Witness 6 cannot be relied upon because Witness 6 subsequently visited the family of Pal Krasniqi, discussed matters with them and even saw the same photograph that the Prosecution relied upon to make the identification. This can be contrasted with his inability to recognise another alleged victim, apparently present at the same time, namely Skender Kuqi, even when he was specifically given the name by investigators from the Office of the Prosecution.⁴²³

218. Descriptions of the clothing worn by Pal Krasniqi / the Catholic Albanian are contradictory. Ded Krasniqi stated that Pal Krasniqi was wearing a T-shirt with stripes and a red collar,⁴²⁴ white towards light blue trainers,⁴²⁵ sports trousers that were blue with a white stripe.⁴²⁶ However, he said that his son changed trousers and T-shirts and shirts among friends.⁴²⁷ Mahir Demaj says that when he last saw Pal Krasniqi, he was wearing blue jeans.⁴²⁸

⁴¹⁹ 7953:6.

⁴²⁰ 7954:13.

⁴²¹ 7960:24.

⁴²² 7961:1.

⁴²³ 5368:22.

⁴²⁴ 4787:13.

⁴²⁵ 4787:17.

⁴²⁶ 4789:22.

⁴²⁷ 4788:23.

⁴²⁸ 92bis Statement of 18 April 2007, § 14.

219. Witness 6 describes Pal Krasniqi as wearing a blue tracksuit,⁴²⁹ where both the upper and lower were blue in colour⁴³⁰ with a white stripe and buttons.⁴³¹ There are both differences and similarities between the descriptions given by Ded Krasniqi and Witness 6. However, a probable cause of this is the meeting that Witness 6 and Ded Krasniqi had together during which they discussed Pal Krasniqi.⁴³²



2. Joining the KLA

221. Ded Krasniqi, the father of Pal Krasniqi, gave evidence that Mahir Demaj and Pal Krasniqi went to join the KLA⁴³⁶ and Ded Krasniqi gave permission for the latter to do so.⁴³⁷ He confirmed that Mahir Demaj told him that Pal Krasniqi joined his comrades⁴³⁸ in Jabllanicë, that he received a uniform⁴³⁹ and that he later visited Mahir Demaj in hospital with two other soldiers⁴⁴⁰ about 5 days after the two of them had arrived in Jabllanicë.⁴⁴¹ Ded Krasniqi confirmed that Alush Agushi, the KLA commander for Jabllanicë,⁴⁴² told him that Pal Krasniqi had been a KLA soldier and fought with him until the first offensive in September.⁴⁴³ However, in relation to the latter contention, there is likely to be an error in that the first offensive took place in August, not September.⁴⁴⁴ It is therefore likely that Pal Krasniqi became a KLA soldier in Jabllanicë.

⁴²⁹ 5247:2.

⁴³⁰ 5247:6.

⁴³¹ 5247:3.

⁴³² See above at § 104.

⁴³³ 7947:10.

⁴³⁴ 7947:17.

⁴³⁵ 7947:13.

⁴³⁶ 4769:18.

⁴³⁷ 4805:9.

⁴³⁸ 4773:10.

⁴³⁹ 4810:5.

⁴⁴⁰ 4810:14.

⁴⁴¹ 4773:22, 4774:9.

⁴⁴² 4810:18.

⁴⁴³ 4811:2.

⁴⁴⁴ 4494:15 – 4494:16, 4510:1.

222. If Pal Krasniqi was a KLA soldier, it gives rise to the obvious possibility that he was not a civilian prisoner held in the barracks as alleged. If he was a soldier, he may have been confined to the barracks for a lawful reason, whether relating to military discipline, or pending his references being checked. He may simply have been recovering from injuries inflicted by the Serbs (see further below at §§ 223 to 226).

3. Beating by the Serbs

223. Both Pal Krasniqi and Mahir Demaj were detained and seriously beaten by both Serb civilians and the Serb police on their journey to Jabllanicë. This would account for any injuries to Pal Krasniqi described subsequently.

224. Ded Krasniqi described Pal Krasniqi and Mahir Demaj being apprehended at a Serb checkpoint at Krusha e Madhe where they were beaten up.⁴⁴⁵ This is corroborated by Mahir Demaj who states that the armed Serb civilians called uniformed police who beat and kick both him and Pal Krasniqi.⁴⁴⁶ They were then taken to Klina⁴⁴⁷ where they were then again beaten seriously⁴⁴⁸ by the Serb police.⁴⁴⁹ Again, Mahir Demaj corroborates this, stating that he and Pal Krasniqi were beaten heavily with fists and boots.⁴⁵⁰ The Serbian police used an iron bar to beat Mahir Demaj until he passed out.⁴⁵¹ When he came to, the Serbian police were discussing killing him.⁴⁵²

225. After their post-midnight release, Mahir Demaj describes being caught again by the Serb police who beat him with a gun on his head⁴⁵³ while Pal Krasniqi begged them not to kill him.⁴⁵⁴

⁴⁴⁵ 4807:9.

⁴⁴⁶ 92bis of Statement 18 April 2007 § 5.

⁴⁴⁷ 4770:1.

⁴⁴⁸ 4807:18.

⁴⁴⁹ 4807:15.

⁴⁵⁰ 92bis Statement of 18 April 2007 § 5.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

⁴⁵³ *Ibid* at § 6.

⁴⁵⁴ *Ibid.*

226. After such severe, and numerous beatings, it is perhaps not surprising that witnesses who may have seen Pal Krasniqi in Jabllanicë would have described his physical condition as poor. Put at its lowest, the Trial Chamber cannot rule out the probability or even the mere possibility that it was the Serbian police who caused any injuries Pal Krasniqi may have exhibited in Jabllanicë.

4. Improvement in Conditions

227. There is also evidence that suggests that Pal Krasniqi's health condition was actually improving while he was at the barracks. Although there are serious doubts about the credibility of Witness 6, he himself states that when he left the barracks on or about 25 July 1998, Pal Krasniqi had the freedom to walk around the barracks⁴⁵⁵ and his health was improving.⁴⁵⁶

228. These facts suggest that rather than suffering injuries additional to those he had already received from the Serb police, Pal Krasniqi was recovering and his health was improving while he was in the barracks.

5. Subsequent Uncertainty Surrounding Pal Krasniqi's Movements

229. There is no certainty as to Pal Krasniqi's movements after mid to late July 1998.

230. Alush Agushi, the commander of Jabllanicë,⁴⁵⁷ informed Ded Krasniqi that he fought together with Pal Krasniqi until the first offensive in September, when they were surrounded by the Serbs and he told his soldiers to go in whatever direction they thought proper⁴⁵⁸ and to go whichever direction they could to seek safety.⁴⁵⁹ However, there is some doubt about this information in that the "first offensive" did not take place in September, but at the start of August 1998.⁴⁶⁰

⁴⁵⁵ 5360:5.

⁴⁵⁶ 5360:2.

⁴⁵⁷ 4810:18.

⁴⁵⁸ 4784:5.

⁴⁵⁹ 4813:7.

⁴⁶⁰ 4494:15 - 4494:16, 4510:1.

231. Ded Krasniqi gave evidence that people said that Pal Krasniqi had last been seen in Napolje and that he disappeared soon after that.⁴⁶¹ There were also rumours that Pal Krasniqi had gone to Glllogjan.⁴⁶²
232. Ded Krasniqi also spoke of what he was told by Dede Deda, his nephew.⁴⁶³ Pal Krasniqi and Dede Deda were very good friends⁴⁶⁴ who knew each other very well⁴⁶⁵ and who would meet each other around twice a week before the fighting broke out.⁴⁶⁶ Dede Deda told Ded Krasniqi that around 15 August 1998, Pal Krasniqi called Dede Deda at home, told him he had a lot of money and asked to meet him in Gjakove at a place where they used to play pool together. Dede Deda went to the meeting place but Pal Krasniqi did not come.⁴⁶⁷ Dede Deda said that it was a brief conversation because they were worried that somebody might intercept it.⁴⁶⁸ While this is, of course, only hearsay, it nevertheless cannot be ruled out that if Pal Krasniqi had suddenly come into a lot of money, he may have either absconded with it or may have been murdered for it by persons having nothing to do with Jabllanicë or the KLA.
233. Furthermore, shortly after Pal Krasniqi was apparently last seen in Jabllanicë, the Serb forces overran the village, killing Lahi Brahimaj's mother and grandmother and other civilians who had remained there.⁴⁶⁹ There is no evidence to say whether Pal Krasniqi left Jabllanicë when it was evacuated, or whether he may have remained and faced the Serbs with fatal consequences.
234. There are therefore a number of areas of major uncertainty relating to the movements of Pal Krasniqi and there exists no evidence that he was killed in KLA custody as alleged.

⁴⁶¹ 4817:1.

⁴⁶² 4817:3.

⁴⁶³ 4818:15.

⁴⁶⁴ 4818:20.

⁴⁶⁵ 4818:25.

⁴⁶⁶ 4818:23.

⁴⁶⁷ 4820:10 – 4821:1.

⁴⁶⁸ 4836:18.

⁴⁶⁹ See 10283 and Witness 17's contemporaneous note at 7771.19-23: "Attacks on Jabllanice and from all weapons starting with tanks, APCs, and multiple rocket-launchers, against Ceskov, Kepuz, and Nepole. Jabllanice has fallen. Infantry has entered. Two old women, Nazmi's mother and another woman have been massacred. One soldier and two elderly men."

6. The Killing of Miodrag Sarić by Ded Krasniqi

235. The Krasniqi family also had mortal enemies following the killing of Miodrag Sarić by his father, Ded Krasniqi.
236. In 1982, Ded Krasniqi's neighbour, Miodrag Sarić⁴⁷⁰ injured his brother Prenk Krasniqi with an axe.⁴⁷¹ Ded Krasniqi took a gun and killed Miodrag Sarić.⁴⁷² The incident was widely reported in the newspapers and on the radio⁴⁷³ and even in the international press.⁴⁷⁴ For this offence, Ded Krasniqi served over 12 years' imprisonment.⁴⁷⁵
237. When Ded Krasniqi was released at the end of his sentence, the matter was again widely reported⁴⁷⁶ and became widely known.⁴⁷⁷ The brothers and sons of Miodrag Sarić were looking for Ded Krasniqi in 1998⁴⁷⁸ to take revenge on him.⁴⁷⁹
238. Milutin Pracević was also looking for Ded Krasniqi. Milutin Pracević was described by Ded Krasniqi as the commander of the police and the army⁴⁸⁰ including Gjakove, who was responsible for ordering the killing of Albanians.⁴⁸¹
239. Both the relatives of Miodrag Sarić and the police were looking for Ded Krasniqi in Klina, so he had to live in Peje at an unknown address.⁴⁸² All the Serb police knew who Ded Krasniqi was.⁴⁸³

⁴⁷⁰ 4825:25.

⁴⁷¹ 4826:4.

⁴⁷² 4826:16.

⁴⁷³ 4827:1.

⁴⁷⁴ 4827:4.

⁴⁷⁵ 4827:9.

⁴⁷⁶ 4827:13.

⁴⁷⁷ 4827:15.

⁴⁷⁸ 4828:4.

⁴⁷⁹ 4828:20.

⁴⁸⁰ 4827:25.

⁴⁸¹ 4827:17.

⁴⁸² 4828:6.

⁴⁸³ 4828:22.

240. The fact that Pal Krasniqi was Ded Krasniqi's son put him in serious danger of a blood feud reprisal killing. Pal Krasniqi also had problems because he was Ded Krasniqi's son.⁴⁸⁴ The Serb police knew that Pal Krasniqi was the son of Ded Krasniqi when they detained him.⁴⁸⁵ This was the reason why Ded Krasniqi had warned his son when he left for Jabllanicë that the police might recognise him and kill him.⁴⁸⁶ Ded Krasniqi confirmed that Mahir Demaj told him Pal Krasniqi was known and recognised by the Serb police.⁴⁸⁷

241. It is therefore clear that there were a number of people, including both civilians and Serb authorities, who were looking for both Ded Krasniqi and Pal Krasniqi, and both their lives were therefore in danger. This would have given others a motive to kill Pal Krasniqi.

7. Description of Injuries of Alleged Victims

242. [REDACTED]

[REDACTED]

Witness 6 describes Pal Krasniqi as being in a "horrifying" state because of the beating⁴⁸⁸ and being in that state for a week⁴⁸⁹ prior to recovering.⁴⁹⁰ However, even if this was right, it is logically not possible to exclude that such injuries were received from Serbs prior to coming to Jabllanicë.⁴⁹¹ On Witness 6's own evidence, he was not in the same room as Pal Krasniqi at that time, and therefore would not have witnessed any beating first hand.⁴⁹²

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁸⁴ 4829:4.

⁴⁸⁵ 4830:5, 4831:11.

⁴⁸⁶ 4832:8.

⁴⁸⁷ 4833:10.

⁴⁸⁸ 5235:20.

⁴⁸⁹ 5241:6.

⁴⁹⁰ 5360:1.

⁴⁹¹ See above at §§ 223 to 226.

⁴⁹² 5233:1-5233:4.

⁴⁹³ 8028:18.

[REDACTED]

[REDACTED]

245. This conflicts with the account of Witness 6, which is of itself unreliable for reasons already set out. Witness 6 makes no mention of Naser Ibrahimaj / Rusi and claims that the soldiers would go and beat Pal Krasniqi one after the other.⁴⁹⁸ At one point he then claims that Nazmi Brahimaj *did* take part the beating,⁴⁹⁹ in complete contradiction to [REDACTED].

246. There must therefore be a reasonable doubt as to whether injuries were observed, and if they were observed, who caused them.

8. Circumstances of Death of Pal Krasniqi Unascertained

247. The body of Pal Krasniqi was found a considerable distance from Jabllanicë village, adjacent to the Lake Radoniq canal. Professor Le Compte considered that there was evidence of prior burial, a likelihood that the body had been moved and

⁴⁹⁴ 5389:23.

⁴⁹⁵ 7950:8.

⁴⁹⁶ 8018:2 – 8019:8.

⁴⁹⁷ 8017:19.

⁴⁹⁸ 5335:17.

⁴⁹⁹ 5337:25.

presence of the body for a very short time at the scene of discovery.⁵⁰⁰ This is also consistent with the evidence of Witness 21.⁵⁰¹

248. A 2003 UNMIK autopsy report determined that the cause of death was multiple gun-shot injury to head, trunk and upper limbs.⁵⁰²

249. However, although the direct cause of death may have been as indicated, there is no evidence to confirm the circumstances of death. It is unclear where he may have been killed, by whom, or in what circumstances. It is not clear whether he was killed while participating in hostilities or while *hors de combat*. There is no evidence that he was killed in KLA custody or by a member of the KLA.

D. Skender Kuqi / the Muslim Albanian

1. Initial Abduction by the Serbs

250. Although it is alleged in § 101 of the 4th Amended Indictment that Skender Kuqi was abducted from his shop in Zahaq by KLA soldiers, there is no evidence of this. In fact, the evidence suggests that he was initially abducted by Serbs.

251. Qerim Kuqi is the cousin of Skender Kuqi⁵⁰³ and lived in village of Lutogllave, close to Zahaq.⁵⁰⁴ He was present in Skender Kuqi's shop when 2 armed men came in.⁵⁰⁵ Qerim Kuqi says that the armed men only spoke Serbian,⁵⁰⁶ which was very good Serbian,⁵⁰⁷ and therefore he was of the view that they were Serbs.⁵⁰⁸ They took Skender Kuqi away⁵⁰⁹ and he did not know where they took him.⁵¹⁰

⁵⁰⁰ D166, p 30 of English Translation, 8788:19-8788:24.

⁵⁰¹ See further the Final Trial Brief of Ramush Haradinaj.

⁵⁰² Forensic Agreed Facts, No 59.

⁵⁰³ 9989:9.

⁵⁰⁴ 9989:5.

⁵⁰⁵ 9999:6.

⁵⁰⁶ 9999:1.

⁵⁰⁷ 9998:20.

⁵⁰⁸ 9999:1.

⁵⁰⁹ 10000:21.

⁵¹⁰ 10000:21.

252. There is therefore no evidence that Skender Kuqi was taken by the KLA, or even what may have happened to him between the date he was taken from his shop and the date when he came to Jabllanicë, which may have been some time apart. Serious injuries could have been caused to him by non-KLA persons unknown during that time.

2. Purely Personal Motive

253. Nor is it clear why Skender Kuqi may have been taken to Jabllanicë. If he was taken by people speaking Serbian, it suggests that they were not Albanian, or, at best, that the abductors were seeking to hide who they were, thus raising the possibility of a purely personal motive for his abduction. [REDACTED]

[REDACTED] Although there are serious doubts over the evidence of [REDACTED] in the absence of any other explanation as to why Skender Kuqi may have been taken to the barracks, it must remain an open issue that it was because of purely personal motives.

3. Uncertainties over Alleged Beating

254. There are again serious inconsistencies in the evidence about Skender Kuqi / the Muslim Albanian. [REDACTED]

[REDACTED]

⁵¹¹ 7956:22.

⁵¹² 7950:8.

⁵¹³ 8017:19.

⁵¹⁴ 8017:1.

⁵¹⁵ 8016:17.

255. Witness 6 makes no mention of Naser Ibrahimaj in connection with the beating. In contrast, he blames Nazmi and Hamza.⁵¹⁶ However, on Witness 6's own account, he was not present in the same room, as by that time he had the freedom of the barracks and was washing dishes.⁵¹⁷

256. Further, Witness 6 for the first time in *cross-examination*, attempted to blame Lahi Brahimag for beating the Catholic Albanian⁵¹⁸ despite never previously mentioning this in statements to the Prosecution nor in examination-in-chief by the Prosecution,⁵¹⁹ and it differing from his earlier evidence that Nazmi and Hamza were responsible.⁵²⁰ Witness 6 tried to claim that this oversight was "maybe because the translator forgot to put it in there."⁵²¹

257. It is submitted that the differences in the accounts are irreconcilable.

4. Cause of Death Unascertained

258. Although Skender Kuqi died, it is not possible from the evidence to ascertain precisely how this occurred beyond the conclusion of the doctor who last attended to him that he died of kidney failure.⁵²² Rrustem Tetaj said he and Ramush Haradinaj went to the local staff in Jabllanicë and met Nazmi Brahimag: "He told us that he [Kuqi] tried to escape when one of the soldiers had injured him slightly, and he said that he would be released as soon as he's [indiscernible] well." ⁵²³ Tetaj said: "Nazmi was very desperate about this case" ⁵²⁴ and "very sad about the whole thing."⁵²⁵

259. While this indicates that Skender Kuqi received some injury in KLA custody, it does not provide proof beyond reasonable doubt of an intention to kill or even to

⁵¹⁶ 5232:17.

⁵¹⁷ 5391:11.

⁵¹⁸ 5337:25.

⁵¹⁹ 5338:21.

⁵²⁰ 5232:17.

⁵²¹ 5338:21.

⁵²² D59.

⁵²³ 3682:12-14.

⁵²⁴ 3779:5.

⁵²⁵ 3782:2.

cause him serious harm. There is no reliable evidence that Lahi Brahimaj was present at any of the material times and the evidence of Nazmi Brahimaj's reaction is the very opposite of what would be expected from a commander who caused or permitted injuries to be inflicted as a matter of policy and practice. His reported reaction is more consistent with a commander who disapproves of such conduct and who has taken all the steps within his power to save the man's life.

260. There is evidence that Skender Kuqi was provided with medical treatment by a doctor at the barracks⁵²⁶ and that he was transferred to the hospital in Irzniq for treatment.⁵²⁷ Dr Haki Shehu, who attended to Skender Kuqi immediately preceding his death, reported to UNMIK that he did not notice any evident wounds on Skender's body when he arrived at the Irzniq hospital, although he did notice signs of kidney blockage, some bruises and a bit of swelling in the face,⁵²⁸ Dr Shehu explained that while he and the other doctors "tried [their] best," Skender Kuqi needed dialysis, his "kidneys were totally blocked and cause of this reason he died."⁵²⁹ Rustem Tetaj additionally confirmed that the reason that Skender Kuqi was transferred to the hospital was because of problems with his kidneys but that the hospital did not have the instruments and means to cure the problem.⁵³⁰

261. There is also a suggestion that Skender Kuqi may have been injured in the process of attempting to escape.⁵³¹

262. Contrary to the allegation in the indictment that Skender Kuqi's kidney had been exposed through an open wound,⁵³² Rustem Tetaj, who was present for the burial and who saw the body, confirmed that he could not see any signs of an open wound.⁵³³

⁵²⁶ D59, UNMIK Statement of Haki Shehu, 8016:20.

⁵²⁷ D59, 3683:17-3683:24.

⁵²⁸ D59.

⁵²⁹ *Ibid.*

⁵³⁰ 3781:22.

⁵³¹ 3682:12.

⁵³² 4th Amended Indictment, § 102.

⁵³³ 3782:18, 3845:15 – 3846:4.

263. There is no medical evidence from those who treated him in the hospital as to what caused his death beyond the kidney failure described above. He may have died because of natural causes, he may have died because of previous beating caused by persons unknown, he may have died because of injuries sustained in the process of escaping, as a result of beating, or because of a failure to properly treat whatever condition he was suffering from, due to incompetence or lack of resources. We have next to no information regarding his previous medical history and whether he suffered from medical complaints such as pre-existing kidney problems that would have necessitated specialist intervention.

E. Crimes Against Humanity

264. For the reasons set out above, there is significant doubt as to whether the alleged mistreatment took place in the way alleged by the Prosecution. In particular, the evidence primarily rests on the accounts of two individuals, ██████████ and Witness 6. Neither witness's account is reliable or credible and the significant conflicts between them make it unsafe to rely on either as corroborating the other.

265. Particular comments on other shortcomings in the evidence will be set out further below.

1. Requirement that the Victims be Civilian

266. It is a requirement that alleged victims of crimes against humanity be civilians.⁵³⁴ The burden of proof remains on the Prosecution to prove that the victims were civilians. It is submitted that they have failed to discharge this burden. One consequence of this for the purposes of crimes against humanity is that the acts alleged cannot be considered to be part of a widespread or systematic attack directed against a civilian population.

⁵³⁴ *Mrkšić* Trial Chamber judgement, § 444-464, *Martić* Trial Chamber judgement, § 50-56.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

268. Pal Krasniqi went to Jabllanicë specifically to join the KLA. There is evidence that he became a KLA soldier and fought for the KLA.⁵³⁹ As such, it cannot be proved that he was a civilian.

269. There is limited information available relating to the actions and status of Skender Kuqi. However, even if there was one person who possessed the status of civilian, and even if he was mistreated, it is submitted that this is insufficient to demonstrate part of a widespread or systematic attack directed against a civilian population.

2. Persecution

270. It is unclear as to the grounds on which the Prosecution allege persecution. The three alleged victims of the persecutory conduct are all Albanians. The fact that one, Pal Krasniqi, is Catholic, is of itself insufficient evidence of grounds of persecution on the grounds of religion. It is immediately obvious that somebody called “Pal” is a Catholic Albanian.⁵⁴⁰ However, there is no evidence that he was subjected to any mistreatment when he initially arrived in Jabllanicë and there is no evidence of a general pattern of mistreatment of Catholics.

271. There is a lack of evidence as to the reasons why Pal Krasniqi and Skender Kuqi may have been at the barracks, though there are suggestions that the latter was there for “personal reasons”.⁵⁴¹ [REDACTED]

⁵³⁵ 7985:3-7985:18.

⁵³⁶ 7894:5.

⁵³⁷ 7917:2.

⁵³⁸ 8002:18.

⁵³⁹ See above at § 221.

⁵⁴⁰ Equivalent to “Paul”.

⁵⁴¹ See above at § 253.

██ As a result, there are not facts from which any safe conclusion could be drawn as to the grounds for any persecution; whether race, religion or politics.

3. Murder

272. It is probable that Pal Krasniqi died as a result of multiple gunshot wounds. However, it is not possible from the evidence to determine who killed him, whether Serbian or Albanian, or why. It is not possible to determine where he was killed. It is not possible to determine whether he was killed while participating in hostilities or while *hors de combat*. There is no evidence that he was killed either in KLA custody or by a member of the KLA.

273. The only indicated cause of death for Skender Kuqi is kidney failure, as ascertained by his attending physician and described above. The fact that he was provided with medical treatment and taken to hospital in Irzniq suggests that there was no intention to kill him, even if he was subjected to mistreatment, which is disputed.

4. Imprisonment

274. As set out above at §§ 60 and 77, it is submitted that the Tribunal does not have jurisdiction to consider the crime against humanity of imprisonment.

275. Furthermore, because of the lack of evidence as to why the three alleged victims might have been detained in the barracks, it is not possible for the Prosecution to discharge the burden of proving that they were not suspected of hostile activities.

5. Torture / Other Inhumane Acts

⁵⁴² See above at §§ 187 to 189 and §§ 213 to 216.

276. For the reasons set out above, it is contended that the evidence cannot be relied upon to support the conclusion that the alleged victims were mistreated in any of the ways alleged by the Prosecution.

277. However, there are further requirements that must be proved as an element of the offence of torture, namely that it is undertaken with the aim of obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person. It is unclear from the evidence, if any mistreatment occurred, whether it was undertaken for any of these reasons.

278. It is submitted that even if [REDACTED] evidence on his alleged mistreatment is accepted as credible, it is insufficiently serious to amount to a crime against humanity.

F. War Crimes

279. For the same reasons as set out above, there is a reasonable doubt that the alleged offences took place as alleged.

G. Modes of Liability of Lahi Brahimaj

1. Committed:

280. It is the Prosecution case that Lahi Brahimaj was *not* responsible for the alleged Jabllanicë “detention facility” *after* 5 July 1998.⁵⁴³ That date precedes all the matters alleged in Counts 31 and 32. It is therefore necessary for the Prosecution to prove that he participated in the commission of the alleged offences other than as the responsible commander for an alleged detention facility.

⁵⁴³ 4th Amended Indictment, § 32(b).

281. The evidence does not support a conclusion that Lahi Brahimaj participated in or condoned and encouraged the mistreatment of Pal Krasniqi or Skender Kuqi as alleged in the Indictment.⁵⁴⁴ Witness 6 only suggested that Lahi Brahimaj participated in their mistreatment for the first time in cross-examination.⁵⁴⁵

[REDACTED]

282. When Rustem Tetaj and others came to Jabllanicë to inquire about the circumstances of Skender Kuqi, they did not meet Lahi Brahimaj. On both occasions, it was his brother, Nazmi Brahimaj, who they met with and discussed matters.⁵⁴⁷ Rustem Tetaj confirmed that Lahi Brahimaj was not present and he had no contact with him when he visited Jabllanicë.⁵⁴⁸

[REDACTED]

284. In such circumstances, it is submitted that the evidence does not support a conclusion that Lahi Brahimaj participated in the *actus reus* of the offences alleged, or that he had the necessary *mens rea*.

285. Alleged responsibility for the alleged offences pursuant to the theory of JCE is set out below, at Part IX Joint Criminal Enterprise.

2. Other Forms of Participation

⁵⁴⁴ *Id.*, § 32(c).

⁵⁴⁵ 5338:21-5338:22.

⁵⁴⁶ 7950:10 - 7950:14.

⁵⁴⁷ 3681:20, 3683:21.

⁵⁴⁸ 3820:16.

286. For the reasons set out above, the fact that Lahi Brahimaj was not alleged to have been a commander responsible for the “detention compound” together with the limited evidence of his participation or even presence, fail to prove in the alternative that he either planned, instigated or aided and abetted the commission of the crimes alleged.

IX. JOINT CRIMINAL ENTERPRISE

A. The Prosecution's Case

1. The Alleged Joint Criminal Enterprise

287. The Prosecution allege that the criminal purpose of the JCE was to consolidate the total control of the KLA over the Dukagjin Operational Zone⁵⁴⁹ by the unlawful removal and mistreatment of Serb civilians and the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA.⁵⁵⁰ They claim further that the common criminal purpose involved the commission of crimes against humanity and war crimes.⁵⁵¹

288. The Prosecution's Pre Trial Brief alleges that, to establish "total control", the Accused and other JCE members:

288.1. Conducted a criminal campaign against the Serbian forces;

288.2. Established a military structure which exercised near total control over the KLA, FARK and the general population; and

288.3. Conducted a campaign of fear, violence and persecution against perceived KLA opponents, namely ethnic Serbs and others perceived to be collaborating with the Serbian regime or otherwise opposing the KLA in order to eliminate or suppress opposition and control the general population through fear.⁵⁵²

289. It is alleged that the JCE "included" the establishment and operation of KLA detention facilities and the mistreatment of detained persons at these facilities.⁵⁵³

⁵⁴⁹ Indictment, § 26, Pre Trial Brief, § 5.

⁵⁵⁰ Indictment, § 26, Pre Trial Brief, § 5.

⁵⁵¹ Indictment, § 26.

⁵⁵² Pre Trial Brief, § 7.

⁵⁵³ Indictment, § 26.

2. Lahi Brahimaj's Alleged Role in the JCE

290. The Prosecution allege that Lahi Brahimaj participated in the JCE by his acts and omissions. The supposed omissions are not specified. He is alleged to have:

290.1. Worked closely, as Deputy Commander of the Dukagjin Operative Staff and as a KLA Commander, with Ramush Haradinaj and providing direct operational support for the KLA's criminal activities in the Dukagjin Operational Zone.⁵⁵⁴

290.2. Run the KLA "detention facility" at Jabllanicë from "at least April 1998"⁵⁵⁵ alternatively "mid-May 1998"⁵⁵⁶ until about the 5 July 1998 for the purpose of detaining and mistreating civilians.⁵⁵⁷

290.3. Condoned and encouraged criminal conduct by his co-Accused and other KLA soldiers at the Jabllanicë detention facility during "that" time period and thereafter, until at least mid-September 1998.⁵⁵⁸

290.4. Condoned and encouraged criminal conduct by KLA soldiers, including the military police and other persons who attacked and otherwise mistreated civilians in the Dukagjin Operational Zone;⁵⁵⁹ and

290.5. Participated in the criminal activities alleged in counts 23 to 28 and counts 31 to 33.⁵⁶⁰ Paragraph 32(e) of the Indictment lists the counts said to form part of his participation of the JCE and excludes Counts 29 and 30.

291. A number of claims are made relating to the alleged make-shift detention facility including: detainees being thrown into a basement flooded with half a

⁵⁵⁴ *Ibid*, § 32(a).

⁵⁵⁵ Indictment, § 32(b)

⁵⁵⁶ *Ibid*, § 43.

⁵⁵⁷ *Ibid*, § 32(b).

⁵⁵⁸ *Ibid*, § 32(c).

⁵⁵⁹ *Ibid*, § 32(d).

⁵⁶⁰ *Ibid*, § 32(e).

metre of water; some given little food or water; some denied medical treatment; and a number of prisoners dying as a result of their injuries or being executed on the orders of the Accused.⁵⁶¹

B. Elements of the JCE Alleged Are Not Criminal

292. The purpose of the JCE alleged by the Prosecution is not criminal. As such, the JCE alleged does not amount to a common *criminal* plan as required by the Appeals Chamber jurisprudence.⁵⁶²

1. To Consolidate Control Over an Area is Not Criminal

293. If the purpose of the JCE was to consolidate control over the Dukagjin area, this could not amount to a criminal purpose. Rather, it is a legitimate tactic used in defence against an aggressor and in a struggle for national liberation.

2. Military Campaign and Defence Against Enemy Attack Are Not Criminal

294. The Prosecution's attempt to portray any actions of the KLA in furtherance of its military campaign as criminal is misconceived.

295. The Prosecutor conceded the KLA's *jus ad bellum* in opening their case: "a military campaign in which these accused indulged is not illegal under international law."⁵⁶³ However, throughout, the Prosecution has sought to characterise as illegal virtually every aspect of the KLA's campaign to defend the people of Kosovo from aggression and pursue their struggle for national liberation.

296. The Prosecution has conducted this case almost as if it had never indicted Slobodan Milošević or his military and paramilitary subordinates for crimes

⁵⁶¹ *Ibid*, § 43.

⁵⁶² *Prosecutor v Tadić*, Appeals Chamber judgement, § 227.

⁵⁶³ 364:18.

against humanity and war crimes against the people of Kosovo.⁵⁶⁴ We submit in closing, as we did in our Pre-Trial Brief, that:

“[T]he overall historical, political and military context is central to understanding the reasons why Lahi Brahimaj and other patriotic Kosovars felt both morally compelled and legally justified in taking the momentous decision to risk their own lives and those of their families and neighbours to take up arms and defend their homes and villages in the struggle for self-determination.”⁵⁶⁵

297. Further, the Prosecution have sought to present the ethnic Albanian population in Kosovo as the aggressors against the Serbs. This stands logic and history on their heads, as if Nelson Mandela had been the aggressor against *apartheid* South Africa.

298. Kosovo and its ethnic Albanian majority population differ from most, if not all, entities that have been brought before international criminal tribunals. Unlike other cases, the Kosovar Albanians waged a national liberation struggle against alien domination that has the sanction of international law.⁵⁶⁶

299. The use of force in furtherance of self-determination and in self-defence against aggressive Serbian military and paramilitary forces does not amount to persecution of Serbs.

⁵⁶⁴ According to the Prosecution Pre-Trial Brief *Milošević et al* 26 November 2001, these 1998 crimes included the shelling of predominantly Kosovar Albanian towns and villages, widespread destruction of property, and expulsion and killing of civilians. By October 1998, the OTP alleges that over 298,000 persons had been internally displaced within Kosovo or had left the province.

⁵⁶⁵ *Prosecutor v Haradinaj, Balaj & Brahimaj*, IT-04-84, Pre-Trial Brief on Behalf of Lahi Brahimaj, 11 February 2007, § 7.

⁵⁶⁶ We incorporate here by reference those arguments advanced in our Pre-Trial Brief in support of the inalienable right of the people of Kosovo under international law to pursue their struggle for self-determination and freedom, *see*, §§ 12-13, especially:

1. Article 1(2) of the United Nations Charter;
2. General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples;
3. Common Articles 1 and 2 of the 1966 International Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights;
4. UN Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; and
5. UN Resolution 3314 (XXIX) Definition of Aggression.

300. It is no crime to question or detain persons, whatever their ethnicity, who are suspected of spying for or collaborating with Serbian military or paramilitary forces or who are otherwise taking part in hostilities.

3. Establishment of Detention Facilities is Not Criminal

301. The Prosecution alleges that the JCE “included” the establishment of detention facilities. However, the establishment of detention facilities is not criminal and is well recognised by both the Geneva Conventions, and the Additional Protocols to the Geneva Conventions. In cases of non-international armed conflicts, express provision is made: “with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”⁵⁶⁷

302. Thus, the restriction of persons’ liberty, whether at a formally designated “detention facility” or elsewhere, is a recognised and legitimate concomitant of an internal armed conflict. What is not legitimate is the mistreatment, amounting to crimes against humanity or war crimes, of persons whose liberty has been restricted.⁵⁶⁸

4. Failure to Prove Policy of Targeting Civilians

303. The Prosecution have failed to discharge the burden of proving that any alleged policy of targeting “collaborators” amounted in fact to a policy to target a section of the civilian population.

C. No Evidence That Purpose of Any JCE was to Be Achieved By Criminal Means

304. If the alleged purpose of the JCE was to consolidate the total control over the Dukagjin Operational Zone, as alleged by the Prosecution, the Prosecution are next required to prove that the agreement was to achieve this *by the execution of*

⁵⁶⁷ Additional Protocol II, Part II Humane Treatment Article 5: “Persons whose liberty has been restricted.”

⁵⁶⁸ Additional Protocol II, Part II Humane Treatment: Article 4 “Fundamental Guarantees”.

war crimes and crimes against humanity. The evidence demonstrates that the opposite was the case; the KLA sought to be a professional and honourable army, in contrast to the tactics of the Serbs against the ethnic Albanian population.

305. Similarly, if the Prosecution contend that the establishment of a “detention facility” at Jabllanicë was included within the JCE, the burden on them is to prove not merely an aim to establish it, but (a) that a detention facility was in fact established; and (b) that the aim was to establish it *for the criminal purpose of committing war crimes and crimes against humanity*.

306. By contrast, the evidence shows overwhelmingly that the KLA never planned to establish, far less did they actually establish, detention facilities with such criminal and self-destructive aims. Assuming *arguendo* that the aim of the Accused was to “consolidate total control of the KLA over the Dukagjin Operational Zone,” the Prosecution’s case does not make sense: lacking the military might and oppressive administrative infrastructure of the Serbian administration, the KLA in common with most other national liberation movements, needed the support of the ordinary people to achieve that goal. Hence it explains why the Prosecution was not able to place before the Trial Chamber a single document from the Dukagjin Operational Zone that advocated inhumane treatment of “perceived collaborators” or the creation of detention facilities in which to incarcerate them.

D. Allegations of JCE in General Not Proven

307. The Brahimaj Defence adopts the arguments of the Haradinaj and Balaj Defences to the effect that the JCE as alleged between the three co-Accused and those named in § 27 of the indictment is not proven.

308. No evidence has been presented to the Trial Chamber that Lahi Brahimaj worked closely with Ramush Haradinaj to fulfil the goals of the alleged JCE at any time during the Indictment period. The evidence supports the contrary conclusion.

308.1. In particular, apart from one meeting on 24 June 1998, there is no evidence that Lahi Brahimaj was ever in Glllogjan during the period covered by the indictment. There is no evidence that Lahi Brahimaj provided direct operational support to Ramush Haradinaj at any time.

308.2. Minutes of the meetings attended jointly by Lahi Brahimaj and Ramush Haradinaj on 21, 23 and 24 June show no trace of any intention to condone the commission of crimes against humanity or war crimes in the lawful pursuit of the goals of consolidating KLA forces in the Dukagjin Zone.⁵⁶⁹

308.3. There is no evidence that Lahi Brahimaj ever met together with *both* Ramush Haradinaj and Idriz Balaj at any time during the indictment period.

308.4. The only evidence that Idriz Balaj was ever in Jablanica was from Pjetër Shala. There is no evidence that Idriz Balaj had any contact with Lahi Brahimaj at all, let alone about the goal of any alleged JCE.

309. The only evidence of Lahi Brahimaj's activities in the Dukagjin Zone concerns his native village of Jabllanicë. This evidence is consistent with his position on the General Staff, making occasional visits to his family, visiting Jabllanicë in connection with his General Staff duties to ensure supply lines of equipment from Albania.

E. Facts of Allegations about Lahi Brahimaj's Role in JCE Not Proven

1. No Evidence that a "Detention Facility" was "Established" or "Operated" at Jablanica

310. There is no evidence of any agreement to establish a detention facility at Jabllanicë. The Prosecution's case appears to be that a make-shift detention

⁵⁶⁹ P140: minutes of meeting in 21 June Irzniq; P142: minutes of 23 June meeting in Jabllanicë; P145: minutes of 24 June meeting in Glllogjan.

facility was established in Jabllanicë from, at the earliest, “at least April 1998”⁵⁷⁰ or “mid-May 1998”⁵⁷¹ until, at the latest, mid-September 1998.⁵⁷²

311. There is evidence that a facility was set up at the entrance to Jabllanicë during the indictment period which served both as a make-shift headquarters and barracks for the defenders of Jabllanicë and as a place where people (whether KLA members or ordinary villagers) could be fed and sheltered en route to and from Albania.⁵⁷³

311.1. However, on the evidence presented, no individual was “detained” in the barracks in Jabllanicë before mid-June 1998. Thereafter, the evidence shows that, for the majority of the time, there was only one person alleged to have been detained at the barracks, ending 25 July 1998.

311.2. That alleged detainee, Witness 6, was a [REDACTED] who had been stopped while driving around with a weapon despite not being a KLA member. His circumstances were highly suspicious. Inferences equally open on the facts include that he was taken to the barracks (a) to be questioned about his possession of a VJ pistol; (b) on suspicion of being a spy or collaborator with MUP or VJ forces; (c) because those who stopped him had nowhere else to take him and simply did not know what else to do with him; or (d) for a combination of the above reasons.

311.3. Witness 6’s “detention” in itself cannot prove that the make-shift barracks were established in order to commit war crimes or crimes against humanity.

312. Furthermore, the supposed “detention facility” was hardly an effective place to detain people; it was a small building in the middle of a meadow used for grazing

⁵⁷⁰ Indictment, § 32(b).

⁵⁷¹ *Ibid*, § 43.

⁵⁷² *Ibid*, § 32(c).

⁵⁷³ See, eg, Jakup Krasniqi: 5075-5076; Pjetër Shala: 9948; Fadil Fazliu: 8009.

animals, with no walls around it.⁵⁷⁴ Witness 6 described it as being a place he could have escaped from if he had chosen.⁵⁷⁵

313. None of the masses of documents seized from KLA locations and members shows evidence of any agreement to set up a detention facility in Jablanica. Absent any direct evidence of such agreement, one can only be inferred if that is the *only* reasonable inference available on the facts. From the extremely limited number of alleged detainees held there, for such brief periods, it cannot safely be concluded that any agreement was ever made to “establish” such a facility, still less to carry out criminal acts there.

314. Furthermore, the extremely limited scale of any alleged detention does not support an inference that a detention facility was “operated” in any meaningful sense of the word. There is no evidence that any particular person had responsibility for detention, and the small scale of the allegations supports the inference that there was no particular agreement for any person to have responsibility for it.

315. Providing food and shelter to KLA members in the make-shift barracks and kitchen at the farm buildings and feeding the hundreds of villagers passing through on their way to Albania to obtain weapons were not criminal aims.

316. Lahi Brahimaj’s name does not appear on any document relating to any alleged detainee. The fact that his brother Nazmi signed documents in relation to Witness 6 does not prove Lahi Brahimaj had knowledge of, condoned, authorised or participated in any way in the alleged detention.

317. Furthermore, the use by Rrustem Tetaj of the expression “prison guards” in relation to Skender Kuqi, cannot – as that witness himself testified – be interpreted as concrete evidence, as opposed to mere rumours, of a prison in Jabllanicë.⁵⁷⁶

⁵⁷⁴ 5844 – 5846, D117, D118: photographs of meadow at Jabllanicë barracks.

⁵⁷⁵ 5243:3 – 5243:6; 5349:5 – 5349:8; 5349:22 – 5349:23.

⁵⁷⁶ 3855:13 – 3855:23.

2. Doubt Whether Alleged Victims Were Civilians

318. The Prosecution alleges that the KLA agreed to target Serb and other civilians. By contrast, the evidence is such that the Trial Chamber cannot be certain that any one of the alleged victims was a non-combatant:

318.1. Witness 6 had several indicia of combatant status:⁵⁷⁷

318.1.1. Was carrying a Yugoslav army pistol;

318.1.2. Possessed a MUP-issued firearm authorisation; and

318.1.3. Carried a photograph of himself together with a uniformed policeman.

318.2. Nenad Remištar.⁵⁷⁸

318.2.1. Was a Police Officer; and

318.2.2. There is no satisfactory proof that he was ever taken to Jabllanicë; at the lowest, the Trial Chamber cannot rule out the possibility that he was killed in a fire-fight as an enemy combatant if he was stopped.

318.3. Unknown Bosnian and Unknown Montenegrins.⁵⁷⁹

318.3.1. Even if Witness 6's uncorroborated evidence that such individuals were ever detained at Jabllanicë is accepted, the Trial Chamber has no evidence on which to determine whether they were combatants or not.

318.4. Pal Krasniqi.⁵⁸⁰

⁵⁷⁷ See further above at § 125.

⁵⁷⁸ See further above at § 164.

⁵⁷⁹ See further above at § 165.

⁵⁸⁰ See further above at § 221.

318.4.1. Was most likely a KLA soldier and thus a combatant.

[REDACTED]

[REDACTED]

[REDACTED]

318.6. Skender Kuqi:

318.6.1. The Trial Chamber cannot rule out the possibility that he was rightly or wrongly suspected of working as informant for Serb forces or that he had forfeited non-combatant status.

318.6.2. At its lowest, the Trial Chamber has insufficient evidence upon which to conclude beyond reasonable doubt that Skender Kuqi was a civilian non-combatant.

319. Based on all of the foregoing, the Prosecution case does not support the existence of an agreement to target Serb civilians or other civilians.

3. Time Periods

320. Even on Prosecution evidence, the earliest suggestion of a prisoner was mid-June 1998. The latest was end of July 1998 when Serb forces overran Jabllanicë and killed the civilians who remained.⁵⁸³ There is no allegation of any other prisoners at any other time during the indictment period.

321. On these limited facts, the Trial Chamber cannot conclude beyond a reasonable doubt that there ever existed an agreement to establish a detention centre for the purpose of the commission of crimes against humanity and war crimes against detainees as alleged in the Indictment.

⁵⁸¹ See further above at § 267.

⁵⁸² 7894:4 – 7894:5, 7894:9 – 7894:11.

⁵⁸³ See Witness 17's contemporaneous note at 7771:19 – 7771:23: "Attacks on Jabllanice and from all weapons starting with tanks, APCs, and multiple rocket-launchers, against Ceskov, Kepuz, and Nepole. Jabllanice has fallen. Infantry has entered. Two old women, Nazmi's mother and another woman have been massacred. One soldier and two elderly men."

4. No Evidence that Lahi Brahimaj was Commander of Alleged Detention Centre

322. Although the Prosecution allege that Lahi Brahimaj was the commander of the alleged detention centre, there is no satisfactory evidence to support this claim.

323. Lahi Brahimaj was nominally appointed Deputy Commander of the Dukagjin Zone on 23 June 1998.⁵⁸⁴ He was discharged on 5 July 1998.⁵⁸⁵ There is no evidence that the responsibilities of a Deputy Commander were ever discussed, still less that they entailed responsibility for any detention centre. It is clear that he never exercised the responsibilities of this nominal position because he was warned for repeated absence from the zone on 4 July and promptly dismissed next day.⁵⁸⁶

324. Witness 6 was the only witness at the barracks during this period who gave evidence, and, although he claimed Lahi Brahimaj was there, he was unable to describe what position he held, if any.⁵⁸⁷

325. Witness 7 described a “commander Maxhupi”, but extreme caution should be exercised with this evidence:

325.1. None of those who accompanied Witness 7 to Jabllanicë referred to meeting anyone there by that name at that time,⁵⁸⁸

325.2. Witness 7 was not available for cross-examination so this reference is untested;

⁵⁸⁴ See P143.

⁵⁸⁵ See P168.

⁵⁸⁶ See P161 & P168.

⁵⁸⁷ 5246:18.

⁵⁸⁸ Witness 16 92*bis* Statement §19: “I have also been asked if I know a man nicknamed ‘Maxhupi’, to which I say that I have *since* heard his name but cannot provide any more information.” (Emphasis added); Witness 23 made no reference in her evidence to anybody by that name.

- 325.3. Witness 7's, son, Witness 6, was present when he was being interviewed by the Office of the Prosecutor and the Trial Chamber cannot exclude the possibility that Witness 6 had influenced his father to use this nickname.⁵⁸⁹
- 325.4. On at least one other occasion, Prosecution investigators gave the name "Maxhupi" to witnesses who were initially unable to provide it.⁵⁹⁰
- 325.5. OTP investigators at no time showed Witness 7 the photo-boards they used in relation to Lahi Brahimaj when interviewing Witness 6 and others.
326. If there was any individual responsible for an alleged detention centre, the candidates include at least: Nazmi Brahimaj;⁵⁹¹ Alush Agushi; and Gjelal Hajda.⁵⁹²
- 326.1. When Witness 6 was released on 25 July, it was Nazmi Brahimaj who signed receipts and a written warning that if he repeated his mistake he would face "criminal charges."⁵⁹³
- 326.2. Witness 7 (again, caution is urged in relation to the identification procedure for the reasons set out above)⁵⁹⁴ said his son told him the man who said he would have released Witness 6 but he did not have the paper work, was named Nazmi Brahimaj.⁵⁹⁵

5. Limited Evidence of Presence of Lahi Brahimaj At Jabllanicë

327. Witness 6 was at pains to place Lahi Brahimaj at Jabllanicë⁵⁹⁶ but when it came to making specific allegations about his conduct he was suspiciously vague.

⁵⁸⁹ See P1248, 92bis Statement of Witness 7 cover page: "Names of all persons present ... [Witness 6] Son of witness."

⁵⁹⁰ See further above at § 106.

⁵⁹¹ 9947:15, 9954:4.

⁵⁹² 9946:23, 9963:18.

⁵⁹³ P335; 5253 – 5255.

⁵⁹⁴ At § 325.

⁵⁹⁵ 92quater §§ 36 – 37.

⁵⁹⁶ 5218:13 – 5218:14; 5218:20 "Two days would not pass without seeing Lahi Brahimaj there."

- 327.1. He does not claim Lahi Brahimaj was present when he was originally brought to Jabllanicë;⁵⁹⁷
- 327.2. His descriptions of receiving beatings are extremely vague and generalised, particularly as to the alleged presence of Lahi Brahimaj;⁵⁹⁸
- 327.3. The reliability of his identifications is highly questionable.⁵⁹⁹ Despite claiming to have learned the names of those who abused him after his release, he positively misidentified a photograph of Myftar Brahimaj as being Hamz.⁶⁰⁰
- 327.4. During the alleged mistreatment of the Bosnian and three Montenegrins, when asked who was involved, Witness 6 does not accuse Lahi Brahimaj but only Nazmi and Hamza.⁶⁰¹
- 327.5. Witness 6 does not claim Lahi Brahimaj was present in Jabllanicë on 25 July 1998 when Nazmi Brahimaj “released” him.
328. Lahi Brahimaj’s responsibilities on the General Staff, also dealt with above at §§ 18 to 22 meant that his presence in Jabllanicë was inevitably sporadic. They also precluded him from commanding soldiers or premises in Jabllanicë since, given the constant danger of attack from Serbian forces, any commander would have to be consistently available.
329. The evidence shows that Lahi Brahimaj was in Drenica for a longer time in Jakup Krasniqi’s first month at the KLA’s General Staff (*ie*, from 11 June 1998):

⁵⁹⁷ 5209, See further above at § 137.

⁵⁹⁸ *See, eg*, 5220:3 – 5220:4; 5220:15 – 5220:21; 5221:3: “Yes. Nazmi was there in the room. Sometimes Lahi would happen to be there in the room. Not all the three of them [Nazmi, Lahi and Hamz Brahimaj] came at the same time.” See further above at § 138.

⁵⁹⁹ See further above at §§ 101 and 107.

⁶⁰⁰ 6347:1 – 8 and above at § 105.

⁶⁰¹ 5228:21 – 5228:25.

“During the first month we met more often because there was not too much fighting going on in Kosova. We were in a phase of trying to consolidate the General Staff, and Lahi Brahimaj was staying for a longer time in this part of Drenica. So we saw each other more often. So when Lahi was staying in these villages in Drenica, we met more often, more frequently, while when he was in the Dukagjini area, we did not meet that frequently.”⁶⁰²

330. Likewise, Bislim Zyrapi testified that he first met Lahi Brahimaj in the Berisha Mountains at General Staff HQ and saw him frequently there.⁶⁰³ When Mr Zyrapi went to meet Ramush Haradinaj in Jabllanicë in mid-July 1998, Lahi Brahimaj travelled with him from the Berisha Mountains, together with Hashim Thaci and Jakup Krasniqi.⁶⁰⁴

331. Lahi Brahimaj remained for two or three days at Jabllanicë prior to 19 July 1998 while Bislim Zyrapi was visiting other areas, since Lahi waited for him there on orders of the General Staff to take Mr Zyrapi to Rahovec.⁶⁰⁵

332. Ramush Haradinaj’s reprimand, issued 24 June 1998, indicates that Lahi Brahimaj had twice failed to fulfil requests to set up meetings,⁶⁰⁶ suggesting strongly that he was absent from the entire Dukagjin Zone after his nominal appointment as Deputy Commander on 23 June 1998 until at least his dismissal on 5 July 1998 and perhaps a period thereafter.

333. Lahi Brahimaj was not present when Rustem Tetaj visited Jabllanicë in connection with the death of Skender Kuci.⁶⁰⁷ Throughout, Tetaj dealt with Nazmi Brahimaj and no mention is made of Lahi.

334. The Brahimaj Defence adopts the legal arguments advanced by its colleagues to the effect that, in any event, mere presence at Jabllanicë would be insufficient to attract criminal liability under the jurisprudence of the Tribunals relating to JCE.

⁶⁰² 5074:19 – 5074:25.

⁶⁰³ 3212:2 – 3212:20.

⁶⁰⁴ 3212:19 – 3212:24.

⁶⁰⁵ 3234:18.

⁶⁰⁶ P161.

⁶⁰⁷ 3779:4.

6. No Evidence of Alleged Participation of Other Alleged JCE Participants

335. There is either no evidence, or at best conflicting and equivocal evidence of the participation of the other alleged members of the JCE in the mistreatment of alleged detainees:

335.1. There is no evidence that either Ramush Haradinaj or Idriz Balaj were involved in any way in any alleged mistreatment of detainees;

335.2. Although Witness 6 alleges that Nazmi Brahimaj was responsible for mistreating prisoners, [REDACTED]

335.3. Pjetër Shala was not questioned by the Prosecution and did not give any evidence about his role in any alleged mistreatment of detainees.

335.4. [REDACTED]

[REDACTED]. Witness 6 does not name anybody by the name of Myftar.

335.5. Although Alush Agushi was described as the commander at Jabllanicë,⁶⁰⁹ the Tribunal has heard no evidence of Alush Agushi's involvement in mistreating detainees at the barracks.

335.6. [REDACTED]

[REDACTED]. Further, neither Witness 6, nor any other witness, makes any mention of an individual by this name.

335.7. Arbnor Zejneli is described by [REDACTED] as coming to Tal Zeka's house in Zhabel village, but he is described as behaving in a respectful

⁶⁰⁸ 8017:17 – 8017:20: “I said that Nazmi came in the evening and gave us each a kick and then he left. He didn't utter a word and he didn't beat anyone and didn't show himself up there.”

⁶⁰⁹ Ded Krasniqi 4810:15 – 4810:18.

manner, reprimanding Pjetër Shala for behaving unprofessionally⁶¹⁰ and driving ██████████ to wherever he wished to go.⁶¹¹

335.8. ██████████
██████████
██████████ Even if this true, there is no
evidence that this was undertaken with intention to mistreat Skender Kuci.
██████████
██████████
██████████

7. Lahi Brahimaj's Brother Nazmi Brahimaj

336. The fact that Lahi Brahimaj is one of the brothers of Nazmi Brahimaj does not support any inference as to the nature of their relationship. The fact that there was no reason for anyone, still less Lahi, to be concerned about Nazmi Brahimaj's treatment of anyone at Jabllanicë is emphasised by the testimony of Rustem Tetaj. Far from showing lack of concern or care for Skender Kuqi, Tetaj said Nazmi was: "very desperate about this case,"⁶¹⁴ and "very sad about the whole thing."⁶¹⁵ He had taken all appropriate steps to obtain medical help for the ailing man but: "The problems were related to his kidneys, and the hospital did not have the instruments and the means to cure it. This was confirmed to me by Nazmi."⁶¹⁶

337. The evidence indicates that for most of the period during which any mistreatment is alleged to have occurred in Jabllanicë (13 June to 25 July 1998) Lahi Brahimaj was primarily concerned with General Staff matters.

338. There is no evidence that anyone ever brought to Lahi Brahimaj's attention any complaint of mistreatment at the make-shift barracks in Jabllanicë.

⁶¹⁰ 7431:5.

⁶¹¹ 7440:3.

⁶¹² 7956:22.

⁶¹³ 7956:23.

⁶¹⁴ 3779:5.

⁶¹⁵ 3782:2.

⁶¹⁶ 3781:22 – 3781:24.

8. Alleged Mistreatment Not Proven

339. Although much was made by the Prosecution of the allegation that there was a flooded basement at the barracks in Jabllanicë,⁶¹⁷ there was no evidence that it was used to mistreat anybody. Witness 6 described seeing water in a basement under the barracks building,⁶¹⁸ but did not allege any mistreatment there.

340. Similarly, there is no evidence that anybody detained was denied medical treatment. In fact, quite the opposite. [REDACTED]

[REDACTED]

[REDACTED]⁶²⁰

341. There is no evidence that any individual was executed or killed in the barracks in Jabllanicë or that Lahi Brahimaj or anyone else ordered them to be sent anywhere else to be killed.

[REDACTED]

[REDACTED]

[REDACTED]

F. Responsibility of Lahi Brahimaj Through Participation in Counts 23 to 28 and 31 to 34

343. It is alleged that Lahi Brahimaj participated in the JCE through his participation in counts 23 to 28 and 31 to 34.⁶²² For reasons set out in the Final Trial Brief for Ramush Haradinaj there is little or no evidence before the Trial Chamber of the crimes alleged in Counts 23 to 26 or 33 and 34. Any arguable

⁶¹⁷ 415:25.

⁶¹⁸ 5206:1.

⁶¹⁹ 1816:17 – 1817:1.

⁶²⁰ 3781 – 3782.

⁶²¹ See above at § 119.

⁶²² Indictment, § 32(e) enumerates those counts alleged to constitute acts and omissions by Lahi Brahimaj that form part of the JCE. Counts 29 and 30 are not alleged as part of the JCE.

participation in the supposed JCE therefore rests on Lahi Brahimaj's alleged participation in Counts 27 and 28 and Counts 31 and 32.

1. Counts 27 and 28

344. As set out at § 137 above, there is no evidence that Lahi Brahimaj participated in the stopping, questioning, conveyance to Jabllanicë and initial detention of Witness 6. Thereafter, Witness 6's evidence is not credible and only purports to describe in vague terms the presence of Lahi Brahimaj when he claims he was mistreated. Questions of identification are highly relevant to his testimony and the Brahimaj Defence adopts all that is said in that regard by the Balaj Team in their Final Trial Brief.

345. Furthermore, facts alleged within Counts 27 and 28 do not fall within the ambit of the alleged JCE. For reasons stated above at § 125 there is no satisfactory proof that Witness 6 was a civilian and there are many inferences open to the Trial Chamber as to the reasons for any alleged detention, of whatever duration, and his potential mistreatment, at whoever's hands.

2. Counts 31 and 32

346. It is not alleged that Lahi Brahimaj held any command responsibility in the Dukagjin Operative Zone, or that he held responsibility for any alleged detention facility as at the date of the offences alleged in Counts 31 and 32.⁶²³ The mere sporadic presence of Lahi Brahimaj does not attract criminal liability.

347. [REDACTED]
[REDACTED] Witness 6 claimed that Lahi Brahimaj participated in their mistreatment, but only at a very late stage in his testimony and his evidence cannot be regarded as credible.⁶²⁴

⁶²³ Indictment, § 32(b).

⁶²⁴ See further above at § 281.

348. [REDACTED]

G. Counts 28 and 29

349. Notwithstanding the omission of Counts 28 and 29 from paragraph 32(e) of the Indictment, the Prosecution asserts in those specific counts that Lahi Brahimaj was responsible pursuant to their JCE theories for the claimed abduction, mistreatment and/or killing of Nenad Remiřtar, as well as for the alleged mistreatment of an unnamed Bosnian and three Montenegrins.

350. In so doing, the Prosecution presumably rely on their claim that there was a plan to mistreat and kill perceived civilian collaborators with Serbian Forces or other civilian opponents of the KLA. See: Offences Section, above, at §§ 40 to 49.

351. In relation to Witness 6's claims concerning a Bosnian and three Montenegrins, it is unclear which limb of their JCE allegation the Prosecution relies on. No evidence has been given that the alleged treatment resulted from hostility towards these individuals' perceived racial, political or religious affiliations; neither is there any evidence that any of the four were perceived as collaborators or as opponents of the KLA. The mere alleged reference by soldiers to the Bosnian's occupation does not on its own amount to proof that he was perceived as a collaborator. There is no evidence either way on whether they were civilians.

352. If, which is not accepted, either of the Prosecution's theories of JCE could be shown to have any justification in fact, it is submitted that the mistreatment alleged in Counts 29 and 30 falls outside the bounds of the "natural and foreseeable consequences" of the execution of any such JCE.

⁶²⁵ See further above at §§ 191 to 197.

353. Furthermore, Mr Brahimaj's role in relation to the General Staff during the period covered by these two counts, together with the fact that the Prosecution do not allege that he was present at or participated in any way in the events alleged therein, makes it impossible to be satisfied beyond a reasonable doubt that he knew of, shared in, encouraged, condoned or in any way supported such mistreatment as part of any joint criminal plan to mistreat and kill perceived collaborators and opponents of the KLA.

H. No Evidence Lahi Brahimaj Condoned or Encouraged KLA Members to Mistreat Detainees

354. The Prosecution has failed to demonstrate any credible evidence that Lahi Brahimaj condoned or encouraged mistreatment of detainees by the KLA. As illustrated above at §§ 86 to 123, 149 to 160 and 182 to 216, the testimonies of both Witness 6 and Witness 3 are fraught with inconsistencies and contradictions. Neither witness proves conclusively Mr Brahimaj's presence or role in Jabllanicë. It cannot be reliably inferred that Mr Brahimaj encouraged any mistreatment in Jabllanicë when questions arise regarding his presence or role during the period it was alleged to have occurred.

355. The nature of the make-shift barracks at Jabllanicë and of the large numbers of villagers and soldiers who passed through there at different times during the indictment period creates doubt and uncertainty as to who, if anyone, was in a position to exercise control there. Even assuming *arguendo* that one or more individuals did suffer mistreatment as alleged, it is not possible for the Trial Chamber to conclude safely that Lahi Brahimaj had any knowledge of or control over those who may have been responsible for such mistreatment. Still less is it possible to conclude that he condoned or encouraged others to mistreat any person in any such way.

I. Counts Which Do Not Support Alleged JCE

356. There is no credible evidence that the alleged victims of abduction in Counts 23 to 26 were ever taken to Jabllanicë. Likewise, there is no evidence to support the allegations in Counts 33 and 34. They thus provide no support for the Prosecution's claim of a JCE.

X. CONCLUSION

357. The Defence for Lahi Brahimaj submit that the Prosecution have not discharged the burden of proving beyond reasonable doubt that he committed any of the counts in the Indictment, either by direct participation or as part of a JCE.

358. For the reasons set out in this Final Trial Brief, the Defence for Lahi Brahimaj respectfully invite the Trial Chamber to find Mr Brahimaj not guilty of the crimes charged.

Respectfully submitted:



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PAUL TROOP

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Word Count: 29,661

XI. AUTHORITIES

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<i>Blaškić</i> Trial Chamber judgement	<i>Prosecutor v Tihomir Blaškić</i> , Case No. IT-95-14-T, Judgement, 3 March 2000.
<i>Brđanin</i> Appeals Chamber judgement	<i>Prosecutor v Brđanin</i> , IT-99-36-A, Judgement, 3 April 2007.
<i>Brđanin</i> Trial Chamber judgement	<i>Prosecutor v Brđanin</i> , IT-99-36-T, Judgement, 1 September 2004.
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<i>Kayishema</i> Trial Chamber judgement	<i>Prosecutor v Clément Kayishema and Obed Ruzindana</i> , Case No. ICTR-95-1-T, Judgement, 21 May 1999.
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<i>Krnojelac</i> Appeals Chamber judgement	<i>Prosecutor v Milorad Krnojelac</i> , Case No. IT-97-25-A, Judgement, 17 September 2003.
<i>Krnojelac</i> Trial Chamber judgement	<i>Prosecutor v Milorad Krnojelac</i> , Case No. IT-97-25-T, Judgement, 15 March 2002.
<i>Kupresić</i> Appeals Chamber judgement	<i>Prosecutor v Zoran Kupresić et al.</i> , Case No. IT-95-16-A, Judgement, 7 March 2003.
<i>Kupresić</i> Trial Chamber judgement	<i>Prosecutor v Zoran Kupresić et al.</i> , Case No. IT-95-16-T, Judgement, 14 January 2000.
<i>Kvočka</i> Appeals Chamber judgement	<i>Prosecutor v Miroslav Kvočka et al.</i> , Case No. IT-98-30/1-A, Judgement, 28 February 2005.
<i>Limaj</i> Appeals Chamber judgement	<i>Prosecutor v Fatimir Limaj, Haradin Bala and Isak Musliu</i> , Case No. IT-03-66-A, 27 September 2007.
<i>Limaj</i> Trial Chamber judgement	<i>Prosecutor v Fatimir Limaj, Haradin Bala and Isak Musliu</i> , Case No. IT-03-66-T, 30 November 2005.
<i>Martić</i> Trial Chamber judgement	<i>Prosecutor v Milan Martić</i> , Case No. IT-95-11-T, Judgement, 12 June 2007.
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<i>Naletilić and Martinović</i> Appeals Chamber judgement	<i>Prosecutor v Mladen Naletilić aka "Tuta" and Vinko Martinović aka Štela</i> , Case No. IT-98-34-A, Judgement, 3 May 2006.
<i>Ntagerura et al</i> Appeals Chamber judgement	<i>Prosecutor v André Ntagerura et al</i> , Case No ICTR-99-46-A, Judgement, 7 July 2006.

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Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), Geneva, 8 June 1977.
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<i>Tadić</i> Trial Chamber judgement	<i>Prosecutor v Duško Tadić aka "Dule"</i> , Case No. IT-94-1-T, Judgement, 7 May 1997.