UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-03-66-A
		Date:	27 September 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **27 September 2007**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

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Mr. Steffen Wirth
Ms. Kristina Carey
Ms. Katharina Margetts
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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal," respectively) is seized of two appeals[1] from the Judgement rendered by Trial Chamber II on 30 November 2005, in the case of *Prosecutor v. Fatmir Limaj*, *Haradin Bala and Isak Musliu*, Case No. IT-03-66-T ("Trial Judgement").

2. In the second amended Indictment filed on 6 November 2003 ("Indictment"), Fatmir Limaj, born on 4 February 1971 in Banja, then in the municipality of Suva Reka in the autonomous region of Kosovo ("Kosovo"), Isak Musliu, born on 31 October 1970 in Račak/Reçak in the municipality of Štimlje/Shtime in Kosovo, and Haradin Bala, born on 10 June 1957 in Gornja Koretica/Koroticë E Epërme in the municipality of Glogovac/Gllogoc in Kosovo, were charged with individual criminal responsibility pursuant to Article 7(1) of the Statute, including through participation in a joint criminal enterprise alleged to have come into existence before May 1998 and continued until at least August 1998. The Indictment alleged that the purpose of the joint criminal enterprise was to target Serbian civilians and perceived Albanian collaborators and subject those individuals to cruel treatment, torture and murder in violation of Article 3 of the Statute (violations of the laws or customs of war) and Article 5 of the Statute (crimes against humanity).

3. The Indictment charged Fatmir Limaj with individual criminal responsibility under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting the aforementioned crimes. He was alleged to have personally participated in the enforcement of the detention of civilians in the Llapushnik/Lapušnik prison camp, in their interrogation, assault, mistreatment and torture, and to have planned, instigated and ordered the murder of detainees both in and around the prison camp and in the Berishe/Beriša Mountains. Fatmir Limaj was further charged with superior responsibility pursuant to Article 7(3) of the Statute in respect of these offences, which was alleged to arise out of the position of command and control he then held over the KLA members responsible for the operation of the Llapushnik/Lapušnik prison camp.

4. Haradin Bala was charged with individual criminal responsibility under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting

the aforementioned crimes. He was alleged to have personally participated in the enforcement of the detention of civilians in the Llapushnik/Lapušnik prison camp, in their interrogation, assault, mistreatment and torture, as well as in the murder of detainees both in the camp and in the Berishe/Beriša Mountains. Haradin Bala was not charged under Article 7(3) of the Statute.

5. The Indictment charged Isak Musliu with individual criminal responsibility under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting the aforementioned crimes, except for the murders committed in the Berishe/Beriša Mountains on or about 26 July 1998. He was alleged to have personally participated in the enforcement of the detention of civilians, as well as in the interrogation, assault, mistreatment, torture, and murder of detainees in the Llapushnik/Lapušnik prison camp. Isak Musliu was further charged with superior responsibility pursuant to Article 7(3) of the Statute in respect of some of the offences, which was alleged to arise out of the position of command and control he then held over the KLA soldiers who acted as guards in the prison camp.

6. On 30 November 2005, the Trial Chamber found Haradin Bala guilty, pursuant to Article 7(1) of the Statute, for the offences of torture, cruel treatment and murder as violations of the laws or customs of war under Article 3 of the Statute (Counts 4, 6 and 10). The Trial Chamber acquitted Haradin Bala on all other counts of the Indictment. For the crimes to which he was convicted, Haradin Bala was sentenced to a single sentence of 13 years of imprisonment. Fatmir Limaj and Isak Musliu were found not guilty on all counts of the Indictment. The Prosecution appeals the acquittals of Fatmir Limaj, Isak Musliu and Haradin Bala. The Prosecution also appeals the sentence imposed by the Trial Chamber on Haradin Bala for the crimes for which he was convicted.[2] Haradin Bala appeals his conviction and sentence.[3]

7. The Appeals Chamber heard oral submissions of the Parties regarding these appeals on 5 and 6 June 2007. Having considered the written and oral submissions of the Prosecution and the Accused, the Appeals Chamber hereby renders its Judgement.

[1] Bala Notice of Appeal, 30 December 2005; Prosecution Notice of Appeal, 30 December 2005.
[2] *See* Prosecution Appeal Brief, 15 March 2006.
[3] *See* Bala Appeal Brief, 9 May 2006.

II. STANDARD FOR APPELLATE REVIEW

8. On appeal, the parties must limit their arguments to legal errors that invalidate the judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the International Tribunal[4] and the International Criminal Tribunal for Rwanda ("ICTR").[5] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to invalidation of the judgement, but is nevertheless of general significance to the International Tribunal's jurisprudence.[6]

9. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the judgement. An allegation of an error of law which has no chance of changing the outcome of a judgement may be rejected on that ground.[7] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[8]

10. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[9] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the

[4] *See, e.g.*, *Blagojević and Jokić* Appeal Judgement, para 6; *Brdanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.

[5] *See Brdanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.

[6] *Blagojević and Jokić* Appeal Judgement, para. 6; *Brdanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Stakić* Appeal Judgement, para. 7; *Kupreškić et al.* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247.

[7] *Blagojević and Jokić* Appeal Judgement, para. 7; *Brdanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.

[8] *Blagojević and Jokić* Appeal Judgement, para. 7; *Brdanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6; *Kupreškić et al.* Appeal Judgement, para. 26. *See also Gacumbitsi* Appeal Judgement, para. 7; *Ntagerura* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.

[9] *Blagojević and Jokić* Appeal Judgement, para. 8; *Brdanin* Appeal Judgement, para. 10; *Galić* Appeal Statement, para. 8; *Stakić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

Trial Chamber accordingly.[10] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[11] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal.[12]

11. In relation to allegations of errors on a question of law, the Appeals Chamber considers that the standards of review are the same for appeals by the Defence and Prosecution. The appealing party, which alleges that the Trial Chamber committed an error on a question of law, must establish that the error invalidates the judgement.[13]

12. When considering alleged errors of fact on appeal from the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[14] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[15] In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".[16] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić,* which stated:

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[10] *Blagojević and Jokić* Appeal Judgement, para. 8; *Brdanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.

[11] *Blagojević and Jokić* Appeal Judgement, para. 8; *Brdanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.

[12] *Brdanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12.

[13] *See Bagilishema* Appeal Judgement, para. 9.

[14] *Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 13; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Kordić and Čerkez* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

[15] *Blagojević and Jokić* Appeal Judgement, para. 226; *Brdanin* Appeal Judgement, para. 13; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 458. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proved each element of that crime and the relevant mode of liability beyond a reasonable doubt. *See Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.

[16] *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Furundžija* Appeal Judgement, para. 37, referring to *Tadić* Appeal Judgement, para. 64. *See also Kvočka et al.* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Aleksovski* Appeal Judgement, para. 63; *Musema* Appeal Judgement, para. 18.

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[17]

13. The ICTR Appeals Chamber in *Rutaganda* and *Bagilishema* held that the same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[18] Under Article 25(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate "an error of fact that occasioned a miscarriage of justice". For the error to be one that occasioned a miscarriage of justice, it must have been "critical to the verdict reached".[19] Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[20]

14. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[21] Arguments of a party which do not have the potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[22]

15. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial

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[17] *Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19, quoting *Kupreškić et al.* Appeal Judgement, para. 30. *See also Kordić and Čerkez* Appeal Judgement, para. 19, fn. 11; *Blaškić* Appeal Judgement, paras 17-18.

[18] *Blagovević and Jokić* Appeal Judgement, para. 9.

[19] *Kupreškić* Appeal Judgement, para. 29.

[20] *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See also Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 14.

[21] *Blagojević and Jokić* Appeal Judgement, para. 10; *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 6, citing *Niyitegeka* Appeal Judgement, para. 9. *See also Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.

[22] *Blagojević and Jokić* Appeal Judgement, para. 10; *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 6, citing *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.

Judgement to which the challenges are being made.[23] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[24]

16. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[25] Furthermore, the Appeals Chamber may dismiss arguments which are evidently unfounded without providing detailed reasoning.[26]

III. HARADIN BALA' S APPEAL

17. Haradin Bala presents five grounds of appeal:[27] first, that the Trial Chamber incorrectly identified him as Shala, a prison guard at the Llapushnik/Lapušnik camp;[28] second, that the Trial Chamber erred in finding that he was present and personally participated in murders committed in the Berishe/Beriša Mountains;[29] third, that the Trial Chamber erred in finding that he subjected Witness L12 to cruel treatment;[30] fourth, that the Trial Chamber erroneously rejected his alibi defence;[31] and fifth, that the Trial Chamber erroneously found Witnesses L04 and L06 credible, resulting in factual errors and a miscarriage of justice.[32] The Prosecution responds that the Trial Chamber did not err in any of the above findings.

A. Haradin Bala's first ground of appeal: alleged improper identification of Haradin Bala as prison guard "Shala"

18. Haradin Bala submits that the Trial Chamber erred in law and in fact in finding beyond reasonable doubt that he was the guard "Shala" who committed the crimes for which he was

[23] *Blagojević and Jokić* Appeal Judgement, para. 11; Practice Direction on Appeals Requirements, para. 4(b). *See also Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[24] *Blagojević and Jokić* Appeal Judgement, para. 11; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.
[25] *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 12; *Stakić* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 47*; Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 8.
[26] *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 12; *Stakić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, para. 48; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19.
[27] Bala does not pursue the third, fifth, seventh and ninth ground of appeal set forth in the Notice of Appeal, Notice of Withdrawal of Grounds of Appeal, 9 May 2006.
[28] Bala Appeal Brief, paras 14-125.
[29] Bala Appeal Brief, paras 126-176.
[30] Bala Appeal Brief, paras 177-182.
[31] Bala Appeal Brief, paras 183-244.

convicted. Haradin Bala alleges four sub-errors under his first ground of appeal. First, that in failing to give any weight to the non-identifications of three eye-witnesses, the Trial Chamber failed to apply the principle of *in dubio pro reo*;[33] second, that the failure to attach any weight to the non-identifications constitutes a reversal of the burden of proof;[34] third, that the Trial Chamber erroneously relied on in-court identifications;[35] and fourth, that in assessing the evidence, the Trial Chamber failed to consider the individual as well as the combined strength of the evidence and only considered evidence in support of, and not against, his proper identification as Shala.[36]

1. Whether the Trial Chamber failed to apply the principle of *in dubio pro reo*

19. Haradin Bala submits that the Trial Chamber erred in law in not giving any weight to the failure of three eye witnesses - Vojko Bakrač, Witness L04 and Witness L12 - to identify him as the guard known as Shala from a photo spread, thus failing to apply - or misapplying - the principle of *in dubio pro reo*.[37] He argues that in the absence of any evidence explaining why the witnesses failed to identify him as the guard known as Shala, the Trial Chamber should have proceeded on an assumption in his favour.[38] Accordingly, it should have found that the reason the witnesses did not identify him from the photo spread was because they did not recognize him as the guard known as Shala.

20. The Prosecution responds that the only reasonable conclusion the Trial Chamber could have reached was that Haradin Bala was properly identified as the guard known as Shala.[39] Further, it submits that the principle *in dubio pro reo* does not apply to individual pieces of evidence, but only to the elements of the offence and the ultimate conclusion of guilt.[40] Thus, it submits that the Trial Chamber did not misapply the standard of proof when it found, based on the totality of the evidence, that Haradin Bala was properly identified as the guard known as Shala.[41] Relying on the *Tadić* Sentencing Judgement, Haradin Bala replies that the application of the principle *in dubio pro reo* "has never been limited to the ultimate conclusion of guilt."[42]

[32] Bala Appeal Brief, paras 245-266.
[33] Bala Appeal Brief, paras 28-46.
[34] Bala Appeal Brief, paras 47-55.
[35] Bala Appeal Brief, paras 63-95.
[36] Bala Appeal Brief, paras 96-122. *See also* AT 34-37 and 81-82 (5.6.2007).
[37] Bala Appeal Brief, para. 28.
[38] Bala Appeal Brief, paras 32, 45.
[39] Prosecution Response Brief, para. 1.31.
[40] Prosecution Response Brief, paras 1.33-1.34.
[41] Prosecution Response Brief para. 1.37.
[42] Bala Reply Brief, para. 6. *See also* AT 48-49 (5.6.2007).

(a) Whether the applicability of *in dubio pro reo* is limited to ultimate conclusions of guilt

21. The Appeals Chamber is satisfied that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt,[43] applies to findings required for conviction, such as those which make up the elements of the crime charged. This approach is consistent with the case-law of the International Tribunal and is a logical approach, given that, in the context of issues of fact, the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt.[44] In *Naletilić and Martinović*, the Appeals Chamber recognized the applicability of this principle to the *mens rea* requirement of knowledge of the existence of an armed conflict.[45] Similarly, the *Naletilić and Martinović* Trial Chamber applied the principle in the context of the crime of torture: It held that the evidence did not allow the Trial Chamber to distinguish between beatings that were inflicted with a specific purpose – which is required to establish the crime of torture - and beatings that may have been inflicted for reasons of pure cruelty, but not with a specific purpose. Consequently, the Trial Chamber found *in dubio pro reo* that the specific purpose necessary for torture had not been established beyond reasonable doubt.[46] Further, the principle of *in dubio pro reo* is not applied to individual pieces of evidence and findings of fact on which the judgement does not rely. For example, in *Kvočka et al.*, the Appeals Chamber dismissed Prcać's argument that the Trial Chamber failed to apply the principle when it found that Prcać was an administrative assistant at the Omarska camp.[47] The Appeals Chamber held that the finding that Prcać was an administrative assistant was not a fact aimed at conviction or an element of the crime charged, and thus the *in dubio pro reo* inquiry did not apply.

(b) Application of the *in dubio pro reo* principle

22. The Appeals Chamber is not satisified that Haradin Bala has established that the Trial Chamber misapplied the principle of *in dubio pro reo* to his identification as the guard known as Shala. The Trial Chamber reasonably assessed all of the evidence, including the failure of three eye-witnesses to identify Haradin Bala,[48] his alibi and his health at the relevant time,[49] and concluded

[43] *See Čelebići* Trial Judgement, para. 601. *See also* Christine V. D. Wyngaert (ed.), Criminal Procedure Systems in the European Community Butterworths, London (1993) at 21 (Belgium), 148 (Germany), 324 (Portugal), and Christoph J. M. Safferling, Towards an International Criminal Procedure, OUP, New York (2001) at 260.
[44] *See Naletilić and Martinović* Appeal Judgement, para. 120; *Stakić* Appeal Judgement, paras 102-103. *Naletilić and Martinović* Trial Judgement, footnote 1100. *See also Tadić* Appeal Decision on Jurisdiction, para. 143.
[45] *Naletilić and Martinović* Appeal Judgement, para. 120.
[46] *Naletilić and Martinović* Trial Judgement, fn. 1100.
[47] *Kvočka et al.* Appeal Judgement, paras 623-624.
[48] Trial Judgement, paras 627-628.
[49] Trial Judgement, paras 649-650.

that it was "not left with a reasonable doubt"[50] that Haradin Bala was the guard known as Shala despite the possibilities for mistaken identifications.

2. Whether the Trial Chamber reversed the burden of proof

23. Haradin Bala further submits that the Trial Chamber's failure to consider the three failed photo-identifications by Vojko Bakrač, Witness L04 and Witness L12 was a reversal of the burden of proof, thus constituting an error of law.[51] Haradin Bala argues that the burden of proof requires the Prosecution to establish each element of the charges beyond a reasonable doubt;[52] accordingly, the Prosecution should have been required to prove that the non-identifications were caused for reasons other than that the witnesses failed to recognize him.[53] The Prosecution responds that the burden of proof applies to the whole of the evidence and not to each individual fact.[54]

24. In its Judgement, the Trial Chamber in discussing the burden of proof upon the Prosecution to establish the identification of the Accused beyond reasonable doubt correctly stated that:

> The ultimate weight to be attached to each relevant piece of evidence, including each visual identification, where more than one witness has identified an Accused, is not to be determined in isolation. Even though each visual identification and each other relevant piece of evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, it is the cumulative effect of the evidence, *i.e.* the totality of the evidence bearing on the identification of an Accused, which must be weighed to determine whether the Prosecution has proved beyond reasonable doubt that each Accused is a perpetrator as alleged.[55]

The Prosecution was thus not required to establish the reasons for the failed photo spread identifications, because the Trial Chamber was satisfied that the cumulative effect of the other evidence on the identification of Haradin Bala as the guard Shala established this fact beyond reasonable doubt. The burden of proof on the Prosecution to establish facts beyond reasonable doubt does not necessarily require the Prosecution to establish that each piece of evidence independently establishes the relevant fact to that standard.

3. Whether the Trial Chamber erred in relying on in-court identifications

25. Haradin Bala submits that the Trial Chamber made a legal error in relying on his in-court identifications as the guard known as Shala by Witnesses L04, L06, L07, L10, L12, and L96,

[50] Trial Judgement, para. 650.
[51] Bala Appeal Brief, paras 47-55.
[52] Bala Appeal Brief, paras 47, 50.
[53] Bala Appeal Brief, para. 50.
[54] Prosecution Response Brief, para. 1.33.
[55] Trial Judgement, para. 20, citing *Prosecutor v. Kunarac*, Decision on Motion for Acquittal, Case No. IT-96-23-T, 3 July 2000, para. 4: "A tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered".

leaving only one identification which was "free from taint" - that of Ivan Bakrač.[56] He argues that in-court identifications should be given no probative weight because of their unreliable nature.[57] He also claims that four specific circumstances increase the unreliability of these identifications. First, the fact that all witnesses who made in-court identifications had seen him on television prior to giving testimony;[58] second, that Witnesses L04, L06, L10 and L12 are related to or acquainted with each other and had the opportunity and motivation to discuss the case before giving testimony;[59] third, that the Trial Chamber should not have placed weight on the in-court identifications made by Witnesses L04 and L12 as they previously failed to identify him as the guard known as Shala in a photo spread;[60] and fourth, he submits that the Trial Chamber erroneously gave no weight to the three failed photo spread identifications.[61] Haradin Bala also points out that the Prosecution admitted in response that Vojko Bakrač was shown the same high quality photograph of Haradin Bala which was shown to Ivan Bakrač. Thus, the sole basis relied upon by the Trial Chamber to attach no weight to this failed identification of Haradin Bala as the guard known as Shala by Vojko Bakrač – namely, that Haradin Bala's face on this photo was hardly distinct - is eliminated.[62]

26. The Prosecution agrees that no probative weight should be given to in-court identifications,[63] and it concedes that the Trial Chamber placed some, albeit little, weight on the in-court identifications.[64] However, the Prosecution argues that this error does not invalidate the finding,[65] as other evidence establishes beyond reasonable doubt that Haradin Bala was the guard known as Shala.[66] The Prosecution points in particular to the photo spread identifications made by Ivan Bakrač and Witness L96, to evidence showing Haradin Bala's pseudonym was Shala and to evidence identifying Haradin Bala as Shala by description. The Prosecution further refers to Witness L07's evidence on meeting Shala who identified himself as Haradin Bala and to evidence of Haradin Bala's presence in the Llapushnik/Lapušnik village. The Prosecution claims that this evidence is sufficient to establish beyond reasonable doubt that Haradin Bala was the guard known as Shala.[67]

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[56] Bala Appeal Brief, para. 64, Bala Reply Brief, para. 9.
[57] Bala Appeal Brief, para. 65, citing *Kamuhanda* Appeal Judgement, para. 243; *Kunarac et al.* Decision on Motion for Acquittal, para. 19; *Kunarac et al.* Appeal Judgement, para. 320; Bala Reply Brief, para. 3. *See also* AT 39-42 (5.6.2007).
[58] Bala Appeal Brief, para. 67.
[59] Bala Appeal Brief, para. 69.
[60] Bala Appeal Brief, para. 70; Bala Reply Brief, paras 19, 28.
[61] Bala Reply Brief, paras 10-28.
[62] Bala Reply Brief, para. 18.
[63] Prosecution Response Brief, para. 1.4.
[64] Prosecution Response Brief, para. 1.6.
[65] Prosecution Response Brief, paras 1.6, 1.10. *See also* AT 47 (5.6.2007).
[66] Prosecution Response Brief, paras 1.10-1.13.
[67] Prosecution Response Brief, para. 1.13. *See also ibid.*, para. 1.12, with reference to Trial Judgement, paras 603-632. *See also* AT 49-63 (5.6.2007).

27. The Appeals Chamber agrees with both parties that no probative weight should be attached to in-court identifications.[68] As considered by the *Kunarac* Trial Chamber, in-court identifications are inherently unreliable "[b]ecause all of the circumstances of a trial necessarily lead such a witness to identify the person on trial".[69] This has been affirmed in both the *Kunarac* and *Kamuhanda* Appeal Judgements.[70]

28. In the present case, the Trial Chamber stated that it was "very conscious that an identification of an Accused in a courtroom may well have been unduly and unconsciously influenced by the physical placement of the Accused and the other factors which make an Accused a focus of attention in a courtroom."[71] The Trial Chamber further noted, with respect to the in-court identifications made by Witnesses L04 and L12, that they could be mistaken because of the Witnesses' previous failures to identify Haradin Bala as the guard known as Shala in a photo spread.[72] It also took into account the fact that all of the witnesses who made in-court identifications of Haradin Bala as the guard known as Shala had seen Haradin Bala on television prior to giving testimony and stated that it was not satisfied on the evidence of the individual witnesses alone that Haradin Bala had been identified beyond reasonable doubt to be the guard Shala.[73] Nevertheless, despite the reliability problems of the in-court identifications, the Trial Chamber accepted the evidence of each of the six witnesses who made in-court identifications (Witnesses L04, L06, L07, L10, L12 and L96) as evidence that could be used in combination with other identification evidence given by other witnesses. Further, in reaching its conclusion that Haradin Bala was the guard known as Shala, the Trial Chamber did not distinguish between the in-court identifications and other evidence given by the witnesses, including the descriptions of Haradin Bala they gave during their testimony. Accordingly, the Trial Chamber attached some weight to the in-court identifications and to the extent that it did, it was in error.[74] The impact of this error on the finding of the Trial Chamber that Haradin Bala was the guard known as Shala will be determined later in this Judgement.[75]

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[68] The failure to identify an accused in court, however, can be a reason for declining to rely on the evidence of an identifying witness. In this context, *see Kvočka et al.* Appeal Judgement, para. 473.
[69] *Kunarac et al.* Trial Judgement, para. 562.
[70] *Kunarac et al.* Appeal Judgement, para. 320; *Kamuhanda* Appeal Judgement, para. 243.
[71] Trial Judgement, para. 18, citing Professor Willem Wagenaar, T. 7140; ex. DM7; *see also Vasiljević* Trial Judgement, para. 19.
[72] Trial Judgement, para. 627.
[73] Trial Judgement, paras 607, 610, 611, 613, 614, 616, 627, 631.
[74] The Appeals Chamber notes that while the Trial Chamber "accept[ed] the honesty of the seven identifying witnesses," it previously found that it was not convinced of Witness L96's honesty and thus only gave weight to those material parts of his evidence which were confirmed by evidence offered by others: Trial Judgement, paras 26, 613.
[75] *See infra* para. 33.

4. Whether the Trial Chamber erred by not attaching weight to the failed identifications

29. Three witnesses – Vojko Bakrač, Witness L04 and Witness L12 - failed to select Haradin Bala as the guard known as Shala from a photo spread that included his photograph.[76] Three other witnesses (Ivan Bakrač, Witness L96 and Witness L64) selected Haradin Bala as the guard known as Shala from a photo spread, although the honesty and credibility of two of these three witnesses - Witnesses L96 and L64 - was distrusted by the Trial Chamber. Witnesses L06, L07 and L10 identified Haradin Bala as the guard Shala in court without first having been asked to attempt to identify Shala in a photo spread.[77] Haradin Bala submits that the Trial Chamber erred in declining to give weight to these failed identifications.[78]

30. In considering this allegation, the Appeals Chamber recalls its finding in *Kupreškić et al.*

> that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognise the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances. The principles developed in these jurisdictions acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations.[79]

After having examined a number of domestic criminal law systems in relation to the question of identification evidence, the Appeals Chamber stated in *Kupreškić et al.*:

> Courts in domestic jurisdictions have identified the following factors as relevant to an appellate court's determination of whether a fact finder's decision to rely upon identification evidence was unreasonable or renders a conviction unsafe: identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.[80]

In addition, the Appeals Chamber observes that identification evidence may be affected by the length of time between the crime and the confrontation.[81]

31. When considering the three failed identifications and the in-court identifications, the Appeals Chamber notes that the Trial Chamber found one piece of identification evidence to be

[76] Bala Appeal Brief, para. 55. *See* ex. P83 "Photo line up".
[77] Bala Appeal Brief, para. 71. *See also* Trial Judgement, paras 610, 611, 614.
[78] Bala Appeal Brief, paras 23-27. *See also* AT 37-39 (5.6.2007).
[79] *Kupreškić et al.* Appeal Judgement, para. 34. *See also Kunarac et al.*, Decision on Motion for Acquittal, 3 July 2000, para. 8.
[80] *Kupreškić et al.* Appeal Judgement, para. 40 (internal footnotes omitted).
[81] *See* Corpus Juris Secundum, XXXIV. Identification Evidence in General, section 1095, updated November 2006.

particularly convincing: that of Ivan Bakrač. The Trial Chamber specifically held that Ivan Bakrač stood out among the witnesses because of the "care, honesty, competence and […] reliability he displayed when giving evidence and because of the opportunities he had in 1998 to closely observe the guard in the prison camp whom he then knew as Shala."[82] It further noted that Ivan Bakrač "immediately and unhesitatingly" recognized Haradin Bala's photo in a photo spread shown to him in 2003 and identified him as the guard he knew as Shala.[83]

32. The Appeals Chamber has found above that the Trial Chamber did not reverse the burden of proof or violate the principle of *in dubio pro reo* when, after considering all the evidence including the failure of Vojko Bakrač, Witness L04 and Witness L12 to identify Haradin Bala as the guard known as Shala, it found beyond a reasonable doubt that Haradin Bala was in fact Shala. Furthermore, when assessing all the evidence bearing on the identification of Haradin Bala,[84] the Trial Chamber reasonably attached significant probative weight to the testimony of Ivan Bakrač and only slight probative weight to the courtroom identification evidence. Hence, the Appeals Chamber declines to find that the Trial Chamber would have reached a different conclusion had it not taken into account the courtroom identification evidence.

5. Whether the Trial Chamber erred in its summing up of the evidence

33. Haradin Bala also alleges that the Trial Chamber erred in its summing up of the evidence and did not correctly apply the standard of proof beyond reasonable doubt because it failed to consider the individual as well as the combined strength of the evidence. Additionally, he submits that the Trial Chamber did not evaluate the totality of the evidence but focused only on the evidence in support of, not against, his proper identification as the guard known as Shala.[85] He submits that unreliable evidence cannot become reliable simply because it is corroborated by other unreliable evidence.[86] He further argues that the Trial Chamber applied a balance of probabilities standard rather than the required proof beyond reasonable doubt standard to his identification as Shala.[87] The Prosecution responds that the Trial Chamber considered all circumstances, including evidence related to Haradin Bala's alibi and health, and after weighing this evidence both separately and in combination with the identification evidence, found beyond reasonable doubt that Haradin Bala was the guard known as Shala.[88]

[82] Trial Judgement, para. 624.
[83] *Ibid*.
[84] Trial Judgement, para. 20.
[85] Bala Appeal Brief, para. 98.
[86] Bala Appeal Brief, paras 100-102.
[87] Bala Appeal Brief, paras 115-117.
[88] Prosecution Response Brief, para. 1.57.

34. The Appeals Chamber notes that this argument merely restates Haradin Bala's previous argument that the Trial Chamber misapplied the principle of *in dubio pro reo* and the burden of proof beyond reasonable doubt. The Appeals Chamber has already found that the Trial Chamber did not err in this respect.

35. As a result, and despite the Trial Chamber's error in relation to the weight attached to the in-court identifications, Haradin Bala's first ground of appeal is dismissed.

B. Haradin Bala's second ground of appeal: alleged error in finding that Haradin Bala participated in the murders in the Berishe/Beriša Mountains

1. Arguments of the parties

36. Haradin Bala alleges that the Trial Chamber erred in law and in fact in finding that he was present and personally participated in nine murders in the Berishe/Beriša Mountains on 25 or 26 July 1998 and claims this error amounts to a miscarriage of justice and invalidates the Trial Judgement.[89] Specifically, he alleges that his participation in these murders was not proven beyond reasonable doubt as there was a reasonable inference favourable to him, which the Trial Chamber failed to consider.[90] He points to "unchallenged" evidence that the terrain of the Berishe/Beriša Mountains was difficult to cross for "a man in optimal physical condition"; that he was in poor medical condition during that time; and that the weather conditions were extreme during the relevant period.[91] He claims that this evidence, taken together, necessitates the reasonable inference that he was incapable of walking the prisoners into the Berishe/Beriša Mountains and that he could not have been present at the time the nine murders took place.[92]

37. In the alternative, Haradin Bala claims that the Trial Chamber erred in law by shifting the burden of proof and requiring him to demonstrate that he was physically incapable of engaging in the nine murders.[93] Similar to his above contention, he claims that he produced uncontested evidence at trial raising reasonable doubt as to his identification as the KLA soldier that walked into the Berishe/Beriša Mountains, and that the Prosecution failed to prove beyond reasonable doubt that he was this soldier.[94] Alternatively, he submits that another reasonable inference available to the Trial Chamber was that when he left the group of remaining prisoners they were still alive and he

[89] Bala Appeal Brief, para. 130.
[90] Bala Appeal Brief, paras 132-133, citing *Čelebići* Appeal Judgement, para. 458.
[91] Bala Appeal Brief, para. 144.
[92] *Ibid*. *See also* AT 42-45 (5.5.2007).
[93] Bala Appeal Brief, para. 145.
[94] Bala Appeal Brief, paras 148-150.

was not present when those prisoners were executed.[95] Also, he claims that no reasonable trier of fact could have concluded that he was guilty of the murders without relying on the testimony of Witness L96, whom the Trial Chamber found to be unreliable.[96]

38. As to the allegedly erroneous finding of the Trial Chamber regarding his personal participation in the murders,[97] Haradin Bala argues that the ballistics evidence allows for the reasonable inference that more than two people were involved in the shootings.[98] He also argues that the Trial Chamber misapplied the *in dubio pro reo* principle in finding that "the forensic evidence […] neither confirms nor denies the active presence of a third guard in the [Berisha] Mountains at the time of the executions", because Haradin Bala may not have actually shot at the prisoners, a factor which could have significantly influenced the sentence.[99] Also, Haradin Bala argues that the Trial Chamber relied on Witness L96's uncorroborated testimony concerning the events after the first group of prisoners was released, although the Trial Chamber had unequivocally stated that it would not rely on his evidence regarding material issues unless that evidence was corroborated.[100]

39. The Prosecution responds that the Trial Chamber did not shift the burden of proof and that its conclusions were reasonably based on the totality of the evidence.[101] The Prosecution argues that the Trial Chamber accepted credible evidence of five witnesses that Shala/Haradin Bala and another KLA soldier, Murrizi, marched the detainees remaining in the prison camp into the Berishe/Beriša Mountains.[102] The Prosecution also refers to the poor health of the detainees who were walked to the Mountains after having been subjected to the deplorable conditions in the camp,[103] and, in relation to Haradin Bala, argues that the medical evidence of Zeqir Gashi and Fitim Selimi does not support the conclusion that it was physically impossible for Haradin Bala to have escorted the detainees.[104] As to the alleged shifting of the burden of proof, the Prosecution argues that the Trial Chamber correctly held that it was "not left with a reasonable doubt" that Haradin Bala was the guard known as Shala in the camp and escorted the detainees to the Berishe/Beriša Mountains, after having considered the identification evidence, the alibi evidence and the evidence regarding Haradin Bala's health, both separately and in combination.[105] To this, Haradin Bala replies that the

[95] Bala Appeal Brief, para. 158.
[96] Bala Appeal Brief, para. 159.
[97] Bala Appeal Brief, para. 161.
[98] Bala Appeal Brief, paras 163-165.
[99] Bala Appeal Brief, para. 166 (with reference to Trial Judgement, para. 453), and paras 167-168.
[100] Bala Appeal Brief, paras 170-173.
[101] Prosecution Response Brief, para. 2.1.
[102] Prosecution Response Brief, para. 2.2.
[103] Prosecution Response Brief, paras 2.3-2.4.
[104] Prosecution Response Brief, para. 2.7.
[105] Prosecution Response Brief, para. 2.17, with reference to Trial Judgement, paras 649-650.

evidence regarding his health should have been considered independently of the evidence regarding identification and alibi.[106]

40. In relation to Haradin Bala's submissions on his personal participation in the murders, the Prosecution responds that Witness L96's eyewitness testimony was supported by probative evidence: Witness L96 could lead investigators to the murder site where the bodies were uncovered;[107] surviving witnesses testified that Haradin Bala escorted the group of prisoners to the Berishe/Beriša Mountains;[108] ballistics evidence neither established nor precluded that a third KLA soldier participated in the executions; Haradin Bala's and Murrizi's joint role in the release of the first group of prisoners (leaving the remaining prisoners, including Witness L96, with Haradin Bala and Murrizi); and the bodies of all of the remaining prisoners (with the exception of three) were later recovered in the vicinity.[109]

41. The Prosecution also argues that it is mere speculation that Haradin Bala could have left the crime site prior to the executions as no evidence was adduced in support of such an inference.[110] As to the possible presence of a third KLA soldier at the executions, the Prosecution responds that Witnesses L96 and L10 identified Haradin Bala and a third soldier as carrying automatic weapons or "Kalashnikov", and Murrizi as carrying a "rifle".[111] Hence, the Prosecution argues that even if the ballistics evidence raised a reasonable doubt as to whether a third weapon was fired, these two witnesses testified that Haradin Bala and the third KLA soldier were in possession of Kalashnikovs, and bullets and casings found at the execution site were attributed to at least two separate Kalashnikovs.[112]

2. Discussion

42. The essence of the first challenge made by Haradin Bala is whether or not it was reasonable for the Trial Chamber to find that he made the trip into the mountains given the condition of his health. In its Judgement, the Trial Chamber thoroughly evaluated the evidence regarding Haradin Bala's health. It considered that Haradin Bala was in poor health before 1998; that he suffered from and took medication for *angina pectoris*; that he had high blood pressure and a heart arrhythmia and took medication for the arrhythmia; and that he was told by his doctor to avoid overexertion.[113] While considering the evidence of Haradin Bala's health, the Trial Chamber also placed particular

[106] Bala Reply Brief, para. 41.
[107] Prosecution Response Brief, para. 2.30.
[108] Prosecution Response Brief, paras 2.23-2.30.
[109] Prosecution Response Brief, para. 2.23.
[110] Prosecution Response Brief, para. 2.27.
[111] Prosecution Response Brief, para. 2.36.
[112] *Ibid*. *See also* AT 68-79 (5.6.2007). For Bala's reply, *see also* AT 80-81 (5.6.2007)
[113] Trial Judgement, para. 648.

emphasis on the fact that despite these health concerns, Haradin Bala joined the KLA and served as a soldier, actually participating in military action on certain occasions.[114] It found that this fact indicated "either or both that, despite his physical condition, he was able to engage in the demanding physical activities of combat, or that he did not always hold back from the physical demands of KLA service because of his physical condition."[115] It concluded from "the general circumstances" that Shala, along with Murrizi and possibly another KLA soldier, were present and directly involved in shooting the nine Kosovo Albanian prisoners in the Berishe/Beriša Mountains on or about 26 July 1998. The general circumstances relied upon by the Trial Chamber were:

> the body of evidence as to the role of Shala and Murrizi in the prison camp, the fact that when Llapushnik/Lapusnik came under Serbian attack both men escorted the remaining prisoners on the march to the Berishe/Berisa Mountains, their joint role in the release of the first group of prisoners, leaving the remaining prisoners, including L96, with Shala and Murrizi, and that the bodies of all of these remaining prisoners, with the exception of L96, Hetem Rexhaj and Xheladin Ademaj, were later recovered in the vicinity.[116]

43. On the basis of all of the evidence considered, the Trial Chamber concluded that it was not left with any reasonable doubt that Haradin Bala committed the nine murders in the Berishe/Beriša Mountains despite his ill health.[117]

44. In light of the evidence considered by the Trial Chamber that Haradin Bala was an active member of the KLA despite his health condition, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to refuse Haradin Bala's proposed inference that he was incapable of walking the prisoners into the Berishe/Beriša Mountains.[118] While it may not have been medically advisable for Haradin Bala to have made the trip into the mountains, he had already shown that his medical condition did not prevent him from partaking in certain physical duties to serve the KLA, including as a guard in the prison camp. Specifically, the evidence shows that despite having high blood pressure and an arrhythmic heartbeat since 1998, he had engaged in military action with these health problems.[119] Further evidence supports the reasonableness of the Trial Chamber's finding. This evidence includes identification evidence that Haradin Bala was the guard known as Shala (as discussed above); evidence that the guards Shala and Murrizi gathered the prisoners in the prison camp and led them towards the mountains, with Shala bringing up the rear;[120] and evidence that Shala called out the names of approximately ten prisoners and

[114] Trial Judgement, para. 648.
[115] *Ibid.*
[116] Trial Judgement, para. 454.
[117] Trial Judgement, paras 650, 461, 466, 471, 476, 482, 487, 492, 501 and 506.
[118] *See Galić* Appeal Judgement, para. 218. *See also Kupreškić et al.* Appeal Judgement, para. 303; *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458; *Ntagerura et al.* Appeal Judgement, paras 304-306.
[119] Trial Judgement, para. 648, citing Elmi Sopi T. 6746-6747 (3.5.2005).
[120] Trial Judgement, para. 448.

subsequently released them.[121] In light of this evidence, Haradin Bala fails to show that it was unreasonable for the Trial Chamber to conclude that he was capable of walking the prisoners into the Berishe/Beriša Mountains and was present at the time the murders took place.

45. Nor does the Appeals Chamber agree with Haradin Bala's contention that the Trial Chamber improperly shifted the burden of proof by requiring him to demonstrate that he was physically incapable of engaging in the nine murders. The Appeals Chamber notes that Haradin Bala fails to meet the requirements for appeal, as he does not specify where in the Trial Judgement the error allegedly lies, but merely makes a broad assertion that the Trial Judgement shifted the burden of proof because it did not accept the alibi evidence he put forward.[122] Furthermore, Haradin Bala does not demonstrate that the Trial Chamber was not satisfied that the Prosecution had fulfilled its burden of negating any reasonable doubt that he was "physically capable of engaging in the acts alleged in the Indictment".

46. With regard to Haradin Bala's claim that he produced uncontested evidence at trial sufficient to raise reasonable doubt that he was the KLA soldier that walked into the Berishe/Beriša Mountains, and that the Prosecution failed to provide proof beyond reasonable doubt that he was this soldier, this ground of appeal is dismissed for the reasons stated above.[123]

47. With respect to Haradin Bala's sub-ground of appeal that the Trial Chamber erred in finding that he personally participated in the murders, the Appeals Chamber finds that Haradin Bala has not demonstrated any error. The Appeals Chamber notes that the Trial Chamber carefully weighed the evidence when it held that Haradin Bala (a.k.a. Shala) and Murrizi "were present and directly involved in the shooting at the prisoners", drawing this inference from

> the role of both Shala and Murrizi in the prison camp, the fact that when Llapushnik/Lapusnik came under Serbian attack, both men escorted the remaining prisoners on the march to the Berishe/Berisa Mountains, their joint role in the release of the first group of prisoners, leaving the remaining prisoners, including L96, with Shala and Murrizi, and that the bodies of all of these remaining prisoners, with the exception of L96, Hetem Rexhaj and Xheladin Ademaj, were later recovered in the vicinity.[124]

The Trial Chamber further held that

> both Shala and Murrizi, and perhaps a third KLA soldier, acted together in shooting and killing all but L96, Xheladin Ademaj and perhaps Hetem Rexhaj, of the remaining group of prisoners.[125]

Later in the Trial Judgement, the Trial Chamber found that

[121] Witness L06, T. 1028-1030 (26.11.2004); Witness L12, T. 1815-1818 (13.12.2004); Witness L10, T. 2962-2965 (3.2.2005).
[122] Bala Appeal Brief, paras 145-150. *See also Galić* Appeal Judgement, paras 7, 11.
[123] *See supra* para. 45.

> Haradin Bala participated physically in the material elements of the crime of murder, jointly with Murrizi, and perhaps with a third KLA soldier. As discussed earlier, in view of the circumstances of the killing and the position of the victims, the Chamber has found that Haradin Bala acted with the intent to commit murder when he participated in the killing of these victims. He is responsible for the murder of the nine prisoners as a direct perpetrator.[126]

48. The Appeals Chamber notes that Witness L96's evidence on the executions is supported by his testimony that he led investigators from the UNMIK Police Central Criminal Investigation Unit ("CCIU") to the site, and by the statement of Judy Thomas, a Canadian police officer serving in CCIU, who stated that two civilian men led her to the execution site in August of 2001.[127] While Judy Thomas did not state that Witness L96 was one of these two civilian men, the Trial Chamber found that her statement on the location of the grave site "accords generally with the prisoners' evidence, including that of L96."[128] This was a reasonable inference on the evidence of both Judy Thomas and Witness L96. The Appeals Chamber also finds that the Trial Chamber ruled reasonably on the evidence provided by Witnesses L04, L06, L10, L12 and L96 on Bala's role in the process of releasing the first group of prisoners in the Berishe/Beriša Mountains.[129] Furthermore, the Trial Chamber did not err by considering Haradin Bala's role in the prison camp and in escorting the prisoners to the Berishe/Beriša Mountains as relevant evidence when determining his participation in the murders of the second group of prisoners.

49. While the Trial Chamber found that ballistics evidence neither established nor precluded that a third KLA soldier participated in the murders, the Appeals Chamber finds that there was no evidence before the Trial Chamber to suggest that Haradin Bala left the execution site prior to the murders and thus, the Trial Chamber's failure to discuss this issue does not constitute an error of fact. Also, the testimony of Witnesses L10 and L96 that Shala was seen with an automatic weapon, the type of weapon that the ballistics evidence determined was used in the murders, supports the Trial Chamber's finding that Shala/Haradin Bala participated in the murder of the second group of prisoners.

50. For all these reasons, the Appeals Chamber finds that the Trial Chamber did not err with respect to Haradin Bala's personal participation in the murder of the second group of prisoners in the Berishe/Beriša Mountains.

51. Consequently, Haradin Bala's second ground of appeal is dismissed.

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[124] Trial Judgement, para. 454 (internal footnotes omitted).
[125] *Ibid.*
[126] Trial Judgement, para. 664.
[127] Trial Judgement, para. 457, with reference to Judy Thomas, ex. P110 "Statement of Judy Thomas and exhibits", para. 18.
[128] Trial Judgement, para. 457.
[129] Trial Judgement, para. 450.

C. Haradin Bala's fourth ground of appeal: alleged error in finding that Haradin Bala subjected Witness L12 to cruel treatment

52. Haradin Bala submits that the Trial Chamber erred in law by impermissibly shifting the burden of proof and requiring him to show that he was physically incapable of personal participation in the cruel treatment of Witness L12, thus invalidating the Trial Judgement.[130] He argues in the alternative that the Trial Chamber erred in fact by failing to take into account uncontested evidence that he was physically incapable of engaging in the cruel treatment of Witness L12.[131] He specifically claims that where an accused puts forth a positive defence of physical impossibility and adduces reasonable evidence to support this defence, the Prosecution is then required to prove this evidence false, which it failed to do.[132]

53. The Prosecution responds that Haradin Bala overstates the medical evidence presented to the Trial Chamber.[133] It claims that the evidence only supports the conclusion that it was not medically sensible for a person with Haradin Bala's medical condition to engage in sustained physical exertion.[134]

54. Both of Haradin Bala's arguments regarding his defence based on physical impossibility were dismissed in the previous discussion of whether he participated in the murder of prisoners in the Berishe/Beriša Mountains.

55. Thus, for the reasons there given, the Appeals Chamber dismisses the fourth ground of appeal.

D. Haradin Bala's sixth ground of appeal: the Trial Chamber's rejection of Haradin Bala's alibi

56. Haradin Bala submits that the Trial Chamber erred in rejecting his alibi defence and alleges three sub-errors of law and fact. First, he claims that the Trial Chamber incorrectly shifted the burden of proof to him rather than requiring the Prosecution to eliminate any reasonable possibility that the evidence of alibi is true;[135] he also submits that the Trial Chamber made a factual error in assessing the alibi defence on the basis of an unfairly high standard.[136] Second, he argues that the

[130] Bala Appeal Brief, para. 177.
[131] Bala Appeal Brief, paras 178-180.
[132] Bala Appeal Brief, para. 180.
[133] Prosecution Response Brief, para. 3.2.
[134] Prosecution Response Brief, para. 3.2. *See also* AT 76 (5.6.2007).
[135] Bala Appeal Brief, para. 187.
[136] Bala Appeal Brief, para. 196.

Trial Chamber erred in law by holding his decision not to give sworn evidence against him.[137] Third, he submits that the Trial Chamber failed to provide a reasoned opinion for why it rejected his alibi.[138]

1. Whether the Trial Chamber shifted the burden of proof for alibi evidence

(a) Arguments of the parties

57. Haradin Bala claims that the Trial Chamber shifted the burden of proof by requiring him to demonstrate that his alibi was "consistent and credible" rather than requiring only that he show a "reasonable possibility that the evidence of alibi is true."[139] He argues that the Trial Chamber's reasoning that "the testimony of most of the witnesses for the Defence for Haradin Bala does not necessarily negate the evidence that Haradin Bala remained in Llapushnik/Lapusnik after the end of May",[140] shows that the Trial Chamber reversed the burden of proof. He claims that "[i]t is not required that alibi evidence negates the Prosecution evidence, but rather that the evidence seeking to undermine the alibi excludes the possibility that Haradin Bala left at the end of May or the beginning of June 1998."[141] Haradin Bala submits that this legal error invalidates the Trial Judgement because he would have met the burden of production had the Trial Chamber applied the correct burden of production for alibi defences. Haradin Bala claims that if not for this legal error, the Prosecution would have been unable to prove its case beyond reasonable doubt and he would not have been found guilty.[142]

58. Haradin Bala further submits that the Trial Chamber made factual errors in concluding that he was in Llapushnik/Lapušnik until the end of July 1998,[143] and by assessing the alibi evidence on the basis of an unfairly high standard, which resulted in a miscarriage of justice.[144] He claims that the Trial Chamber assessed the evidence differently when favourable to the Prosecution than when favourable to the Defence, particularly with regard to inconsistencies in recalling dates of events.[145] He further submits that the alleged discrepancies between his unsworn statement and other Defence witnesses result from either a lack of precision, the degeneration of memory over the seven years since the events, or the highly stressful nature of the events.[146] Specifically, he challenges the Trial

[137] Bala Appeal Brief, paras 234, 236, 240, 241.
[138] Bala Appeal Brief, para. 226.
[139] Bala Appeal Brief, para. 187, citing *Vasiljevič* Trial Judgement, para. 15; *Čelebići* Appeal Judgement, para. 581; *Kunarac et al.* Trial Judgement, para. 625.
[140] Trial Judgement, para. 647.
[141] Bala Appeal Brief, para. 220.
[142] Bala Appeal Brief, para. 228.
[143] Bala Appeal Brief, para. 208.
[144] Bala Appeal Brief, paras 230-231.
[145] Bala Appeal Brief, paras 199, 209-210, 214.
[146] Bala Appeal Brief, paras 193, 194, 196, citing *Simba* Trial Judgement, para. 345.

Chamber's findings concerning the date of his arrival to Llapushnik/Lapušnik, his departure from Llapushnik/Lapušnik, and the opening date of Dr. Zeqir Gashi's clinic. He argues that, if assessed fairly, evidence given by witnesses Ferat Sopi, Elmi Sopi, Ruzhdi Karpuzi, Skender Bylykbashi, Avdullah Puka, Dr. Selimi and by himself, in his unsworn statement, would at least lead to a reasonable doubt about his presence at the crime scene in June and July 1998.[147] Finally, he submits that the Trial Chamber failed to provide a reasoned opinion for the rejection of his alibi that he was not in Llapushnik/Lapušnik in June and July of 1998.[148]

59. Haradin Bala also alleges a factual error in the Trial Chamber's observation that Elmi Sopi's testimony "is not seriously different" from Dr. Zeqir Gashi's testimony that his clinic in Llapushnik/Lapušnik was opened in the beginning of June 1998 and that Haradin Bala visited his clinic thereafter.[149] As Elmi Sopi testified that Haradin Bala was not in Llapushnik/Lapušnik after 29 May 1998,[150] Haradin Bala argues that the Trial Chamber's observation reveals an unfair assessment of the evidence. He submits that the alleged factual errors resulted in a miscarriage of justice because the Trial Chamber would not have rejected his alibi defence had it assessed the alibi evidence more fairly.[151]

60. The Prosecution responds that Haradin Bala's argument merely restates the burden of proof beyond reasonable doubt.[152] It submits that the Trial Chamber applied the correct standard in assessing the alibi evidence, finding that it did not give rise to a reasonable doubt.[153] The Prosecution also argues that the Trial Chamber relied on the evidence of the camp victims and not on the falsity of the alibi evidence to establish that Haradin Bala was in Llapushnik/Lapušnik in June and July of 1998.[154]

61. As to the alleged factual errors, the Prosecution argues that the Trial Chamber was correct in finding inconsistencies between Haradin Bala's unsworn statement and the testimony of other Defence witnesses: The testimony of Elmi Sopi and the unsworn statement of Haradin Bala concerning when Haradin Bala left Llapushnik/Lapušnik differed by at least six days.[155] Such a difference, the Prosecution submits, is not inconsequential and goes beyond a "lack of precision".[156] The Prosecution further submits that the Trial Chamber's findings on the date of Haradin Bala's

[147] Bala Appeal Brief, paras 211-212.
[148] Bala Appeal Brief, paras 197-199, 226.
[149] Bala Appeal Brief, paras 197-199.
[150] Elmi Sopi, T. 6747 (31.5.2005).
[151] Bala Appeal Brief, paras 230-231.
[152] Prosecution Response Brief, para. 4.8.
[153] Prosecution Response Brief, para. 4.10. *See also* AT 63-66 (5.6.2007).
[154] Prosecution Response Brief, para. 4.17.
[155] Prosecution Response Brief, para. 4.38.
[156] *Ibid.*

arrival to Llapushnik/Lapušnik, his departure from Llapushnik/Lapušnik, and the opening date of Dr. Zeqir Gashi's clinic were not unreasonable. Rather, the Prosecution claims that "the Chamber set out a detailed basis for its finding regarding the alibi evidence, explaining its rationale in finding that evidence lacking in credibility, erroneous, or indeed consistent with the body of evidence establishing Bala's presence in Llapushnik/Lapušnik during June and July 1998."[157]

62. The Prosecution submits that the Trial Chamber's observation that the testimony of Elmi Sopi "is not seriously different" from the evidence of Dr. Zeqir Gashi is a typographical error[158] and that the Trial Chamber meant to refer to the testimony of Ferat Sopi instead. Ferat Sopi estimated that Dr. Zeqir Gashi's clinic was opened between 20 and 25 May 1998, but was certain only that the clinic was opened in May.[159] The Trial Chamber held that "[this] may well mean […] the very last days of May."[160] Therefore, according to the Prosecution, it would not have been unreasonable for the Trial Chamber to observe that the evidence of Ferat Sopi "is not seriously different" from the evidence of Dr. Zeqir Gashi that the clinic was opened in the beginning of June 1998.[161]

(b) Alleged legal error of shifting the burden of proof

63. The Appeals Chamber notes and agrees with the ICTR Appeals Chamber's finding in *Kamuhanda* with respect to the burden of proof regarding alibi that:

> [a]n alibi […] is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution.[162]

Similarly, the ICTR Appeals Chamber held in *Kajelijeli* that:

> [t]he burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[163]

This does not, however, require the Prosecution to specifically disprove each alibi witness's testimony beyond reasonable doubt. Rather, the Prosecution's burden is to prove the accused's guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi.

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[157] Prosecution Response Brief, para. 4.64.
[158] Prosecution Response Brief, para. 4.40.
[159] Ferat Sopi, T. 7051-7052 (9.6.2005).
[160] Trial Judgement, para. 257.
[161] Prosecution Response Brief, para. 4.40.
[162] *Kamuhanda* Appeal Judgement, para. 167. *See also Kajelijeli* Appeal Judgement, paras 41-42, and *Kayishema and Ruzindana* Appeal Judgement, para. 111.
[163] *Niyitegeka* Appeal Judgement, para. 60 (internal footnotes omitted). *See also Čelebići* Appeal Judgement, para. 581; *Musema* Appeal Judgement, para. 202 (with reference to *Kunarac et al.* Trial Judgement, para. 625); *Kayishema and Ruzindana* Appeal Judgement, para. 113.

64. In light of the above, the Appeals Chamber is satisfied that the Trial Chamber correctly held that:

> So long as there is a factual foundation in the evidence for that alibi, the Accused bears no onus to establish that alibi; it is for the Prosecution to "eliminate any reasonable possibility that the evidence of alibi is true". Further, as has been held by another Trial Chamber, a finding that an alibi is false does not in itself "establish the opposite to what it asserts". The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment.[164]

65. When evaluating Haradin Bala's alibi evidence, the Trial Chamber observed that "the testimony of most of the witnesses for the Defence for Haradin Bala does not necessarily negate the evidence that Haradin Bala remained in Llapushnik/Lapušnik after the end of May."[165] The use of the phrase "to negate the evidence" could be read in the sense that the Trial Chamber required Haradin Bala to negate the Prosecution evidence that Haradin Bala remained in Llapushnik/Lapušnik after the end of May 1998, thus effectively putting on Haradin Bala the burden of proving his alibi. However, the Trial Chamber accurately stated that the Prosecution had to eliminate any reasonable possibility that the evidence of alibi is true. Thus, the Appeals Chamber finds that when the Trial Chamber held that the alibi evidence did not "negate the evidence" of the Prosecution, it was not stating a legal requirement. Indeed, it was rather explaining the reasons why it did not find that Haradin Bala's alibi raised a reasonable doubt in the Prosecution's case. The Trial Chamber made it clear that it rejected Haradin Bala's alibi evidence after having considered the evidence as a whole:

> The evidence relevant to whether it has been established that the Accused Haradin Bala was a KLA guard in the prison camp at Llapushnik/Lapusnik in the period relevant to the Indictment, especially that relating to identification by victims and others, the alibi and the health of Haradin Bala, having been weighed both separately and in combination, and having regard to all the circumstances, the Chamber is persuaded, and finds, that the Accused Haradin Bala was indeed the KLA soldier and prison guard known as Shala who was active in the KLA prison camp in Llapushnik/Lapusnik between 9 May 1998 and 25 or 26 July 1998.[166]

Hence, Haradin Bala does not show that the Trial Chamber erred in law when assessing his alibi.

(c) Alleged factual errors in assessing alibi evidence

66. The Appeals Chamber further finds that the Trial Chamber did not err in its factual findings with respect to the date of Haradin Bala's arrival to Llapushnik/Lapušnik, his departure from Llapushnik/Lapušnik, and the date Dr. Zeqir Gashi's clinic was opened there.

[164] Trial Judgement, para. 11, citing *Vasiljević* Trial Judgement, para. 15, fn. 7.
[165] Trial Judgement, para. 647.
[166] Trial Judgement, para. 649.

67. Haradin Bala submits that the Trial Chamber attached too much weight to the discrepancy between his unsworn statement and the testimony of other Defence witnesses concerning the date of his arrival in Llapushnik/Lapušnik, even though the difference was only one or two days. As to his departure from Llapushnik/Lapušnik, Haradin Bala argues that the Trial Chamber erroneously found an inconsistency between his unsworn statement saying that he left Llapushnik/Lapušnik after two weeks, and Defence Witness Elmi Sopi's evidence that Haradin Bala left after the fighting on 28 May 1998.[167] Haradin Bala also argues that the Trial Chamber assessed the evidence differently when favourable to the Prosecution than when favourable to the Defence, because it did not attach critical significance to the discrepancy between the evidence of Prosecution witness Dr. Zeqir Gashi, who testified that the health clinic opened in the beginning of June 1998 and that Haradin Bala visited his clinic on two occasions thereafter, and the evidence of Elmi Sopi who testified that Haradin Bala did not come back to Llapushnik/Lapušnik after the end of May 1998.[168]

68. The Appeals Chamber finds that the Trial Chamber's considerations concerning the inconsistent evidence on the date of Haradin Bala's arrival do not reveal any error on the part of the Trial Chamber. With respect to the date of his departure from Llapushnik/Lapušnik, the abovementioned inconsistencies do not render unreasonable the Trial Chamber's finding that Haradin Bala remained in Llapushnik/Lapušnik after the end of May, in particular in light of all the evidence establishing his presence in the prison camp provided by witnesses who were detainees after May 1998.[169] The Appeals Chamber also notes that the witnesses on whom the Defence relied in making its case that Haradin Bala left Llapushnik/Lapušnik for Luzhnice/Luznica at the end of May 1998[170] gave no evidence of actually seeing him in Luzhnice/Luznica at that time.[171]

69. The Appeals Chamber also finds no error in the Trial Chamber's finding that Dr. Zeqir Gashi's clinic was opened in Llapushnik/Lapušnik on 31 May 1998.[172] The Trial Chamber considered the evidence of Dr. Gashi[173] together with evidence from Ferat Sopi and Exhibit P217[174] and it was reasonable for the Trial Chamber to find, in light of all of this evidence, that the clinic was opened on 31 May 1998.

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[167] Bala Appeal Brief, paras 189-194, with reference to Trial Judgement, paras 636-637.
[168] Bala Appeal Brief, paras 197-198, with reference to Trial Judgement, para. 645.
[169] *See* Trial Judgement, para. 647.
[170] Trial Judgement, para. 637; Defence Final Brief, para. 835.
[171] Trial Judgement, para. 639. *See also ibid.*, paras 647, 640.
[172] Trial Judgement, para. 645.
[173] Dr. Zeqir Gashi, T. 5603-5604 (11.4.2005), T. 5642-5645 (11.4.2005), T. 5654-5655 (11.4.2005). Ex. DB7 "92bis statement of Howard Tucker", para 10.
[174] Trial Judgement, paras 644-645; ex. P217 "List of Administered Injections". *See also* Ferat Sopi, T. 7051-7052 (9.6.2005).

70. As to the Trial Chamber's observation that Elmi Sopi's testimony "is not seriously different" from its finding that Dr. Gashi's clinic opened on 31 May 1998,[175] the Appeals Chamber is satisfied that the Trial Chamber meant to refer to the evidence of Ferat Sopi and not Elmi Sopi.[176] Having established that there was a typographical error, the Appeals Chamber is satisfied that the Trial Chamber reasonably found that Ferat Sopi's testimony was not "seriously different" from its finding that Dr. Gashi's clinic opened on 31 May 1998. Furthermore, Haradin Bala has not demonstrated that this error had any impact on the verdict.

71. The Appeals Chamber finds that the factual challenges contained in this ground of appeal are without merit.

2. Haradin Bala's decision not to give sworn evidence

72. Haradin Bala alleges that the Trial Chamber erred in law by holding his decision not to give sworn evidence against him. The Trial Chamber reasoned that "the absence of sworn evidence from the Accused [...] has the effect [of] depriving the Defence for Haradin Bala of evidence which could have provided a sure and convincing foundation for the alibi".[177] Haradin Bala submits that this reasoning reveals that the Trial Chamber held his decision not to testify against him.[178] He also claims that the Trial Chamber used a double standard in assessing his unsworn statement.[179] He asserts that the Trial Chamber made it clear that his unsworn statement was not evidence and so not a convincing foundation for an alibi but it then used the unsworn statement as evidence against him on a number of occasions. He argues that the Trial Chamber should have either considered the unsworn statement as evidence and explained how much weight it would attach to it, or disregarded it as evidence in its entirety. Relying on the *Akayesu* Trial Judgement, Haradin Bala also submits that the probative value attached to an unsworn statement should be less than the value attached to sworn evidence that is subject to cross-examination. Thus, Haradin Bala argues that the Trial Chamber erred in using his unsworn statement to discount sworn witness testimony that supported his alibi defence.[180]

73. The Prosecution responds that the Trial Chamber did in fact treat Haradin Bala's unsworn statement as evidence, in accordance with Rule 84*bis* of the Rules. This Rule reads that "[t]he Trial Chamber shall decide on the probative value, if any, of the statement." Thus, the Prosecution submits that "[t]here would [...] be no need to decide the probative value of anything that is not

[175] *Ibid.*
[176] *See* Trial Judgement, paras 644, 647.
[177] Trial Judgement, para. 635.
[178] Bala Appeal Brief, para. 234.
[179] Bala Appeal Brief, paras 235-239.

evidence."[181] The Prosecution also argues that the Trial Chamber did not apply a double standard in assessing the unsworn statement; rather, it was entitled to attach weight to some parts of the statement but not to others.[182] Furthermore, the Prosecution contends that Haradin Bala's reliance on the *Akayesu* Trial Judgement is misplaced, as the Trial Chamber's finding in that case related to prior inconsistent statements of the same witness who later gave sworn, in-court testimony. Because the issue in this case concerns discrepancies between Haradin Bala's unsworn statement and the sworn, in-court testimonies of other witnesses, the Prosecution submits that the *Akayesu* Trial Judgement is not instructive.[183]

74. The Appeals Chamber observes, as a preliminary matter, that Haradin Bala does not explain how the alleged legal error invalidates the judgement and merely argues that the Trial Chamber's assessment of his unsworn statement was improper.[184] However, the Appeals Chamber acknowledges that the Trial Chamber's assessment of Haradin Bala's unsworn statement had some bearing on its decision to reject his alibi defence and a different assessment may have changed the outcome of the Judgement. The Appeals Chamber addresses this sub-ground of appeal accordingly.[185]

75. Rule 84*bis*(A) of the Rules provides that an accused may elect to make an opening statement which shall not be sworn or subject to cross-examination. In making a statement, whether sworn or unsworn, an accused accepts that the Trial Chamber "shall decide on the probative value, if any, of the statement" under Rule 84*bis*(B) of the Rules. The assessment of unsworn statements under Rule 84*bis* of the Rules is, thus, a discretionary function of the Trial Chamber. Such a statement is generally given somewhat less weight than testimony given under oath, which is subject to cross-examination and inquiry from the Bench.[186]

76. The Appeals Chamber is not satisfied that the Trial Chamber held against Haradin Bala his decision not to testify. The Trial Chamber specifically stated that "Haradin Bala elected not to give sworn evidence. This is his legal right and no finding adverse to him may be made because of this."[187] In its discussion of his alibi, the Trial Chamber stated that the absence of sworn evidence from the Accused had the effect of "depriving the Defence for Haradin Bala of evidence which could have provided a sure and convincing foundation for the alibi, and for the contention about his

[180] Bala Appeal Brief, para. 243.
[181] Prosecution Response Brief, para. 4.24. *See also* AT 66-67 (5.6.2007).
[182] Prosecution Response Brief, para. 4.28, citing *Kvočka et al.* Trial Judgement, paras 618, 623, 612, 614, and 678-681; *Kvočka et al.* Appeal Judgement, paras 535-540, 581-585.
[183] Prosecution Response Brief, para. 4.29.
[184] Bala Appeal Brief, para. 244.
[185] *Kvočka* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.
[186] *See Blagojević and Jokić*, Decision on Vidoje Blagojević's Oral Request, 30 July 2004, p. 7.
[187] Trial Judgement, para. 635.

health."[188] This statement in no way suggests that Haradin Bala's decision not to testify was held against him. It merely represents the Trial Chamber's view that the evidence before it was insufficient for the Trial Chamber to find that Haradin Bala's alibi and health defences raised a reasonable doubt that he had committed the crimes for which he was found guilty.[189] Accordingly, Haradin Bala has not shown that the Trial Chamber held against him his decision not to testify.

77. The Appeals Chamber also does not accept Haradin Bala's argument that the Trial Chamber used a double standard in assessing his unsworn statement by discounting it as evidence on one occasion and using it as evidence against him on other occasions. Haradin Bala claims that "the Trial Chamber made it clear that the unsworn statement was not evidence"[190] when it stated that the "absence of sworn evidence from the Accused [...] has the effect of depriving the Defence for Haradin Bala of evidence which could have provided a sure and convincing foundation for the alibi".[191] In the context of the Trial Judgement, however, it is clear that the Trial Chamber did treat the unsworn statement as evidence. Immediately following this challenged statement, the Trial Judgement states that "the Defence for Haradin Bala must rely on an unsworn opening statement and *other* evidence […]."[192] In the following paragraphs, the Trial Chamber assessed Haradin Bala's statement together with the testimonies of witnesses under oath.[193] The Trial Chamber, thus, did not employ a double standard in assessing Haradin Bala's unsworn statement.

78. Haradin Bala further claims that the Trial Chamber erred in law by weighing his unsworn statement against the testimonies of witnesses made under oath that supported his alibi defence. The Appeals Chamber finds that the wording of Rule 84*bis* of the Rules leaves to the discretion of the Trial Chamber the determination of the probative value of an unsworn statement. The Appeals Chamber finds that Haradin Bala fails to show that the Trial Chamber abused its discretion in comparing the content of his unsworn statement with evidence offered by other witnesses for the defence, in particular Elmi Sopi, Avdullah Puka and Ruzhdi Karpuzi.[194]

79. Thus, the Trial Chamber did not err in its evaluation of Haradin Bala's unsworn statement.

[188] *Ibid.*
[189] *Ibid.*
[190] Bala Appeal Brief, para. 235.
[191] Trial Judgement, para. 635.
[192] *Ibid.* (emphasis added).
[193] Trial Judgement, paras 636-637.
[194] Trial Judgement, para. 647.

3. Whether the Trial Chamber failed to provide a reasoned opinion for the rejection of Haradin Bala's alibi

80. Haradin Bala submits that the Trial Chamber failed to provide a reasoned opinion for its rejection of his alibi that he was not in Llapushnik/Lapušnik in June and July of 1998.[195] The Prosecution claims this assertion should be summarily rejected as unsubstantiated.[196]

81. The fair trial requirements of the Statute include the right of each accused to a reasoned opinion by the Trial Chamber under Article 23 of the Statute and Rule 98*ter*(C) of the Rules.[197] A reasoned opinion ensures that the accused can exercise his or her right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 25 to review these appeals.[198] The reasoned opinion requirement, however, relates to a Trial Chamber's judgement rather than to each and every submission made at trial.[199]

82. The Trial Chamber, in a nine-page section of the Trial Judgement entitled "Haradin Bala's alibi", thoroughly considered Haradin Bala's alibi evidence, first addressing the alibi that he was not in the crime area when the crimes were committed[200] and then addressing the alibi that he was physically incapable of committing these crimes.[201] It described his submissions;[202] assessed the evidence presented by witnesses Kadri Dugolli, Elmi Sopi, Shefki Bala, Skender Bylykbaski, Avdullah Puka, Dr. Zequir Gashi, Ferat Sopi, and Ruzhdi Karpuzi; explained whether it found the witnesses' testimony credible and persuasive and, if not, why not; and pointed out inconsistencies.[203] Thus, the Trial Judgement offers a reasoned opinion for its rejection of Haradin Bala's alibi.

83. Consequently, Haradin Bala's sixth ground of appeal is dismissed.

E. Haradin Bala's eighth ground of appeal: alleged error in finding Witnesses L04 and L06 credible

84. Haradin Bala submits that the Trial Chamber erred in fact when it found Witnesses L04 and L06 to be credible as there were obvious inconsistencies between their 9 January 2005 post-

[195] Bala Appeal Brief, para. 226.
[196] Prosecution Response Brief, para. 4.19.
[197] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41.
[198] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kunarac et al.* Appeal Judgement, para. 41.
[199] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23.
[200] Trial Judgement, paras 634-647.
[201] Trial Judgement, paras 648-649.
[202] Trial Judgement, paras 634, 636, 639, 642, 643, 646, 648.
[203] *See Čelebići* Appeal Judgement, para. 581.

testimony interviews given to the Prosecution and their 1998 statements made to the Serbian authorities.[204] Specifically, he claims that both Witnesses L04 and L06 "blatantly lied" in the 9 January 2005 interviews when they stated that their 1998 interviews with the Serbian authorities had lasted not more than ten minutes, as records of the interviews show that each interview lasted three hours.[205] Haradin Bala argues that the Trial Chamber should have given their interviews no evidentiary value whatsoever or, at least, should have explained in the Trial Judgement why it considered Witnesses L04 and L06 credible despite their untenable and identical explanations to the Prosecution.[206] Last, Haradin Bala submits that the Appeals Chamber is in an equal position to assess this question of credibility as the relevant evidence for this appeal was disclosed after the witnesses had testified in court.[207] Haradin Bala claims that a miscarriage of justice has occurred since Witness L04's and L06's testimonies were relied upon to establish his guilt for cruel treatment by omission for the maintenance and enforcement of detention conditions, for aiding and abetting the cruel treatment of Witness L04, and for cruel treatment for forcing Witnesses L04, L10 and a third individual to bury three persons, including Agim Ademi.[208]

85. The Prosecution responds that these arguments were already made in Haradin Bala's Final Trial Brief, and that they do not demonstrate an error of fact.[209] It states that the Trial Chamber did consider exhibits P203 and P204, the relevant exhibits of Witness L04's and L06's 1998 interviews with the Serbian authorities.[210] It was reasonable for the Trial Chamber to have found Witnesses L04 and L06 credible despite evidence that they had each changed their story about the length of their previous interviews.[211] As the credibility of witnesses must be balanced against the trial record as a whole, the Trial Chamber is better placed than the Appeals Chamber to assess the credibility of these two witnesses.[212] The Trial Chamber did not fail to consider Witness L04's and L06's statements about the 1998 interviews,[213] and Haradin Bala has not shown how his convictions would be affected were Witness L04's and L06's testimonies found unreliable.[214]

86. The Appeals Chamber recalls that a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."[215] Such disregard is

[204] Bala Appeal Brief, paras 247-248.
[205] Bala Appeal Brief, para. 248.
[206] Bala Appeal Brief, paras 259-260; Bala Reply Brief, paras 50-52.
[207] Bala Appeal Brief, para. 261; Bala Reply Brief, para. 48.
[208] Bala Appeal Brief, para. 262.
[209] Prosecution Response Brief, paras 5.6, 5.14.
[210] Prosecution Response Brief, para. 5.9.
[211] Prosecution Response Brief, paras 5.9, 5.23-5.29.
[212] Prosecution Response Brief, para. 5.11.
[213] Prosecution Response Brief, paras 5.15-5.22.
[214] Prosecution Response Brief, paras 5.30–5.31.
[215] *Kvočka et al.* Appeal Judgement, para. 23.

shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[216]

87. The Appeals Chamber notes that Witness L04's and Witness L06's 1998 interviews with the Serbian authorities were disclosed to Haradin Bala on 29 December 2004, and the statements given to the Prosecution on 9 January 2005[217] were disclosed on 1 February 2005. Although the witnesses had already testified, the parties agreed to submit the 1998 interview with the Serbian authorities and the conflicting 2005 interview with the Prosecution as evidence, rather than re-calling the witnesses.[218] Both Witnesses L04 and L06 stated in their 2005 interviews to the Prosecution that their 1998 interviews had lasted about ten minutes, although the information summary of the 1998 interviews with the Serbian authorities shows that they each lasted three hours. The Trial Chamber discussed the credibility of both Witnesses L04 and L06, but did not directly address this clear and identical discrepancy in their respective stories about the extent of their 1998 interviews.[219]

88. Nevertheless, the Appeals Chamber will not disturb the Trial Chamber's findings on the credibility of Witnesses L04 and L06. The evidence on the length of the 1998 interviews, although not cited by the Trial Chamber, does not directly impact upon the Trial Chamber's reasoning regarding the crimes in question, but instead impacts upon the general question of the credibility of the two witnesses. The Trial Chamber found the witnesses' testimonies with regard to Haradin Bala to be honest and credible[220] after having carefully examined their testimonies and numerous factors touching upon their credibility. In particular, the Trial Chamber extensively and carefully discussed Witness L06's 1998 interview in relation to the identification of Haradin Bala, finding that "it will be approached with caution".[221] As to Witness L04, the Trial Chamber held that it "was impressed by the demeanour of L04 as he gave this evidence and accepts his account to be honest and reliable".[222] In this context, the Appeals Chamber recalls that "it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness."[223] Taking into consideration the above findings on the credibility of Witnesses L04 and L06, the Appeals Chamber finds that the Trial Chamber reasonably accepted the honesty of their testimony, in particular in light of the evidence of Witnesses L07, L10, L12, L96 and Vojko and Ivan Bakrač, which corroborated much of it. Hence, the Appeals Chamber concludes that a reasonable trier of fact could have found Witnesses L04 and

[216] *Ibid.*
[217] Ex. P203, "(2) ICTY statement of L04 of 9 January 2005"; ex. P204, "(2) ICTY statement of L06 of 9 January 2005".
[218] Prosecution Response Brief, paras 5.12-5.13.
[219] Trial Judgement, paras 606, 607, 614, 615.
[220] Witness L04: Trial Judgement, paras 398, 407, 627, 631; Witness L06: Trial Judgement, paras 615, 631.
[221] Trial Judgement, para. 615.
[222] Trial Judgement, para. 398.

L06 credible despite the claim with respect to the length of their interviews with the Serbian authorities in 1998.

89. Haradin Bala's eighth ground of appeal is thus dismissed.

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[223] *Kordić and Čerkez* Appeal Judgement, para. 21, fn 12.

IV. THE PROSECUTION'S APPEAL REGARDING HARADIN BALA

A. First ground of appeal: Haradin Bala's alleged criminal responsibility as a participant in a joint criminal enterprise in the Llapushnik/Lapušnik prison camp

90. The Prosecution submits in relation to all Accused that the Trial Chamber erroneously failed to find that all three were members of a joint criminal enterprise and thus were individually responsible for the crimes committed in furtherance of the system of ill-treatment in the Llapushnik/Lapušnik prison camp, and for those which were reasonably foreseeable as a possible consequence of this system.[224]

91. The Prosecution argues that the Trial Chamber erred both in law and in fact by finding that it was not satisfied that "either the existence or the scope of the alleged joint criminal enterprise" in the Llapushnik/Lapušnik prison camp was established.[225] The Prosecution argues that all requirements for the systemic form of a joint criminal enterprise were fulfilled, namely:[226]

(1) the prison camp was run - and the victims were detained - by the KLA;

(2) the conditions in the camp amounted to the crime of cruel treatment, and accordingly there existed a common plan (amounting to or involving the commission of cruel treatment and torture) and a system of ill-treatment; and

(3) the KLA soldiers in the camp who detained people must have known of the conditions in the camp under which the victims were detained, and since they intended these conditions, they intended to further the system of ill-treatment.[227]

92. Haradin Bala responds[228] that the Prosecution's arguments have no merit and that the Trial Chamber's finding was correct and should be upheld.[229] He claims further that the Prosecution has failed to meet its burden to establish that the Trial Chamber engaged in any legal or factual errors or that even if some factual errors can be identified, that they were so prejudicial to the outcome as to

[224] Prosecution Appeal Brief, para. 1.6.
[225] Prosecution Appeal Brief, para. 2.230, with reference to Trial Judgement, paras 666-669.
[226] *See also* AT 128 (6.6.2007).
[227] Prosecution Appeal Brief, paras 2.231, 2.295, 2.301; *see also* AT 137-138 (6.6.2007)].
[228] In addition to his own submissions, Haradin Bala adopts, by reference, the arguments set forth by Fatmir Limaj and Isak Musliu regarding joint criminal enterprise to the extent they apply to him and entitle him to relief (Bala Response Brief, para. 1, fn. 1).
[229] Bala Response Brief, para. 4.

constitute a miscarriage of justice.[230] Similarly, the Limaj Defence and the Musliu Defence respond that there is no basis upon which Fatmir Limaj and Isak Musliu could be found to have participated in a joint criminal enterprise, as the Trial Chamber correctly found that they had not planned, instigated, ordered, committed or otherwise aided and abetted any of the crimes charged in the Indictment.[231]

1. Whether the Trial Chamber erred in finding that the members of a joint criminal enterprise were not sufficiently identified

(a) The identification of members of a joint criminal enterprise: alleged error of law

93. The Prosecution submits that the Trial Chamber erred in law by requiring "evidence demonstrating that a group of individuals, whose *identities* could be established at least by reference to their category as a group […] furthered a common plan" as an element necessary to a finding that a joint criminal enterprise existed.[232] The Prosecution claims that members of a joint criminal enterprise need not be identified by name or by membership in any particular group, other than their participation in the group which constituted the joint criminal enterprise and was pled in the Indictment.[233] It submits that in line with the jurisprudence of the International Tribunal, it is only necessary for it to show a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and participation of the accused in the common design.[234]

94. The Prosecution argues that the identification of the joint criminal enterprise members, beyond being members of the joint criminal enterprise, is not an additional element needed to establish joint criminal enterprise liability.[235] It claims that cases the Trial Chamber referred to in this context were concerned with *pleading* joint criminal enterprise and that the Trial Chamber erroneously applied the requirements for pleading as substantive elements for establishing joint criminal enterprise liability.[236] The Prosecution claims further that the Trial Chamber was *not*

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[230] Bala Response Brief, para. 24.
[231] Limaj Response Brief, paras 112-114; Musliu Response Brief, paras 89-91. For Musliu's response, *see also* AT 189-190 (6.6.2007). For the Prosecution's reply, s*ee also* AT 205-206 (6.6.2007).
[232] Prosecution Appeal Brief, para. 2.232, with reference to Trial Judgement, para. 669 (emphasis added). *See also* AT 128-129 (6.6.2007).
[233] Prosecution Appeal Brief, para. 2.232. *See also* AT 130 (6.6.2007).
[234] Prosecution Appeal Brief, para. 2.234. *See also* AT 128-129 (6.6.2007).
[235] Prosecution Appeal Brief, para. 2.235.
[236] Prosecution Appeal Brief, para. 2.236, with reference to *Brdanin* Trial Judgement, para. 346: "[T]he *indictment* must inform the accused, *inter alia*, of the identity of those engaged in the enterprise so far as their identity is known, but at least by reference to their category as a group" (first emphasis added). *Prosecutor v. Milorad Krnojelac*, Case No. 97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16: "[T]he accused must be informed by the *indictment* of […] the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group" (emphasis added).

dissatisfied with the pleading of joint criminal enterprise in the Indictment which sufficiently identified the members of the alleged joint criminal enterprise.[237] It argues further that their identification was not too general and that the cases the Trial Chamber referred to accepted broader or similar identifications.[238]

95. Haradin Bala responds that the Prosecution incorrectly assumes that the Trial Chamber imposed a legally improper element on the concept of joint criminal enterprise; instead, the Trial Chamber sought evidence on the identification of the members of the alleged joint criminal enterprise in order to assess on some objective basis whether a plurality of persons with a common plan existed.[239]

96. Haradin Bala further responds that there is nothing in the Trial Judgement to indicate that the Trial Chamber held that the Indictment was insufficiently pled.[240] What the Trial Chamber found was not a pleading problem, but a deficiency in the evidence offered in support of the allegations made in the Indictment.[241] It held that the evidence adduced at trial "was so general that it cannot provide a sufficient categorisation to identify the participants in the joint criminal enterprise".[242] Further, the Haradin Bala Defence claims that the authorities relied upon by the Prosecution, where other Trial Chambers found that "the identification of the members of the joint criminal enterprise alleged in those cases were sufficiently pled in the Indictment, still required evidence at trial to establish whether or not the identification in the indictment was supported by the evidence at trial".[243]

97. The Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber erred in law when it considered the requirement for identification of the participants in a joint criminal enterprise.

98. At the outset, the Appeals Chamber notes that there is no indication in the Trial Judgement that the Trial Chamber was dissatisfied with the pleading of joint criminal enterprise in the Indictment. Hence, the question of whether the Indictment was insufficiently pled in relation to joint criminal enterprise liability does not arise and will not be considered by the Appeals Chamber.

99. As to the substantive elements for establishing joint criminal enterprise liability, the Trial Judgement's section on the "Law on the forms of liability charged" correctly sets out the

[237] Prosecution Appeal Brief, paras 2.238-2.240.
[238] Prosecution Appeal Brief, paras 2.240-2.242,
[239] Bala Response Brief, paras 26, 31, 34.
[240] Bala Response Brief, para. 32.
[241] Bala Response Brief, para. 33.
[242] Bala Response Brief, para. 33.
[243] Bala Response Brief, para. 33.

requirements for joint criminal enterprise liability as defined in the Tribunal's jurisprudence.[244] When examining the participation of the three Accused in a joint criminal enterprise, the Trial Chamber held that

> [i]n the *absence of evidence* demonstrating that a group of individuals, whose identities could be established at least by reference to their category as a group, in the sense identified in the jurisprudence, furthered a common plan, and, given the *lack of evidence* as to the scope of any such plan, the principal elements of joint criminal enterprise have not been established.[245]

A plain reading of this finding is that the Trial Chamber was not satisfied that the Prosecution had adduced sufficient evidence of the identity of the alleged participants in the joint criminal enterprise to establish a plurality of persons sharing a common plan existed. Thus, the Appeals Chamber is not satisfied that the Trial Chamber applied an erroneously narrow approach to the legal requirement of "identification" as argued by the Prosecution.

(b) The identification of members of a joint criminal enterprise: alleged error of fact

100. In the alternative, the Prosecution argues that the Trial Chamber erred in fact in failing to find that the only reasonable inference from the evidence was that the members of the systemic joint criminal enterprise were sufficiently identified by their category as a group, namely *the KLA soldiers in the Llapushnik/Lapušnik camp*, including the three Accused.[246]

101. The Prosecution submits that the Trial Chamber's own findings support this conclusion. It found that, first, the KLA conducted the prison camp in Llapushnik/Lapušnik and thus accepted that KLA soldiers perpetrated crimes in the camp;[247] second, "the evidence of all witnesses is consistent with respect to the presence of guards in the compound";[248] and, third, at least two guards, Haradin Bala and "Murrizi", were identifiable by name.[249] In relation to "unnamed" perpetrators who committed crimes in the camp, the Prosecution argues that these perpetrators could be identified by their belonging to the group of KLA soldiers in the camp, as the evidence does not support the existence of "rogue elements" or "opportunistic" perpetrators operating in the camp.[250]

102. In its Judgment the Trial Chamber found that "there were a number of people involved in the commission of the criminal acts established in this decision", and that "the evidence could support an inference […] that there must have existed some form of joint criminal enterprise which

[244] Trial Judgement, para. 511.
[245] Trial Judgement, para. 669 (emphasis added).
[246] Prosecution Appeal Brief, paras 2.245, 2.253; Prosecution Reply Brief, paras 4.12-4.15.
[247] Prosecution Appeal Brief, para. 2.246, referring to Trial Judgement, para. 282. *See also* Prosecution Appeal Brief, para. 2.247, referring to Trial Judgement, paras 291, 666; 296-297 (Witness L07); 300 (Witness L10); 310-311 (Witness L04); 336 (Fehmi Xhema).
[248] Prosecution Appeal Brief, para. 2.246, referring to Trial Judgement, para. 276.
[249] Prosecution Appeal Brief, para. 2.246, referring to Trial Judgement, para. 666.

was comprised of persons unknown who were members of the KLA".[251] It also found, however, that there was no "evidence demonstrating that a group of individuals, whose identities could be established at least by reference to their category as a group, in the sense identified in the jurisprudence, furthered a common plan".[252] The Trial Chamber held that it could not determine the identity of the people involved in the operation of the camp, with the exception of Haradin Bala.[253]

103. For the reasons set out below, the Appeals Chamber finds that the Trial Chamber did not err in fact when it found that there was insufficient evidence to identify a plurality of persons who furthered a common plan to commit cruel treatment in the Llapushnik/Lapušnik prison camp.

104. The Trial Chamber found that "[a]ll witnesses testified that the guards in the prison camp were Shala or Shale and Murrizi".[254] Both were found to be KLA soldiers,[255] and the Trial Chamber held that the prison camp was conducted by the KLA and existed for about six weeks.[256] The jurisprudence of the Appeals Chamber provides clear guidance on what constitutes sufficient evidence to establish the identification of participants in a joint criminal enterprise. In *Krnojelac*, the accused was found guilty as a co-perpetrator in a systemic joint criminal enterprise to commit crimes in the KP Dom prison facility in Foča.[257] While the Appeals Chamber found that "[t]he principal perpetrators of the crimes constituting the common purpose […] should […] be identified as precisely as possible",[258] it held that it was sufficient for such an identification to establish that the principal perpetrators were "civilian and military authorities and/or guards and soldiers present at KP Dom".[259] Similarly, in *Vasiljević*, the Appeals Chamber accepted the finding of the Trial Chamber that a joint criminal enterprise to commit persecution existed, although two out of the three participants of the joint criminal enterprise were unidentified men.[260] In *Krstić*, the Appeals Chamber accepted the finding of the Trial Chamber that a joint criminal enterprise to commit genocide existed, although "the Trial Chamber did not identify individual members of the Main Staff of the VRS as the principal participants in the genocidal enterprise".[261] By the same token, the Appeals Chamber held in *Stakić* that the participants in the joint criminal enterprise "included the leaders of political bodies, the army, and the police who held power in the Municipality of

[250] Prosecution Appeal Brief, paras 2.248-2.51; Prosecution Reply Brief, paras 4.16-4.29.
[251] Trial Judgement, para. 666.
[252] Trial Judgement, paras 669, 666.
[253] Trial Judgement, para. 666.
[254] Trial Judgement, para. 276. *See also ibid.*, para. 666.
[255] Trial Judgement, para. 454.
[256] Trial Judgement, para. 282.
[257] *Krnojelac* Appeal Judgement, paras 108-112.
[258] *Krnojelac* Appeal Judgement, para. 116.
[259] *Krnojelac* Appeal Judgement, para. 116.
[260] *Vasiljević* Appeal Judgement, paras 130, 142.
[261] *Krstić* Appeal Judgement, para. 143.

Prijedor", without further identification.[262] In addition, in *Brdanin*, the Appeals Chamber found that while a Chamber must "identify the plurality of persons belonging to the JCE […] it is not necessary to identify by name each of the persons involved".[263] In light of these findings, the Appeals Chamber is satisfied that no reasonable trier of fact could have found that it was impossible "to determine the identity of those involved in the operation of the prison camp, apart from the Accused Haradin Bala".[264] Instead, the only reasonable inference from the evidence and from the above mentioned findings of the Trial Chamber is that the KLA guard known as Murrizi was also identifiable as being involved in the operation of the prison camp together with Haradin Bala.

105. In relation to the question whether other KLA members who committed crimes of cruel treatment and torture in the Llapushnik/Lapušnik prison camp were identified as being involved in the operation of the prison camp, the Trial Chamber held that:

1) Prisoners were beaten by KLA soldiers on a daily basis, mostly at night;[265]

2) Witness L07 was beaten up by a man wearing a mask and "another man in military uniform";[266]

3) Witness L10 was beaten by KLA guards on two occasions;[267]

4) Witness L06 was repeatedly struck on his back with a club by, he said, Ramadan Behluli and beaten on his neck by Ali Gashi, both KLA soldiers;[268] as this was done "for a specific purpose, *i.e.* for punishing him and/or obtaining information concerning so-called spies", the Trial Chamber found that the elements of torture had been satisfied.[269]

5) Witness L04 witnessed other detainees being continuously beaten by KLA soldiers. He was himself mistreated by KLA members, two of whom he said were "Tamuli" and "Qerqiz".[270]

6) Witness L12 was chained to a wall and beaten with a stick by Haradin Bala, whom the witness referred to as "Shala" and who was a KLA soldier;[271] as this was done in order to

[262] *Stakić* Appeal Judgement, para. 69.
[263] *Brdanin* Appeal Judgement, para. 430.
[264] Trial Judgement, para. 666.
[265] Trial Judgement, paras 291, 300, 311, 424.
[266] Trial Judgement, paras 296-297.
[267] Trial Judgement, para. 300.
[268] Trial Judgement, paras 245, 304, 666.
[269] Trial Judgement, paras 304, 306.
[270] Trial Judgement, paras 310-311.
[271] Trial Judgement, paras 315, 649, 658.

obtain information from him, the Trial Chamber found that the elements of torture were made out.[272]

7) Stamen Genov was beaten with rifle butts and kicked by KLA soldiers;[273] in addition, the Trial Chamber found that this was done in order to punish and interrogate him because of his military affiliation. Thus, the elements of torture were found to have been made out.[274]

8) Shaban Hoti was severely beaten and mistreated by KLA soldiers on two days; again, the Trial Chamber found that the elements of torture were established.[275]

It is evident from these findings that KLA soldiers systematically beat detainees, committing the crimes of cruel treatment and torture in the prison camp.

106. With respect to the question whether these KLA soldiers were identifiable as participants in the systemic joint criminal enterprise, however, the Trial Chamber held that

> [w]hile the evidence could support an inference, on one possible view, that there must have existed some form of joint criminal enterprise which was comprised of persons unknown who were members of the KLA, that is so general that it cannot provide a sufficient categorisation to identify the participants in the joint criminal enterprise.[276]

This was based on the Trial Chamber's findings that it could not rule out that persons who were not involved in the operation of the camp, or "opportunistic visitors", committed crimes for personal purposes such as retribution, and not in pursuance of any KLA policy or plan of targeting Serbian civilians and perceived Kosovo Albanian collaborators.[277] That is, the Trial Chamber was not satisfied that the Prosecution had established that Haradin Bala, Murrizi and other KLA soldiers were participants in a systemic joint criminal enterprise, sharing a common plan to target Serbian civilians and perceived Kosovo Albanian collaborators in the prison camp. Whether this finding is one that no reasonable trier could have reached is examined in the following.

(c) Whether the Trial Chamber reasonably found that crimes may have been committed by "opportunistic visitors" who could not be identified as members of a systemic joint criminal enterprise

107. The Prosecution submits that the Trial Chamber erred in law and fact when it found that it "[could not] be ruled out" that "persons involved in the operation of the camp or 'opportunistic

[272] Trial Judgement, paras 316, 318.
[273] Trial Judgement, para. 365.
[274] Trial Judgment, paras 365-366, 373.
[275] Trial Judgement, paras 424-425.
[276] *Ibid.*
[277] Trial Judgement, para. 668.

visitors' to the camp […] for personal reasons, such as revenge, mistreated or killed old enemies [and/or] detained people for reasons other than giving effect to the KLA policy."[278] The Prosecution argues that the Trial Chamber either erred in law – in finding that personal motives exclude a crime being committed in pursuance of a common plan – or erred in fact – in finding that it was reasonably possible that "rogue elements" or "opportunistic visitors" may have used the camp to commit crimes for purely personal motives.[279]

108. As to the alleged error of law, the Prosecution argues that personal motives do not exclude the perpetrator's intention to further a system of ill-treatment, as long as the perpetrator *also* had the intent to further this system of ill-treatment.[280]

109. The Appeals Chamber notes that motive is generally not an element of criminal liability. The Appeals Chamber has repeatedly confirmed the "'inscrutability of motives in criminal law' insofar as liability is concerned, where an intent […] is clear".[281] The *mens rea* of a systemic joint criminal enterprise requires proof of the participant's personal knowledge of the system of ill-treatment, as well as the intent to further this system of ill-treatment.[282]

110. The Appeals Chamber finds, however, that the Trial Chamber did not confuse the notions of motive and intent when it required for the existence of a systemic joint criminal enterprise in the camp that the common plan encompassed the targeting of Serbian civilians and perceived Kosovo Albanian collaborators. While motive is not an element of the *mens rea* of a joint criminal enterprise, the existence - and scope - of a common plan is part of its *actus reus*. Hence, the targeting of these specific groups was part of the *actus reus* of the joint criminal enterprise charged in the Indictment.[283] Consequently, the Trial Chamber could not, and did not, in the Trial Judgement, widen the scope of the common plan to include the commission of crimes against *any* detainee in the camp, regardless of whether this detainee was a Serbian civilian or perceived Kosovo Albanian collaborator.

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[278] Prosecution Appeal Brief, paras 2.254-2.255, with reference to Trial Judgement, paras 667-668.
[279] Prosecution Appeal Brief, para. 2.255. *See also* AT 129, 135-137 and 205-206 (6.6.2007).
[280] Prosecution Appeal Brief, paras 2.256-2.257, with reference to Trial Judgement, para. 668.
[281] *Jelisić* Appeal Judgement, para. 71, reference to *Tadić* Appeal Judgement, para. 269. *See also Kvočka* Appeal Judgement, para. 106. Motive may have a direct impact at sentencing as a mitigating or aggravating circumstance, *Tadić* Appeal Judgement, para. 269.
[282] *Tadić* Appeal Judgement, paras 202, 220, 228.
[283] Similarly, the Appeals Chamber held in *Stakić* that the "common purpose consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats *in order to establish Serbian control* ('Common Purpose')." (*Stakić* Appeal Judgement, para. 73, emphasis added). Consequently, when examining Mr. Stakić's intent to further the Common Purpose, the Appeals Chamber considered the Trial Chamber's findings that Mr. Stakić was working together with other participants in the joint criminal enterprise "to implement the SDS-initiated plan to consolidate Serb authority and power within the municipality", and that "[h]e was aware that he could frustrate the objective of achieving a Serbian municipality […]" (*ibid.*, para. 82).

111. As to the alleged error of fact, the Prosecution argues that the Trial Chamber erred in finding that it could not exclude the possibility that some perpetrators in the camp were driven *exclusively* by personal motives, and that such crimes were not committed in pursuance of a common plan.[284] The Prosecution also submits that according to the Trial Chamber's own findings, the only issue of "personal disputes" alleged by the Defence had no bearing on the events in the camp.[285] When considering these issues, the Appeals Chamber will both examine whether it was reasonable to find that rogue elements *within the KLA* may have committed crimes outside the common plan,[286] and whether it was reasonable to find that "opportunistic visitors" from *outside the KLA* may have come to the camp and committed crimes outside the common plan.[287]

(i) Whether "rogue" KLA members or other "opportunistic visitors" could have committed crimes that would fall outside the common plan

112. The Trial Chamber found that it "is not possible on the available evidence to infer that all the crimes relating to the prison camp were committed by participants in a joint criminal enterprise [because] it is open on the evidence that at the relevant time some KLA members detained people for reasons other than giving effect to the KLA policy of combating collaboration with the Serbian authorities."[288]

113. The Appeals Chamber notes that the Trial Chamber found that "some KLA members" may have detained people for other reasons than "in pursuance of any KLA policy or plan of targeting Serbian civilians and perceived Albanian collaborators."[289] This finding was based on an earlier discussion in which the Trial Chamber had referred to "instances of abductions in which personal revenge of individual KLA members was the motivating factor".[290] Furthermore, the Trial Chamber mentioned the testimony given by Susanne Ringgaard Pedersen, a member of the Kosovo Verification Mission ("KVM") between December 1998 and March 1999, in support of its finding that some "rogue" KLA members may have detained prisoners for personal reasons.[291] The Appeals Chamber notes that in the passage quoted by the Trial Chamber, she was asked whether "KVM received information on abductions by the KLA, *including so-called collaborators*", and whether

Hence, the Common Purpose was not limited to the commission of statutory crimes, but also encompassed the goal that was to be achieved by the commission of these crimes, or, in other words, a motive.

[284] Prosecution Appeal Brief, para. 2.258, with reference to Trial Judgement, paras 667-669.
[285] Prosecution Appeal Brief, para. 2.263, reference to Trial Judgement, paras 31-32, 668.
[286] *See* Trial Judgement, para. 668.
[287] *See* Trial Judgement, para. 667.
[288] Trial Judgement, paras 667-668 (emphasis added). *See also ibid.*, para. 216.
[289] Trial Judgement, para. 668.
[290] Trial Judgement, paras 668 and 216, with reference to *inter alia* Jakub Krasniqi, T. 3441 (14.2.2005).
[291] Trial Judgement, para. 668, fn. 2265.

this was done by "rogue elements" or in pursuit of a "broader policy".[292] She answered that according to the information KVM had at the time, there "were rogue elements and [the KLA] *sometimes found it difficult to control* all instances of personal revenge and cases like that".[293] In addition, witnesses Jan Kickert and Shukri Buja provided evidence on the existence of "rogue KLA members".[294] While Jan Kickert referred to "breakaway KLA factions" in western Kosovo,[295] Shukri Buja testified that he heard about cases where people were arrested or detained as a result of personal revenge in areas where the KLA was in control. He further stated that "[e]specially in July during the offensive there was gossip about these events".[296]

114. Furthermore, the Trial Chamber also considered the testimonies given by Jakub Krasniqi, at that time the spokesman of the KLA,[297] and Peter Bouckaert, at that time a researcher with Human Rights Watch.[298] The Trial Chamber held "that [Peter Bouckaert] never saw anything issued by the KLA which constituted an order to its members to target innocent civilians or to loot or destroy Serbian property."[299] Also, it accepted Jakub Krasniqi's "statement that it was not part of KLA political or military policy to kidnap, torture or murder innocent civilians." On the basis of these testimonies, the Trial Chamber found that "[t]he evidence does not establish, or even indicate, a *general policy* of targeting *civilians as such*, whether Serbian or Kosovo Albanian."[300] Finally, Witness L12 testified that on one occasion he was blindfolded by Haradin Bala and taken to a barn in the prison camp where he was beaten by two women. Arguably, this shows the presence of "opportunistic visitors" in the camp.[301]

115. In light of this evidence, the Appeals Chamber finds that the Trial Chamber did not err in concluding that "it cannot be established with sufficient certainty that these crimes [in the camp] were in fact committed in pursuance of any KLA policy or plan of targeting Serbian civilians and perceived Albanian collaborators".[302]

116. The Prosecution argues further that any member of the systemic joint criminal enterprise who contributed to an "outsider's" crime must be considered as having at the same time committed

[292] Susanne Ringgaard Pedersen, T. 3532 (15.2.2005) (emphasis added).
[293] *Ibid. See also ibid.*, T. 3534 (15.2.2005).
[294] Limaj Defense, Answers to Questions Posed by Appeals Chamber on 30 May 2007, 6 June 2007.
[295] Jan Kickert, T. 676 (23.11.2004).
[296] Shukri Buja, T. 4042-4044 (9.3.2005).
[297] Jakub Krasniqi, T. 3311 (10.2.2005).
[298] Peter Bouckaert, T. 5458 (8.4.2005).
[299] Trial Judgement, para. 215, with reference to Peter Bouckaert, T. 5564-5565 (8.4.2005).
[300] Trial Judgement, para. 215 (emphasis added).
[301] *Kvočka* Appeal Judgement, para. 599. The Appeals Chamber held that while, as a general rule, a participant in a joint criminal enterprise does not have to make a substantial contribution to it, in a "case of 'opportunistic visitors', a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine", *ibid.*

this crime together with the "outsider" in a basic joint criminal enterprise.[303] The Appeals Chamber finds, however, that Haradin Bala was not given adequate notice of such an alternative basic joint criminal enterprise. The Indictment does not allege that he entered into an agreement with any "outsider" to commit a statutory crime,[304] nor was this argued at trial. Hence, the Appeals Chamber does not consider it appropriate to address the merits of this argument. The Prosecution's reference to the Blaškić Appeal Judgement where the Appeals Chamber held that an indictment must plead "the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible",[305] provides no authority in this matter. As the Appeals Chamber also held in Blaškić, "the Prosecution may be required to 'indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged', in other words, to indicate the particular form of participation".[306]

117. As a result, the Trial Chamber reasonably held that it cannot be ruled out that crimes in the camp were committed by "outsiders" who did not share the common plan to target Serbian civilians and perceived Kosovo Albanian collaborators. Therefore, the Appeals Chamber is satisfied that it is a reasonable inference from the evidence that except for the crimes for which Haradin Bala was convicted, the perpetrators of the crimes committed in the camp could not be identified. Hence, with respect to these crimes, the Trial Chamber reasonably held that the perpetrators could not be identified as participants in a systemic joint criminal enterprise.

118. In relation to Haradin Bala's criminal responsibility, the Appeals Chamber does not find it necessary to review whether he was a member of a systemic joint criminal enterprise. This follows from the Appeals Chamber finding that the Trial Chamber's inference from the evidence that unidentified "outsiders" committed crimes in the camp was not unreasonable.[307] Accordingly, whether or not Haradin Bala was a member of a joint criminal enterprise, and whether or not such an enterprise existed at all, is irrelevant to his criminal responsibility for the crimes of "outsiders".[308]

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[302] Trial Judgement, para. 668.
[303] Prosecution Appeal Brief, para. 2.276.
[304] *See*, in particular, Indictment, paras 9, 13.
[305] Prosecution Reply Brief, para. 4.34, with reference to *Blaškić* Appeal Judgement, para. 210, and the *Kvočka* case where there was no pleading of Žigić's acts as being attributable to Kvočka who was nevertheless found liable for them.
[306] *Blaškić* Appeal Judgement, para. 212.
[307] As the Appeals Chamber held in *Kvočka et al.*, "it would not be appropriate to hold every visitor to the camp who committed a crime there responsible as a participant in the joint criminal enterprise". *See Kvočka et al.* Appeal Judgement, para. 599.
[308] The Appeals Chamber notes that the perpetrators who committed the crimes to which Haradin Bala aided and abetted – the torture of Witness L12 and an episode of cruel treatment of Witness L04 – could not be identified. Consequently, it cannot be established that these crimes were committed by participants in a systemic joint criminal enterprise.

119. Similarly, the Prosecution's submission that murder was a natural and foreseeable consequence of a systemic joint criminal enterprise[309] does not require the Appeals Chamber to decide whether Haradin Bala was a member of such a systemic joint criminal enterprise. In general, in the case of a third category joint criminal enterprise, the crimes must be committed by members of the joint criminal enterprise.[310] Since the Trial Chamber reasonably held that it could not be established with sufficient certainty that all crimes in the prison camp were committed in pursuance of a common plan, it is a reasonable inference from the evidence that the murders of Fehmi Xhema, Jefta Petković and Agim Ademi under Count 8 of the Indictment[311] were not committed by members of the systemic joint criminal enterprise. Consequently, Haradin Bala could not incur third category joint criminal enterprise responsibility for these murders. In addition, the Appeals Chamber notes that the Prosecution does not argue on appeal that he incurs criminal responsibility for these crimes as an aider and abettor.[312]

120. Furthermore, the Appeals Chamber finds that Haradin Bala, even if he were a member of a systemic joint criminal enterprise, could not be convicted for having used "outsiders" to commit crimes in the camp. In this context, the Appeals Chamber recalls its finding in *Brđanin* that

> to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[313]

The Appeals Chamber notes, however, that it was neither argued at trial nor on appeal whether Haradin Bala could incur systemic joint criminal enterprise liability for crimes committed by non-members of the enterprise. Furthermore, the Appeals Chamber recalls its finding in *Brdanin* that it would be unfair to enter new convictions in that case on the basis that principal perpetrators do not need to be members of the joint criminal enterprise, as this was not litigated at trial.[314] This reasoning also applies in the present case.

(ii) Whether Haradin Bala would incur criminal responsibility for the crimes committed by "opportunistic visitors" as an aider and abettor

[309] Prosecution Appeal Brief, paras 2.290(a)(iv), 3.157 and 4.7.
[310] *See Tadić* Appeal Judgement, para. 220.
[311] Indictment, paras 8, 28, 31-32 and Annex II. Count 8 also encompassed the alleged murder of Zvonko Marinković and Vesel Ahmeti. The Trial Chamber found, however, that the elements of murder had not been established in relation to both of them.
[312] Prosecution Appeal Brief, para. 4.12.
[313] *Brdanin* Appeal Judgement, para. 413.
[314] *Brdanin* Appeal Judgement, para. 361.

121. In the alternative to Haradin Bala's criminal responsibility as a member of the systemic joint criminal enterprise, the Prosecution submits that he aided and abetted the cruel treatment and torture of detainees in the prison camp.[315]

122. The Appeals Chamber notes that the Indictment charges Haradin Bala with criminal responsibility under Article 7(1) of the Statute for having, *inter alia*, aided and abetted in the commission of these crimes.[316] This form of participation has been litigated at trial and the Trial Chamber found Haradin Bala guilty of having aided and abetted the torture of Witness L12 and an incident of cruel treatment of Witness L04. However, the Trial Chamber did not find him criminally responsible for having aided and abetted any other incident of cruel treatment or torture.[317]

123. The Appeals Chamber is not satisfied, however, that it is the only reasonable inference from the evidence that, in addition to the convictions for aiding and abetting already entered by the Trial Chamber, Haradin Bala incurs criminal responsibility for having aided and abetted the other instances of cruel treatment and torture of detainees in the Llapushnik/Lapušnik prison camp. While the findings of the Trial Chamber show that Haradin Bala played a pivotal role in the functioning of the prison camp,[318] it was open for a trier of fact to conclude that the evidence did not show beyond a reasonable doubt that Haradin Bala knowingly provided substantial assistance as an aider and abettor to each act of cruel treatment or torture in the prison camp. Apart from the evidence in relation to Haradin Bala's participation as a committer or an aider and abettor in specific incidents of cruel treatment and torture, which the Trial Chamber duly considered in paragraphs 654 through 663 of the Trial Judgement, it is a reasonable inference from the evidence to find that Haradin Bala did not provide substantial assistance with respect to other crimes.

2. Conclusion

124. Consequently, the Prosecution's first ground of appeal is rejected in its entirety.

B. Second ground of appeal: Sentence

125. In the alternative to its first ground of appeal, the Prosecution argues that the Trial Chamber erred in exercising its sentencing discretion by sentencing Haradin Bala to the manifestly inadequate sentence of 13 years of imprisonment.[319] The Prosecution argues that the Trial Chamber's error was three-fold. First, the sentence does not reflect the gravity of Haradin Bala's

[315] Prosecution Appeal Brief, para. 4.12.
[316] Indictment, para. 13.
[317] Trial Judgement, paras 653-663.
[318] Trial Judgement, paras 247, 251, 276 and 652.
[319] Prosecution Appeal Brief, para. 4.15.

crimes.[320] Second, the Trial Chamber erred in its assessment of mitigating and aggravating circumstances.[321] Third, the sentence is manifestly inadequate compared to sentences imposed in similar cases.[322] Consequently, the Prosecution requests that a higher sentence be imposed upon Haradin Bala.[323]

1. Standard for appellate review on sentencing

126. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber obliging it to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[324]

127. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[325] Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[326] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[327] It is for the appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[328]

128. To show that the Trial Chamber committed a discernible error in exercising its discretion, "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[329]

[320] Prosecution Appeal Brief, paras 4.20-4.36.
[321] Prosecution Appeal Brief, paras 4.20, 4.37-4.43.
[322] Prosecution Appeal Brief, paras 4.20, 4.44-4.49.
[323] Prosecution Appeal Brief, para. 4.50.
[324] *Galić* Appeal Judgement, para. 392, with further references.
[325] *Ibid.*, para. 393, with further references.
[326] *Ibid.*, with further references.
[327] *Ibid.*, with further references.
[328] *Ibid.*, with further references.
[329] *Ibid.*, para. 394, with further references.

2. Alleged error in failing to properly consider the gravity of Haradin Bala's crimes

129. The Prosecution submits that the Trial Chamber failed to give sufficient weight to the gravity of Haradin Bala's crimes and his role in the commission of these crimes.[330] In particular, the Trial Chamber allegedly erred when determining the inherent seriousness of the crimes for which Haradin Bala was convicted by drawing a distinction favourable to Haradin Bala between his conduct and other "more violent" crimes committed by others.[331] Furthermore, the Prosecution argues that the Trial Chamber erred by giving insufficient weight to Haradin Bala's role as a committer or as an aider of the crimes for which he was convicted.[332] In addition, the Trial Chamber allegedly erred by giving undue weight to its finding that in relation to the Berishe/Beriša Mountains murders, Haradin Bala was acting under orders from a higher authority,[333] and by considering the absence of a sadistic motive in mitigation.[334]

130. Haradin Bala responds that the Trial Chamber correctly determined the gravity of the crimes for which he was convicted, in particular their inherent seriousness and the form and degree of his participation in them as well as the mitigating effect of the absence of a sadistic motive.[335]

131. The Appeals Chamber is satisfied that the Trial Chamber did not err in considering that in comparison to the crimes for which Haradin Bala was convicted, "other KLA members were involved [in] episodes of more violent mistreatment of detainees".[336] The Trial Chamber specified this comparison by stating that Haradin Bala's "role was often as a mere attendant, apparently acting at the bidding of others".[337] The Prosecution did not show that such comparison constitutes a discernible error in sentencing.

132. In relation to the Prosecution's submission that the Trial Chamber gave insufficient weight to Haradin Bala's role as a committer or aider and abettor in the crimes, the Appeals Chamber recalls that Trial Chambers are vested with a broad discretion in determining an appropriate sentence. The mere argument that the Trial Chamber gave insufficient weight to Haradin Bala's role as a committer or aider and abettor does not show that the Trial Chamber ventured outside its sentencing discretion. The Prosecution does not show that the Trial Chamber gave weight to extraneous or irrelevant considerations in this respect, or failed to give sufficient weight to relevant considerations, or made a clear error as to the facts upon which it exercised its discretion or that the

[330] Prosecution Appeal Brief, paras 4.21-4.36. *See also* AT 139-141 (6.6.2007).
[331] Prosecution Appeal Brief, paras 4.22-4.26.
[332] Prosecution Appeal Brief, paras 4.27-4.32.
[333] Prosecution Appeal Brief, paras 4.27, 4.33.
[334] Prosecution Appeal Brief, paras 4.27, 4.34-4.36.
[335] Bala Response Brief, paras 93-120.
[336] Trial Judgement, para. 726.

Trial Chamber's decision was so unreasonable or plainly unjust that it can be inferred that the Trial Chamber must have failed to exercise its discretion properly.

133. The Prosecution further argues that in assessing the gravity of Haradin Bala's crimes, the Trial Chamber erred by placing too much weight on the mitigating claim of acting under orders and the absence of a sadistic motive. The Appeals Chamber recalls that in assessing the gravity of a crime, "a Trial Chamber must take into account the inherent gravity of the crime and the criminal conduct of the accused, the determination of which requires a *consideration of the particular circumstances of the case and the crimes for which the accused was convicted* […]".[338] The Appeals Chamber notes that the fact of acting under orders and the absence of a sadistic motive was not considered by the Trial Chamber in the section on mitigating circumstances. Instead, both factors were taken into account as particular circumstances when assessing the gravity of the crimes. The Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber committed a discernible error in this respect.

3. Comparison with similar cases

134. The Prosecution alleges that Haradin Bala's sentence is manifestly inadequate when compared to the sentences imposed on Esad Landžo (15 years), Duško Tadić (20 years), Zlatko Aleksovski (seven years) and Mitar Vasiljević (15 years).[339] Haradin Bala responds that the Trial Chamber did not err in its detailed comparative analysis of the facts and circumstances of prison camp related crimes, which were similar to those in the present case.[340]

135. The Appeals Chamber recalls its findings in *Dragan Nikolić* on the question of guidance that may be provided by previous sentences rendered before the International Tribunal:

> The guidance that may be provided by previous sentences rendered by the International Tribunal and the ICTR is not only "very limited" but is also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence. The reason for this is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances, when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime, with due regard to the entirety of the case, as the triers of fact. The Appeals Chamber recalls that it does not operate as a second Trial Chamber conducting a trial de novo, and that it will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion.[341]

[337] Trial Judgement, para. 726.
[338] *Galić* Appeal Judgement, para. 409.
[339] Prosecution Appeal Brief, paras 4.44-4.49; AT 140 (6.6.2007).
[340] Bala Response Brief, paras 129-133.
[341] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19 (internal quotations omitted).

136. The Trial Chamber explicitly referred to the sentences imposed on Esad Landžo and Duško Tadić.[342] The Appeals Chamber does not find the Prosecution's attempts to show a discernible error in the Trial Chamber's comparison of Haradin Bala's case with that of the other two to be compelling. With respect to Esad Landžo, the Appeals Chamber notes that the *Čelebići* Trial Chamber found that his crimes – *inter alia* three murders as crimes against humanity - were characterised "by substantial pain, suffering and injury" inflicted by him on the victims.[343] Furthermore, the offences were described as having been committed with "savagery" and Esad Landžo was found to have displayed "particularly sadistic tendencies",[344] *inter alia* by pinning a metal badge to the head of a victim who was unable to walk and who died a few hours later as a result of his injuries.[345] The Appeals Chamber recalls that the Trial Chamber explicitly referred to the particularly heinous nature of the crimes committed by Esad Landžo and that it considered the absence of a sadistic motive in Haradin Bala's crimes.[346] Consequently, the Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber erred when assessing Haradin Bala's sentence in comparison with that of Esad Landžo.

137. With respect to the sentence imposed on Duško Tadić, the Trial Chamber considered the underlying factual and legal allegations of that case and took into account that he was sentenced to 20 years of imprisonment for committing and aiding and abetting cruel treatment, inhumane acts, persecutions, torture, wilfully causing great suffering or serious injury to body or health, and murder under Articles 2, 3 and 5 of the Statute.[347] The Appeals Chamber finds that the convictions against Duško Tadić are sufficiently dissimilar to those entered against Haradin Bala to find that the Trial Chamber did not err when comparing Duško Tadić's sentence with that of Haradin Bala.

138. The Prosecution further argues that the Trial Chamber erroneously referred to the sentence of seven years of imprisonment imposed on Zlatko Aleksovski.[348] When referring to this sentence, the Trial Chamber stated that "[i]t is significant, however, that there was no conviction for murder in that case."[349] This shows that the Trial Chamber was aware of the substantial dissimilarity between the case of Zlatko Aleksovski and the present case, and the Prosecution has not shown that the Trial Chamber's consideration of Zlatko Aleksovski's sentence was erroneous.

[342] Trial Judgement, para. 735.
[343] *See Čelebići* Appeal Judgement, para. 826.
[344] *Čelebići* Appeal Judgement, para. 826.
[345] *Čelebići* Appeal Judgement, para. 565.
[346] Trial Judgement, para. 736.
[347] Trial Judgement, para. 736.
[348] Prosecution Appeal Brief, para. 4.49.
[349] Trial Judgement, para. 736.

139. Finally, the Prosecution referred to the sentence of 15 years of imprisonment imposed on Mitar Vasiljević which was not considered by the Trial Chamber.[350] The Appeals Chamber notes, however, that Mitar Vasiljević was *inter alia* convicted for having aided and abetted persecutions, a crime against humanity.[351] Hence, the convictions for Mitar Vasiljević and Haradin Bala are significantly different, and the Prosecution does not show that the Trial Chamber committed a discernible error when it failed to compare Haradin Bala's case with that of Mitar Vasiljević.

4. Alleged error in assessing mitigating and aggravating circumstances

140. The Prosecution contends that the Trial Chamber erroneously disregarded the vulnerability of the victims as an aggravating factor, because their status as civilians had already been taken into account in the section on the gravity of the crimes. It argues that a difference exists between the status of a civilian and that of a vulnerable victim.[352] Furthermore, the Prosecution argues that the Trial Chamber erroneously double-counted Haradin Bala's subordinate role when assessing the gravity of the crimes and the mitigating factors.[353]

141. Haradin Bala responds that the Trial Chamber properly took into account the vulnerability of the victims when assessing the gravity of the crimes.[354] He also submits that the Prosecution misinterpreted the Trial Chamber's findings in relation to his low status and that its allegation that the Trial Chamber double-counted this factor is incorrect.[355]

142. The Appeals Chamber finds that the Prosecution misstates the Trial Judgement when it contends that the Trial Chamber's only reason for disregarding the vulnerability of the detainees as an aggravating circumstance was their status as civilians. Instead, the Trial Chamber held that the vulnerability of the detainees should not be considered as an aggravating factor, because it had already been taken into consideration when assessing the gravity of the crimes for which Haradin Bala was convicted.[356] The relevant section in the Trial Judgement reads as follows: "The detainees were, of course, defenceless, as they were captive and at his mercy".[357] Consequently, the Trial Chamber did not err in disregarding the vulnerability of the detainees as an aggravating circumstance.

[350] AT 140 (6.6.2007).
[351] *Vasiljević* Appeal Judgement, Disposition.
[352] Prosecution Appeal Brief, paras 4.37-4.40,
[353] Prosecution Appeal Brief, paras 4.37, 4.41-4.43.
[354] Bala Response Brief, paras 121-123.
[355] Bala Response Brief, paras124-128.
[356] Trial Judgement, para. 731.
[357] Trial Judgement, para. 726.

143. With respect to the Prosecution's submission that Haradin Bala's subordinate role was counted twice when assessing the gravity of the crimes and when determining the factors in mitigation, the Appeals Chamber recalls that double-counting for sentencing purposes is impermissible.[358] The Trial Chamber found in the section on the gravity of the offence that "Haradin Bala was not in a position of command" and that his role was "that of a guard".[359] Similarly, in the section on the "aggravating and mitigating circumstances", the Trial Chamber held that Haradin Bala "was not a person with any commanding or authoritative role in the establishment of the camp, and essentially performed duties assigned to him, as essentially a 'simple man'."[360] Consequently, the Trial Chamber erred in considering twice in mitigation Haradin Bala's subordinate role.

144. When the Trial Chamber has committed a discernible error in the process of determining a sentence, there has, by definition, been an abuse of discretion. In such circumstances, the Appeals Chamber may adjust the sentence imposed by the Trial Chamber without remitting the case.[361] If the error is so slight as to be harmless, the Appeals Chamber may affirm the same sentence as imposed by the Trial Chamber: such is the case here. The Appeals Chamber has carefully reviewed the Trial Chamber's reasoning and believes that the Trial Chamber's double-counting error was, in fact, so insignificant that the Trial Chamber would have arrived at the same sentence of thirteen years even if it had not fallen into error.

5. Conclusion

145. As a result, and despite the error committed by the Trial Chamber in relation to the double-counting of Haradin Bala's subordinate role, the Prosecution's second ground of appeal is rejected in its entirety.

[358] *Deronjić* Judgement on Sentencing Appeal, para. 107.
[359] Trial Judgement, para. 726.
[360] Trial Judgement, para. 732.
[361] *See Krstić* Appeal Judgement, para. 266; *Vasiljević* Appeal Judgement, para. 181; *Krnojelac* Appeal Judgement, paras 263-264.

V. THE PROSECUTION'S APPEAL REGARDING FATMIR LIMAJ

146. The Prosecution submits that the Trial Chamber's acquittal of Fatmir Limaj resulted from its misapplication of the standard of proof.[362] First, the Trial Chamber took an erroneously piecemeal approach to the evaluation of evidence, applying the standard of proof to individual facts that did not have to be proven "beyond reasonable doubt".[363] Second, the Trial Chamber applied a standard of proof that was not "beyond reasonable doubt" but rather one that entertained *any* doubt, including errors not based upon evidence, logic and common sense.[364] The Prosecution argues that these errors led the Trial Chamber to make a substantial number of factual findings that, in view of the totality of the evidence, were wholly unreasonable.[365]

147. In particular, the Prosecution submits that the alleged legal errors led the Trial Chamber to forego factual findings that a reasonable trier of fact should have made, namely: Fatmir Limaj personally participated in the operation of the Llapushnik/Lapušnik prison camp (first ground of appeal);[366] during May through 26 July 1998, Fatmir Limaj held a position of command and control in the KLA, including command of the KLA soldiers in the prison camp (second ground of appeal);[367] and Fatmir Limaj, as a member of a joint criminal enterprise, was individually responsible for all the crimes committed in furtherance of the system of ill-treatment in the prison camp as well as those crimes which were reasonably foreseeable as a possible consequence of that system of ill-treatment (third ground of appeal).[368] As a result, the Prosecution submits that the Appeals Chamber should convict Fatmir Limaj for all the crimes perpetrated in the Llapushnik/Lapušnik prison camp, and sentence him for these offences.[369]

148. Fatmir Limaj responds that the Prosecution's alleged errors are predicated more on the Trial Chamber's factual findings than on specific legal principles and constitute an attempt by the Prosecution to re-litigate its case.[370] He claims that the Prosecution's appeal is "obviously unmeritorious"[371] and that a Trial Chamber is best placed to determine the credibility and reliability

[362] Prosecution Appeal Brief, paras 1.6(a), 2.1-2.29, with reference to Trial Judgement, paras 531-565 and 600. *See also* AT 87-89 (6.6.2007) and AT 195-198 (6.6.2007).
[363] Prosecution Appeal Brief, paras 2.19-2.28.
[364] Prosecution Appeal Brief, paras 2.2, 2.4-2.18, with reference to *Rutaganda* Appeal Judgement, para. 488.
[365] Prosecution Appeal Brief, para.1.4. *See also* AT 89 (6.6.2007).
[366] Prosecution Appeal Brief, paras 1.6(a), 2.3 and 2.29. *See also* AT 87 (6.6.2007).
[367] Prosecution Appeal Brief, paras 1.6(b) and 2.29. *See also* AT 87 (6.6.2007).
[368] Prosecution Appeal Brief, para. 1.6(e).
[369] Prosecution Appeal Brief, para. 1.7.
[370] Limaj Response Brief, para. 17. *See also* AT 142-143 (6.6.2007).
[371] Limaj Response Brief, para. 13.

of live witnesses.[372] Relying on the *Tadić* Appeal Judgement, Fatmir Limaj argues that the Appeals Chamber can only disturb the Trial Chamber's findings and substitute its own findings if the evidence relied upon by the Trial Chamber could not have been accepted by any reasonable trier of fact, or where its evaluation has been "wholly erroneous".[373] He claims that the Prosecution has to establish that the Trial Chamber's decision to acquit was a decision that "no reasonable tribunal of fact *could* have reached" and that it fails to do so.[374]

A. First ground of appeal: Fatmir Limaj's alleged personal participation in the Llapushnik/Lapušnik prison camp

1. Whether the Trial Chamber erred in law and/or in fact by artificially dissecting the evidence

149. The Prosecution submits that the Trial Chamber erred in law and/or fact by applying the "beyond a reasonable doubt" standard of proof first to individual pieces of evidence considered in isolation from the overall body of evidence that did not need to be proven beyond reasonable doubt, and thereafter to the final determination of the elements of the offence(s) and the accused's guilt.[375] This artificial dissection of the evidence led the Trial Chamber to fail to consider the visual identification evidence establishing the participation of Fatmir Limaj in the prison camp together with the evidence of his command[376] and with the evidence that Fatmir Limaj was known as "Çeliku"/"Çelik"[377] or "Commander Çeliku".[378] The Prosecution also argues that the Trial Chamber did not properly consider the corroborative effect of the identification evidence as a whole.[379]

150. Fatmir Limaj responds that an appeal is not a trial *de novo*.[380] He claims that the Trial Chamber's approach to the evidence is clearly set out in the Trial Judgement: It considered the evidence as a whole including his *nom de guerre* "Çeliku" and the presence of the "Çeliku units", when deciding to acquit him of each count.[381] He further claims that the Prosecution in fact objects to the findings reached by the Trial Chamber and not to its approach to the evidence.[382] In sum,

[372] Limaj Response Brief, para. 21, with reference to *Furundžija* Appeal Judgement, para. 37.
[373] Limaj Response Brief, para. 22, with reference to *Tadić* Appeal Judgement, para. 64.
[374] Limaj Response Brief, para. 25, with reference to *Čelebići* Appeal Judgement, para. 434 (emphasis in the original). *See also* AT 143-146 (6.6.2007), citing *Rutaganda* Appeal Judgement, para. 24.
[375] Prosecution Appeal Brief, paras 1.4, 2.2, 2.19, 2.21-2.23, with reference to Trial Judgement, para. 10.
[376] Prosecution Appeal Brief, para. 2.25.
[377] Prosecution Appeal Brief, para. 2.38.
[378] Prosecution Appeal Brief, paras 2.36, 2.39, with reference to Trial Judgement, paras 560, 561, and 565. *See also* AT 98-99 (6.6.2007).
[379] Prosecution Appeal Brief, para. 2.27. *See also* AT 108-110 (6.6.2007).
[380] Limaj Response Brief, paras 19-20, quoting *Erdemovic* Appeal Judgement, para. 15.
[381] Limaj Response Brief, paras 26-33, with reference to Trial Judgement, paras 10, 16-17, 20, 561, 563, 601. *See also* Limaj Response Brief, paras 79, 81. *See also* AT 146-150, 153-154 and 163 (6.6.2007).
[382] Limaj Response Brief, para. 34.

Fatmir Limaj argues that his acquittal was wholly justified on the evidence[383] and the Prosecution's appeal should be rejected.[384]

151. At the outset, the Appeals Chamber notes that it is undisputed among the parties that Fatmir Limaj used the pseudonyms "Çeliku" or "Commander Çeliku" at the relevant time: While the Prosecution adduced evidence that he was also known as **"**Çeliku"/"Çelik"[385] or "Commander Çeliku", Fatmir Limaj himself stated that in the end of April 1998 he used the pseudonym "Çeliku" for communication purposes while he was known as "Daja" among the soldiers[386]

152. For the reasons set out below, the Appeals Chamber finds that the Trial Chamber did not adopt an erroneous piecemeal approach when it applied the standard of proof beyond reasonable doubt to the evidence of Fatmir Limaj's personal participation in the prison camp.

153. The Trial Chamber emphasized the importance of evidence as to the visual identification of each of the Accused in the prison camp.[387] However, the Trial Chamber's examination of the evidence was not limited to issues of visual identification, but included evidence relating to Fatmir Limaj's pseudonym.[388] For instance, when assessing Witness L10's evidence, the Trial Chamber found that it was not apparent that the man he met in the camp was "Çeliku".[389] Thus, it implicitly made the link between "Çeliku" and Fatmir Limaj. The same reasoning was used when the Trial Chamber assessed the evidence of Witness L07,[390] Witness L04[391] and Witness L96.[392] The Trial

[383] Limaj Response Brief, para. 35. *See also* AT 164 (6.6.2007).
[384] Limaj Response Brief, paras 26, 36.
[385] Prosecution Appeal Brief, paras 2.36-2.41. *See also* AT 107-108, 110 and 114 (6.6.2007). The Appeals Chamber notes that, when examining ex. P34 "Documentary Video about the UCK in the area of the village of Llapushnik during the spring and summer of 1998" the Trial Chamber held that "[i]n this context, Skender Shala referred on a couple of occasions to "Commander Çelik". If it is accepted that "Çelik" is a reference to Fatmir Limaj, as to which there is no direct evidence […]", Trial Judgement, para. 594. The Trial Chamber based its finding on the English transcript of ex. P34 (ex. P34.1a, "Transcript of the Documentary Video" which refers sometimes to the name "Çeliku" (pp. 4, 11, 12), once to "Uncle" and "Commandant Limaj" and two times to the name "Çelik" (pp. 8-9, when Skënder Shala is interviewed). The Trial Chamber also found that "[a] review of the entire interview reveals that Fatmir Limaj is at times referred to "Uncle", *i.e.* Daja, "Çeliku" or Commandant Limaj"; […] his soldiers are sometimes referred to as belonging to "Çelik's unit" or the '121st Brigade'", Trial Judgement, para. 595, with reference to ex. P34, pp. 8, 11, 12-13 and 14. Therefore, the finding in paragraph 594 on "Çelik" not being a reference to Limaj is limited to Skënder Shala's evidence given during the interview. Consequently, the Trial Chamber did not assume that "Çelik" and "Çeliku" are different persons. Furthermore, the Appeals Chamber notes that "Çelik" is a declinated form of "Çeliku", *see* Albanian and English Dictionary (Pavli Qesqu, ed.) Tiranan, 1999, pp. 13, 140.
[386] Fatmir Limaj, T. 6255-6256 (24.5.2005) (emphasis added). *See also*, Fatmir Limaj, T. 5938 (18.5.2005) and Trial Judgement, para. 598 (in the context of his alleged command responsibility for the Llapushnik/Lapušnik prison camp). *See also* Fatmir Limaj, T. 6257 (24.5.2005) (emphasis added). *See also* Limaj Response Brief, paras 79 and 81. *See also* AT 166 (6.6.2007).
[387] Trial Judgement, para. 16.
[388] *See* Trial Judgement, paras 539, 544, 547, 553.
[389] Trial Judgement, para. 539.
[390] Trial Judgement, para. 547.
[391] Trial Judgement, para. 544.
[392] Trial Judgement, para. 553, with reference to Witness L96, T 2416-2418; 2437-2442 (26.1.2005).

Chamber further held that it considered "all other relevant evidence" to reach its conclusion,[393] such as Exhibit P30, a notebook found in the storage room of Fatmir Limaj's apartment in which the name of a victim of the Llapushnik/Lapušnik prison camp was mentioned.[394] Furthermore, the Trial Chamber considered evidence in relation to his alleged commanding role[395] and the testimony given by Fatmir Limaj himself.[396] Accordingly, the Trial Chamber correctly found that:

> The ultimate weight to be attached to each relevant piece of evidence, including each visual identification where more than one witness has identified an Accused, is *not to be determined in isolation*. Even though each visual identification and each other relevant piece of evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, it is the *cumulative effect on the evidence*, *i.e.* the totality of the evidence bearing on the identification of an Accused, which must be weighed to determine whether the Prosecution has proved beyond reasonable doubt that each Accused is a perpetrator as alleged.[397]

154. Thus, it was on the basis of the totality of the evidence, and not only on the basis of visual identification evidence, that the Trial Chamber found that the Prosecution had failed to establish that Fatmir Limaj had personally participated in the operation of the Llapushnik/Lapušnik prison camp.[398]

2. Whether the Trial Chamber applied a standard amounting to "proof beyond *any* doubt"

155. The Prosecution submits that in many instances when examining whether Fatmir Limaj was identified as participating in the prison camp, the standard of proof applied by the Trial Chamber was not "beyond reasonable doubt" but rather one that entertained *any* doubt, including doubt not based upon evidence, logic or common sense.[399] The Prosecution argues that this is contrary to established jurisprudence, according to which "the standard of proof is such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt."[400]

156. The Prosecution recalls the ICTR Appeals Chamber's finding in *Rutaganda* that

> [t]he reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.[401]

157. The Prosecution further refers to the national legal systems of Germany, Scotland, England, Canada, and the United States of America as to the standard sufficient for conviction.[402] It argues

[393] *See* Trial Judgement, para. 563.
[394] Ex. P30 "Notebook"; Trial Judgement, para. 564.
[395] *See*, for instance, Trial Judgement, para. 532.
[396] Trial Judgement, para. 557.
[397] Trial Judgement, para. 20 (emphases added).
[398] Trial Judgement, para. 688.
[399] Prosecution Appeal Brief, paras 2.2, 2.4.

> [t]hat the standard of proof beyond reasonable doubt or the standard sufficient for conviction is less than certainty. It is that when one considers the totality of evidence, one is satisfied that the accused committed the crime, even though other theories may exist.[403]

158. The Prosecution further argues that the Trial Chamber misapplied the standard of proof and the *in dubio pro reo* principle in favour of the Accused.[404]

159. In addition or alternatively, the Prosecution submits that the Trial Chamber erred in *fact* in not finding that Fatmir Limaj personally participated in the operation of the prison camp by, first, failing to consider clearly relevant evidence, second, failing to consider the corroborative effect of evidence, and third erroneously evaluating evidence.[405] Since the Prosecution's arguments in relation to the alleged error of law are part and parcel of its arguments in relation to the alleged factual errors, they will be discussed together.

(a) Whether the Trial Chamber erred when examining Witness L07's evidence

(i) Alleged error in discounting Witness L07's evidence due to "unconscious transference"

160. The Prosecution submits that the Trial Chamber erred when considering Witness L07's identification evidence.[406] While the Trial Chamber found Witness L07 to be an honest and credible witness,[407] it unreasonably rejected his visual identification of Fatmir Limaj in the prison camp,[408] on television[409] and in the courtroom,[410] because the possibility of mistake due to extensive public exposure on television and in newspapers ("unconscious transference") and the "suggestive" courtroom environment rendered the identification unreliable.[411]

161. The Prosecution argues that the possibility of unconscious transference could arise only if Witness L07 had seen him for the first time in the prison camp and was then exposed to his image and asked to identify him.[412] However, Witness L07's evidence was that he had seen Fatmir

[400] Prosecution Appeal Brief, paras 2.17-2.18, with reference to the *Tadić* Appeal Judgement.
[401] Prosecution Appeal Brief, para. 2.16 (quoting *Rutaganda* Appeal Judgement, para. 488).
[402] Prosecution Appeal Brief, paras 2.8-2.14.
[403] Prosecution Appeal Brief, paras 2.15 and 2.8-2.14.
[404] Prosecution Appeal Brief, para. 2.18. *See also* AT 111-113 (6.6.2007).
[405] Prosecution Appeal Brief, paras 2.30-2.32 and 2.34, referring to Trial Judgement, paras 531-565; Prosecution Notice of Appeal, paras 5-6. *See also* AT 89 (6.6.2007).
[406] Prosecution Appeal Brief, para. 2.55. *See also* AT 101-104 (6.6.2007).
[407] Prosecution Appeal Brief, para. 2.56, with reference to Trial Judgement, para. 550.
[408] Prosecution Appeal Brief, para. 2.58, with reference to Trial Judgement para. 549.
[409] Prosecution Appeal Brief, para. 2.58.
[410] Prosecution Appeal Brief, para. 2.62.
[411] Prosecution Appeal Brief, paras 2.58-2.59, with reference to Trial Judgement, para. 550. *See also ibid.*, paras 2.57, 2.61 and 2.63. *See also* AT 110-111 (6.6.2007).
[412] Prosecution Appeal Brief, para. 2.63. *See also* AT 199-200 (6.6.2007).

Limaj's photo in the press prior to his detention and then recognised him in the prison camp.[413] Thus, when Witness L07 identified Fatmir Limaj in the camp, he was already a "familiar" person to him.[414]

162. Fatmir Limaj responds that the Trial Chamber carefully assessed Witness L07's in-court testimony[415] and reasonably rejected his purported identification.[416] The Trial Chamber correctly noted that the circumstances of the purported sighting of "Çeliku" prior to Witness L07's detention were not detailed in evidence.[417] In neither of the videos in which he appeared was Fatmir Limaj the main focus, and the interview he gave to Tirana TV on 3 June 1998 was transmitted as an audio broadcast.[418] In addition, the Trial Chamber properly considered the "added possibility" that Witness L07 may have unconsciously believed that he recognised Fatmir Limaj because of the latter's subsequent extensive public exposure on television and in newspapers.[419]

163. In the challenged finding, the Trial Chamber found as follows:

> *[I]n addition*, in this particular case, there is the *added possibility* that unconsciously, L07 may have purported to recognise the Accused Fatmir Limaj because of his extensive public exposure on television and in newspapers, especially following the events in Llapushnik/Lapusnik. *Having given careful consideration to all of these factors*, the Chamber considers that, while L07 was honest in his evidence, despite the difficulties identified, and while his identification might be correct, the Chamber is unable to be satisfied that his identification of Fatmir Limaj as the person he knew in the Llapushnik/Lapusnik prison camp as Commander Çeliku, is reliable.[420]

164. The use of the terms "in addition" and "having given careful consideration to all of these factors" shows that the rejection of Witness L07's identification evidence was not exclusively based on the "added" possibility of unconscious transference, but was supported by other factors considered by the Trial Chamber, namely: the "apparent" contradictions between Witness L07's account and that of Shukri Buja,[421] the lack of evidence that the "commander" Witness L07 met in the camp was in fact Fatmir Limaj a.k.a. "Çeliku"[422] and the possibility of a mistaken in-court identification due to the suggestive environment.[423]

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[413] Prosecution Appeal Brief, paras 2.60, 2.110, with reference to *ibid.*, paras 2.57-2.65.
[414] Prosecution Appeal Brief, paras 2.60-2.65.
[415] Limaj Response Brief, para. 70, with reference to Trial Judgement, paras 545-550.
[416] Limaj Response Brief, para. 70, with reference to, *inter alia*, Trial Judgement, para. 547. *See also* AT 161-162 and 165 (6.6.2007).
[417] Limaj Response Brief, para. 71.
[418] Limaj Response Brief, para. 71, with reference to Trial Judgement, para. 549.
[419] Limaj Response Brief, para. 72, with reference to Trial Judgement, para. 549.
[420] Trial Judgement, para. 550 (emphasis added).
[421] Trial Judgement, para. 547.
[422] *Ibid.*, with reference to Witness L07, T. 794 (24.11.2004, closed session). The Appeals Chamber notes that the Prosecution states that it is not unreasonable to rely on hearsay evidence. The Appeals Chamber finds that this is irrelevant since what matters is whether the findings of the Trial Chamber are reasonable or not and not whether it would have been unreasonable to proceed otherwise.
[423] Trial Judgement, para. 550.

165. As to the possibility of unconscious transference, Professor Wagenaar's expert report, which was admitted into evidence and relied upon by the Trial Chamber,[424] explained the rules for identification tests applicable to *unfamiliar* persons[425] as follows:

> Rule 1. […] [T]here should not be even a single occasion at which the witness might have seen the perpetrator before he encountered him at the scene of the crime.[426]
>
> Rule 2. […] [A]fter the crime the witness should not have seen any pictures of the suspect. […]. This phenomenon is called unconscious transference […][427]

166. In its challenged finding, the Trial Chamber reasonably considered Rule 2 on the possibility that unconscious transference will occur when the witness is exposed to an image of the perpetrator *after* the commission of the crime. In addition, this finding reasonably took into account Rule 1 on the necessity of avoiding such an exposure *prior* to the crime: The Trial Chamber noted that Witness L07 gave evidence that he immediately recognized "Commander Çeliku" as Fatmir Limaj when meeting him in the prison camp, due to the fact that he had previously seen him in the press.[428] As to the instances where he had seen him in the press, the Trial Chamber noted that

> [t]here is evidence before the Chamber that Fatmir Limaj was one of the two soldiers standing by the side of Jakup Krasniqi when he gave his first public statement in June 1998 from Klecke/Klecka as spokesperson of the KLA.[429] Fatmir Limaj was also seen as one of a column of soldiers in a funeral march on 16 June 1998, which was broadcast.[430] On these videos, though, Fatmir Limaj is not the sole or main focus of visual attention. Finally, Fatmir Limaj apparently gave an interview on 3 June 1998 to a journalist of the Tirana TV network, but it would seem on the evidence that this interview was only broadcast by sound. It is again from the media that L07 subsequently came to the conclusion that Commander Celiku was Fatmir Limaj. [431]

167. Considering these circumstances under which Fatmir Limaj was allegedly seen, the Appeals Chamber is not satisfied that the only reasonable inference from this evidence is that Fatmir Limaj was a person *familiar* to Witness L07 before they met in the camp.

168. Consequently, the Trial Chamber did not err in finding that Witness L07's evidence - that he recognised Fatmir Limaj as the person he knew in the prison camp as "Commander Çeliku" - could have resulted from, *inter alia*, a possibility of unconscious transference.

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[424] Trial Judgement, para. 550 to be read in light of *ibid.*, para. 19 *in fine*. *See also ibid.*, para. 537 and fn. 1769.
[425] Ex. DM7 "1). Curriculum Vitae of Professor Wagenaar and 2). Expert Report of Professor Wagenaar 'Report to the ICTY, IT-03-66 Against Fatmir Limaj, Haradin Bala and Isak Musliu', dated 22 May 2005", paras 6 and 8.
[426] *Ibid.*, Rule 1, para. 10.
[427] *Ibid.*, Rule 2, para. 11.
[428] Trial Judgement, para. 549, with reference to Witness L07, T. 794 (24.11.2004, Closed Session).
[429] Fatmir Limaj, T. 5956 (18.5.2005).
[430] Exhibit P35, "Video Recording of TV Documentary about Fatmir Limaj, After his Arrest"; Fatmir Limaj, T. 6299-6301 (25.5.2005).
[431] Trial Judgement, para. 549, with reference to ex. P37 "FBIS Article Dated 3 June 1998 re. Interview with Mr. Celiku, "UCK Commander Tells Tirana Television 'Death or Reality'"; Fatmir Limaj, T. 6268 (24.5.2005).

(ii) Allegedly erroneous evaluation of Witness L07's identification evidence in light of Shukri Buja's testimony

169. The Prosecution argues that, upon his arrival in the prison camp, Witness L07 saw Shukri Buja and Commander Çeliku,[432] and that it is inconceivable that the Trial Chamber used Shukri Buja's testimony that Fatmir Limaj was *not* present during this encounter with Witness L07 to call into doubt Witness L07's evidence.[433] Indeed, the Trial Chamber questioned the credibility of Shukri Buja's testimony as possibly founded on his loyalty to the KLA in general and Fatmir Limaj in particular.[434] The Prosecution further argues that Buja's evidence must be discredited on the basis that he said that Witness L07 was not detained in the camp but in a different house, while the Trial Chamber found that Witness L07 was detained for two or three days in the camp's storage room.[435]

170. Fatmir Limaj responds that the Trial Chamber correctly noted that Witness L07 did not allege that Shukri Buja or anyone else present at that meeting referred to the "commander" as "Çeliku".[436] Fatmir Limaj further responds that the Prosecution seeks alternately to discredit the testimony of Shukri Buja, its own witness, and then later to rely upon his testimony in a different context.[437] The Prosecution replies that it is reasonable for a Trial Chamber to accept a witness' testimony only in part.[438]

171. The Appeals Chamber is satisfied that, having found that Shukri Buja's testimony about Witness L07's detention and release was not reliable,[439] the Trial Chamber erred when it took this evidence into consideration to support its rejection of Witness L07's identification evidence. However, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that this error occasioned a miscarriage of justice, because the contradictions between Witness L07's account and the account of Shukri Buja constitute only one of several reasons on the basis of which the Trial Chamber reasonably rejected the reliability of Witness L07's identification evidence.[440]

(iii) Alleged failure to find Witness L07's testimony corroborated

[432] Prosecution Appeal Brief, para. 2.94.
[433] Prosecution Appeal Brief, para. 2.95.
[434] Prosecution Appeal Brief, para. 2.95, with reference to Trial Judgement, para. 547.
[435] Prosecution Appeal Brief, para. 2.95, with reference to Trial Judgement, para. 297.
[436] Limaj Response Brief, para. 73, with reference to Trial Judgement, para. 549.
[437] Limaj Response Brief, para. 70 *in fine*.
[438] Prosecution Reply Brief, para. 2.33, with reference to *Naletilić and Martinović* Appeal Judgement, para. 441; Trial Judgement, paras 53-65 and 277.
[439] Trial Judgement, para. 547.
[440] The Trial Chamber also took into account the purported sighting of Fatmir Limaj by Witness L07 prior to his detention, the lack of evidence that the "commander" Witness L07 met in the camp was in fact "Commander Çeliku," and the possibility of a mistaken in-court identification due to the suggestive courtroom environment.

172. With respect to Ivan Bakrač, the Prosecution contends that the Trial Chamber should not have rejected his identification of Fatmir Limaj in light of its finding that the period during which Ivan Bakrač allegedly identified Fatmir Limaj was a "reasonably prolonged exposure time" that "could well found a subsequent accurate identification of the 'commander'".[441]

173. The Prosecution further argues that after his detention, Ivan Bakrač recognised an image of Fatmir Limaj on television and on the Internet, as the "commander" he knew from the prison camp.[442] The Trial Chamber was in error in refusing to accept the reliability of Ivan Bakrač's identification of Fatmir Limaj from an Internet photo on the basis that it was too small to be recognisable,[443] and it failed to consider Ivan Bakrač's testimony that the same photo was much larger when he *first* saw it on the Internet.[444] The Prosecution further claims that Ivan Bakrač also recognised Fatmir Limaj in court in a still from a video clip showing a column of marching KLA soldiers which included Fatmir Limaj.[445]

174. The Prosecution also submits that the Trial Chamber erroneously focused on his failure to identify Fatmir Limaj in a photo included on a photoboard shown to him in court: This photograph depicted Fatmir Limaj without a beard, which he did have on television and on the Internet and which is an image that more closely accords with Ivan Bakrač's memory.[446]

175. Fatmir Limaj responds that Ivan Bakrač had the opportunity to see and spend time with the "commander" he describes. Still, however, he did not identify Fatmir Limaj, or a "Commander Çeliku" as being involved in the camp,[447] although he was shown a photo-spread of Fatmir Limaj twice.[448] He argues that the Trial Chamber gave proper weight to the fact that Ivan Bakrač had not mentioned seeing "Commander Çeliku" in any previous statement to the Prosecution.[449]

176. As to the identification of Fatmir Limaj in a still from a video-clip, the Appeals Chamber brings attention to the fact that the Trial Chamber noted that the name of Fatmir Limaj was

[441] Prosecution Appeal Brief, para. 2.68, with reference to Trial Judgement, para. 537. *See also* AT 104-105 (6.6.2007).
[442] Prosecution Appeal Brief, para. 2.69, with reference to Trial Judgement, para. 533.
[443] Prosecution Appeal Brief, para. 2.120.
[444] *Ibid.*
[445] Prosecution Appeal Brief, paras 2.69, 2.119-2.120, with reference to Trial Judgement, paras 533, 536-537. The Appeals Chamber notes that the video clip shown to Ivan Bakrač in court was allegedly the same he saw on television and on the Internet.
[445] Prosecution Appeal Brief, para. 2.121.
[446] Prosecution Appeal Brief, para. 2.122. *See* also Prosecution Reply Brief, paras 2.18-2.19. The Prosecution submits that the Trial Chamber then used this erroneous interpretation to exaggerate the significance of the fact that Ivan Bakrač did not recognise a photo of Fatmir Limaj on a photospread, stating that it occurred even though in the photo Fatmir Limaj was "clean-shaven" [Prosecution Appeal Brief, para. 2.102, with reference to Trial Judgement, para. 537]. *See also* Prosecution Reply Brief, para. 2.17.
[447] Limaj Response Brief, paras 52-56, with reference to Trial Judgement, paras 531-537.
[448] Limaj Response Brief, paras 53, 76.
[449] Limaj Response Brief, para. 57, with reference to Trial Judgement, para. 533. *See also* AT 159-161 (6.6.2007).

mentioned in a captioning running along the bottom of the film that was shown in court. When asked whether such captioning appeared when he was previously shown the video by ICTY investigators, Ivan Bakrač answered: "[N]o, no. I don't think there were any captions. *I didn't really pay any attention, though*."[450]

177. As to the identification of Fatmir Limaj on a photo from the Internet, the Appeals Chamber finds that it was reasonable for the Trial Chamber not to have relied solely on the Prosecution's mere reference to the testimony of Ivan Bakrač that the same picture was much larger when he first saw it on the Internet, since this larger picture was not introduced into evidence.[451] Furthermore, taking into account the small size of the photograph from which Ivan Bakrač allegedly identified Fatmir Limaj, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber's refusal to accept this part of his evidence is unreasonable.

178. Moreover, the Appeals Chamber finds that it was not unreasonable of the Trial Chamber to reject Ivan Bakrač's identification evidence after he failed to identify the photograph of Fatmir Limaj from a photo-spread shown to him in court as the person he knew as the "commander" at the Llapushnik/Lapušnik prison camp. This is particularly so as Ivan Bakrač was shown what should have been a very recognisable photograph of Fatmir Limaj in the photo-spread, portraying him as clean-shaven, just as the witness described the man he saw in the prison camp.[452]

179. Therefore, the Appeals Chamber is satisfied that the Trial Chamber reasonably found that it could not accept the reliability of Ivan Bakrač's purported identification of Fatmir Limaj.[453]

180. With respect to Vojko Bakrač, the Prosecution submits that, while still in the camp, he saw an image of Fatmir Limaj on television and recognised him as the "commander" he had met earlier during his detention.[454] The Prosecution argues that in addition to corroborating all of the identification witnesses, this evidence also corroborates his son Ivan Bakrač's testimony that he and his father recognised the "commander" they had met in the prison camp on television.[455] The Prosecution claims that Vojko Bakrač's identification of Fatmir Limaj is further supported by his testimony that the person he met in the camp stated that he was a lawyer, and Fatmir Limaj is indeed a lawyer.[456] The Prosecution further submits that the Trial Chamber erroneously drew a negative inference from Vojko Bakrač's failure to identify a photo of Fatmir Limaj from a

[450] Ivan Bakrač, T. 1438 (3.12.2004) (emphasis added).
[451] Ex. P80 "Photo From Website www.kosovo.com, Marked by the Witness in Court".
[452] *See* Trial Judgement para. 533 *in fine*.
[453] *See* Trial Judgement, para. 537.
[454] Prosecution Appeal Brief, para. 2.73. *See also* AT 105-106 (6.6.2007).
[455] Prosecution Appeal Brief, para. 2.73. Prosecution Reply Brief, paras 2.8 and 2.13.
[456] Prosecution Appeal Brief, para. 2.73, with reference to Trial Judgement, para. 532.

photoboard, finding that it was "a very recognisable photograph of Fatmir Limaj, albeit clean-shaven, rather than with the small beard the witness had described".[457] Since witnesses' evidence and media images from the relevant time described or showed Fatmir Limaj with a small beard and not "clean-shaven", this likely explains why Vojko - and Ivan - Bakrač did not recognise Fatmir Limaj on the photo-spread.[458]

181. In addition, the Prosecution claims that the parties agreed to admit into evidence Vojko Bakrač's statement to the Serbian authorities of 8 July 1998 in which he stated that he saw a march of KLA soldiers on television, identifying one of them as the "commander" from the camp. Thus, the Trial Chamber erred in rejecting this evidence on the basis that it was not given in court. It also failed to consider that Vojko Bakrač endorsed the content of his statement to the Serbian authorities in his ICTY statement of 22 January 2005.[459] Morevoer, the notes of the statement to the Serbian authorities are consistent with other details of Vojko Bakrač's in-court account of his detention, for example that he and his son were told by the "commander" that they would be released.[460]

182. Fatmir Limaj responds that Vojko Bakrač does not mention his name in his testimony, or that a "Commander Çeliku" was involved in the prison camp.[461] Indeed, when shown Fatmir Limaj's photograph, Vojko Bakrač stated that the man in the picture was not connected with the camp.[462] Moreover, when shown a video clip which showed Fatmir Limaj bearded,[463] Vojko Bakrač did not pick him out as the "commander" he saw at Llapushnik/Lapušnik, nor did he identify it as the same video clip he allegedly saw in the *oda* (guestroom).[464]

183. The Trial Chamber found that in January 2002, in the course of an interview with CCIU investigators, Vojko Bakrač was shown a series of photographs. One of the photographs was determined by the Trial Chamber to be a very recognisable image of Fatmir Limaj, albeit clean-shaven, rather than with the small beard the witness had described. In relation to this photograph, Vojko Bakrač stated: "Number 2 looks familiar, but I don't know from where and I cannot connect him with this case."[465] Number 2 was the photograph of Fatmir Limaj.[466] Since Vojko Bakrač failed

[457] Prosecution Appeal Brief, para. 2.116, with reference to Trial Judgement, para. 532. *See also* Prosecution Reply Brief, para. 2.9.
[458] Prosecution Appeal Brief, para. 2.116.
[459] Prosecution Appeal Brief, paras 2.74 and 2.121-2.125 and Prosecution Reply Brief, paras 2.6-2.7, with reference to Trial Judgement, para. 536.
[460] Prosecution Reply Brief, para. 2.11.
[461] Limaj Response Brief, paras 44-45 and 76.
[462] Limaj Response Brief, para. 45, with reference to Trial Judgement, para. 532.
[463] Limaj Response Brief, para. 50. Fatmir Limaj also argues that the Prosecution's submissions regarding his non-identification on account of being clean-shaven in the photospread can be rejected in light of ex. P202.
[464] Limaj Response Brief, para. 49. *See also* AT 159-161 (6.6.2007).
[465] Agreed fact, T. 1370-1371 (2.12.2004); Ex. DB1 (photo spread A1).
[466] Trial Judgement, para. 532.

to identify Fatmir Limaj during this CCIU interview, the Appeals Chamber finds that the Trial Chamber reasonably refused to accept this part of Vojko Bakrač's identification evidence.

184. The Trial Chamber further found that the evidence of Ivan and Vojko Bakrač revealed a number of inconsistencies.[467] The Trial Chamber considered in particular whether Vojko Bakrač identified the man he met in detention as Fatmir Limaj, *whilst still in the camp* - as alleged by the Prosecution - or *subsequently* in the weeks following his release, as testified by his son Ivan Bakrač.[468] The Trial Chamber also considered the notes taken during a statement given by Vojko Bakrač to the Serbian authorities on 8 July 1998, and endorsed in his ICTY statement of 22 January 2005. The statement of 8 July 1998 mentions that on one occasion *during their detention*, Vojko Bakrač and his son Ivan saw a column of marching soldiers on television and recognised the person known to them as the "commander".[469]

185. The Appeals Chamber finds that the admission into evidence of these statements by agreement of the parties[470] did not preclude the Trial Chamber from assessing the witness' credibility as well as the reliability and probative value of his statements in light of all of the evidence. Further, the notes taken during the statement given on 8 July 1998 were not rejected for the reason that they were not an actual recording of the conversation, but because they were taken by an unknown individual who was not called to testify in court. In addition, the Trial Chamber found that this record was not signed by Vojko Bakrač, and that it is not consistent with Ivan Bakrač's testimony that he and his father recognised the person known to them as the "commander" on television *after* their detention. Finally, the Trial Chamber held that no mention was made in Vojko Bakrač's testimony recognising anyone on television whilst still in detention, in spite of lengthy questioning on his recollection of the person known to him as the "commander".[471]

186. The Appeals Chamber considers that it was unreasonable for the Trial Chamber to reject the notes taken during the statement given on 8 July 1998 on the basis that they were not signed by Vojko Bakrač or that they were taken by an unknown individual. Indeed, Vojko Bakrač expressly endorsed these notes during his ICTY statement of 22 January 2005.[472] However, in these notes, Vojko Bakrač does not mention Fatmir Limaj either by his name or by his pseudonym of "Çeliku", although other names such as Shala, Ramiz and Hoxha are mentioned. Instead, Vojko Bakrač only

[467] Trial Judgement, para. 535.
[468] Ivan Bakrač, T. 1561-1562 (6.12.2004).
[469] Trial Judgement, para. 536; ex. P202, "1) Interview of Vojko Bakrač in the offices of Pristina CRDB of 8th July 1998 and 2) ICTY Statement of Vojko Bakrač of 22nd January 2005", p. 5.
[470] Ex. P202, "1) Interview of Vojko Bakrač in the offices of Pristina CRDB of 8th July 1998 and 2) ICTY Statement of Vojko Bakrač of 22nd January 2005".
[471] Trial Judgement, para. 536.
[472] Ex. P202, "2) ICTY Statement of Vojko Bakrač of 22nd January 2005".

refers to the "commander" without any further specification. Therefore, the Appeals Chamber finds that the Trial Chamber reasonably refused to accept that Vojko Bakrač's mentioning of the "commander" was a clear reference to Fatmir Limaj, a.k.a. "Commander Çeliku". Consequently, the Prosecution has not shown that the Trial Chamber's error occasioned a miscarriage of justice.

187. Moreover, in his ICTY statement of 22 January 2005, Vojko Bakrač explicitly stated that he could not remember the face of the "commander" he saw at the front of the convoy on television.[473] Furthermore, Vojko Bakrač did not identify the video clip showing the convoy, although this video clip was allegedly the same as the one he saw on television during his detention.[474] It is reasonable to infer that this is the explanation for why he was not able to identify Fatmir Limaj from the photospread. As a consequence, the Prosecution has failed to demonstrate that the Trial Chamber was unreasonable in rejecting Vojko Bakrač's identification evidence.[475]

188. As to the Prosecution's submission that Vojko Bakrač's account corroborates the account of Ivan Bakrač, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber was in error when it failed to find that their identification evidence, which was reasonably rejected, could be mutually corroborative.[476]

189. The Prosecution further submits that the Trial Chamber erroneously rejected Witness L10's identification of Fatmir Limaj as the person he met twice in the storage room of the prison camp and who ordered his release.[477] After his detention, Witness L10 recognised "Çeliku" on television as being from the camp, found out that his name was Fatmir Limaj, and identified him in court.[478] Similarly, after his detention, Witness L06 recognised the man he met twice in the storage room of the prison camp and who told him he could go home on television,[479] heard that his name was Fatmir Limaj,[480] and identified him in court.[481] In addition, while watching television after his release, Witness L04 recognised Fatmir Limaj on a photo as the person he had met in the camp[482] and who had given him release papers stating that "Commander Çeliku" had ordered his release.[483]

[473] Ex. P202, "2) ICTY Statement of Vojko Bakrač of 22nd January 2005", para. 9.
[474] *Ibid*., para. 12. Vojko Bakrač declared: "[i]t looks very much like the convoy that we saw on the Albanian channel, but I cannot say that it's the same. The soldiers walk in the same way, but there is no way for me to recall it for certain."
[475] Trial Judgement, paras 535, 539.
[476] *See* Trial Judgement, para. 535.
[477] Prosecution Appeal Brief, para. 2.70, with reference to Trial Judgement, para. 539. Prosecution Reply Brief, para. 2.22. *See also* AT 106 (6.6.2007).
[478] Prosecution Appeal Brief, para. 2.70, with reference to Trial Judgement, paras 539-540.
[479] Prosecution Appeal Brief, para. 2.71, with reference to Trial Judgement, para. 538. *See also* AT 106 (6.6.2007).
[480] Prosecution Appeal Brief, para. 2.71, with reference to Trial Judgement, para. 538.
[481] Prosecution Appeal Brief, para. 2.71, with reference to Trial Judgement, para. 540.
[482] Prosecution Appeal Brief, para. 2.72, with reference to Trial Judgement, para. 543.
[483] Prosecution Appeal Brief, para. 2.72. *See also* AT 106 (6.6.2007).

190. Fatmir Limaj responds that the Trial Chamber properly dealt with the evidence of Witnesses L10, L06 and L04.[484] More specifically, he argues that while Witness L10 stated that he heard the name "Çeliku" twice in Llapushnik/Lapušnik,[485] he did not mention anything about "Çeliku" or "Fatmir Limaj" when interviewed by CCIU investigators[486] and the Serbian authorities[487] prior to the trial. He also responds that Witness L04's evidence is unreliable: He claims that although Witness L04 "could not read his own name at trial", his evidence was that he was given a piece of paper on which it was written that he was released on order of "Commander Çeliku".[488] Fatmir Limaj claims that this evidence is further rendered unreliable in light of Witness L06's testimony that the release paper contained only his first and last name,[489] and Vojko and Ivan Bakrač's testimonies that the receipt given to them merely stated that they were released "by the KLA".[490] Fatmir Limaj further responds that the Trial Chamber carefully assessed Witness L04's reliability[491] and correctly noted that "L04 stressed how memorable this meeting with Commander Çeliku was for him […]. Yet […] he omitted altogether to mention this encounter when first interviewed about these events by a CCIU investigator in January 2002".[492]

191. The Prosecution replies that Witness L04 demonstrated that he was capable of reading a list of names.[493] The Prosecution further replies that Fatmir Limaj's criticism of Witness L10's failure to mention Çeliku in his CCIU statement is unjustified,[494] as the witness explained this failure during cross-examination as follows:

> I have said that I was given a release paper; this I know very well. He asked me whether I remember. […] maybe the translator didn't translate properly. That's why it was not written, that I didn't write Celiku. Maybe it is the mistake of the interpreter or the translator. […] maybe when it was translated it was not translated "Celiku".[495]

Witness L10 testified that the focus of this interview was to inquire about the fate of family members. Thus, his statement does not detract from his testimony, corroborated by Witness L04, that they were issued release papers signed by "Commander Çeliku".[496] The Prosecution further argues that Vojko and Ivan Bakrač's evidence of being released on the orders of the "commander"

[484] Limaj Response Brief, paras 58-59, with reference to Trial Judgement, paras 538-544.
[485] Limaj Response Brief, para. 60, with reference to Trial Judgement para. 539.
[486] Limaj Response Brief, para. 60.
[487] *Ibid.*
[488] Limaj Response Brief, para. 62.
[489] *Ibid.*
[490] Limaj Response Brief, fn. 61 of para. 62.
[491] Limaj Response Brief, paras 63-64, with reference to Trial Judgement, paras 541-544.
[492] Limaj Response Brief, para. 63, with reference to Trial Judgement, para. 535.
[493] Prosecution Reply Brief, para. 2.25.
[494] Prosecution Reply Brief, para. 2.22.
[495] Prosecution Reply Brief, paras 2.22-2.23, with reference to Trial Judgement, para. 539.
[496] Prosecution Reply Brief, paras 2.24 and 2.32, with reference to Trial Judgement, para. 539.

corroborates Witness L10's and Witness L04's evidence regarding their own release on "Commander Çeliku's" order.[497]

192. With respect to Witness L06 and Witness L10, the Appeals Chamber finds that the Trial Chamber expressed reasonable doubts about the reliability of their evidence on the issues set out above. These doubts were based on their testimony that their encounters in the prison camp with the man purported to be Fatmir Limaj lasted just a few minutes. These encounters occurred while Witness L06 and Witness L10 were sitting inside the storage room while the man alleged to be Fatmir Limaj was standing outside and speaking "through the window and the door."[498] Moreover, the Trial Chamber reasonably found that Witnesses L06 and L10 may have been unconsciously influenced by the media when recognising Fatmir Limaj on television as the man they had met in the camp, in particular since there was no evidence relating to the nature of the television programmes that may have prompted this identification.[499] Finally, the Trial Chamber emphasized that Witness L06 and Witness L10 gave differing descriptions of the man they subsequently identified as Fatmir Limaj, finding that Witness L10 remembered a man with a beard who was 200 cm tall, while Witness L06 described a man with no beard who was taller than him. [500]

193. The Trial Chamber also reasonably refused to accept Witness L10's evidence that the man he met in the camp was "Çeliku",[501] basing its finding on the fact that Witness L10 did not mention "Commander Çeliku" when interviewed by CCIU investigators in August 2001[502] and by "the Serbs" in 1998[503] on the events in the prison camp.

194. As to Witness L04, the Trial Chamber found that he did not mention being taken to see a "commander", or more specifically "Commander Çeliku", when interviewed by the CCIU investigator in January 2002 with his explanation for this omission being that the interpreters might not have understood him.[504] The Trial Chamber found, however, that throughout his testimony, Witness L04 stressed how memorable this meeting with Commander Çeliku was for him, as it led to his release being ordered. As a result, it held that this failure to mention the meeting when interviewed in January 2002 remains unexplained. The Trial Chamber also found that before this

[497] Prosecution Reply Brief, para. 2.27, with reference to Trial Judgement, paras 532-533. The Prosecution also argues that Witness L96 corroborates this evidence that Fatmir Limaj played a role in detention and release decisions (*see* Prosecution Appeal Brief, paras 2.75 and 2.90, with reference to Trial Judgement, para. 551. Prosecution Reply Brief, para. 2.29. *See also,* Limaj Response Brief, para. 65, with reference to Trial Judgement, paras 538-540). This issue will be considered under the second ground of appeal.
[498] Trial Judgement, para. 540, with reference to Witness L10, T. 2996-2997 (4.2.2005, Private Session).
[499] Trial Judgement, para. 540.
[500] *Ibid*. The Trial Chamber notes that "[t]he height of L06 has been agreed between the parties to be 175.5 cm, T. 5187-5188".
[501] Trial Judgement, para. 539.
[502] Witness L10, T. 2957 (3.2.2005).
[503] Witness L10, T. 2975 (3.2.2005).

interview, Witness L04 had seen Fatmir Limaj appearing on television many times and had thus concluded that he was Commander Çeliku.[505] Therefore, the Trial Chamber reasonably refused Witness L04's evidence that the "commander" he met in the prison camp was Fatmir Limaj.[506]

195. As to the possibility of unconscious transference, the Prosecution submits that this principle does not apply to any of the identification witnesses - Ivan and Vojko Bakrač, Witness L04, Witness L06, Witness L10 and Witness L96 -, because none of them saw the "commander" *for the first time* at the crime scene and then subsequently in the media.[507]

196. The Appeals Chamber is satisfied that the Trial Chamber was correct in finding that, after the events in the prison camp, all of these witnesses saw Fatmir Limaj in the media. Furthermore, none of the identification evidence of these witnesses was rejected on the basis of possible unconscious transference alone. Therefore, the Appeals Chamber is satisfied that the Trial Chamber reasonably took this possibility into account when refusing to accept the identification evidence of these witnesses.[508]

197. The Prosecution further submits that the Trial Chamber failed to consider the corroboration between Witness L07, Ivan Bakrač and Vojko Bakrač as to the meeting between the latter two and Commander Çeliku.[509] Witness L07 testified that Commander Çeliku spoke with the "two Croats", *i.e.* Ivan and Vojko Bakrač,[510] for about ten minutes concerning their release,[511] which is consistent with Ivan and Vojko Bakrač's description of their meeting with the person known to them as the "commander".[512] The Prosecution further argues that the failure of Ivan and Vojko Bakrač to mention that Witness L07 was released in their presence, as testified by Witness L07, should not have been given any significance, since they did not previously know him.[513]

198. Fatmir Limaj responds that while Ivan and Vojko Bakrač had the opportunity to see and spend time with the "commander", they did not state that this person was called "Commander Çeliku", or identify Fatmir Limaj from the photo-spreads shown to them as this person.[514]

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[504] Trial Judgement, para. 542, with reference to Witness L04, T. 1209-1210 (30.11.2004).
[505] Witness L04, T. 1218-1219 (30.11.2004, Private Session).
[506] Trial Judgement, para. 544.
[507] Prosecution Appeal Brief, paras 2.111-2.114. *See also* AT 106-107 (6.6.2007).
[508] *See* Trial Judgement, paras 534 (Ivan and Vojko Bakrač), 540 (Witnesses L06 and L10) and 544 (Witness L04).
[509] Prosecution Appeal Brief, paras 2.78-2.79, with reference to Trial Judgement, paras 522-537 and 548.
[510] Prosecution Appeal Brief, para. 2.79, with reference to Trial Judgement, para. 548.
[511] Prosecution Appeal Brief, para. 2.79.
[512] Prosecution Appeal Brief, para. 2.79, with reference to Trial Judgement, para. 533, fn. 1753; Trial Judgement, paras 549-550.
[513] Prosecution Appeal Brief, para. 2.80.
[514] Limaj Response Brief, para. 76.

199. The Trial Chamber merely "noted" the omission by Ivan and Vojko Bakrač to mention that Witness L07 was released in their presence, without making an explicit finding and without explicitly drawing an inference from it. Hence, the Prosecution has not demonstrated that the Trial Chamber made an unreasonable finding with respect to this part of Witness L07's evidence.[515]

200. As to the meeting of about ten minutes with the commander of the camp,[516] the Trial Chamber found that neither Ivan nor Vojko Bakrač identified the "commander" they spoke to as Fatmir Limaj or "Commander Çeliku". Hence, the Prosecution does not show that the Trial Chamber unreasonably failed to find that their evidence corroborated Witness L07's testimony as to having met Fatmir Limaj, a.k.a. "Commander Çeliku," on that occasion.

201. The Prosecution further submits that the Trial Chamber failed to properly consider that Witness L07's evidence was corroborated by other witnesses who identified Fatmir Limaj as the person they knew from the prison camp or, as for Witness L96, from the Berishe/Beriša Mountains.[517] Indeed, according to the Prosecution, the Trial Chamber failed to consider the "amazing coincidence" that seven witnesses[518] testified as to having met Fatmir Limaj - and no other prominent figures during and after the war[519] - during their detention.[520]

202. Fatmir Limaj responds that the Trial Chamber carefully considered the evidence,[521] both separately and cumulatively.[522] He claims that the Prosecution made inaccurate assertions about the Trial Chamber's consideration of the evidence, because, for instance, Vojko and Ivan Bakrač and Witness L96 did not state that they met Fatmir Limaj during their detention.[523] To this, the Prosecution replies that it did not misstate the evidence of Vojko Bakrač and Ivan Bakrač and Witness L96 as to the person they met in the prison camp,[524] but rather used a shorthand way to explain that these witnesses *subsequently recognised* the "commander" they met in detention as being Fatmir Limaj.[525]

203. The Appeals Chamber finds that, first, the Prosecution's assertion is a very shorthand way of stating the evidence. Indeed, as found above, the Trial Chamber did not err in expressing reasonable doubts regarding the reliability of the identification evidence of Vojko Bakrač, Ivan

[515] Trial Judgement, para. 548 *in fine*.
[516] Prosecution Appeal Brief, paras 2.78-2.79, with reference to Trial Judgement, paras 522-537 and 548.
[517] Prosecution Notice of Appeal, paras 5(3) and 6(3); Prosecution Appeal Brief, paras 2.55 and 2.92.
[518] Vojko Bakrač, Ivan Bakrač, Witness L10, Witness L07, Witness L06, Witness L04 and Witness L96.
[519] Prosecution Appeal Brief, paras 2.76-2.77.
[520] Prosecution Appeal Brief, para. 2.33. *See also* AT 101 (6.6.2007).
[521] Limaj Response Brief, paras 90-92.
[522] Limaj Response Brief, para. 92, with reference to Trial Judgement paras 560-561.
[523] Limaj Response Brief, paras 41, 43.
[524] Prosecution Reply Brief, para. 2.2.
[525] Prosecution Reply Brief, para. 2.3.

Bakrač, Witness L10, Witness L07, Witness L06 and Witness L04. It also reasonably found that the credibility of Witness L96 was doubtful as to material issues and had to be corroborated.[526] Moreover, corroboration of testimonies, even by many witnesses, does not establish automatically the credibility, reliability or weight of those testimonies.[527] Corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence.[528] It is an element that a reasonable trier of fact may consider in assessing the evidence. However, the question of whether to consider corroboration or not forms part of its discretion.

204. In sum, the Prosecution has not established that the Trial Chamber erred in failing to find that Witness L07's testimony was corroborated.

(b) Whether the Trial Chamber erred when examining the witnesses' physical descriptions of the person they allegedly identified as Fatmir Limaj[529]

205. The Prosecution submits that the Trial Chamber unreasonably ignored the similarities in witnesses' evidence as to the age, height and clothes of the person they identified as Fatmir Limaj, preferring instead to highlight minor inconsistencies.[530] While at the relevant time Fatmir Limaj was 27 years old and 181 cm tall,[531] Ivan Bakrač testified that the person known to him as the "commander" was around 180-185 cm. Witness L06 stated that the person known to him as "Commander Çeliku" was taller than him (his height being 175.5 cm). Only Witness L10's estimate - approximately 200 cm - did not accurately approximate the height of the person known to him as "Commander Çeliku".[532]

206. As to clothing, the Prosecution claims that the person identified as Fatmir Limaj was described as wearing a camouflage, neat uniform and an officer's satchel (by Vojko Bakrač), a satchel and uniform (Witness L96) and an officer's bag (Witness L07).[533] As to the man's age, Vojko Bakrač testified that "the commander" was between 30-35, while Ivan Bakrač said that "the

[526] Trial Judgement, para. 26.
[527] *See Musema* Trial Judgement, para. 46, confirmed by *Musema* Appeal Judgement, paras 37-38; *Kamuhanda* Trial Judgement, para. 40.
[528] *See Aleksovski* Appeal Judgement, paras 62-63, with reference to *Tadić* Appeal Judgement, para. 65; *Čelebići* Appeal Judgement, paras 492 and 506; *Gacumbitsi* Appeal Judgement, para. 72; *Semanza* Appeal Judgement, para. 153; *Kayishema and Ruzindana* Appeal Judgement, paras 154 and 229.
[529] Prosecution Notice of Appeal, paras 6(2)(d) and 6(3)(b) and (d).
[530] Prosecution Appeal Brief, paras 2.81-2.82, 2.86, 2.99, 2.106 (with reference to Trial Judgement, paras 561 and 562), and 2.100. *See also* AT 113-114 (6.6.2007).
[531] Prosecution Appeal Brief, para. 2.85.
[532] Prosecution Appeal Brief, para. 2.83, with reference to Trial Judgement, para. 533.
[533] Prosecution Appeal Brief, para. 2.84.

commander" was in his mid thirties, "probably 35, 36" and Witness L96 that "Commander Çeliku" was "quite young".[534]

207. The Prosecution further argues that the Trial Chamber was unreasonable in noting that Witness L04 spoke of a "medium-size beard", when he also said it was "not a very big beard", later clarifying that it was "2 or 3 centimetres" long.[535] In addition, the Trial Chamber failed to consider that Witnesses L10, L07, L96, Shefqet Kabashi[536] and Ivan Bakrač described Fatmir Limaj as having either a small beard or as being unshaven.[537] The Trial Chamber also failed to acknowledge that witnesses' observations were made at different points in time.[538] Thus, the Trial Chamber should have viewed the evidence on Fatmir Limaj's beard as strongly corroborative of his personal appearance and his participation in the prison camp.[539]

208. The Trial Chamber found that although Witness L06 and Witness L10 were detained together in the prison camp,[540] their descriptions of "Commander Çeliku" showed considerable differences.[541] The Trial Chamber also found[542] that Ivan and Vojko Bakrač, who potentially had most extensive contact with the person known to them as the "commander",[543] gave inconsistent physical descriptions of this person.[544] In light of the above mentioned reservations the Trial Chamber had regarding the identification evidence of these witnesses, the Appeals Chamber finds that the Trial Chamber was reasonable not to infer from this physical description evidence that these witnesses identified Fatmir Limaj as being in the camp.

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[534] Prosecution Appeal Brief, para. 2.85.
[535] Prosecution Appeal Brief, para. 2.107.
[536] During trial, Shefqet Kabashi testified subject to protective measures. The Appeals Chamber lifted most of the protective measures related to his pseudonym "Witness L95" (Decision on Prosecution's Motion for Variance of Protective Measures, 30 May 2007. *See also* Order related to Decision of 30 May 2007 in which *inter alia* the confidential status of the former decision was lifted).
[537] Prosecution Appeal Brief, para. 2.108.
[538] Prosecution Appeal Brief, para. 2.107.
[539] Prosecution Appeal Brief, para. 2.108. For Limaj *see* AT 194 (6.6.2007).
[540] Trial Judgement, para. 539 with reference to Trial Judgement, paras 270 and 279.
[541] Trial Judgement, para. 540: "L10 remembers a man with a beard, and of a very characteristic height, about 200 cm, while L06 described that same man as not having a beard, and simply stated that he was taller than him." Witness L04 spoke of a "medium-size beard", "not a very big beard" and later clarified that it was "2 or 3 centimetres" long, *see* Trial Judgement, para. 544.
[542] Trial Judgement, para. 562.
[543] The Appeals Chamber notes that the Trial Chamber found that Ivan Bakrač testified that the first encounter with the "commander" lasted about 10, 15 minutes.[543] [Ivan Bakrač, T. 1431 (3.12.2004)] and the second lasted about 15 to 20 minutes [Ivan Bakrač, T. 1432-1433 (3.12.2004); *see also* Trial Judgement, paras 533 and 537]; Vojko testified that the second encounter with the "commander" lasted around "half an hour, 45 minutes, an hour at the most" [Vojko Bakrač, T. 1342 (2.12.2004); *see also* Trial Judgement, para. 532].
[544] The Appeals Chamber notes that Vojko Bakrač described the man as wearing a camouflage uniform, a *small beard*, an officer's satchel, that he was in his thirties and taller than him [Vojko Bakrač, T. 1334-1335 (2.12.2004)]; Ivan Bakrač described the commander as wearing a camouflage uniform, *"clean shaven, not freshly shaven, he did not have any facial hair"*, around 35 years old, about 180 to 185 cm tall, medium build, with slightly longer hair which was partly grey and combed back [Ivan Bakrač, T. 1430 (3.12.2004)]; *see* Trial Judgement, para. 532.

209. The Appeals Chamber notes that the Trial Chamber's finding on "arresting inconsistencies" in the physical descriptions of the person known as the "commander" or as "Commander Çeliku" was based on a cumulative assessment of all descriptions provided by the witnesses.[545] The Appeals Chamber further notes that these witnesses were detained together during at least some time of their detention: Witnesses L06 and L10 were detained together from 13 or 14 June 1998 to 25 or 26 July 1998, Witness L04 from 28 June to 25 or 26 July 1998, Vojko and Ivan Bakrač from 29 June to 6 July 1998, Witness L07 for three days in July 1998 and Witness L96 from 18 to 25 or 26 July 1998.[546] This allows for the reasonable inference that their observations of the physical description of the person known as the "commander" or as "Commander Çeliku" were related to the same time period.

210. Thus, the Appeals Chamber finds that the Trial Chamber was not unreasonable in finding that the evidence regarding the physical description of the man allegedly identified as Fatmir Limaj showed "arresting inconsistencies".[547]

211. The Prosecution further submits that the Trial Chamber unreasonably dismissed Ivan Bakrač's identification of Fatmir Limaj without acknowledging that the photoboard shown to Ivan Bakrač (Exhibit DL1) contains a photo of a bearded Fatmir Limaj which is allegedly different from Ivan Bakrač's description of the person he saw in the camp - *i.e.* "not freshly shaven".[548]

212. The Appeals Chamber finds that the Prosecution misstated the evidence since Ivan Bakrač *did* recall Fatmir Limaj "clean-shaven, not freshly shaven, he did not have any facial hair", and Exhibit DL1 indeed shows in photo no. 5 Fatmir Limaj clean-shaven/not freshly shaven, as found by the Trial Chamber.[549]

213. As a result, the Prosecution has not established that the Trial Chamber erred when examining witnesses' descriptions of the person they allegedly identified as Fatmir Limaj in the prison camp.

(c) Whether the Trial Chamber erred in failing to consider Fatmir Limaj's regular presence in the Llapushnik/Lapušnik village and his close proximity to the prison camp

214. The Prosecution argues that the Trial Chamber erroneously failed to consider the regular presence of Fatmir Limaj in the Llapushnik/Lapušnik village during June and July of 1998 when

[545] Trial Judgement, para. 562.
[546] Trial Judgement, para. 279.
[547] Trial Judgement, para. 562.
[548] Prosecution Appeal Brief, paras. 2.102-2.106 and 2.120-2.122, with reference to Trial Judgement, para. 537; Prosecution Reply Brief, paras 2.17-2.19, with reference to Trial Judgement, para. 533 and fn. 1750.

assessing whether he participated in the prison camp. It claims that Fatmir Limaj admitted to having visited Llapushnik/Lapušnik about twice a week during these months,[550] and that he was there during at least one oath ceremony in June or July of 1998,[551] at the time of significant battles,[552] and as part of an inspection with senior KLA military commanders.[553] He also admitted that he was present at/or near the clinic,[554] as well as the KLA headquarters, a mere 200 metres away from the camp.[555] The Prosecution argues that his presence in the village corroborates witness testimony that he was the person called "Commander Çeliku" seen in the camp.[556] The Prosecution argues further that Fatmir Limaj's claim that he did not know about the prison camp is not credible, as Llapushnik/Lapušnik village is of a small size.[557]

215. Fatmir Limaj responds that being in close proximity to the prison camp could not reasonably give rise to a finding of his involvement in it.[558] Also, in its Pre-trial Brief, the Prosecution stated that "the camp's distance from the main road and its location in an enclosed (and constantly guarded) compound made it possible to maintain the camp relatively unobserved, even by KLA soldiers in the village and at the front lines nearby."[559]

216. The Prosecution replies that the Pre-Trial Brief does not suggest that the camp could not have been observed by Fatmir Limaj when he was present in the KLA headquarters, which is within immediate sight of the camp or when he attended an oath ceremony within metres of the camp.[560]

217. The Trial Chamber found that due to the battle on 29 May 1998, the Çeliku 3 unit headquarters moved to the compound of Gzim Gashi, a.k.a. as "Gzim Vojvoda",[561] for some days, which was right across a narrow roadway from the prison camp.[562] It also noted the allegation that

[549] Ex. DL1 "photo line-up". *See* Trial Judgement, para. 533, with reference to Ivan Bakrač, T. 1573 (6.12.2004).
[550] Prosecution Appeal Brief, para. 2.43, with reference to Trial Judgement, para. 598.
[551] Prosecution Appeal Brief, para. 2.44, with reference to Trial Judgement, para. 591. *See also* AT 97 (6.6.2007).
[552] Prosecution Appeal Brief, para. 2.44.
[553] *Ibid.*
[554] *Ibid.*
[555] *Ibid.*
[556] Prosecution Appeal Brief, para. 2.46.
[557] Prosecution Appeal Brief, para. 2.45. *See also* AT 99-101 (6.6.2007).
[558] Limaj Response Brief, para. 85.
[559] Limaj Response Brief, paras 86-87 and 98.
[560] Prosecution Reply Brief, paras 2.41-2.42.
[561] Ruzhdi Karpuzi, T. 3091 (7.2.2005).
[562] Trial Judgement, para. 6, with reference to Elmi Sopi, T. 6767-6768 (1.6.2005); Ruzhdi Karpuzi, T. 3096-3098 (7.2.2005), T. 3175 (8.2.2005); ex. P128 ("Photograph of Llapushnik/Lapušnik farm compound translation marked by Witness"). *See also* Trial Judgement, paras 693 and 714, with reference to Witness L64, T. 4380 (15.3.2005) and mention of "On the same aerial map on which he marked the five fighting positions of Çeliku 3, L64 also marked the three locations where the Çeliku 3 headquarters were stationed, ex. P170".

Fatmir Limaj attended a KLA oath ceremony in another compound, that of Bali Vojvoda, which is immediately adjacent to the prison camp.[563]

218. The Appeals Chamber notes that other Trial Chambers have held that an accused's proximity to an area of criminal activity can be a factor from which an accused's knowledge of the crimes can be inferred.[564] However, in this case, the Appeals Chamber finds that the Trial Chamber reasonably refused to find that the alleged occasional presence of Fatmir Limaj in the immediate proximity of the Llapushnik/Lapušnik prison camp during and after the battle of 29 May 1998, and at one oath ceremony in June-July 1998,[565] proved his knowledge of the existence of the prison camp or his participation in it.

3. Conclusion

219. As a result, the Prosecution's first ground of appeal is dismissed to the extent of the Prosecution's allegations discussed above. The remaining allegations - that the Trial Chamber erred in failing to consider Fatmir Limaj's alleged command position and his ability to make release/detention decisions when examining whether he personally participated in the prison camp - will be examined under the second ground of appeal.

B. Second ground of appeal: Fatmir Limaj's alleged position of command and control

220. The Prosecution also submits that the Trial Chamber erred in law by misapplying the standard of proof "beyond reasonable doubt"[566] and/or erred in fact by erroneously evaluating the evidence and not considering all the relevant evidence pertaining to Fatmir Limaj's alleged command position.[567] The Prosecution claims that when viewed in its totality, the evidence can lead to only one reasonable conclusion: During May through late July 1998, Fatmir Limaj held a position of command that included command over the KLA in the Llapushnik/Lapušnik prison camp.[568]

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[563] Trial Judgement, para. 6, with reference to Elmi Sopi, T. 6767-6768 (1.6.2005); Ruzhdi Karpuzi, T. 3096-3098 (7.2.2005); 3175; ex. P128 ("Photograph of Llapushnik/Lapušnik farm compound translation marked by Witness").
[564] *See Blagojević and Jokić* Trial Judgement, paras 483, 748; *Aleksovski* Trial Judgement, para. 80; *Bagilishema* Trial Judgement, para. 925.
[565] Trial Judgement, paras 569 and 591; Ruzhdi Karpuzi, T. 3096-3104 (7.2.2005), T. 3175-3176 (8.2.2005) (he testified about one oath ceremony in the yard of Bali's house at the end of June-early July); Zeqir Gashi, T. 5618 (11.4.2005) (he testified about one oath ceremony somewhere in Llapushnik/Lapušnik); Witness L64, T. 4386 (15.3.2006), T. 4420-4421 (16.3.2005) (he testified about two oath ceremonies in early June/mid-June near the kitchen of HQ2 which is "Vojvoda's" - or Gzim Gashi's, a.k.a. "Gzim Vojvoda" - compound according to Trial Judgement, para. 693. *See also* Trial Judgement, para. 714 and Ruzhdi Karpuzi, T. 3091 (7.2.2005).
[566] Prosecution Appeal Brief, para. 2.129, with reference to Trial Judgement, paras 568-602.
[567] Prosecution Appeal Brief, paras 2.137 and 2.172, with reference to Trial Judgement, paras 568-602.
[568] Prosecution Appeal Brief, paras 2.129, 2.138 and 2.150 and 2.227-2.229. *See also* AT 90 (6.6.2007).

221. Fatmir Limaj responds that the Prosecution attempts to re-litigate matters that were fully considered in the Trial Judgement.[569] After a careful review of the evidence pertaining to his command position, considering the "whole of the evidence",[570] the Trial Chamber concluded that

> [h]aving regard to *all the matters* concerning the Accused Fatmir Limaj discussed earlier, and also the later consideration given to the allegation of a joint criminal enterprise, it has not been established by the Prosecution that Fatmir Limaj is liable to conviction for any of the offences charged in the Indictment, whether under Article 7(1) or 7(3) of the Statute.[571]

According to Fatmir Limaj, the Prosecution has failed to establish that the Trial Chamber's conclusions on his alleged command responsibility were "unreasonable".[572]

222. Since the alleged error of law and errors of fact are closely intertwined, the Appeals Chamber will, where appropriate, consider them together.

1. Whether the Trial Chamber erred in failing to consider all of the relevant evidence

223. The Prosecution submits that due to its piecemeal approach to the evidence,[573] the Trial Chamber erred by failing to consider the evidence provided by several witnesses identifying Fatmir Limaj as the person they met in the prison camp when addressing his command authority.[574] The Prosecution argues that the Trial Chamber considered evidence of eyewitnesses in the camp as relevant to the issue of identification alone, even though they testified as to his command functions in the camp.[575] The Prosecution also submits that the Trial Chamber accepted Fatmir Limaj's admission that he was the commander of the Çeliku 1 unit in Klecke/Kleçka during the Indictment period,[576] and found that "there is a strong possibility apparent on the evidence that Fatmir limaj [sic] was active as a commander in the prison camp at times relevant to the Indictment […]".[577] Thus, the Prosecution claims it should have considered this evidence along with that of witnesses who stated they met "Commander Çeliku" and found out that his real name was Fatmir Limaj.[578]

224. Fatmir Limaj responds that, in light of all of the evidence, including that of the Defence witnesses who testified that his area of responsibility was confined to Klecke/Kleçka and the Çeliku

[569] Limaj Response Brief, para. 102.
[570] Limaj Response Brief, para. 103, with reference to Trial Judgement, para. 10.
[571] Limaj Response Brief, para. 103 (emphasis added), with reference to Trial Judgement, para. 602.
[572] Limaj Response Brief, paras 105 and 107, with reference to Trial Judgement, paras 569-602. *See also* AT 154-158 and 166-171 (6.6.2007).
[573] Prosecution Appeal Brief, para. 2.144.
[574] Prosecution Appeal Brief, paras 2.139 and 2.171, with reference to Trial Judgement, paras 566-602.
[575] Prosecution Appeal Brief, paras 2.140-2.143 with reference to Trial Judgement, paras 532-533, 538-541, 545, 551. *See also* under the first ground of appeal: Prosecution Appeal Brief, paras 2.47, 2.50, 2.88-2.90.
[576] Prosecution Appeal Brief, para. 2.48, with reference to Trial Judgement, paras 598-599.
[577] Prosecution Appeal Brief, paras 2.51-2.52, with reference to Trial Judgement, para. 601.
[578] Prosecution Appeal Brief, para. 2.49, with reference to Trial Judgement, paras 531-550. *See also* Prosecution Appeal Brief, paras 2.87 and 2.90.

1 unit during the Indictment period, the Trial Chamber did not err in finding that the Prosecution had not established his involvement in the operation of the prison camp.[579]

225. The Appeals Chamber finds that the Trial Chamber referred to the identification evidence of Witnesses L04, L06, L07, L10, L96, and Ivan and Vojko Bakrač when considering this issue.[580] In addition, the Trial Chamber carefully examined Witness L64's identification evidence together with his evidence regarding Fatmir Limaj's area of responsibility.[581] As a result, the Trial Chamber did consider identification evidence when addressing Fatmir Limaj's position of command and control.

2. Whether the Trial Chamber erred in failing to *properly* consider the relevant evidence

(a) Alleged corroboration between Shukri Buja, Ramadan Behluli, Ramiz Qeriqi, Shefqet Kabashi and Witness L64's evidence

226. The Prosecution submits that Shukri Buja, Ramadan Behluli, Ramiz Qeriqi, Shefqet Kabashi and Witness L64's evidence corroborated that Fatmir Limaj was a regional commander whose area of responsibility included the Llapushnik/Lapušnik prison camp during June and July 1998.[582]

227. As a preliminary issue, the Prosecution submits that the Trial Chamber erroneously rejected Shukri Buja's and Ramadan Behluli's prior statements given to the Prosecution, on the basis that they later recanted the portions tending to incriminate Fatmir Limaj. This, the Prosecution argues, nullified the effect of the Trial Chamber's Decision of 25 April 2005 to admit the statements.[583]

228. The Appeals Chamber finds, however, that by rendering its Decision of 25 April 2005, the Trial Chamber did not renounce its power to later assess the reliability of this evidence when determining the guilt of the Accused.[584] Thus, the Trial Chamber did not nullify the effect of the Decision of 25 April 2005 when it assessed the reliability of the videotaped Prosecution interviews and diagrams created by Shukri Buja and Ramadan Behluli in light of the other evidence.

[579] Limaj Response Brief, para. 89, with reference to Trial Judgement, paras 598-602.
[580] Trial Judgement, paras 598 and 600, with reference in fn. 2011 to Trial Judgement, paras 530-562.
[581] Trial Judgement, para. 569.
[582] Prosecution Appeal Brief, paras 2.145 (with reference to Trial Judgement, paras 566-599), 2.146, 2.151-2.252, 2.159-2.160, 2.169, 2.173-2.191; Ramiz Qeriqi, T. 3579-3580 (28.2.2008); ex. P121 "Video of Witness Interview Dated 26 June 2003", pp. 9-10 and 51-52; ex. P160.1 "Transcript of the Interview Dated 28 April 2003", p. 37; ex. P159 "Diagram Drawn by the Witness"; ex. P173 "Handwritten Diagram Made by Witness L64"; ex. P154 "Map". *See also* AT 91-94 (6.6.2007).
[583] Prosecution Appeal Brief, paras 2.173, 2.175-2.176 and 2.192, with reference to Trial Judgement, paras 13, 14, 568, 577-587, 601. *See also* AT 94-95 and 201-202 (6.6.2007).
[584] Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence ("Decision of 25 April 2005"), para. 33; Trial Judgement, para. 580.

229. The Prosecution further alleges that the Trial Chamber demonstrated that Shukri Buja's prior interview process had been fair and the questioning clear[585] and that any confusion during the interview related to errors in translation.[586] The Prosecution submits, however, that the Trial Chamber noted that Shukri Buja "consciously had been evasive" during his in-court testimony and appeared to have "consciously sought to avoid" providing answers to questions about material issues in the case.[587] The Prosecution further argues that the Trial Chamber erroneously disregarded Buja's prior statement on the basis that he described Fatmir Limaj's role as that of a coordinator rather than a commander.[588]

230. The Prosecution asserts in particular that in his statement, Shukri Buja indicated that Klecke/Kleçka was the regional command headquarters with an area of responsibility that would necessarily have included the Llapushnik/Lapušnik camp.[589] His statement also indicated that he believed Fatmir Limaj to be the commander of the area, superior in authority to himself and his fellow soldiers.[590] In addition, it indicated that Buja "received instructions […] from Commander Çeliku" in Klecke/Kleçka.[591]

231. When examining Shukri Buja's prior statement to the Prosecution, the Trial Chamber found that he described Fatmir Limaj's role as one of "coordination"[592] or as "consultative" and that

> [t]hese references leave unclear whether Fatmir Limaj had a command role in the relevant sense. Further, there are passages which leave unresolved whether Fatmir Limaj or Ismet Jashari, aka Kumanova, was the person with ultimate responsibility in Klecke/Kleçka.[593]

The Trial Chamber could not find from his statement that Fatmir Limaj had command of an area which included the Llapushnik/Lapušnik prison camp during the Indictment period,[594] and the Appeals Chamber finds that the Prosecution has not demonstrated that no reasonable trier of fact

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[585] Prosecution Appeal Brief, paras. 2.180 (with reference to Trial Judgement, para. 582) and 2.181.
[586] Prosecution Appeal Brief, para. 2.181.
[587] *Ibid.*
[588] Prosecution Appeal Brief, para. 2.183, with reference to Trial Judgement, para. 582.
[589] Prosecution Appeal Brief, para. 2.153.
[590] *Ibid.*
[591] *Ibid.* For Limaj *see* AT 166-168 (6.6.2007).
[592] Trial Judgement, para. 582, with reference to ex. P160.1, "Transcript of the Interview dated 28 April 2003", pp. 36-37 and 51.
[593] *Ibid.*, p. 43.
[594] Trial Judgement, para. 582. Although it is not mentioned in the Trial Judgement, the Trial Chamber implicitly considered Shukri Buja's diagram (which is part of his statement) since it held in para. 601 that it reached its conclusion as to Fatmir Limaj's alleged position of command on the basis of each relevant piece of evidence considered separately and in combination (*see also* Trial Judgement, paras 10, 17 and 20). Furthermore, a Trial Chamber only has to deal with evidence which is necessary for the purposes of the Trial Judgement (*see Kordić and Čerkez* Appeal Judgement, para. 382). Since Buja's evidence on this issue has been found to be irrelevant for establishing whether Fatmir Limaj held a position of command including the Llapushnik/Lapušnik prison camp at relevant time, the Trial Chamber was not unreasonable when it did not explicitly mention the diagram in the Trial Judgement.

could have drawn such inference from this evidence. Thus, the Trial Chamber did not reject Shukri Buja's prior statement on the sole basis of being expressly disavowed in his in-court testimony.

232. The Prosecution further argues that Ramadan Behluli indicated in his Prosecution statement that in the spring of 1998, the KLA General Headquarters in this area was in Klecke/Kleçka, under Fatmir Limaj's command.[595] He said that "Fatmir Limaj was there the zone Commander," making it clear that he knew that Fatmir Limaj held command over Shukri Buja and Ramiz Qeriqi.[596] He also explained that the area of responsibility of the Klecke/Kleçka General Headquarters included the area of Llapushnik/Lapušnik where the camp was located.[597] The Prosecution further submits that the Trial Chamber was satisfied that Behluli made his statement to the Prosecution voluntarily[598] and that it found his explanation for why his oral testimony departed so substantially on key points regarding the relevant command structure from May to mid-August 1998 from his prior statement to be unsatisfying.[599] In its Decision of 25 April 2005, the Trial Chamber noted that the witness' reasons demonstrated an "unpreparedness to tell the truth".[600]

233. The Trial Chamber found that in his prior statement of 25 April 2003, Ramadan Behluli placed Fatmir Limaj as the commander of the Pashtrik/Paštrik zone which included the Llapushnik/Lapušnik village and the prison camp.[601] However, the Trial Chamber noted that he also referred to Ramiz Qeriqi being a battalion commander, which is indicative of a time-period subsequent to the Indictment period.[602] The Trial Chamber thus concluded that this raised the issue of whether Ramadan Behluli properly understood the time period in question. The Trial Chamber also found that the zone under Klecke/Kleçka's command, which he drew on a map, included the relevant part of the Llapushnik/Lapušnik village, on the southern side of the Prishtina/Pristina-Peje/Pec road.[603] However, the witness drew the zone prior to being asked whether this was the situation in July 1998.[604] Moreover, when specifically asked if this was the situation in July 1998, he just answered that "[t]his is … the zone under the Klecka command".[605] Furthermore, the Trial Chamber held that Ramadan Behluli stated in his April 2003 interview that he was only receiving

[595] Prosecution Appeal Brief, paras 2.155 and 2.166.
[596] *Ibid.*
[597] *Ibid.*
[598] Prosecution Appeal Brief, para. 2.167, with reference to Trial Judgement, para. 586. Prosecution Appeal Brief, para. 2.186.
[599] Prosecution Appeal Brief, para. 2.167. *See also* Prosecution Appeal Brief, paras 2.186-2.189.
[600] *Ibid.*
[601] Trial Judgement, para. 584, with reference to ex. P121 "Video of Witness Interview Dated 26 June 2003", pp. 22-23.
[602] Trial Judgement, para. 584, with reference to ex. P121 "Video of Witness Interview Dated 26 June 2003", pp. 22.
[603] Trial Judgement, para. 585, with reference to ex. P119 "Black and White Map with Yellow Markings".
[604] Trial Judgement, para. 585, with reference to ex. P121 "Video of Witness Interview Dated 26 June 2003", p. 51.
[605] *Ibid.*

orders from Ramiz Qeriqi and not from Fatmir Limaj.[606] The Appeals Chamber finds that the Trial Chamber reasonably inferred from this evidence that Fatmir Limaj's area of responsibility did not include the area of Llapushnik/Lapušnik in which the camp was located. Therefore, the Appeals Chamber finds that the Trial Chamber did not reject Ramadan Behluli's prior statement on the sole basis of being expressly disavowed during his in-court testimony.[607]

234. For all these reasons, the Prosecution fails to demonstrate that the Trial Chamber unreasonably held that while it had "strong suspicions", it was not able to make positive findings on the basis of Shukri Buja's[608] or Ramadan Behluli's evidence.[609]

235. The Prosecution alleges that Ramiz Qeriqi testified that the line of command was Likofc/Likovac (General Staff), Klecke/Kleçka (regional), Kroimire/Krajmirovce (local), with Rexhep Selimi in command in Likofc/Likovac, Fatmir Limaj in command in Klecke/Kleçka and himself in command in Kroimire/ Krajmirovce.[610] The Prosecution submits that the Trial Chamber erroneously evaluated Ramiz Qeriqi's evidence[611] and found ambiguity because Qeriqi also stated that the area was the same at the time he was battalion commander, which factually occurred after the period relevant to the Indictment. However, the Prosecution claims, it is clear that Qeriqi was emphasising the fact that the overall area of responsibility and KLA structure *remained* the same both *before* and *after* the formal establishment of the brigades and that Qeriqi was not confused as to the area of responsibility in the two different periods of time as found by the Trial Chamber.[612]

236. The Trial Chamber found that Ramiz Qeriqi described a line of organisation from Likofc/Likovac via Klecke/Kleçka to Kroimire/Krajmirovce.[613] The Trial Chamber also found that he stated that Rexhep Selimi was in command in Likofc/Likovac, that Fatmir Limaj was in command in Klecke/Kleçka and that the general commander of the KLA was Azem Syla.[614] However, the Trial Chamber considered a number of uncertainties in Ramiz Qeriqi's evidence as to the position of Fatmir Limaj before mid-August 1998: Ramiz Qeriqi testified that between May and

[606] Trial Judgement, para. 587, with reference to ex. P121 "Video of Witness Interview Dated 26 June 2003", pp. 23, 28.
[607] The Trial Chamber did not hold that the oral testimony of Buja and Behluli rendered void their prior videotaped OTP statements, as alleged by the Prosecution. The Trial Chamber carefully assessed both the oral testimonies and the prior videotaped OTP interviews and explained why each piece of evidence was not reliable. The prior OTP interviews were found to be unreliable for the reasons detailed above; s*ee also* Trial Judgement, paras 582, 584, 587) and the oral testimonies were found to be unreliable because of the witnesses' evident sense of bondship with the KLA in general and Fatmir Limaj in particular that may have influenced their in-court evidence (*see* Trial Judgement, paras 580 and 586).
[608] Trial Judgement, para. 581.
[609] Trial Judgement, para. 586.
[610] Prosecution Appeal Brief, para. 2.154.
[611] Prosecution Appeal Brief, para. 2.200.
[612] Prosecution Appeal Brief, para. 2.202, with reference to Trial Judgement, para. 573. *See also* AT 92-93 (6.6.2007).
[613] Trial Judgement, para. 572.
[614] Trial Judgement, para. 572, with reference to Ramiz Qeriqi, T. 3579 (28.2.2005).

July 1998, he only very rarely went to Klecke/Kleçka and was not taking any orders from Fatmir Limaj because he was no longer the commander in Kroimire/Krajmirovce.[615] The Trial Chamber also noted that he testified that he was taking orders from Shukri Buja,[616] and when asked who Shukri Buja got his orders from, he answered that he did not know.[617] Moreover, the Trial Chamber found that when drawing on Exhibit P154 the limits of the zone under the command of Klecke/Kleçka which included Llapushnik/Lapušnik,[618] the witness' own description of the drawing suggested some confusion as to the time period on which he was relying. Indeed, he used the term "battalions", which the Trial Chamber found to be related to a time after the Indictment period.[619]

237. The Appeals Chamber finds that this evidence allows for the reasonable inference that Ramiz Qeriqi's testimony related to a time subsequent to the Indictment period.[620] Thus, the Trial Chamber did not err in failing to draw from Ramiz Qeriqi's evidence the inference that Fatmir Limaj had a position of regional command that included the Llapushnik/Lapušnik prison camp during the relevant Indictment period.

238. The Prosecution further submits that the Trial Chamber also failed to adequately consider highly probative evidence that Fatmir Limaj exercised command authority over KLA forces from neighbouring areas when these forces were seconded to his area of responsibility.[621] The Prosecution argues in particular that Shefqet Kabashi testified that during the relevant Indictment period his unit was seconded to assist Fatmir Limaj's unit under Fatmir Limaj's command[622] which extended beyond Klecke/Kleçka and included the Llapushnik/Lapušnik village.[623] The Trial Chamber disregarded this evidence, apparently because Shefqet Kabashi seemed uncertain about the exact boundaries of Fatmir Limaj's overall area of responsibility.[624] The Prosecution argues that this would not be surprising for a soldier of Shefqet Kabashi's rank, since his knowledge of the boundaries of Fatmir Limaj's area was "based on what he had heard on television and radio broadcasts and from his impression as a member of the KLA in the neighbouring unit".[625]

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[615] *Ibid*., T. 3579-3580 (28.2.2005), T. 3711 (3.3.2005).
[616] *Ibid*., T. 3711 (3.3.2005).
[617] *Ibid*., T. 3582 (28.2.2005). T. 3711-3712 (3.3.2005).
[618] Ex. P154 "Map".
[619] Trial Judgement, para. 573, with reference to Ramiz Qeriqi, T. 3581 (28.2.2005). The Trial Chamber previously made the finding that: "After the offensive of 25 and 26 July 1998, brigades and battalions were formed". [Trial Judgement, para. 64, with reference to Ramiz Qeriqi, T. 3692 (3.3.2005) and Bislim Zyrapi, T. 6824 (1.6.2005)]. The Appeals Chamber notes that these findings have to be considered in light of the Trial Chamber's finding that "[t]he Chamber regards Ramiz Qeriqi as a witness of diminished credibility" (Trial Judgement, para. 29 *in fine*).
[620] Trial Judgement, para. 573.
[621] Prosecution Appeal Brief, para. 2.145, with reference to Trial Judgement, paras 566-599.
[622] Prosecution Appeal Brief, paras 2.146 and 2.148.
[623] Prosecution Appeal Brief, para. 2.148.
[624] Prosecution Appeal Brief, para. 2.147, with reference to Trial Judgement, para. 593.
[625] Prosecution Appeal Brief, para. 2.147, with reference to Trial Judgement, para. 593.

239. The Prosecution asserts that Shefqet Kabashi also testified that he was taken to a meeting at Fatmir Limaj's headquarters in Klecke/Kleçka which was attended by Shukri Buja, Isak Musliu, the leader of the Guri unit and other unit commanders. During this meeting, Çeliku asked those present to report problems that they were having in their respective areas of responsibility to him.[626] According to the Prosecution, this evidence corroborates, and is corroborated by, other evidence of Fatmir Limaj's command in Llapushnik/Lapušnik[627] and as a regional commander.[628]

240. The Appeals Chamber notes that the Trial Chamber examined Shefqet Kabashi's evidence and found that he "acknowledged himself that he was uncertain about the boundaries of the zone which he says was under the command of Çeliku, and that his evidence in this respect was nothing more than his understanding at the time, which was based on what he had heard on television and radio broadcasts and from his impression as a member of the KLA in a neighbouring unit."[629]

241. On this basis, the Trial Chamber found that the evidence of Shefqet Kabashi does not demonstrate that Fatmir Limaj had a position of command and authority which extended geographically beyond the command of his local unit in Klecke/Kleçka.[630] The Appeals Chamber finds that the Prosecution does not show that this finding of the Trial Chamber was erroneous.

242. As to the Prosecution's submissions in relation to a meeting at Fatmir Limaj's headquarters in Klecke/Kleçka, the Appeals Chamber finds that the Trial Chamber did not err in disregarding this evidence, as it does not support the allegation that Fatmir Limaj had a position of command that included the Llapushnik/Lapusnik prison camp.

243. The Prosecution also alleges that Witness L64 testified that Fatmir Limaj came to Llapushnik/Lapušnik to give a speech, introducing himself as the person responsible for the area. Witness L64's evidence was that Fatmir Limaj further announced that Qerqizi would be the person responsible for the fighting position in Llapushnik/Lapušnik. Witness L64 also testified that "Qerqiz regularly reported to Fatmir Limaj about the situation in Llapushnik/Lapušnik."[631]

244. The Trial Chamber found that only Witness L64's evidence could support the Prosecution's allegation that, in the time relevant to the Indictment, Fatmir Limaj was in a position of command which included the Llapushnik/Lapušnik prison camp.[632] However, the Trial Chamber found that it could only give weight to his evidence in relation to a material issue if it had been confirmed in

[626] Prosecution Appeal Brief, paras 2.149 and 2.164
[627] Prosecution Appeal Brief, para. 2.148.
[628] Prosecution Appeal Brief, para. 2.149.
[629] Trial Judgement, para. 593.
[630] *Ibid.*
[631] Prosecution Appeal Brief, para. 2.156, with reference to Trial Judgement, para. 569.
[632] Trial Judgement, para. 569.

some material particular by other evidence, which the Trial Chamber accepted.[633] As held above, the Trial Chamber reasonably rejected the evidence of Shukri Buja, Ramiz Qeriqi, Ramadan Behluli and Shefqet Kabashi regarding Fatmir Limaj's alleged command over an area that included the prison camp. Hence, even if considered together, this evidence cannot corroborate Witness L64's evidence on this issue.

245. Consequently, the Trial Chamber reasonably refused to find that the evidence of Shukri Buja, Ramiz Qeriqi, Ramadan Behluli, Shefqet Kabashi and Witness L64 corroborated Fatmir Limaj's alleged rank as a regional commander whose area of responsibility included the Llapushnik/Lapušnik prison camp, in the Indictment period, *i.e.* from May to 26 July 1998.

(b) Witness L64's evidence, including his diary

246. The Prosecution submits that the Trial Chamber also erred in evaluating specific portions of Witness L64's evidence - in particular his diary - by imposing an impermissibly rigorous standard when reviewing Prosecution evidence vis-à-vis Defence evidence.[634] The Prosecution argues that in discounting Witness L64's testimony regarding Fatmir Limaj's command, the Trial Chamber unreasonably found that it was "based largely on no more than hearsay and rumours and that he had no reliable knowledge of the regional structure of the KLA".[635]

247. The Prosecution submits in particular that the Trial Chamber overlooked the fact that Witness L64's testimony was based on his own first-hand knowledge as a Çeliku 3 unit member in Llapushnik/Lapušnik.[636] As such he knew that "Qerqiz" commanded Çeliku 3 and that Fatmir Limaj had the authority to appoint "Qerqiz" as the unit commander.[637] Witness L64 also conceded that he did not know details about the overall structure of the *wider* KLA and the KLA structure *outside* the group of units that he served in and interacted with directly. The Prosecution claims that this admission should have bolstered, rather than detracted from, his credibility.[638]

248. The Prosecution submits that the Trial Chamber also failed to appreciate Witness L64's testimony concerning Fatmir Limaj's participation in an oath ceremony in Llapushnik/Lapušnik, despite his account having been corroborated by Karpuzi. The Trial Chamber held that Karpuzi's

[633] *See* Trial Judgement, paras 28, 569 and 571.
[634] Prosecution Appeal Brief, paras 2.192 and 2.194.
[635] Prosecution Appeal Brief, para. 2.192, with reference to Trial Judgement, para. 570.
[636] Prosecution Appeal Brief, para. 2.193.
[637] *Ibid.*
[638] Prosecution Appeal Brief, paras 2.193-2.194.

in-court testimony differed from his Prosecution interview in July 2003 and erroneously treated these inconsistencies as invalidating the evidence in his prior Prosecution interview.[639]

249. The Trial Chamber found that, when drawing his diagram roughly depicting the organisation of the KLA, Witness L64 had no reliable knowledge of the regional structure of the KLA at the time relevant to the Indictment.[640] This conclusion was based on Witness L64's testimony that he "knew some names" within the KLA and "didn't know what functions and what grades they had". He also stated that he based his knowledge on "what Luani said or someone else".[641] The Trial Chamber also found that the reliability of Witness L64's evidence was doubtful, considering that his account varied between examination-in-chief and cross-examination, on the issue of Witness L64 being disarmed by Çeliku.[642] It also varied between his oral testimony and his previous statements on the number of times Witness L64 saw Çeliku in Llapushnik/Lapušnik.[643]

250. In light of these considerations, the Prosecution does not demonstrate that the Trial Chamber made an inference on Witness L64's evidence that no reasonable trier of fact could have made. Furthermore, the Appeals Chamber recalls its earlier finding that the Trial Chamber reasonably rejected the evidence of Shukri Buja, Ramadan Behluli and Ramiz Qeriqi regarding Fatmir Limaj's alleged position as a regional commander which included the Llapushnik/Lapušnik prison camp. Consequently, Witness L64's diagram could not be corroborated by those of Shukri Buja, Ramadan Behluli and Ramiz Qeriqi, and the Trial Chamber only accepted Witness L64's evidence regarding a material issue if this part of his evidence was "confirmed in some material particular by other evidence, which the Chamber accepts."[644]

251. In addition, with respect to Witness L64's diary, the Prosecution argues that the Trial Chamber appeared to view it with suspicion in part because it did not contain a complete record of the events in Llapushnik/Lapušnik from May to June 1998. According to the Prosecution, the idea that such a document would provide a complete record is unreasonable, particularly as many of the events mentioned in it are corroborated by other evidence.[645]

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[639] Prosecution Appeal Brief, para. 2.195, with reference to Trial Judgement, para. 592.
[640] Trial Judgement, para. 570, referring to Witness L64, T. 4707-4712 (23.3.2005).
[641] Trial Judgement, fn. 1897, referring to Witness L64, T. 4707-4712 (23.3.2005).
[642] *See* Trial Judgement, para. 569. During examination-in-chief, Witness L64 testified that he was being summoned to Klecke/Kleçka to hand over his weapon, following an operation to collect weapons undertaken in Lladroc/Ladrovac without Çeliku's knowledge and that he was told by Qerqiz about the summons but that he refused to go to Klecke/Kleçka (Witness L64, T. 4400-4402, 16.3.2005); during cross-examination, Witness L64 testified that he had in fact been disarmed by Çeliku but that this was because it had been discovered that he had been intending to leave Llapushnik/Lapušnik to murder someone (Witness L64, T. 4839-4840, 30.3.2005; T. 4842-4843, 30.3.2005, Private Session; T. 4867-4869, 31.3.2005, Private Session).
[643] *See* Trial Judgement, para. 569, fn. 1887.
[644] Trial Judgement, para. 28.
[645] Prosecution Appeal Brief, para. 2.198, with reference to Trial Judgement paras 28 and 571.

252. The Trial Chamber found that Witness L64's diary was a later transcription of notes made during the war, however not recorded contemporaneously.[646] The Trial Chamber further found that it included a short summary of the witness' childhood and life, followed by more specific entries dated May and July 1998 as well as throughout 1999.[647] However, the Trial Chamber also found that the diary did not record events which could be considered as memorable by Witness L64, in particular the speech allegedly given by Çeliku in the Llapushnik/Lapušnik village around mid-May 1998, in which he announced that he was responsible "for the area".[648]

253. The Appeals Chamber finds that in light of the above considerations of the Trial Chamber, the Prosecution has not shown that no reasonable trier of fact could have concluded that Witness L64's diary was not reliable, particularly in light of the general reservations which the Trial Chamber had concerning this witness.

(c) Jan Kickert's evidence in relation to the 30 July 1998 meeting

254. The Prosecution submits that the Trial Chamber erroneously evaluated Jan Kickert's evidence regarding a meeting with representatives of the European Community on 30 July 1998,[649] attended by Jan Kickert from the Austrian Embassy, David Slinn from the British Embassy in Belgrade, Jakup Krasniqi, Rame Buja and Fatmir Limaj.[650]

255. The Prosecution recalls the Trial Chamber's finding that

> the significance of the presence of Fatmir Limaj at the third of these meetings is a matter of controversy. The Prosecution rely [*sic*] on it as evidence of his high stature in the KLA. However, the Chamber notes he did not use a hierarchy number at the meeting. Fatmir Limaj explains his presence on the basis that he was then unit commander for the place where the meeting was held, *i.e.* in Klecka/Klecka.[651]

256. The Prosecution submits that after the meeting, Kickert wrote a report stating that he had met with "KLA spokesman Jakup Krasniqi, the *regional commander Çeliku* and Rame Buja, former LDK secretary and now a KLA staff member".[652] The Prosecution argues that the Trial Chamber unreasonably rejected this evidence based upon Fatmir Limaj's assertion that he was the commander of the Klecke/Kleçka unit only, upon the fact that the meeting was held in

[646] Trial Judgement, para. 571.
[647] *Ibid.*
[648] *Ibid.*
[649] Prosecution Appeal Brief, para. 2.209, with reference to Trial Judgement, para. 128.
[650] Prosecution Appeal Brief, para. 2.210. *See also* AT 97 (6.6.2007).
[651] Prosecution Appeal Brief, para. 2.211, with reference to Trial Judgement, para. 130.
[652] Prosecution Appeal Brief, para. 2.213 (emphasis added).

Klecke/Kleçka as well as Kickert's statement that Fatmir Limaj was not referred to by a number (unlike others in the KLA hierarchy).[653]

257. The Trial Chamber found that on 30 July 1998 a third meeting between representatives of foreign missions of States of the European Community and the KLA was held in Klecka/Kleçka.[654] This meeting was attended by Jan Kickert from the Austrian Embassy and David Slinn from the British Embassy in Belgrade. The KLA was represented by Jakup Krasniqi (the KLA spokesperson), Rame Buja (the person responsible for organising the civil authorities in the so-called free territories) and Fatmir Limaj.[655] As to the significance of the presence of Fatmir Limaj in this meeting, the Trial Chamber noted that he did not use a hierarchy number (as other KLA leaders did) and explained his presence on the basis that he was the unit commander for the place where the meeting was held, *i.e.* Klecka/Kleçka.[656]

258. The Trial Chamber considered Jan Kickert's testimony that in late June 1998 he "had no idea of the structure of [the KLA]" and that the foreign missions had difficulties in identifying their interlocutors in the KLA.[657] In addition, the Trial Chamber referred to the part of Jakup Krasniqi's testimony in which he stated that Fatmir Limaj attended the meeting because it was held in the area where his unit was based, that is Klecka/Kleçka. Thus, the Appeals Chamber finds that it was reasonable of the Trial Chamber to refuse to consider this evidence as demonstrating that Fatmir Limaj held a position of regional command that included the Llapushnik/Lapušnik prison camp.

(d) Exhibit P34

259. The Prosecution submits that the Trial Chamber unreasonably refused to accept the content of Exhibit P34 (a pro-KLA documentary created to commemorate fallen KLA-fighter Sadik Shala) which stated that Fatmir Limaj exercised command over the Çeliku unit in Llapushnik/Lapušnik by early May 1998.[658] The Prosecution claims that the Trial Chamber erroneously considered the *ex post facto* nature of the documentary and the interchangeable use of the terms "Çelik's unit" and the "121st Brigade".[659] The Prosecution argues that the structure of the 121st Brigade existed much earlier and was merely *formalised* in August 1998.[660] This is made apparent by the fact that Sadik

[653] Prosecution Appeal Brief, para. 2.214, with reference to Trial Judgement, para. 130.
[654] Trial Judgement, para. 128, with reference to Jan Kickert, T. 677 (23.11.2004), T. 749-750 (23.11.2004); Jakup Krasniqi, T. 3406-3408 (14.2.2005).
[655] *Ibid.*, with reference to Jan Kickert, T. 680 (23.11.2004), T. 749 (23.11.2004); Jakup Krasniqi, T. 3406-3408 (14.2.2005).
[656] Trial Judgement, para. 130.
[657] Trial Judgement, para. 131, with reference to Jan Kickert, T. 708 (23.11.2004).
[658] Prosecution Appeal Brief, paras 2.215-2.216 and 2.121, with reference to Trial Judgement, para. 595.
[659] Prosecution Appeal Brief, para. 2.217, with reference to Trial Judgement, para. 595.
[660] *See also* AT 90, 96-97, 200-201 (6.6.2007).

Shala, who was the subject of the documentary, died on 19 July 1998.[661] In addition, the Prosecution submits that the Trial Chamber failed to consider that in this documentary, Lahi Ibrahimaj stated that Sadik Shala was assigned the task of provisioning Çeliku's *units* in the Pashtrik zone. It claims that this corroborates the evidence that Fatmir Limaj was in charge of more than one unit in Klecke/Kleçka.[662]

260. The Trial Chamber found that although the time period of the documentary was clearly May to July 1998, Fatmir Limaj's soldiers were sometimes referred to as belonging to "Çelik's unit" or "the 121st Brigade". The Trial Chamber uncontestedly found that the 121st Brigade had not been formed at the time relevant to the Indictment,[663] and held that other evidence described the KLA command structure as "a mystery" and "more a matter of diffuse horizontal command and coordination structure."[664]

261. The Appeals Chamber is satisfied that it was therefore reasonable for the Trial Chamber to consider that the use of the term "121st Brigade" for a period between May and July 1998 raised a reasonable doubt that, prior to August 1998, the organisation of the 121st Brigade was not achieved to a degree that Fatmir Limaj was in a position of a regional command that included the Llapushnik/Lapušnik prison camp.

262. With respect to Lahi Ibrahimaj's testimony, the Appeals Chamber finds that the Prosecution misstates the evidence. The witness stated that "[S]adik Shala provisioned Çeliku's *unit* in the Pashtrik operations zone",[665] thus explicitly referring to only one Çeliku unit. Hence, the Trial Chamber did not err in refusing to find that this evidence corroborated other evidence that Famir Limaj was allegedly in charge of more than a single unit in Klecke/Kleçka.

(e) Evidence regarding prisoner release papers

263. The Prosecution submits that the Trial Chamber erred by failing to consider the evidence given by Vojko and Ivan Bakrač and Witnesses L04, L06, L10 and L96 in relation to release papers bearing the authorisation of "Commander Çeliku".[666] The Prosecution argues that this shows that Fatmir Limaj exerted a command function in the camp.[667] The Prosecution submits in particular that

[661] Prosecution Appeal Brief, para. 2.217.
[662] Prosecution Appeal Brief, paras 2.219-2.220.
[663] Trial Judgement, para. 595.
[664] Trial Judgement, para. 131, with reference to ex. P61 "Embassy Report Prepared by Witness Kickert Dated 27 June 1998", p. 1; Jan Kickert, T. 708 (23.11.2005).
[665] Ex. P34.1 "Transcript of the Documentary Video", p. 4 (emphasis added).
[666] Prosecution Appeal Brief, para. 2.222. The Prosecution alleges in fn. 369 that the Trial Chamber further erred when rejecting the evidence about the release papers because they were not in evidence.
[667] Prosecution Appeal Brief, para. 2.222.

Witness L96 corroborates this evidence that Fatmir Limaj played a role in detention and release decisions.[668]

264. Fatmir Limaj responds in particular that Witness L96 did not identify him prior to trial and that the Trial Chamber reasonably found that his subsequent identification by this witness on television was unreliable.[669] Fatmir Limaj further responds that Witness L96 did not mention "Çeliku" or "Fatmir Limaj" in his original statements[670] and stated that he did not see Fatmir Limaj or Commander Çeliku in detention.[671] In addition, there is no corroborating evidence because Witness L96 is the only eye-witness who saw Fatmir Limaj or Commander Çeliku in the Berishe/Beriša Mountains.[672]

265. The Trial Chamber considered that Witness L10 had not mentioned before a CCIU investigator in August 2001 that he was given a release paper, let alone one that had "Commander Çeliku" written on it.[673] During cross-examination, he stated that this omission was due to a possible mistake by the translator.[674] As to Witness L06, the Appeals Chamber notes that he testified that his release paper had only his first and last name on it.[675] Furthermore, Vojko Bakrač merely said in his statement to the Serbian authorities of 8 July 1998, referenced by the Trial Chamber, that he and his son Ivan Bakrač were released "by the KLA".[676] Finally, as to Witness L04's evidence, the Trial Chamber found that his failure to mention "Commander Çeliku" or any other "commander" while being interviewed by CCIU investigators in 2002 "remains unexplained".[677] The Trial Chamber considered in particular that he had throughout his testimony stressed how memorable his meeting with "Commander Çeliku" had been, as it led to his release being ordered.[678] The Appeals Chamber finds that this above captured evidence was reasonably assessed by the Trial Chamber. Moreover, as to Witness L96's testimony that Fatmir Limaj played a role in detention and release decisions,[679] the Trial Chamber uncontestedly[680] found that his

[668] Prosecution Appeal Brief, para. 2.75, with reference to Trial Judgement, para. 551. Prosecution Reply Brief, para. 2.29.
[669] Limaj Response Brief, para. 65, with reference to Trial Judgement, paras 538-540.
[670] Limaj Response Brief, para. 69, with reference to Trial Judgement, para. 553.
[671] Limaj Response Brief, para. 66, with reference to Trial Judgement, para. 557.
[672] Limaj Response Brief, para. 68, with reference to Trial Judgement, para. 554. *See also* Limaj Response Brief, para. 69, fn.76, with reference to Trial Judgement, para. 557. Limaj points out that, on the issue of counts 9-10 of the Indictment and the allegation of Fatmir Limaj's presence in the Berishe/Beriša Mountains and responsibility for the killings that took place there, the Prosecution did not dispute, contradict or otherwise controvert any aspect of Limaj's testimony in this regard whilst he was cross-examined.
[673] Trial Judgement, para. 539, with reference to Witness L10, T. 2974-2980 (3.2.2005), T. 3002 (4.2.2005).
[674] Witness L10, T. 2980 (3.2.2005).
[675] Witness L06, T. 1030 (26.11.2004); *see also* Trial Judgement, para. 450.
[676] Trial Judgement, para. 536, with reference to ex. P202, p. 7. *See also* Limaj Response Brief, fn. 61 of para. 62.
[677] Trial Judgement, para. 543.
[678] *Ibid*.
[679] Trial Judgement, para. 553.
[680] *See* Prosecution Reply Brief, para. 2.29: "Limaj repeats the Trial Chamber's findings on L96's credibility which the Prosecution does not challenge." *See also* Limaj Response Brief, paras 67-69.

credibility was doubtful as to material issues, and that it had to be corroborated in relation to those issues.[681] Taking into consideration the above findings, Witness L96's testimony is not supported in this respect. Thus, the Prosecution does not demonstrate that the Trial Chamber unreasonably failed to find that the evidence relating to release papers either corroborated that Fatmir Limaj personally participated in the operation of the prison camp, or that he had a command position that included the prison camp in his area of responsibility.[682]

(f) Evidence given by Fatmir Limaj

266. The Prosecution argues that the Trial Chamber erroneously evaluated Fatmir Limaj's evidence,[683] accepting that his area of responsibility did not include the Llapushnik/Lapušnik prison camp.[684]

267. The Prosecution alleges in particular that the Trial Chamber conceded that the fighting positions of Çeliku 3 were "in the general vicinity" of the Llapushnik/Lapušnik prison camp.[685] The Trial Chamber also noted the mutually corroborating evidence of the locations of the fighting positions on an aerial photo marked by Ruzhdi Karpuzi, Witness L64 and Fatmir Limaj.[686] With respect to Fatmir Limaj's marked positions, the Trial Chamber found that "the prison camp is, however, not marked as being under the command of the Çeliku 3 unit". Thus, the Prosecution claims, the Trial Chamber erroneously considered the fact that Fatmir Limaj chose not to implicate himself by marking the location of the prison camp on the aerial photo as an action worthy of negating the substantial body of Prosecution evidence to the contrary.[687]

268. The Appeals Chamber finds that the Trial Chamber did not explicitly consider the possible motivation for Fatmir Limaj not to mark the location of the prison camp on the photo. This, however, was reasonable in light of the evidence given by Ruzhdi Karpuzi and Witness L64, who both did not place the fighting positions of the Çeliku 3 unit inside the camp or its immediate surroundings, but in the general vicinity of the camp. Thus, their evidence corroborates Fatmir Limaj's evidence on this issue, and the Trial Chamber did not err in its assessment of the latter.

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[681] Trial Judgement, para. 26.
[682] *See supra*, para. 219.
[683] This evidence includes that of Defence witnesses Rexhep Selimi, Bislim Zyrapi and Elmi Sopi. On the evidence of these witnesses: S*ee* Limaj Response Brief, para. 106, with reference to Trial Judgement, paras 598-599. *See also* Prosecution Reply Brief, paras 2.43-2.63, with reference to Trial Judgement, paras 591-592, 599. *See also* AT 98 (6.6.2007). For Limaj's response, *see* AT 170 (6.6.2007).
[684] Prosecution Appeal Brief, para. 2.223.
[685] Prosecution Appeal Brief, para. 2.224, with reference to Trial Judgement, para. 692.
[686] *Ibid.*
[687] Prosecution Appeal Brief, paras 2.225-2.226, with reference to Trial Judgement, para. 692.

3. Whether the Trial Chamber erred in law or in fact when assessing the evidence pertaining to Fatmir Limaj's alleged ability to enforce discipline over KLA soldiers in the camp

269. The Prosecution submits that the Trial Chamber also misapplied the standard of proof beyond reasonable doubt and erred by erroneously evaluating evidence that Fatmir Limaj disarmed soldiers and consequently erred by unreasonably concluding that this did not demonstrate an exercise of his command authority.[688]

270. The Prosecution further submits that the Trial Chamber erred in not finding that disarming a soldier is a core disciplinary function of a commander as made clear by Defence Witness Sylejman Selimi.[689] It argues that the Trial Chamber appears not to have considered this when assessing the evidence of Witness L64 and Fadil Kastrati, both of whom testified about Fatmir Limaj disarming them as a disciplinary measure.[690] Fatmir Limaj had the authority to impose disciplinary measures and exercised that authority, and it was irrelevant to know *why* the disciplinary action took place.[691] Furthermore, the Prosecution argues that Fatmir Limaj's unreliable evidence should not have been used to negate Fadil Kastrati's credible evidence that Fatmir Limaj disarmed him and said that this is "because there are regulations and discipline in the ranks of the KLA".[692]

271. The Prosecution also claims that the Trial Chamber erroneously held that Witness L64's evidence showed that Fatmir Limaj's ability to discipline was "limited and not consistent with that expected of a commander".[693] With respect to disarming Kastrati, the Trial Chamber held that it was unable to determine whether Fatmir Limaj's action "reflected true powers of discipline rather than mere personal influence […], or depended on the purported invocation of orders from above".[694] The Prosecution argues that Fatmir Limaj himself conceded that he disarmed Kastrati, although he downplayed the basis for doing so.[695] The Prosecution argues that all this evidence

[688] Prosecution Appeal Brief, paras 2.131 and 2.206, with reference to Trial Judgement, paras 569, 589-590. *See also* AT 97 (6.6.2007).
[689] Prosecution Appeal Brief, para. 2.207, with reference to Sylejman Selimi, T. 2084-2085 (17.1.2005). This witness was in fact a Prosecution Witness: as recalled by the Trial Chamber, "[i]n the course of the presentation of its case, the Prosecution requested that four Prosecution witnesses, all former KLA members, be declared hostile. […] The Chamber denied the request with respect to Sylejman Selimi […]" (Trial Judgement, para. 768, with reference to Oral Decision of the Trial Chamber, 18 January 2005. *See also* AT 97 (6.6.2007).
[690] Prosecution Appeal Brief, para. 2.196.
[691] Prosecution Appeal Brief, para. 2.133.
[692] Prosecution Appeal Brief, para. 2.130, with reference to Trial Judgement, para. 588. Prosecution Appeal Brief, para. 2.135.
[693] Prosecution Appeal Brief, para. 2.208, with reference to Trial Judgement, para. 569.
[694] Prosecution Appeal Brief, paras 2.208 and 2.212, with reference to Trial Judgement, para. 590.
[695] Prosecution Appeal Brief, para. 2.196.

suggests that Fatmir Limaj had the material ability to disarm KLA soldiers and that he did so on more than one occasion.[696]

272. The Appeals Chamber is satisfied that the Trial Chamber reasonably found that Witness L64's evidence was unreliable due to discrepancies between his examination-in-chief and his cross-examination.[697] Since this was the main reason for the rejection of Witness L64's evidence, it is irrelevant to examine whether the Trial Chamber also reasonably inferred on his evidence that Fatmir Limaj's material ability to discipline subordinates was in fact limited and not consistent with that expected of a commander.

273. With respect to Fadil Kastrati, the Trial Chamber examined his evidence in order to determine whether Fatmir Limaj was exercising "true powers of discipline" or mere personal influence over him.[698] The Appeals Chamber recalls that for the purposes of Article 7(3) of the Statute, effective control over subordinates requires possession of material abilities to prevent subordinate offences or to punish subordinate offenders; substantial influence which falls short of such effective control is not sufficient.[699] The Appeals Chamber is satisfied that the Prosecution has not shown that no reasonable trier of fact could have inferred from the evidence of Fadil Kastrati that his disarming merely reflected Fatmir Limaj's personal influence, and not true powers of discipline in the sense of effective control, as required for criminal responsibility pursuant to Article 7(3) of the Statute.[700]

274. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not misapply the standard of proof beyond reasonable doubt and was not unreasonable in finding, after "very careful analysis", that in the Indictment period, Fatmir Limaj did not hold a position of command in the KLA which included command of KLA soldiers in the Llapushnik/Lapušnik prison camp.[701]

4. Conclusion

275. The Appeals Chamber is satisfied that the Trial Chamber did not err in applying the standard of proof beyond reasonable doubt to the totality of the evidence as a whole. In light of the totality of the evidence and the relevant findings of the Trial Chamber, the Appeals Chamber finds that the

[696] Prosecution Appeal Brief, para. 2.208, with reference to *Blaškić* Appeal Judgement, para. 69.
[697] Trial Judgement, para. 569. This should also be considered in light of the finding that the credibility of Witness L64 was also viewed "extremely" negatively by the Trial Chamber (*see* Trial Judgement, para. 28).
[698] Trial Judgement, para. 590.
[699] *See Čelebići* Appeal Judgement, para. 266; *see also ibid.*, para. 192.
[700] The Prosecution does not allege nor show that Fadil Kastrati was a KLA soldier from the Llapushnik/Lapušnik prison camp; the Trial Chamber found that he was in Blinaje/Lipovica when he was disarmed by Fatmir Limaj.
[701] Trial Judgement, para. 601.

Trial Chamber reasonably found that Fatmir Limaj does not incur criminal responsibility for any of the offences charged in the Indictment, be it under Article 7(1) or 7(3) of the Statute. Consequently, the remainder of the Prosecution's first ground of appeal and the second ground of appeal are dismissed.

C. Third ground of appeal: joint criminal enterprise

276. The Prosecution's submissions under the third ground of appeal have already been addressed above together with the Prosecution's first ground of appeal in relation to Haradin Bala.[702] The Appeals Chamber recalls its findings that the Trial Chamber reasonably found that Fatmir Limaj did not personally participate in the Llapushnik/Lapušnik prison camp and that he did not hold a position of command over this camp or guards working therein. Thus, the Appeals Chamber finds that the Prosecution's allegations under the third ground of appeal in relation to Fatmir Limaj have already been disposed of.

[702] *See supra* paras 90 *et seq.*

VI. THE PROSECUTION'S APPEAL REGARDING ISAK MUSLIU

277. The Prosecution submits that the Trial Chamber's acquittal of Isak Musliu resulted from its misapplication of the standard of proof. First, the Trial Chamber took an erroneously piecemeal approach to the evaluation of evidence and applied the standard of proof to individual facts that did not have to be proven "beyond reasonable doubt". Second, it applied a standard of review that was not "beyond reasonable doubt" but rather one that entertained *any* doubt, including errors not based upon evidence, logic and common sense. The Prosecution argues that these errors led the Trial Chamber to make a substantial number of factual findings that, in view of the totality of the evidence, were wholly unreasonable.[703] These findings of the Trial Chamber are the same, *mutatis mutandis*, as those mentioned by the Prosecution in its appeal against Fatmir Limaj.[704]

278. Isak Musliu responds by making essentially the same arguments as Fatmir Limaj in his response to the Prosecution's appeal against his acquittal.[705] Isak Musliu further argues that the Prosecution's appeal against his acquittal is "perverse", that it undermines the integrity of the trial process and the International Tribunal, and that it is an abuse of prosecutorial power.[706]

A. First ground of appeal: Isak Musliu's alleged personal participation in the Llapushnik/Lapušnik prison camp

279. The Prosecution submits that the Trial Chamber misapplied the "beyond reasonable doubt" standard of proof and erred in law when it found that Isak Musliu did not personally participate in the operation of the Llapushnik/Lapušnik prison camp.[707]

1. Whether the Trial Chamber erred in law and/or in fact by artificially dissecting the evidence

280. The Prosecution submits that the Trial Chamber's piecemeal approach to the evaluation of the evidence departed from proper legal analysis which establishes that items of circumstantial evidence may be insufficient in isolation to establish a fact but when taken together may be

[703] Prosecution Appeal Brief, para.1.4. *See also* AT 87-89 (6.6.2007).
[704] *See supra* para. 147.
[705] *See supra* para. 148. *See also* Musliu Response Brief, para. 42; *ibid.*, para. 13, with reference to *Tadić* Appeal Judgement, para. 64; *ibid.*, para. 16, with reference to *Čelebići* Appeal Judgement, para. 434. *See also* AT 190-191 (6.6.2007).
[706] Musliu Response Brief, para. 5. *See also* AT 176-178 (6.6.2007). The Appeals Chamber notes that the ICTR Appeals Chamber stated in *Ndindabahizi* that such use of the term "perverse" is appropriate in some legal systems (*Ndindabahizi* Appeal Judgement, para. 107, fn. 231). However, in other jurisdictions this term may have very different connotations. In German law, for instance, a reference to "perverted justice" could be equated with the last phase of the jurisprudence of the *Reichsgericht* during the Nazi-regime. Therefore, in order to avoid any ambiguity, such language should not be employed.
[707] Prosecution Appeal Brief, paras 1.6(c), 3.1, with reference to Trial Judgement, paras 672-688, 743.

decisive.[708] The Prosecution argues in particular that the Trial Chamber restricted its evaluation of Isak Musliu's participation in the prison camp to a limited portion of the evidence, namely direct visual identification. Thus, it failed to properly consider evidence that Isak Musliu was the person known as Qerqiz(i)[709] and that witnesses testified about seeing a person they knew as Qerqiz(i) in the prison camp, often beating people. It also failed to correctly consider Isak Musliu's almost continuous presence in the village of Llapushnik/Lapušnik at the time, his frequent close proximity and at times visits to the camp and his command of the only armed force operating in the area.[710]

281. In particular, the Prosecution argues that the Trial Chamber's piecemeal approach to evaluating the evidence led it to erroneously conclude that "the only witness who purports to have identified Isak Musliu inside the Llapushnik/Lapušnik prison camp is L96".[711] The Prosecution submits that the Trial Chamber was in error when it failed to find that the collective and cumulative effect of the evidence of Witnesses L04, L10 and L12 established Isak Musliu's presence in the camp.[712]

282. Isak Musliu responds that the Trial Chamber correctly set out its approach to the evidence:

> [It] has determined in respect of each of the counts charged against each of the Accused, whether it is satisfied beyond reasonable doubt, *on the basis of the whole of the evidence*, that every element of that crime and the forms of liability charged in the Indictment have been established.[713]

283. He argues that the Trial Chamber attached particular importance to evidence of visual identification and considered it together with all of the evidence presented at trial.[714] He claims that the Prosecution's allegation that the Trial Chamber erred in applying a piecemeal approach is without merit and contradicted by numerous statements made by the Trial Chamber.[715]

284. In sum, Isak Musliu submits that the Trial Chamber did not err in applying the standard of proof and that the decision to acquit him was one clearly available to a reasonable Trial Chamber.[716]

285. The Appeals Chamber notes that in addition to visual identification evidence, the Trial Chamber took into account witness testimonies that Isak Musliu was, at the time relevant to the

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[708] Prosecution Appeal Brief, para. 3.3, with reference to *Brdanin* Trial Judgement, para. 35. The Prosecution made further submissions which are essentially the same, *mutatis mutandis*, as made in relation to Limaj. *See also* Prosecution Appeal Brief, paras 1.4, 3.2, 2.2, 2.19, 2.21-2.23, 3.2, with reference to Trial Judgement, para. 10. *See also* AT 121-122 (6.6.2007).
[709] The names "Qerqiz" and "Qerqizi" or "Qerqiz(i)" are used interchangeably throughout this judgement.
[710] Prosecution Appeal Brief, para. 3.4. *See also* AT 115-116 (6.6.2007).
[711] Prosecution Appeal Brief, para. 3.8, with reference to Trial Judgement, para. 687.
[712] Prosecution Appeal Brief, paras 3.9, 3.6 (Witnesses L04 and L10) and 3.7 (Witness L12).
[713] Musliu Response Brief, para. 18, quoting Trial Judgement, para. 10 (emphasis added).
[714] Musliu Response Brief, para. 20, with reference to Trial Judgement, para. 20.
[715] Musliu Response Brief, paras 43-44.
[716] Musliu Response Brief, para. 45. *See also* AT 178-182 (6.6.2007).

Indictment, known as "Qerqiz",[717] that certain prisoners heard the name "Qerqiz" while being beaten and that a person called "Qerqiz" was almost continuously present in the prison camp between around 28 June and approximately 23 July 1998.[718] Thus, the Trial Chamber did not apply the standard of proof beyond a reasonable doubt to a limited portion of the evidence only, namely direct visual identification of Isak Musliu in the camp. To the contrary, the Trial Chamber considered all the evidence of identification adduced as a whole to make its finding that it had not been proven beyond reasonable doubt that Isak Musliu personally participated in the Llapushnik/Lapušnik prison camp.

2. Whether the Trial Chamber applied a standard amounting to "proof beyond *any* doubt"

286. The Prosecution submits that in many instances when examining whether Isak Musliu was identified as participating in the prison camp, the standard of proof applied by the Trial Chamber was not "beyond reasonable doubt" but rather one that entertained *any* doubt, including doubt not based upon evidence, logic or common sense.[719]

287. In addition or alternatively, the Prosecution submits that the Trial Chamber erred in fact by, first, failing to properly consider clearly relevant evidence; second, by failing to properly consider the corroborative effect of all evidence that Isak Musliu personally participated in the camp; and third, by erroneously evaluating evidence.[720] The Prosecution's arguments in relation to the alleged errors of law[721] are part and parcel of its arguments on the alleged factual errors.[722] Thus, they will be discussed together below.

(a) Alleged failure to properly consider that Isak Musliu was known as "Qerqiz(i)"

288. The Prosecution submits that the Trial Chamber adopted contradictory positions on whether Isak Musliu was the person known as Qerqiz: While it referred repeatedly to "Isak Musliu, aka Qerqiz", *inter alia* in a section entitled "Findings",[723] the Trial Chamber criticised Witness L04's testimony as "provid[ing] no reliable basis for a finding that Qerqiz was Isak Musliu […]",[724] in spite of the identification of Isak Musliu by one of Witness L04's co-detainees, who, pursuant to Witness L04's testimony, knew that Qerqiz's true name was Isak Musliu as they both came from

[717] Trial Judgement, para. 675.
[718] Trial Judgement, para. 673. *See also ibid.*, paras 20, 683 and 688.
[719] Prosecution Appeal Brief, paras 2.2, 2.4, 3.2 and 3.10.
[720] Prosecution Appeal Brief, para. 3.15, with reference to Trial Judgement, paras 672-688. AT 89 (6.6.2007)
[721] *See* for the alleged error of law: Prosecution Appeal Brief, paras 3.11 -3.13. For the alleged errors of fact: *ibid.*, paras 3.15 -3.16.
[722] *See* Prosecution Appeal Brief, para. 3.14. *See also* paras 3.11 (3.59), 3.12 (3.54), and 3.13, 3.17-3.19.
[723] Prosecution Appeal Brief, para. 3.12, with reference to Trial Judgement, para. 712. Prosecution Reply Brief, paras 3.12-3.13.
[724] Prosecution Appeal Brief, paras 3.12, 3.17 (with reference to Trial Judgement, para. 675), 3.57.

Recak/Racak.[725] The Prosecution further submits that abundant evidence established Isak Musliu's pseudonym beyond all reasonable doubt.[726]

289. Isak Musliu responds that even if his nickname was Qerqiz, the issue in relation to Witness L04 was whether the man he could not identify was in fact Isak Musliu. Further, the Trial Chamber noted in the Trial Judgement the confusing effect of the use of pseudonyms.[727] As to Witnesses L10 and L12, Isak Musliu refers to the relevant findings of the Trial Chamber.[728]

290. Isak Musliu further responds that the fact that there was evidence to establish that he was known as Qerqiz does not mean that such evidence was available to the witnesses to assist them in establishing that the masked man they claim was Qerqiz was in fact him.[729] In relation to the Prosecution's argument that "there was no evidence that the name 'Qerqiz' could possibly have referred to someone other than Isak Musliu", Isak Musliu submits that the Prosecution did not adduce evidence at trial that the name "Qerqiz" could reasonably refer only to him.[730]

291. At the outset, the Appeals Chamber notes that it is undisputed between the Prosecution and the Defence for Isak Musliu that Isak Musliu was also known as Qerqiz at the relevant time mentioned in the Indictment.[731] Further, Isak Musliu did not dispute that he was in Llapushnik/Lapušnik[732] from May to July 1998 although he claims that he spent certain periods of time in Rahovec/Orahovac.[733] In light of this, the Appeals Chamber will now examine whether the Trial Chamber erred when rejecting the evidence of Ruzhdi Karpuzi and Witnesses L04, L10, L12, L64 and L96 in which they identified a person who went by the pseudonym Qerqiz in the prison camp.

(b) Allegedly erroneous evaluation of Karpuzi's evidence as to seeing Isak Musliu in the camp

292. The Prosecution argues that the Trial Chamber ignored the probative evidence of Karpuzi's visual identification of Isak Musliu a.k.a. Qerqiz in the prison camp when it held that "L96 [was] the only witness who testified to having seen Isak Musliu in the Llapushnik/Lapušnik prison camp

[725] Prosecution Appeal Brief, paras 3.39 and 3.55, with reference to Trial Judgement, para. 675.
[726] Prosecution Appeal Brief, paras 3.17-3.19, 3.40, 3.55; with references to Elmi Sopi, T. 6754 (31.5.2005); Dragan Jašović, T. 5207 (5.4.2005); Witness L64, T. 4358-4359 (15.3.2005); Ruzhdi Karpuzi, T. 3075 (7.2.2005); ex P23, "Black Diray "Moldan GIPS 1984" with handwritten notes in Albanian seized in the residence of Musliu, Isak", pp. 2, 5; Defence Final Trial Brief, para. 1062 (ex. DM10, "92bis statement of Agim Kameri"); T. 5586 (11.4.2005). *See also* Prosecution Reply Brief, paras 3.14-3.15.
[727] Musliu Response Brief, para. 53, with reference to Trial Judgement, para. 24. Prosecution Reply Brief, para. 3.3. *See also* AT 183-184 (6.6.2007).
[728] Musliu Response Brief, paras 24-25. *See also* AT 184 (6.6.2007).
[729] Musliu Response Brief, para. 54. *See also* AT 184-187 and 191-192 (6.6.2007).
[730] Musliu Response Brief, para. 55.
[731] AT 116-117 (6.6.2007, Prosecution) and 185 (6.6.2007, Musliu Defence).
[732] *See* Musliu Pre-Trial Brief, para. 24.
[733] *See* Musliu Response Brief, para. 74.

without a mask."[734] The Prosecution argues that the Trial Chamber erroneously held "that *from Gzim Gashi's compound*, Ruzhdi Karpuzi could *hear* Isak Musliu, aka Qerqiz, singing in the *oda* located across the narrow roadway in the Llapushnik/Lapušnik prison camp compound."[735] It is the submission of the Prosecution that Karpuzi testified that he personally *saw* Isak Musliu singing in the upstairs section of Building A1 located in the prison camp on more than one occasion.[736]

293. Isak Musliu responds that Karpuzi's evidence that Isak Musliu once sang in the compound cannot support Witness L96's testimony that he saw Isak Musliu in the camp:[737] Unless the Prosecution seriously claims that Isak Musliu was singing as he beat Witness L96 – which was not the evidence of Witness L96 -, it is difficult to see how Karpuzi's testimony can support Witness L96's very serious allegations.[738] That Isak Musliu may have sung a song in the camp does not support the finding that he personally participated in the camp's operation.[739]

294. The Appeals Chamber considers that an examination of Ruzhdi Karpuzi's testimony shows that he stated that he in fact *saw* Isak Musliu singing in Building A1[740] *within* the Llapushnik/Lapušnik prison camp compound.[741] However, the Appeals Chamber finds, Judge Schomburg dissenting, that even if Isak Musliu had been singing in the prison camp on occasions, the Prosecution has not shown that this would have made it unreasonable for the Trial Chamber not to find that he was responsible for crimes committed in the camp. Furthermore, the Appeals Chamber notes that Ruzhdi Karpuzi testified that he did not know anything about a prison camp in Llapushnik/Lapušnik.[742] Thus, the Appeals Chamber, Judge Schomburg dissenting, is not satisfied that the Prosecution has demonstrated that the Trial Chamber's use of "hear" rather than "saw" materially impacted its findings with respect to Isak Musliu's presence in the prison camp.

[734] Prosecution Appeal Brief, para. 3.46, with reference to Trial Judgement, paras 672, 679.
[735] Prosecution Appeal Brief, para. 3.46, with reference to Trial Judgement, para. 694 (emphasis added).
[736] Prosecution Appeal Brief, paras 3.47-3.53. *See also* AT 118-120, 123-124 and 192-194 (6.6.2007).
[737] Musliu Response Brief, para. 60.
[738] Musliu Response Brief, para. 64.
[739] Musliu Response Brief, paras 64, 68.
[740] Marked number 2 on ex. P6, p.1.
[741] Ruzhdi Karpuzi, T. 3095 (7.2.2005, emphases added). *See also* T. 3092-3096 (7.2.2005) and ex. P6 "Booklet of locations", pp. 1 (U003-2456) and 4 (U008-3669) [ex. P128 is ex. P6 with the annotations of Ruzhdi Karpuzi. The building marked number 2 was identified by Ruzhdi Karpuzi as "oda of ?" and corresponds to Building A1]. *See also* Ruzhdi Karpuzi, T. 3247-3249 (9.2.2005).
[742] Ruzhdi Karpuzi, T. 3089 (7.2.2005): "Ole, when he showed me this photograph, he asked me whether I recognised this terrain; and I said, Yes. After he asked me questions about a prison in Lapusnik, he said that the prison was here; and I said to him that, I don't know anything about it but I can tell you that I've stayed in this area myself. This is Gezim's house, and everything is marked there, what it is."

(c) Allegedly erroneous evaluation of Witnesses L04's, L10's and L12's evidence as to seeing Isak Musliu in the prison camp

295. The Prosecution submits that the Trial Chamber was unreasonable not to consider the connection between Isak Musliu and the name "Qerqiz(i)"[743] and to find that cumulatively the evidence given by Witnesses L04, L10 and L12 was insufficient to identify Isak Musliu/Qerqiz(i) in the camp.[744] The Prosecution submits in particular that the Trial Chamber erroneously failed to rely on Witness L10's testimony that Qerqiz put him in the storage room and mistreated him, that Emin Emini was taken out of the storage room by Qerqiz, and that Haradin Bala (a.k.a. Shala) addressed a person that always wore a mask as Qerqiz.[745] The Prosecution also argues that the Trial Chamber unreasonably dismissed Witness L12's testimony that the name Qerqiz was mentioned by individuals detained in the cowshed.[746]

296. Isak Musliu responds that while Witnesses L04, L10 and L12 referred in some way "to a Qerqiz", none of them identified Isak Musliu as being that person known as Qerqiz.[747] He argues that the Trial Chamber decided not to rely on Witness L04 who testified to having never seen the face of Qerqiz because the man he identified as being known as Qerqiz and who he learnt to be Isak Musliu always wore a mask.[748] Also, Witness L04 testified that he learned that the man he knew as Qerqiz was known by that pseudonym and was in fact Isak Musliu from a fellow detainee at the prison camp who was not called to testify, so that the Trial Chamber had no confirmation of what Witness L04 stated.[749] Witness L04 himself could only give a very general description of the man he was told was called Qerqiz,[750] and he did not mention Qerqiz in two of the three interviews he gave to investigative authorities regarding his detention in the prison camp.[751]

297. The Prosecution replies that Isak Musliu blends two separate points when arguing that the evidence to establish that he was known as Qerqiz was not available to the witnesses at the time in the camp to assist them in establishing that the masked man they claim was Qerqiz was in fact him: First, whether a person called "Qerqiz" was in the prison camp, and second, whether that "Qerqiz" was Isak Musliu.[752] According to the Prosecution, Isak Musliu appears to argue that the Trial Chamber would have needed to find that each witness gave evidence on both points in order to

[743] Prosecution Appeal Brief, paras 3.19, 3.55.
[744] Prosecution Appeal Brief, para. 3.58.
[745] Prosecution Appeal Brief, para. 3.56, with reference to Trial Judgement, para. 677.
[746] Prosecution Appeal Brief, para. 3.57.
[747] Musliu Response Brief, para. 22.
[748] Musliu Response Brief, para. 23 (with reference to Trial Judgement, para. 674) and para. 52.
[749] Musliu Response Brief, para. 23, with reference to Trial Judgement, paras 674-675.
[750] Musliu Response Brief, para. 23, with reference to Trial Judgement, para. 675.
[751] Musliu Response Brief, para. 23, with reference to Trial Judgement, para. 676.
[752] Prosecution Reply Brief, paras 3.7-3.8.

prove that Isak Musliu was in the prison camp, which is not required under the International Tribunal's jurisprudence.[753]

298. The Appeals Chamber notes that with respect to Witness L10, the Trial Chamber held that while he stated that he identified Qerqiz in the prison camp as the "masked perpetrator" because "[Shala] addressed him as Qerqiz"[754] and "he later learned that Qerqiz was Isak Musliu"[755], Witness L10 "acknowledged that he could not distinguish Qerqiz from the other soldiers at the camp because of the mask he wore."[756] Thus, the Trial Chamber held that Witness L10 gave "no evidence on which the Chamber can reliably conclude that the man at [the] prison camp whom L10 says he then knew as Qerqiz is in fact Isak Musliu."[757] This conclusion was a reasonable inference on the evidence. While Witness L10 was generally found to be credible,[758] the Appeals Chamber is not satisfied that the only reasonable inference to be drawn from his testimony is that the "masked perpetrator" who used to come to the storage room was Qerqiz. In any case, such a finding would not impact upon the criminal responsibility of Isak Musliu. Haradin Bala (a.k.a. Shala) who allegedly addressed the "masked perpetrator" as Qerqiz did not testify at trial. Apart from his reference to Shala, Witness L10 gave a rather vague physical description of the "masked perpetrator", testifying that the man he thought was Qerqiz was "stocky, not very tall, wearing a camouflage uniform (not black as described by L04) and carrying an automatic gun". In addition, the Trial Chamber stated that he did not "explain how and from whom he learned Qerqiz's real or full name",[759] apart from the fact that "more remotely L10 says Emin Emini also once told him 'this guy is from Racak'".[760] Moreover, in light of its findings on the confusing nature of pseudonyms[761] and at least in the absence of any specific evidence as to how common and uncommon the pseudonym "Qerqiz" was, the Trial Chamber was not obligated to conclude beyond a reasonable doubt that everyone referred to as "Qerqiz" was in fact Isak Musliu. Consequently, the Appeals Chamber finds, Judge Schomburg dissenting, that this evidence does not compel the only reasonable inference that Qerqiz/Isak Musliu was the "masked perpetrator" referred to by Witness L10.

[753] Prosecution Reply Brief, para. 3.8, with reference to *Kunarac* Decision on Motion of Acquittal, 3 July 2000, para. 4.
[754] Trial Judgement, para. 677, with reference to Witness L10, T. 2950-2951 (3.2.2005), T. 3048 (4.3.2005).
[755] Trial Judgement, para. 677, with reference to Witness L10, T. 2951 (3.2.2005).
[756] Trial Judgment, para. 677, with reference to Witness L10, T. 2950 (3.2.2005).
[757] Trial Judgement, para. 677.
[758] Trial Judgement, para. 35.
[759] Trial Judgement, para. 677.
[760] Trial Judgement, para. 677, with reference to Witness L10, T. 3048 (4.3.2005).
[761] Trial Judgement, para. 24.

299. With respect to Witness L04, the Trial Chamber found that his testimony provided "no reliable basis for a finding that Qerqiz was Isak Musliu".[762] The Appeals Chamber notes that Witness L04 never testified to having seen Isak Musliu's face on any occasion.[763] Furthermore, the Trial Chamber considered as hearsay the testimony of Witness L04 regarding his conversation with another detainee by which this other detainee identified the man that took him out as using the pseudonym Qerqiz and being in fact Isak Musliu. The Appeals Chamber notes that this other detainee was not called to testify and that the Trial Chamber had no possibility of further examining the basis upon which this detainee allegedly identified Musliu in the camp.[764] Thus, the Trial Chamber reasonably held that Witness L04's testimony did not provide "a reliable basis for a finding that Qerqiz was Isak Musliu or that Isak Musliu served in the Llapushnik/Lapušnik prison camp."[765]

300. With respect to Witness L12's testimony, the Trial Chamber held that

> [u]nlike witnesses L04 and L10 who testified to having seen Qerqiz at the prison camp, L12 only testified that he heard the pseudonym Qerqiz while detained there. It appears from his evidence that on one occasion, Qerqiz was mentioned by one of the individuals that beat him during his detention in the Llapushnik/Lapusnik prison camp.[766]

The Appeals Chamber notes that Witness L12 testified that he was attacked on one occasion in the prison camp by two women and two men, and that one of the women addressed a man as "Qerqizi" and "brother", while that person addressed her as "sister". The Appeals Chamber further notes that the testimony given by Witness L12 was partly inconsistent, in particular in relation to the identity of the persons who beat him.[767] The Appeals Chamber also notes that Witness L 12 refers at one point to "Rrahman Qerqizi" rather than simply to "Qerqizi"[768] – a source of additional confusion since the name "Rrahman" is not elsewhere associated with the name "Qerqizi" or with Isak Musliu. Also, as held by the Trial Chamber, Witness L12 did not testify that he personally saw the person who was addressed as Qerqiz. The Appeals Chamber finds that it is not the only reasonable inference from Witness L12's testimony that "Qerqiz" was present when Witness L12 was beaten on this occasion. Consequently, the Trial Chamber reasonably refrained from finding that Qerqiz participated in the beating of Witness L12.

[762] Trial Judgement, para. 675.
[763] Trial Judgement, para. 674.
[764] Trial Judgement, paras 674 (with reference to Witness L04, T. 1173-74 [30.11.2005]), 675.
[765] Trial Judgement, para. 675.
[766] Trial Judgement, para. 678, with reference to Witness L12, T. 1808-1811 (13.12.2004).
[767] Witness L12 first said that Shala beat him, then he stated that Shala did not beat him and that four people beat him, and then he said that only the two women and not the men beat him, T. 1808-1810 (13.12.2004).
[768] Witness L 12, T. 1808 (13.12.2004).

301. In sum, having considered the above captured findings of the Trial Chamber in relation to the testimonies of Witnesses L04, L10 and L12, the Appeals Chamber, Judge Schomburg dissenting with respect to Witness L10, is not satisfied that the only reasonable inference that can be drawn from the evidence is that these Witnesses identified Isak Musliu in the prison camp.

(d) Allegedly erroneous evaluation of Witness L64's testimony that Isak Musliu had access to and entered the prison camp

302. The Prosecution argues that the Trial Chamber illogically held that "although [Witness L64] recalls seeing him [Qerqiz] enter two or three times, he never saw him in the prison camp", as it is difficult to understand where exactly the Trial Chamber thought Isak Musliu could have been between entering and exiting the camp if not "in" the camp.[769] The Prosecution also argues that the Trial Chamber erred in failing to consider the case as a whole when it held that "there [was] no other evidence which confirms or denies this aspect of L64's evidence".[770]

303. The Appeals Chamber recalls, however, that the Trial Chamber was "not able to accept the credibility and reliability of the evidence of […] L64 unless that evidence is *independently* confirmed in some material particular."[771] The Appeals Chamber has already found above that the Trial Chamber reasonably rejected the evidence of Ruzhdi Karpuzi and Witnesses L10, L04 and L12 as to the presence of Isak Musliu inside the prison camp. In light of these findings, the Appeals Chamber is satisfied that Witness L64's evidence in relation to Isak Musliu's presence in the camp is unsupported in some material particular by other evidence which has to be accepted.

(e) Allegedly erroneous evaluation of Witness L96's identification of Isak Musliu in the camp

304. The Prosecution submits that the Trial Chamber erred when it described Witness L96's testimony that he saw Isak Musliu unmasked twice in the camp as "unsupported" and found that "there is no confirmation of L96's encounters with Isak Musliu and of his alleged beating in the prison camp by other prisoners detained in the storage room".[772]

305. The Prosecution argues that Witness L96 was not held in the storage room when he saw the person identified as Isak Musliu, but instead was upstairs in Building A1.[773] This evidence was supported by Karpuzi who saw Isak Musliu singing on more than one occasion in an upstairs room

[769] Prosecution Appeal Brief, para. 3.59, with reference to Witness L64, T. 4464-4465 (16.3.2005) and Trial Judgement, paras 686-687.
[770] Prosecution Appeal Brief, paras 3.60, 3.29-3.38. *See also* AT 202-204 (6.6.2007).
[771] Trial Judgement, para. 687 (emphasis added). *See also ibid.*, para. 28.
[772] Prosecution Appeal Brief, para. 3.41 (emphasis omitted), with reference to Trial Judgement, paras 681-682. *See also* AT 119 and 202-204 (6.6.2007).
[773] Prosecution Appeal Brief, para. 3.42, with reference to Witness L96, T. 2301-2302, 2306, 2316 (24.1.2005).

in Building A1,[774] as well as by other circumstantial evidence.[775] Hence, the Trial Chamber unreasonably required corroboration of Witness L96's evidence by another person detained in the *storage room*. As to possible corroboration by detainees held with Witness L96 when Isak Musliu entered Building A1, the Prosecution submits that Shaban Hoti was murdered,[776] Bajrush Rexhaj and Sahit Beqaj joined the KLA,[777] and Alush Luma and an unidentified person from Varigove/Varigovce did not testify.[778] Hence, the Prosecution argues that it is not surprising that witnesses detained in Building A1 could not confirm Witness L96's encounters with Isak Musliu.[779]

306. The Prosecution further suggests that the Trial Chamber unreasonably rejected Witness L96's testimonial evidence that he knew Isak Musliu from childhood days when they were living in neighbouring villages and that this was how he recognised him in the camp, by finding that there was no evidence of specific direct meetings, or a specific description of their "association".[780]

307. Musliu responds that the Trial Chamber reasonably considered that Witness L96's encounters with him were not confirmed, that he may have been in Rahovec/Orahovac at that time, and that Witness L96 had not mentioned Isak Musliu's presence in the camp when he was interviewed by the Serbian authorities and CCIU investigators in August 1998.[781]

308. With respect to the evidence given by Witness L96, the Trial Chamber held that it was

> unable to be satisfied to the required degree that it can accept the evidence of […] L96 […] that Isak Musliu was in the prison camp in Llapushnik/Lapusnik in the respective circumstances[782]

and that

> there is no confirmation of L96's encounters with Isak Musliu and of his alleged beating in the prison camp by other prisoners detained in the storage room[,]

consequently finding that his testimony was "unsupported".[783]

309. The Appeals Chamber sees no error in these findings of the Trial Chamber. In particular, the Trial Chamber did not err in requiring corroboration of Witness L96's evidence that he saw Isak Musliu in the prison camp, because the Trial Chamber found that it

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[774] Prosecution Appeal Brief, paras 3.42, 3.46-3.53.
[775] Prosecution Appeal Brief, paras 3.42, 3.29-3.38.
[776] Prosecution Appeal Brief, para. 3.43, with reference to Trial Judgement, para. 474.
[777] Prosecution Appeal Brief, para. 3.43.
[778] *Ibid.*
[779] *Ibid.*
[780] Prosecution Appeal Brief, para. 3.44, with reference to Trial Judgement, para. 682.
[781] Musliu Response Brief, paras 29-31. *See*, however, in relation to the last submission, Trial Judgement, para. 684.
[782] Trial Judgement, para. 687.
[783] Trial Judgement, para. 682.

> is not able to accept the credibility and reliability of the evidence of either L96 or L64 unless that evidence is independently confirmed in some material particular.[784]

While the Appeals Chamber finds that the Trial Chamber erroneously held that Witness L96 testified that the first time he saw Isak Musliu in the camp was in the storage room - an examination of Witness L96's testimony shows that he stated that he saw Isak Musliu on the first day of his detention in an upstairs room of Building A1 -,[785] the above findings on the testimonies of Ruzhdi Karpuzi and Witnesses L04, L10 and L12 show that Witness L96's testimony that he saw Isak Musliu in the camp is not corroborated.

310. Thus, the Appeals Chamber is not satisfied that the only reasonable inference that can be drawn from the evidence is that Witness L96's testimony as to having seen Isak Musliu unmasked on two occasions in the camp was corroborated by other evidence.

(f) Alleged failure to consider Isak Musliu's presence in the Llapushnik/Lapušnik village, the prison camp and its surroundings

311. The Prosecution submits that the Trial Chamber also unreasonably failed to consider evidence of Isak Musliu's near continuous presence in Llapushnik/Lapušnik, his frequent close proximity to the camp, and at times, his presence in the camp itself, when determining whether he personally participated in the prison camp.[786] In particular, the Prosecution refers to Isak Musliu's Pre-Trial Brief in which he "accepted that Isak Musliu was based in Llapushnik/Lapušnik from May to July 1998 – but not continuously", and to a footnote stating that Isak Musliu "occasionally returned home to visit his family and was involved in operations outside of Llapushnik/Lapušnik."[787]

312. Isak Musliu responds that being in close proximity to the camp could not reasonably give rise to a finding of one's involvement in it,[788] referring to the Prosecution Pre-Trial Brief:

> [T]he camp's distance from the main road and its location in an enclosed (and constantly guarded) compound made it possible to maintain the camp relatively unobserved, even by KLA soldiers in the village and at the front lines nearby.[789]

313. The Appeals Chamber recalls its earlier findings that it was not the only reasonable inference from the testimonies of Ruzhdi Karpuzi and Witnesses L04, L10, L12, L64 and L96 that Isak Musliu was present inside the camp during the Indictment period. In light of these findings, the

[784] Trial Judgement, para. 687. *See also ibid*., para. 26.
[785] Ex. P6 "Booklet of Locations", p. 4. Witness L96, T. 2294-2308, in particular T. 2306 (24.1.2005).
[786] Prosecution Appeal Brief, paras 3.24, 3.26-3.28, 3.85-3.88. *See also* AT 116 (6.6.2007).
[787] Prosecution Appeal Brief, paras. 3.25, 3.26, 3.71-3.72 and 3.74. *See also* Prosecution Reply Brief, paras 3.35-3.37.
[788] Musliu Response Brief, para. 66.
[789] Prosecution Pre-Trial Brief, para. 39.

Appeals Chamber is satisfied that it was open to a reasonable trier of fact to find that the close proximity alone of Çeliku 3 fighting positions to the prison camp did not support the inference that Isak Musliu was present and personally participated in the operation of the prison camp.[790]

3. Conclusion

314. In sum, the Appeals Chamber is satisfied, Judge Schomburg dissenting, that notwithstanding some minor errors in the Trial Chamber's reasoning which do not have an impact on the verdict the Trial Chamber reasonably assessed the totality of the evidence and found that Isak Musliu was not present inside the prison camp and did not participate in its operation.

315. The Prosecution's first ground of appeal is therefore rejected.

B. Second ground of appeal: Musliu's alleged command and control over the KLA soldiers in the prison camp

316. The Prosecution further submits that the Trial Chamber erroneously failed to find that the Çeliku 3 unit was responsible for operating the prison camp, that members of that unit performed duties therein, and that Isak Musliu held a position of effective control over those soldiers who participated in crimes in the prison camp, among them Haradin Bala and other Çeliku 3 soldiers.[791] According to the Prosecution, this failure contradicts several findings of the Trial Chamber, namely that the prison camp was run and staffed by KLA soldiers,[792] that it was located to the south of the Peje/Peć-Prishtina/Priština main road and that, essentially, the only KLA unit south of that road was Çeliku 3.[793] The Prosecution argues that since the Trial Chamber found that Isak Musliu exercised command and control over Çeliku 3, it would have also found that he exercised command and control over the KLA soldiers in the camp, had it not failed to find that Çeliku 3 operated the prison camp.[794] In addition, the Prosecution submits that the Trial Chamber erred in failing to find that Isak Musliu was *the* overall commander of the Çeliku 3 unit, finding instead that he only was in "a leadership position" in that unit.[795]

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[790] For the same reason, the Appeals Chamber will not address the Prosecution's submissions that the Trial Chamber failed to properly consider evidence that Musliu was the "direct commander of KLA forces in Llapushnik/Lapušnik, including those in the prison camp" when addressing the question of whether Musliu was present in the camp, Prosecution Appeal Brief, paras 3.29-3.30, 3.39, 3.76-3.142.
[791] Prosecution Appeal Brief, paras 3.78 and 3.144(6). *See also ibid.*, para. 3.76.
[792] Prosecution Appeal Brief, paras 3.76 and 3.86, with reference to Trial Judgement, paras 174, 273, 279, 282.
[793] Prosecution Appeal Brief, para. 3.76, with reference to Trial Judgement, paras 702, 713.
[794] Prosecution Appeal Brief, para. 3.76.
[795] Prosecution Appeal Brief, paras 3.77, 3.83. *See also* AT 125-127 and 204-205 (6.6.2007). For Musliu's response, *see* AT 188-189 (6.6.2007).

1. Alleged errors of law and fact

317. Similar to the first ground of appeal, the Prosecution argues that the Trial Chamber erred in applying a standard of "proof beyond *any* doubt",[796] and in applying an erroneously piecemeal approach to the evidence[797] which led to erroneous findings in relation to Isak Musliu's position of command and control.[798]

318. The Appeals Chamber observes that it is in relation to the same findings that the Prosecution submits that both legal and factual errors were committed by the Trial Chamber.[799] Therefore, the Appeals Chamber will consider both types of errors together when examining the Prosecution submissions. It will first address the alleged errors in assessing the role of the Çeliku 3 unit and its members in relation to the prison camp, and subsequently the alleged errors in assessing the precise nature of Musliu's position of command.

(a) Whether the Çeliku 3 unit operated the Llapushnik/Lapušnik prison camp

(i) Çeliku 3 was the only KLA unit south of the Peje/Peć-Prishtina/Priština main road

319. The Prosecution submits that the Trial Chamber effectively found that Çeliku 3 was the only KLA unit that was regularly stationed south of the Peje/Peć-Prishtina/Priština main road during the Indictment period.[800] Arguably, this follows from two Trial Chamber findings, namely

> that with the exception of a Pellumbi unit located a distance to the south of the position of Llapushnik/Lapusnik prison camp for a time in July 1998, and the Çeliku 3 positions located in the general vicinity of the Llapushnik/Lapusnik prison camp, all other units were located north of the Peje/Peć-Prishtina/Pristina main road;[801]

and that

> the preponderance of evidence favours the view that several KLA units, each under separate command, were located in the area, but, with one exception for a time in July, not to the south of the main road […].[802]

The Prosecution further recalls that the Trial Chamber repeatedly held that the Llapushnik/Lapušnik prison camp was a "KLA run prison camp" and operated by KLA soldiers,[803] and that there was considerable evidence that members of the Çeliku 3 unit were engaged in operating the prison camp

[796] Prosecution Appeal Brief, paras 2.1-2.29, 3.79.
[797] Prosecution Appeal Brief, paras 3.3-3.9, 3.79, with reference to Trial Judgement, paras 690-716.
[798] Prosecution Appeal Brief, paras 3.79-3.80.
[799] Prosecution Appeal Brief, paras 3.80-3.81.
[800] Prosecution Appeal Brief, para. 3.85.
[801] Trial Judgement, para. 702.
[802] Trial Judgement, para. 713.
[803] Prosecution Appeal Brief, paras 3.86, 3.99, 3.103, with further references to the Trial Judgement.

with no evidence of any other entity in that role.[804] Hence, the Prosecution submits that the Trial Chamber erroneously failed to find that the Çeliku 3 unit operated the prison camp.[805]

320. The Trial Chamber's findings in relation to this issue are ambiguous: While it held that all KLA units were, at the relevant time, located *north of the Peje/Peć-Prishtina/Priština main road*, with the exception of the Pellumbi unit (for some time in July 1998) and *the Çeliku 3 positions* in the general vicinity of Llapushnik/Lapušnik,[806] it later found that several KLA units were located in the area of the Llapushnik/Lapušnik village, "but, *with one exception for a time in July, not to the south of the main road*".[807] Since the Trial Chamber found that it was the Pellumbi unit that was located to the south of the position of the Llapushnik/Lapušnik prison camp for a time in July 1998,[808] it did not find that Çeliku 3 was the only KLA unit located to the south of the main road. Thus, the Appeals Chamber concludes that the Prosecution does not show that the Trial Chamber found that the Çeliku 3 unit was the only KLA unit that was, during the Indictment period, regularly stationed south of the Peje/Peć-Prishtina/Priština main road where the prison camp was located.

(ii) Neither the Pellumbi unit nor the "occasional visitor" could have operated the camp

321. The Prosecution argues that there was no evidence that the Pellumbi unit ran the prison camp, because the Trial Chamber noted that the Pellumbi unit was present south of the main road only for part of July 1998 (while the prison camp operated "from mid June 1998 at the latest to 25 or 26 July 1998"),[809] and in the separate village of Kizhareke/Kisna Reka.[810] Similarly, the finding that soldiers from units north of the main road "ate and slept […] south […] of the main road from time to time"[811] does not impact on the necessary inference that Çeliku 3 operated the prison camp. The Prosecution further argues that the Trial Chamber erred in failing to consider the evidence of Sylejman Selimi – the commander of the KLA zone to which the Pellumbi unit belonged – that soldiers leaving a zone would need to have permission.[812]

322. The Prosecution also submits that while the Trial Chamber observed that Elmi Sopi did "not specify which KLA soldiers ate at Gzim Gashi's kitchen",[813] Ruzhdi Karpuzi and Witness L64

[804] Prosecution Appeal Brief, para. 3.87.
[805] Prosecution Appeal Brief, para. 3.105.
[806] Trial Judgement, para. 702.
[807] Trial Judgement, para. 713.
[808] Trial Judgement, para. 702.
[809] Trial Judgement, para. 282.
[810] Prosecution Appeal Brief, para. 3.97, with reference to Trial Judgement, paras 698, 701.
[811] Prosecution Appeal Brief, para. 3.97, with reference to Trial Judgement, para. 713.
[812] Prosecution Appeal Brief, para. 3.104, with reference to Trial Judgement, para. 107.
[813] Prosecution Appeal Brief, para. 3.98, with reference to Trial Judgement, para. 695.

made it clear that they, as members of the Çeliku 3 unit, ate there.[814] No evidence suggested that occasional soldiers sleeping and eating south of the main road operated the prison camp.[815]

323. The Prosecution submits that findings on Haradin Bala's duties within the prison camp, suggesting a level of organization, are consistent with the Trial Chamber's finding that the camp was KLA-run: The "deplorable conditions of detention" were "to a great extent dependent on the acts *or omissions* of Haradin Bala", and it was Haradin Bala who "supervised" the emptying of the toilet buckets from the storage room and the cowshed.[816] The level of organization is further evidenced by, *inter alia*, the consistent evidence of victim witnesses "with respect to the presence of guards in the compound",[817] the "similar circumstances" under which victims were abducted and the identification of individual KLA soldiers by several witnesses, as well as the similar instructions given by KLA guards to some of the detainees who were released.[818] Furthermore, the Trial Chamber found that the

> fact that the prison camp functioned for at least six weeks and over thirty people were detained there, could suggest that its operation relied on the co-operation of a certain number of people […].[819]

324. The Appeals Chamber is satisfied that it is not the only reasonable inference from the evidence that the Çeliku 3 unit operated the prison camp, as it can be reasonably inferred that soldiers of the Pellumbi unit and/or soldiers from units north of the main road were participating in the operation of the prison camp. The Appeals Chamber notes the Trial Chamber's findings that the Llapushnik/Lapušnik prison camp was a "KLA run prison camp" and operated by KLA soldiers.[820] The Prosecution did not demonstrate that the operation of the camp had to be carried out by soldiers of a single, specific KLA unit such as Çeliku 3. In particular, the Prosecution's submissions on the level of organization inside the camp which allegedly showed that it was KLA run[821] do not exclude the reasonable inference that the camp was run by KLA soldiers from other units.

325. Furthermore, it is not the only reasonable inference from the evidence that no soldiers from other KLA units who ate from time to time at Gzim Gashi's compound could have been among the KLA soldiers operating the prison camp. First, Elmi Sopi did "not specify which KLA soldiers ate at Gzim Gashi's kitchen",[822] allowing for the reasonable inference that soldiers from units north of the main road were eating there; second, Ruzhdi Karpuzi's and Witness L64's evidence that Çeliku

[814] Prosecution Appeal Brief, para. 3.98.
[815] Prosecution Appeal Brief, para. 3.98.
[816] Prosecution Appeal Brief, para. 3.100, with reference to Trial Judgement, para. 652.
[817] Prosecution Appeal Brief, para. 3.101, with reference to Trial Judgement, para. 276.
[818] Prosecution Appeal Brief, para. 3.101, with reference to Trial Judgement, paras 273, 280.
[819] Prosecution Appeal Brief, para. 3.102, with reference to Trial Judgement, para. 666.
[820] Trial Judgement, paras 273, 276, 278-279.
[821] *See* Prosecution Appeal Brief, paras 3.100-3.102.

3 soldiers ate at Gzim Gashi's kitchen[823] does not render unreasonable the inference that soldiers of other KLA units did so as well. Also, soldiers of the Pellumbi unit could have been among those soldiers who ate and slept in Gzim Gashi's compound from time to time, in particular – but not necessarily limited to – during part of July 1998 when this unit was located south of the main road in the village of Kizhareke/Kisna Reka. In particular, the Prosecution has not shown that the Trial Chamber erroneously failed to consider the evidence of Sylejman Selimi, the commander of the KLA zone to which the Pellumbi unit belonged, who testified that soldiers leaving a zone would need permission. This evidence does not compel the only reasonable inference that soldiers of the Pellumbi unit could not have been participating in the operation of the prison camp, as no evidence has been adduced as to whether such permissions were given.

(iii) Alleged error in relation to reasonable doubt standard: direct evidence

326. The Prosecution submits that the Trial Chamber erred in requiring direct evidence to establish the role of the Çeliku 3 unit in the prison camp:[824]

> [T]here is no *direct evidence* which establishes that the Çeliku 3 unit was responsible for operating the prison camp or that members of the Çeliku 3 unit performed duties in the prison camp.[825] […] In the absence of any satisfactory direct evidence […], the evidence is not sufficient to establish that the Accused Isak Musliu was a KLA commander of, or that he had a leadership position or exercised control in, the prison camp".[826]

327. The Prosecution alleges that circumstantial evidence is sufficient to support a conviction,[827] that the requirement of direct evidence constituted a misapplication of the standard of proof beyond reasonable doubt, and that this error is intertwined with the error of artificially parsing out the evidence.[828]

328. The Appeals Chamber finds that the Trial Chamber did not misapply the law in finding that "there is no *direct* evidence which establishes that the Çeliku 3 unit was responsible for operating the prison camp".[829] While the use of the words "direct evidence" on its face could suggest that the Trial Chamber did not consider circumstantial evidence, it is evident from the Trial Judgement that the Trial Chamber also considered inferential or circumstantial evidence, namely the "relative proximity of the Çeliku 3 fighting positions to the prison camp", "the very close proximity of Gzim

[822] Trial Judgement, para. 695.
[823] Ruzhdi Karpuzi, T. 3090 (7.2.2005); Witness L64, T. 4386 (15.3.2005, Private Session); T. 4421, T. 4438, T. 4443-4447 (16.3.2005).
[824] Prosecution Appeal Brief, para. 3.94.
[825] Prosecution Appeal Brief, para. 3.95, with reference to Trial Judgement, para. 714.
[826] Prosecution Appeal Brief, para. 3.95, with reference to Trial Judgement, para. 715 (emphasis added).
[827] Prosecution Appeal Brief, para. 3.96, with reference to *Bagilishema* Appeal Judgement, para. 37; *Krstić* Appeal Judgement, paras 34-35; *Jelisić* Appeal Judgement, para. 47; *Rutaganda* Appeal Judgement, paras 547-548.
[828] Prosecution Appeal Brief, para. 3.96.
[829] Trial Judgement, para. 714 (emphasis added).

Gashi's compound to the prison camp", and "the evidence […] that soldiers from other KLA units also ate at this compound, at least from time to time".[830] Hence, the Trial Chamber's conclusion is to be understood in the sense that the Trial Chamber was not satisfied that there was "sufficient" evidence pointing to the Çeliku 3 unit as responsible for operating the prison camp.

(iv) Alleged error in relation to reasonable doubt standard: application of standard of proof to discrete portions of the evidence

329. The Prosecution submits that the Trial Chamber erred in failing to consider or evaluate evidence, or to consider the corroborative value of evidence, by taking a piecemeal approach to the application of the standard of proof.[831] In particular, the Prosecution argues that the Trial Chamber considered only two portions of evidence in relation to the "proximity" of the Çeliku 3 unit to the prison camp: first, that the unit was "positioned in the general vicinity" of the prison camp, and that its fighting positions were in "relative proximity" to the prison camp; and second, the "very close proximity" of Gzim Gashi's compound - where Çeliku 3 "had its headquarters […] at least for part of the time relevant to the Indictment" - to the prison camp.[832]

330. The Prosecution argues that the Trial Chamber considered evidence of "general proximity" in isolation and assessed *separately* the other body of evidence, stating that "the very close proximity of Gzim Gashi's compound to the prison camp" does not provide a sufficient basis for inferring a connection between the Çeliku 3 unit and the prison camp.[833] Furthermore, the rationale provided by the Trial Chamber for eliminating that evidence is inapposite, as it focused on the *reasons* for moving the headquarters to Gzim Gashi's compound, neglecting the critical point that the Çeliku 3 unit's headquarters and the prison camp were next door for part of the relevant time period.[834] Also, the Prosecution recalls the Trial Chamber's finding that the Çeliku 3 unit's kitchen was across the road from the camp in Gzim Gashi's compound, which provides even more compelling evidence that the Çeliku 3 unit was involved in the operation of the prison camp.[835]

331. The Appeals Chamber is satisfied that the Trial Chamber did not apply an erroneously piecemeal approach when considering the evidence in relation to the proximity of the Çeliku 3 unit to the prison camp. The Trial Chamber found that

[830] *Ibid.*
[831] Prosecution Appeal Brief, para. 3.89.
[832] Prosecution Appeal Brief, para. 3.90, with reference to Trial Judgement, para. 714.
[833] Prosecution Appeal Brief, para. 3.91, with reference to Trial Judgement, para. 714.
[834] Prosecution Appeal Brief, para. 3.92, with reference to Trial Judgement, para. 714.
[835] Prosecution Appeal Brief, paras 3.92 (with reference to Trial Judgement, para. 638), and 3.93.

> [t]he relative proximity of the Çeliku 3 fighting positions to the prison camp does not, *in itself*, provide a sufficient basis for inferring a connection between the Çeliku 3 unit and the prison camp, *nor does* the very close proximity to Gzim Gashi's compound to the prison camp.[836]

This finding could indicate that the Trial Chamber indeed assessed evidence separately from the other body of evidence. The Appeals Chamber recalls, however, its earlier finding that the Trial Chamber also considered other evidence together before it found that the Çeliku 3 unit was not responsible for operating the prison camp, namely "the evidence […] that soldiers from other KLA units also ate at this compound, at least from time to time".[837]

332. As to the Prosecution's submission that the Trial Chamber failed to consider together with the above-mentioned evidence that the Çeliku 3 unit kitchen was across the road from the camp in Gzim Gashi's compound, the Appeals Chamber finds that the Prosecution has not demonstrated that it is the only reasonable inference from this evidence that the Çeliku 3 unit was responsible for operating the prison camp, because the kitchen was also used by soldiers from other units. Furthermore, it is irrelevant whether the Trial Chamber's rationale for the location of the Çeliku 3 unit's headquarters in Gzim Gashi's compound for at least part of the Indictment period – "as a matter of expediency in the face of Serbian shelling of the earlier headquarters" – is inapposite, as it does not render erroneous the Trial Chamber's finding that the location of the Çeliku 3 unit's headquarters during part of the Indictment period does not, in itself or together with the other evidence, establish that the Çeliku 3 unit was responsible for operating the prison camp.

333. As a result, the Appeals Chamber finds that the Prosecution has not established that the Trial Chamber erred either in law or in fact when it failed to find that *the Çeliku 3 unit was responsible* for operating the Llapushnik/Lapušnik prison camp after having considered the evidence as to the location of the Çeliku 3 unit's fighting positions in proximity to the prison camp, the small size of the Llapushnik/Lapušnik village, the Çeliku 3 unit's use of kitchen facilities next door to the prison camp in Gzim Gashi's compound, the temporary location of the Çeliku 3 unit's headquarters in Gzim Gashi's compound and the deployment of the Pellumbi unit.

334. The Appeals Chamber will now consider the Prosecution's alternative submission that the Trial Chamber erred in failing to find that *members of the Çeliku 3 unit performed duties* in the camp.

[836] Trial Judgement, para. 714.
[837] Trial Judgement, para. 714.

(b) Whether soldiers of the Çeliku 3 unit participated in the operation of the camp

335. The Prosecution submits that the Trial Chamber erroneously assessed Karpuzi's evidence regarding the regular appearance of Çeliku 3 soldiers in the *oda* that was within the prison compound: Karpuzi's testimony that he saw Musliu singing in the *oda*, and that other KLA soldiers were also present, established that at least two Çeliku 3 soldiers – Isak Musliu and Karpuzi – were present within the camp.[838] Allegedly, this evidence goes far beyond a mere "close proximity" of the Çeliku 3 unit to the camp:[839] Together with other evidence such as the location of the Çeliku 3 unit's fighting positions in close proximity to the prison camp, the small size of Llapushnik/Lapušnik, the Çeliku 3 unit's use of kitchen facilities next door to the prison camp in Gzim Gashi's compound, and the location of the Çeliku 3 unit's headquarters in Gzim Gashi's compound, this proves that the Çeliku 3 unit had to have been involved in the operation of the prison camp.[840]

336. The Prosecution further submits that the Trial Chamber erroneously failed to consider that Isak Musliu's presence as a senior ranking official or commander in the prison camp would support a finding that the Çeliku 3 unit had to have been involved in the operation of the prison camp.[841]

337. The Prosecution also asserts that the Trial Chamber erred in failing to find that Haradin Bala was a member of the Çeliku 3 unit:[842] The Trial Chamber found that there were only two persons nicknamed Shala in the village of Llapushnik/Lapušnik, Ruzhdi Karpuzi and Haradin Bala.[843] One of the sources cited in support of this finding was Isak Musliu's statement to UNMIK in which he stated that in his "team" there were two persons "with the nickname Shala".[844] Thus, both persons with the pseudonym Shala were in Isak Musliu's unit. This unit was the Çeliku 3 unit, because Karpuzi gave uncontested evidence that he was in the Çeliku 3 unit and that Isak Musliu was his commander.[845] This evidence is consistent with the Trial Chamber's finding that Isak Musliu was in a leadership position in the Çeliku 3 unit.[846] Furthermore, the Prosecution submits that Haradin Bala stated in his Pre-Trial Brief that, on or about 8 May 1998, he "attached himself to a unit known as 'Çeliku 3' [and] was known as 'Shala'."[847]

[838] Prosecution Appeal Brief, paras 3.108-3.110.
[839] Prosecution Appeal Brief, para. 3.111.
[840] Prosecution Appeal Brief, paras 3.112-3.113.
[841] Prosecution Appeal Brief, para. 3.115.
[842] Prosecution Appeal Brief, paras 3.116, 3.122. *See also*, AT 126 (6.6.2007).
[843] Prosecution Appeal Brief, para. 3.118, with reference to Trial Judgement, para. 622.
[844] Prosecution Appeal Brief, para. 3.118, with reference to Trial Judgement, para. 622 and ex. P32, "CCIU witness statement of Isak Musliu dated 24 May 2001".
[845] Prosecution Appeal Brief, para. 3.118, with reference to Trial Judgement, para. 591.
[846] Prosecution Appeal Brief, para. 3.118. *See also ibid.*, para. 3.120.
[847] Prosecution Appeal Brief, para. 3.121, with reference to Bala Pre-Trial Brief, para. 5.

338. The Prosecution further argues that the Trial Chamber noted that various witnesses testified that KLA soldiers participating in the operation of the camp included Shala, Qerqizi, Tamuli,[848] and Salihi,[849] and that Tamuli and Salihi's position in the Çeliku 3 unit is evidenced by the partial list of Çeliku 3 soldiers set out in ex. P244.1.[850] The Prosecution also argues that Witness L64 stated that he was a soldier in Çeliku 3 and acknowledged having been in the prison camp on several occasions.[851]

339. With respect to Ruzhdi Karpuzi, the Appeals Chamber recalls that the Prosecution has not demonstrated that the Trial Chamber's consideration of his evidence as being evidence of having heard rather than seen Isak Musliu in the camp would have had any impact upon the Trial Chamber's findings with respect to the presence of Isak Musliu in the prison camp. Similarly, even if Ruzhdi Karpuzi had been singing in the prison camp on occasions, the Prosecution has not shown that this would have made it unreasonable for the Trial Chamber not to find that he was participating in the functioning of the camp. Hence, the Trial Chamber did not err in this respect.

340. In relation to Haradin Bala, the Appeals Chamber notes that the Trial Chamber did not make a finding as to whether he was a member of the Çeliku 3 unit. While the Trial Chamber held "that there were only two persons using the pseudonym Shala in Llapushnik/Lapušnik in the relevant period",[852] the Appeals Chamber is satisfied that it is not the only reasonable inference on the evidence that both of these persons using the pseudonym Shala were members of the Çeliku 3 unit throughout the Indictment period. The Appeals Chamber is mindful of Isak Musliu's statement given to UNMIK in which he stated that he "had two persons in [his] team with the nickname Shala".[853] He also stated that he did not "know if any of them was Haradin Balay [*sic*]."[854] He did not, however, specify in which time period the two persons who were using the pseudonym Shala were members of this "team".

341. The Prosecution further argues that the Trial Chamber found that "Tamuli" and "Salihi" were guards in the prison camp, and that the Trial Chamber erroneously failed to consider that they were members of the Çeliku 3 unit. The Prosecution suggests that this is evidenced by the partial

[848] Prosecution Appeal Brief, paras 3.123-3.124, with, reference to Trial Judgement, paras 251, 541, and 311.
[849] Prosecution Appeal Brief, para. 3.124, with reference to Trial Judgement, para. 276 ("All witnesses testified that the guards in the prison were Shala […] and Murrizi, although some witnesses saw also […] Tamuli, Qerqiz, Avduallah, Salihi, Hoxta, and Witness L64").
[850] Prosecution Appeal Brief, para. 3.124, with reference to ex. P244.9.
[851] Prosecution Appeal Brief, para. 3.124, with reference to Trial Judgement, para. 276 and Witness L64, T. 4353-4356 (15.3.2005), T. 4461-4464 (16.3.2005).
[852] Trial Judgement, para. 622.
[853] Ex. P32, "CCIU witness statement of Isak Musliu dated 24 May 2001".
[854] *Ibid*. In this regard, the Appeals Chamber notes that the Trial Chamber found that there were other individuals with the surname of "Shala" operating in the broader vicinity, such as Ferat Shala, Haxhi Shala, Shaban Shala, Nexhmi Shala, and Ramiz Shala (*see* Trial Judgement, para. 622).

list of Çeliku 3 soldiers set out in Exhibit P244.1. The Appeals Chamber finds, however, that this is not the only reasonable inference to be drawn from the evidence. First, the Trial Chamber did not make a finding that "Tamuli" and "Salihi" were guards in the camp. Instead, it stated that "some witnesses saw also some other uniformed men in the camp, namely Tamuli [and] Salihi".[855] Furthermore, paragraph 11 of Exhibit P244.1 refers to a list of persons in a notebook with the title "Çeliku 3", and while this list mentions a person called Skender Salihi, no further specification is given as to whether this person is the person called "Salihi" who is mentioned as one of the uniformed men in the camp in paragraph 276 of the Trial Judgement. Furthermore, paragraph 11 of Exhibit P244.1 only reads that "it is *possible* that these persons have been mobilised".[856] Paragraph 12 mentions four lists of "night guard duty shifts" with the "pseudonyms of persons at operating and manning the points [*sic*]". These lists include the name "Salihi" twice and the name "Tamuli" once. No further specifics are given that could show that these names indeed refer to the uniformed men "Salihi" and "Tamuli" mentioned in paragraph 276 of the Trial Judgement. In this context, the Appeals Chamber recalls the Trial Chamber's finding that "[a]t the time relevant to the Indictment, it was quite usual for members of the KLA to use a pseudonym rather than their own name. [T]he evidence was, at times, confusing because of this cultural practice; the Chamber has sought to minimise the effects of this in this Judgement."[857] As a result, the Appeals Chamber is not satisfied that it is the only reasonable inference from Exhibit P244.1 that the uniformed men called "Salihi" and "Tamuli" who are referred to in paragraph 276 of the Trial Judgement, were members of the Çeliku 3 unit during the Indictment period.

342. In relation to Witness L64, the Appeals Chamber recalls that he testified that he was a soldier in the Çeliku 3 unit and that he was in the Llapushnik/Lapušnik prison camp about two or three times.[858] The Appeals Chamber further recalls that the Trial Chamber held that "L64 [was] a former Çeliku 3 soldier".[859] In addition, the Appeals Chamber is mindful of Naser Kastrati's evidence that he met Witness L64 one day in the prison camp.[860] The Appeals Chamber finds that it is not the only reasonable inference from this evidence that Witness L64 was a Çeliku 3 soldier who was participating in the operation of the prison camp. Kastrati merely states that he saw Witness L64 on one day outside in the prison camp, and Witness L64 testified that he visited the prison camp about two or three times. The Appeals Chamber finds that it is not the only reasonable inference from this evidence that Witness L64 was participating in the operation of the prison camp.

[855] Trial Judgement, para. 276.
[856] Emphasis added.
[857] Trial Judgement, para. 24.
[858] Trial Judgement, para. 276, with reference to Witness L64, T. 4356-64 (16.3.2005).
[859] Trial Judgement, para. 690.
[860] Ex. P197, "92bis statement of Naser Kastrati", para. 35.

Hence, the Trial Chamber did not err when it refused to base Isak Musliu's criminal responsibility on any acts done by Witness L64.

343. In sum, the Appeals Chamber is satisfied that it is not the only reasonable inference from the evidence set out above "that members of the Çeliku 3 unit performed duties in the prison camp",[861] thus participating in the operation of the Llapushnik/Lapušnik prison camp. Furthermore, the Appeals Chamber recalls its finding that the Prosecution has not established that the Trial Chamber erred either in law or in fact when it failed to find that the Çeliku 3 unit was responsible for operating the Llapushnik/Lapušnik prison camp. Consequently, the Prosecution's submissions in relation to the question whether Isak Musliu was the overall commander of the Çeliku 3 unit and exercised "exclusive command or leadership of the Çeliku 3 unit"[862] have already been disposed of.

2. Conclusion

344. The Appeals Chamber finds that it is not the only reasonable inference from the evidence that the Çeliku 3 unit operated the prison camp, or that soldiers of this unit committed crimes in the prison camp at a time at which Isak Musliu exercised effective command and control over any such soldier. Hence, the Trial Chamber did not err in failing to find that Isak Musliu incurred criminal responsibility pursuant to Article 7(3) of the Statute for crimes committed in the Llapushnik/Lapušnik prison camp.

345. Consequently, the Prosecution's second ground of appeal is rejected.

C. Third ground of appeal: joint criminal enterprise

346. The Appeals Chamber recalls its finding, Judge Schomburg dissenting, that it was not the only reasonable inference from the totality of the evidence that Isak Musliu was present inside the Llapushnik/Lapušnik prison camp and participated in its operation.[863] Therefore, the Appeals Chamber finds that the Trial Chamber did not err in failing to find that Isak Musliu was a participant in a systemic joint criminal enterprise to commit cruel treatment and torture in the prison camp.

347. As a result, the Prosecution's third ground of appeal is rejected.

[861] Trial Judgement, para. 714.
[862] *Ibid.*
[863] *See supra* note 314.

VII. DISPOSITION

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

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearing on 5 and 6 June 2007;

SITTING in open session;

DISMISSES Haradin Bala's appeal in its entirety;

DISMISSES, Judge Wolfgang Schomburg dissenting with respect to the Prosecution's first ground of appeal in relation to Isak Musliu, the Prosecution's appeal;

AFFIRMS the sentence imposed by the Trial Chamber against Haradin Bala, subject to credit being given under Rule 101(C) of the Rules for the period Haradin Bala has already spent in detention; and

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Haradin Bala is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

Fausto Pocar	Mohamed Shahabuddeen	Andrésia Vaz
Presiding Judge	Judge	Judge

Theodor Meron	Wolfgang Schomburg
Judge	Judge

Judge Mohamed Shahabuddeen appends a declaration.

Judge Wolfgang Schomburg appends a partially dissenting and separate opinion and declaration.

Dated this twenty-seventh day of September 2007

At The Hague, The Netherlands

[Seal of the International Tribunal]

VIII. DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree with the judgement of the Appeals Chamber, but consider it prudent to make this declaration. With respect to membership of a joint criminal enterprise (JCE), I accept that the judgement is based on the established jurisprudence, by which I am bound. However, on an individual basis, I desire to say that the acquiescence of persons who originally were non-members of a JCE to membership of it can be inferred from the circumstances of their participation in the enterprise.[1] As to 'opportunistic' visitors, it is not necessary to identify them in order to establish their membership of a JCE.

2. I also take the opportunity to enter a reservation on paragraph 21 of the judgement of the Appeals Chamber. That paragraph states 'that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged'. The statement is wide enough to imply that the principle is applicable both to questions of fact and to questions of law. If it implies that, I am content. But an understanding to that effect may be disputed on the basis of previous jurisprudence of the Tribunal, which has held that the principle does not apply to questions of law.

3. If the statement restricts the applicability of the principle to questions of fact, I would wish to consider Mettraux's reference to 'the general principle of criminal law that where there is a doubt in the interpretation of the law, that doubt should always be interpreted in favour of the accused (*in dubio pro reo*) …'.[2] In *Delalić*,[3] the Trial Chamber said:

> The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.[4] This is why ambiguous criminal statutes are to be construed *contra proferentem.*

Also, one recalls the observation of the United States Supreme Court that there is a 'familiar rule that, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"'.[5] Other judicial statements to that effect are legion. I believe that the principle on which

[1] *See* my Partly Dissenting Opinion in *The Prosecutor v. Radoslav Brdanin,* Case No. IT-99-36-A, Judgement, 3 April 2007.
[2] Guénaël Mettraux, *International Crimes and the* ad hoc *Tribunals* (Oxford, 2005), p. 226.
[3] IT-96-21-T, 16 November 1998, para. 413 (also called *Čelebići*).
[4] See *R. v. Wimbledon JJ, ex p. Derwent* [1953] 1 QB 380.
[5] *Adams Wrecking Co. v. United States*, 434 U.S. 275, 284-285 (1978), quoting *United States v. Bass*, 404 U.S. 336, 348 (1971). See also *George P. Fletcher and Jens David Ohlin*, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', JICJ 3 (2005) 539, at 552.

they rely is subsumed by the principle of *in dubio pro reo.* Such statements apply that principle both to questions of fact and to questions of law.

4. By contrast, in *Stakić*,[6] the Trial Chamber, referring to the principle of *in dubio pro reo*, said that 'this principle is applicable to findings of fact and not of law'. The circumstance that no authorities were given possibly signified that the statement needed none, presumably being well established in the practice of the law.

5. Nevertheless, such material as I have seen encourages a doubt as to whether the principle is restricted to questions of fact. Probably more often than not the principle is invoked in respect of questions of fact, but I am not satisfied that it cannot apply to questions of law. However self-sufficient are rules for the interpretation of provisions of a conventional nature, the principle has to be borne in mind in the course of applying those rules; also, outside of such provisions, there can exist questions of law.

6. I appreciate the point made by my learned colleague Judge Schomburg. It is of course 'the duty and noble obligation of a court itself to ascertain and apply the relevant law in the given circumstances of the case, for the law lies within the judicial knowledge of a court of law.' However, before having 'judicial knowledge' of the law, the court must 'ascertain' the law. In ascertaining the law, the court is guided by certain principles. These include the principle of *in dubio pro reo*.

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

Dated this 27th day of September 2007
At The Hague
The Netherlands

Mohamed Shahabuddeen

[Seal of the International Tribunal]

[6] IT-97-24-T, 31 July 2003, para. 416.

IX. PARTIALLY DISSENTING AND SEPARATE OPINION AND DECLARATION OF JUDGE SCHOMBURG

1. I respectfully dissent from the standard for appellate review and consequently from the Appeals Chamber's upholding the acquittal of Isak Musliu. Further, I deem it necessary to write separately on the reasons for dismissing the Prosecution's arguments against Haradin Bala's partial acquittal. Finally, I must react by an own declaration to the final phrasing of paragraph 21 of the Appeal Judgement and to the declaration submitted thereto by Judge Shahabuddeen.

A. Standard for Appellate Review

2. I respectfully disagree with the distinction drawn by the Appeals Chamber[1] between an appeal lodged by the Prosecution and an appeal submitted by the Defence. The Appeals Chamber posits that

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

The Statute of the International Tribunal does not allow for such a distinction, stating in its Article 25(1) that

> [t]he Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor …

3. While in a number of jurisdictions, primarily those influenced by Anglo-Saxon legal traditions, the Prosecution does not have a right or has *de facto* only a limited possibility to appeal acquittals, the law under our Statute is abundantly clear. For good reasons, in particular with a view to the truth-finding mandate of the International Tribunal, and independently from domestic solutions, the legislator has granted a convicted person and the Prosecutor an equal right to appeal. It follows that the Appeals Chamber's task is exactly the same vis-à-vis an appeal from the Prosecution as it is vis-à-vis an appeal lodged by the Defence. The test applicable to an appeal from the Prosecution simply[2] has to mirror the test applicable to an appeal from the Defence, and it thus appears as the flipside of the same coin: the Appeals Chamber will only overturn an acquittal if no

[1] Judgement, para. 13.
[2] Of course, taking into account all the details of the fine-tuned settled jurisprudence with respect to appeals from the Defence.

reasonable Trial Chamber[3] could have come to that acquittal based on the facts before it, *i.e.* a conviction is the only reasonable conclusion.

4. It would be wrong to give even the impression that the Prosecution's task is a more difficult one. What the Prosecution must demonstrate on appeal is that the Trial Chamber's doubts as to the guilt of an accused were unreasonable, and that it simply expressed theoretical doubts where reasonable doubts were to be expected. It goes without saying that no judge confronted with mega cases *sui generis* could ever write a judgement without any doubts. The Trial Chamber's task when entering an acquittal is to convincingly show that the doubts which remain are indeed reasonable, and constitute grounds for arriving at an acquittal. It is the Appeals Chamber's task as regards factual findings to review the Trial Judgement, in as far as appealed by the Prosecution, in such a way as to ascertain that the doubts of the Trial Chamber as to an accused's guilt were indeed reasonable against the backdrop of the entire trial record.

5. The Appeals Chamber can only overturn an appealed acquittal for factual reasons if there is no reasoned decision explaining, where necessary in detail, why in the opinion of the Trial Chamber the Prosecution was not able to discharge its burden of proof. In short, the Appeals Chamber has to assess whether no Trial Chamber could have come to this conclusion, in particular taking into account those parts of the trial record to which the Prosecution has explicitly pointed. If the Trial Chamber fails to provide the necessary exhaustive discussion in the Trial Judgement, the Appeals Chamber may remand the case. If the Trial Chamber's discussion is regarded as exhaustive but the Appeals Chamber considers that the only reasonable conclusion is a conviction, the Appeals Chamber must directly replace the acquittal with a conviction. The Appeals Chamber can also replace the acquittal with a conviction if it comes to the conclusion that no additional findings can be expected by remanding the case.

B. Responsibility of Isak Musliu

6. Based on this test, I respectfully dissent from the Appeals Chamber's disposition which upholds the acquittals of Isak Musliu as regards the Prosecution's First Ground of Appeal. In my view, on the evidence that was before the Trial Chamber, no trier of fact could have had reasonable doubts as to Isak Musliu's guilt as regards his personal commission of crimes as a perpetrator pursuant to the genuine wording of Article 7(1) of the Statute ("committed"). Based on the convincing arguments submitted by the Prosecution in its briefs and supported in its oral

[3] I dislike the settled expression "no reasonable trier of fact" as the question is not whether a judge is reasonable but whether his or her conclusion is reasonable *in concreto*. However, if this language is employed, it also has to be employed when an appeal is lodged by the Prosecution. I would prefer that in both directions the standard be rephrased to read that "no trier of fact could reasonably come to this conclusion."

submissions,[4] the Appeals Chamber should have granted the Prosecution's First Ground of Appeal or at least remanded the case against Isak Musliu.

7. The expected success of the Prosecution's First Ground of Appeal primarily rests on two pillars. The first pillar is the evidence provided by witness Karpuzi. The Judgement lacks an in-depth discussion of Karpuzi's statements and testimony,[5] in particular in relation to his first statement.[6] A first statement is, in principle, the most relevant testimony.[7] This in the case at hand all the more so as the witness immediately afterwards conscientiously corrected the translated version of his first statement.[8] Interestingly enough, however, he did not change at all his first statement in relation to Isak Musliu's presence in the camp. I note that Karpuzi was already acquainted with Isak Musliu before his presence in the camp and knew from before his nickname, Qerqiz/Qerqizi. The second pillar is the unequivocal testimony of Witness L10.[9] Based on this compelling evidence, regarded credible by the Trial Chamber, I am convinced that the Appeals Chamber should not have confirmed the acquittal as regards Isak Musliu's personal commission of crimes as a perpetrator in the Llapushnik/Lapušnik prison camp,[10] against which the Prosecution's First Ground of Appeal was directed.

C. Responsibility of Haradin Bala

8. It is for several reasons that I do not dissent from the disposition of the Appeals Chamber in relation to the individual criminal responsibility of the accused Haradin Bala.

9. However, with all due respect, I am somewhat concerned about the Appeal Judgement's lack of a sufficient discussion that would constitute a convincing response to the Prosecution's submissions on joint criminal enterprise.

10. The Appeal Judgement shows in a nutshell that the concept of joint criminal enterprise, in particular in its third category, lacks clear definitions meticulously determining the scope of individual criminal responsibility. On the one hand, the theory of joint criminal enterprise is too expansive as it *de facto* allows individuals to be punished solely for membership in a criminal organization, however vaguely defined that membership may be.[11] On the other hand, it might be employed in too a limited way, as this case demonstrates.

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[4] Prosecution Appeal Brief, para. 3.1. *et seq*., AT. 115-127 (6.6.2007).
[5] *See* in particular T. 3095 (7.2.2005).
[6] *See* ex. 136a.
[7] *See* for this generally acknowledged observation most recently ROLF BENDER, ARMIN NACK & WOLF-DIETER TREUER, TATSACHENFESTSTELLUNG VOR GERICHT, *inter alia* p. 28 *et seq.* (3rd ed. 2007).
[8] *See* ex. 137a.
[9] *See* T. 2922, 2950-2951 (3.2.2005).
[10] As alleged in the Indictment.
[11] *See* in this context *Brdanin* Appeal Judgement, Partly Dissenting Opinion of Judge Shahabuddeen, para. 14 and Declaration of Judge van den Wyngaert.

11. The interpretation of the word "committing" contained in Article 7(1) of the Statute should never give the impression of being or tending to be arbitrary: the principle of *nullum crimen sine lege stricta* is also applicable to this general part of substantive criminal law. It is true that at a domestic level there is a development to punish mere membership in a criminal or similar organization. However, this approach has not found its way into the binding statutory law of the Tribunal. It has to be emphasized again that each interpretation of a statutory norm is limited by its wording. To put it briefly: the Appeals Chamber has missed a unique opportunity to do the mandatory by fixing the borders of individual criminal liability while at the same time reconciling its approach with the one employed by the International Criminal Court, namely, co-perpetratorship and the concept of control over the act,[12] an approach predominantly accepted on a global level,[13] and – of particular importance for this International Tribunal – in the former Yugoslavia. There can be only one concept of attribution in substantive international criminal law, which desires to be globally acknowledged.

12. In the case at hand, even by applying the concept of joint criminal enterprise, but in any event by applying the more convincing concept of (co-)perpetratorship as a sound interpretation of "committing" pursuant to Article 7(1) of the Statute, taking into account all of the arguments advanced by the Prosecution, one could have easily come to a different conclusion.

13. However, as this interpretation of the word "committing" in Article 7(1) of the Statute has been brushed aside by the Appeals Chamber without further reasoning,[14] there is no merit in an attempt to subsume the facts of the case against Haradin Bala under the much more contoured concept of (co-)perpetratorship, in particular in its objective criterion "control over the act," which indeed has the advantage of determining individual criminal responsibility *in abstracto* in advance and not on an unforeseeable case-by-case basis (*nullum crimen sine lege stricta et praevia*).

14. Primarily, however, I abstain from a dissent on the merits in the case against Haradin Bala for a different reason: judicial economy demands, as explicitly spelled out in Rules 73*bis*(D) and

[12] *See Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, paras. 317 *et seq*.

[13] *See* MAX PLANCK INSTITUTE FOR FOREIGN AND INTERNATIONAL CRIMINAL LAW, PARTICIPATION IN CRIME: CRIMINAL LIABILITY OF LEADERS OF CRIMINAL GROUPS AND NETWORKS, EXPERT OPINION, COMMISSIONED BY THE UNITED NATIONS –INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, OFFICE OF THE PROSECUTOR Ulrich Sieber, ed., 2006) (at present nine volumes). *See also Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide; *Simić* Appeal Judgement, Dissenting Opinion of Judge Schomburg.

[14] *See Stakić* Appeal Judgement, para. 62: "This mode of liability … does not have support in customary international law…" In this context, I note the recent decision by the Pre-Trial Chamber of the International Criminal Court, which noted that "…the Chamber considers, as does the Prosecution and, unlike the jurisprudence of the *ad-hoc* tribunals, that the Statute embraces the third approach, which is based on the concept of control over the crime" and "that the concept of co-perpetration … must cohere with the choice of concept of control over the crime as a criterion for distinguishing between principals and accessories." *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, paras 338 and 340. I regret that this Tribunal has not made any effort to reconcile these two approaches in order to at least come closer to a uniform international criminal law, in particular in its general part.

(E) of the Rules for the pre-trial and trial phase, that also on appeal the focus should be solely on the main crimes.[15]. One has to refrain from addressing all those acts, which do not carry so much weight[16] as to have a significant impact on the outcome of the case, an approach acceptable for appealed issues in the case at hand.

D. The Principle of *In Dubio Pro Reo*

15. The application of the principle *in dubio pro reo* is limited to finding of facts, including legal facts, but cannot be extended to holdings on questions of law.[17] It is therefore, that respectfully I cannot agree with Judge Shahabuddeen in this regard.

16. It is the duty and noble obligation of a court itself to ascertain and apply the relevant law in the given circumstances of the case, for the law lies within the judicial knowledge of a court of law.[18] There is no room for doubt in this determination.

17. Also at a domestic level, it has become settled jurisprudence[19] that the principle of *in dubio pro reo* "only relates to the establishment of facts."[20] "[L]'adage *in dubio pro reo* est sans valeur pour l'interprétation des lois: son rôle est différent et a pour seul but d'imposer l'acquittement d'un délinquant contre lequel les preuves font défaut ou sont insuffisantes pour asseoir une condamnation."[21] In a recent judgement, the German Federal Supreme Court of Justice held that the principle "is not an evidence-rule but a principle pertaining to the decision-making, which the court can adhere to only if, after considering all the evidence, it is not convinced of the existence of a fact

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[15] *See* Strafprozeßordnung [Code of Criminal Procedure], 7 April 1987, as amended, § 154a (Germany): "(1) If individual separable parts of an offense or some of several violations of law committed as a result of the same offense are not particularly significant 1. for the penalty … to be expected, or 2. in addition to a penalty … which has been imposed with binding effect upon the accused for another offense or which he has to expect for another offense, prosecution may be limited to the other parts of the offense or the other violations of law. … The limitation shall be included in the records. (2) After filing of the bill of indictment, the court, with the consent of the public prosecution office, may make this limitation at any stage of the proceedings. (3) At any stage of the proceedings the court may reintroduce into the proceedings those parts of the offense or violations of law which were not considered. An application by the public prosecution office for reintroduction shall be granted. …" (quoted from the courtesy translation provided by the German Federal Ministry of Justice.) According to the settled jurisprudence of the Federal Supreme Court of Germany, this concentration of a case on its most significant parts can also take place on appeal (*Rebuffing* and *Revision*) as it forms part – also on an international level – of the duty to proceed as expeditiously as possible in criminal matters (*Konzentrationsmaxime als Ausfluß des Beschleunigungsgebotes*).

[16] For the purposes of the criminal proceedings, and due to the limited resources of international jurisdiction, although not, of course, for the victims and their relatives.

[17] *See* Judgment, para. 21, first sentence and Declaration of Judge Shahabuddeen.

[18] *See* Fisheries Jurisdiction (U.K. v. Ice.), 1974, I.C.J. 9, para. 17 (July 25); Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 181 (July 25), para. 18.

[19] *Inter alia*, France, Germany, Switzerland and Austria. Unfortunately, it was not possible to further prove the self-evident within the few hours allotted to write this declaration.

[20] Bundesgerichtshof [BGH] [(German) Federal Supreme Court of Justice] Dec. 16, 1959, 14 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 68 (73), unofficial translation. *See also* Bundesgerichtshof [BGH] [(German) Federal Supreme Court of Justice] Aug. 30, 2006, 12 NSTZ-RECHTSPRECHUNGS-REPORT [NSTZ-RR] 43-45 (2007).

[21] ROGER MERLE & ANDRÉ VITU, TRAITÉ DE DROIT CRIMINEL 250 (7th ed. 1997) with further references.

directly relevant to questions of guilt and legal consequences."[22] Both the Swiss Federal Court[23] and the Austrian Supreme Court[24] subscribe to the same approach.

18. It is the obligation of a court to finally interpret its own law (*jura novit curia*). The court must arrive at only one decisive conclusion. The court may err in this determination, which may be corrected on appeal. However, a court of law cannot leave any remaining doubts about the correct interpretation of relevant law. It is the *nobile officium* and task of a judge to make that final assessment.

19. In the context of the International Tribunal this means that the International Tribunal is the final interpreter of its own law, *e.g.* in particular its own Statute and Rules.

20. Exceptionally, however, there are also questions of fact pertaining to legal issues, *i.e.* legal facts. Such legal facts, *e.g.* the existence of a domestic statute, state practice, customary law or foreign law in general, are subject to the normal fact-finding process of the court, as the power to interpret these norms is not vested to the International Tribunal. In case of doubt on such legal facts, the International Tribunal must also decide in favour of the accused.

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

Dated this twenty-seventh day of September 2007,
At The Hague, The Netherlands.

Judge Wolfgang Schomburg

[Seal of the International Tribunal]

[22] Bundesgerichtshof [BGH] [(German) Federal Supreme Court of Justice] Mar. 14, 2004, 49 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 112 (122), unofficial translation.
[23] *see* ROBERT HAUSER & ERHARD SCHWERI, SCHWEIZERISCHES STRAFPROZESSRECHT § 6.5, § 54.5 (3rd ed. 1997).
[24] *see* EGMONT FOREGGER ET AL., DIE ÖSTERREICHISCHE STRAFPROZEßORDNUNG 371 (7th ed. 1997).

X. ANNEX A: PROCEDURAL BACKGROUND

A. Notices of appeal

1. The Prosecution filed its Notice of Appeal on 30 December 2005.[1] Regarding the acquittals of Fatmir Limaj and Isak Musliu, the Prosecution alleges three grounds of appeal. It challenges the Trial Chambers' application of the standard of proof beyond reasonable doubt in relation to Fatmir Limaj's and Isak Musliu's personal participation in the Llapushnik/Lapušnik prison camp. It further challenges the application of the standard of proof beyond reasonable doubt in relation to Fatmir Limaj's and Isak Musliu's position of command and control in the relevant area and period of the Indictment. Further, the Prosecution challenges the Trial Chamber's findings in relation to the existence of a joint criminal enterprise in the prison camp. In relation to Haradin Bala, the Prosecution repeats its challenges relating to the existence of a joint criminal enterprise and appeals the sentence of years of imprisonment.

2. Haradin Bala filed his Notice of Appeal on 30 December 2005 as well, containing nine grounds of appeal relating to various errors of law and facts.[2] On 9 May 2006, Haradin Bala filed a notice in which he withdrew the third, fifth, seventh and ninth grounds of appeal.[3]

B. Composition of the Appeals Chamber

3. By order of 12 January 2006, the President of the Tribunal, Judge Fausto Pocar, designated the following Judges to form the Appeals Chamber bench hearing the case: Judge Fausto Pocar, Presiding; Judge Mohamed Shahabuddeen; Judge Andrésia Vaz; Judge Theodor Meron; and Judge Wolfgang Schomburg.[4] Pursuant to Rule 65*ter* and Rule 107 of the Rules, Judge Theodor Meron was designated Pre-Appeal Judge.[5]

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[1] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Prosecution Notice of Appeal, 30 December 2005.
[2] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Notice of Appeal by the Defence for Haradin Bala of the Judgement by Trial Chamber I [*sic*] rendered 30 November 2005, 30 December 2005. *See also Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Corrigendum to "Notice of Appeal by the Defence for Haradin Bala of the Judgement by Trial Chamber I [*sic*] rendered 30 November 2005", 4 January 2006.
[3] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Notice of Withdrawal of Grounds of Appeal, 9 May 2006.
[4] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Order Assigning Judges to a Case Before the Appeals Chamber and Designating a Pre-Appeal Judge, 12 January 2006.
[5] *Ibid.*

C. Filing of the appeal briefs

4. The Prosecution filed its Appeal Brief on 15 March 2006[6] and a motion for the variation of the Notice of Appeal pursuant to Rule 108 of the Rules on 27 March 2006.[7] Fatmir Limaj[8] and Isak Musliu[9] responded on 2 May 2006. After the Pre-Appeal Judge partly granted a first,[10] but denied a second[11] motion for extension of time to file a response to the Prosecution's Brief on Appeal, Haradin Bala[12] responded on 8 May 2006. The Prosecution filed its Reply Brief on 23 May 2006.[13]

5. After being granted his motion for an extension of time,[14] Haradin Bala filed his Appeal Brief on 9 May 2006.[15] The Prosecution responded on 19 June 2006.[16] Haradin Bala filed his Reply Brief on 4 July 2006.[17]

D. Requests for provisional release

6. On 20 April 2006, Haradin Bala filed an extremely urgent motion for temporary provisional release to attend his daughter's memorial service.[18] The Appeals Chamber granted this request on 20 April 2006, ordering his provisional release from 23 April 2006 to 27 April 2006.[19]

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[6] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Prosecution's Brief on Appeal, 15 March 2006. A Public Redacted Version was filed on 29 March 2006. The related Book of Authorities was filed on the same day.
[7] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108, 27 March 2006.
[8] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Respondant's Brief of Fatmir Limaj, 2 May 2005.
[9] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Respondant's Brief of Isak Musliu, 2 May 2005.
[10] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Decision on Extension of Time to File Response Brief, 5 April 2006.
[11] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Decision on Defence Application for further Extension of Time to File Response to Prosecution Brief on Appeal, 26 April 2006.
[12] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Response Brief of Mr. Haradin Bala, 8 May 2005. The related Table and Book of Authorities were filed on the same day.
[13] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Prosecution Brief in Reply, 23 May 2006. A Public Redacted Version has been filed on 25 May 2006.
[14] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Decision on Extension of Time, 16 February 2006.
[15] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Appeal Brief of Haradin Bala, 9 May 2006. The related Table of Authorities has been filed on the same day.
[16] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Prosecution's Brief in Response to Appeal Brief of Haradin Bala, 19 June 2006. A Public Redacted Version has been filed on 3 July 2006. On 10 July 2006, the Prosecution filed a corrigendum to this Response, correcting several typographical errors contained in the latter, see *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Corrigendum to Prosecution's Brief in Response to Appeal Brief of Haradin Bala, 10 July 2006.
[17] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Confidential Reply Brief of Haradin Bala, 4 July 2006.
[18] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Extremely Urgent Motion on Behalf of Haradin Bala for Provisional Release, 20 April 2006.
[19] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Daughter's Memorial Service, 20 April 2006.

7. On 31 August 2006, Haradin Bala filed an urgent motion for temporary provisional release to attend his brother's memorial service.[20] The Appeals Chamber granted this request on 1 September 2006, ordering Haradin Bala's provisional release for the period from 5 September 2006 to 9 September 2006.[21]

E. Motion to admit an agreed fact and supplement the trial record

8. On 5 October 2006, the Prosecution filed the "Motion to Admit an Agreed Fact and Supplement the Trial Record" regarding the (cause of the) death of Stamen Genov, a former detainee in the Llapushnik/Lapušnik prison camp.[22] The Prosecution had received the agreement of all three Accused. It further stated that it does not intend to rely on this agreed fact in support of any of its grounds of appeal in this case.[23] The Appeals Chamber granted this motion on 29 November 2006.[24]

F. Status Conferences

9. Status Conferences in accordance with Rule 65*bis* of the Rules were held on 4 May 2006, 29 August 2006, 5 December 2006, 21 March 2007 and 9 July 2007.

G. Appeal Hearing

10. Pursuant to a Scheduling Order of 10 May 2007,[25] the hearing on the merits of the appeal took place on 5 and 6 June 2006.[26]

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[20] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Urgent Motion on Behalf of Haradin Bala for Provisional Release, 31 August 2006.
[21] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Brother's Memorial Service and to Observe the Traditional Period of Mourning, 1 September 2006.
[22] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Prosecution's Motion to Admit an Agreed Fact and Supplement the Trial Record, 5 October 2006.
[23] *Ibid.*, para. 4.
[24] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Corrigendum to Trial Judgement and Decision on Prosecution Motion to Admit an Agreed Fact and Supplement the Trial Record, 29 November 2006.
[25] Scheduling Order for Appeal Hearing, 10 May 2006.
[26] On 6 June 2007, the Limaj Defence filed publicly Answers to Questions Posed by Appeals Chamber on 30 May 2007. On 7 June 2007, the Prosecution filed confidentially a List of Evidence and Findings Regarding Prosecution's Answer to Question No.3 Posed by the Appeals Chamber on 30 May 2007.

XI. ANNEX B: GLOSSARY OF TERMS

A. List of Tribunal and Other Decisions

1. International Tribunal

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal")

BLAGOJEVIĆ AND JOKIĆ
Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement")

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BRĐANIN
Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

ČELEBIĆI
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

DERONJIĆ
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Sentencing Appeal Judgement")

ERDEMOVIĆ
Prosecutor v. Dražen Erdemović, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemović* Sentencing Judgement")

Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemović* Appeal Judgement")

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement")

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement")

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

JOKIĆ
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Judgement on Sentencing Appeal")

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement") *as corrected by Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004, 26 January 2005

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, PAPIĆ AND ŠANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

MILUTINOVIĆ, ŠAINOVIĆ AND OJDANIĆ
Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Appeal Decision on Joint Criminal Enterprise")

NALETILIĆ AND MARTINOVIĆ
Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003 ("*Dragan Nikolić* Sentencing Judgement")

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Appeal Judgement")

M. NIKOLIĆ
Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 ("*Momir Nikolić* Judgement on Sentencing Appeal")

STAKIĆ
Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

DUŠKO TADIĆ
Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision")

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement")

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement")

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

GACUMBITSI
Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

KAJELIJELI
Prosecutor v. Juvénil Kajelijeli, Case No. ICTR-98-44A-A, Judgement and Sentence, 23 May 2005 ("*Kajelijeli* Appeal Judgement")

KAMBANDA
Jean Kambanda v Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

KAMUHANDA
Jean de Dieu Kamuhanda v. Prosecutor, Case No. ICTR-00-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement")

MUSEMA
Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

NDINDABAHIZI
Emmanuel Ndindabahizi, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement")

NIYITEGEKA
Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement").

NTAGERURA, BAGAMBIKI AND IMANISHIMWE
Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

RUTAGANDA
Prosecutor v. Georges Anderson Nderubunwe Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA
Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

B. List of Abbreviations, Acronyms and Short References

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

a.k.a.	Also known as
AT	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected

	version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. In case of doubt the video-tape of a hearing is to be revisited.
Bala Appeal Brief	Confidential Appeal Brief of Haradin Bala, 9 May 2006
Bala Notice of Appeal	Notice of Appeal by the Defence for Haradin Bala of the Judgement by Trial Chamber I rendered on 30 November 2005, 30 December 2005
Bala Pre-Trial Brief	Pre-Trial Brief of Haradin Bala Pursuant to Rule 65ter (F) of the Rules of procedure and Evidence, 1 June 2004
Bala Reply Brief	Confidential Reply Brief of Haradin Bala, 4 July 2006
Bala Response Brief	Confidential Response Brief of Mr. Haradin Bala, 8 May 2006
CCIU	UNMIK Police Central Criminal Investigation Unit
ex.	Exhibit
fn.	footnote
Ibid.	[Latin: *ibidem*] refers to previous citation
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994
Indictment	*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-PT, Decision on Prosecution's Motion to Amend the Amended Indictment, 13 February 2004 ("Second Amended Indictment" attached to the "Prosecution's Motion to Amend the Amended Indictment" filed on 16 November 2003)
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for

	Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
KLA	Kosovo Liberation Army
KVM	Kosovo Verification Mission
LDK	Democratic League of Kosovo
Limaj Response Brief	Confidential Respondent's Brief of Fatmir Limaj, 2 May 2006
Musliu Pre-Trial Brief	Pre-Trial Brief of Isak Musliu, 1 June 2004
Musliu Response Brief	Confidential Respondent's Brief of Isak Musliu, 2 May 2006
oda	Guest room
para.	Paragraph
paras	Paragraphs
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	Confidential Prosecution's Brief on Appeal, 15 March 2006
Prosecution Notice of Appeal	Prosecution's Notice of Appeal, 30 December 2005
Prosecution Pre-Trial Brief	Prosecutor's Notice of Filing of the Pre-Trial Brief and Other Documents Pursuant to Rule 65*ter*, 1 March 2004, and Corrigendum to Prosecution's Pre-Trial Brief, Updated Witness List and Revised Set of Rule 65*ter* Summaries, 30 September 2004
Prosecution Response Brief	Confidential Prosecution Brief in Response to Appeal Brief of Haradin Bala, 3 July 2006
Prosecution Reply Brief	Confidential Prosecution Brief in Reply, 23 May 2006
Rules	Rules of Procedure and Evidence of the International Tribunal
SFOR	Multinational Stabilisation Force
SFRY	Former Socialist Federal Republic of Yugoslavia

SFRY Criminal Code	Criminal Code of the Socialist Republic of Yugoslavia, adopted on 28 September 1976 and entered into force on 1 July 1977
Statute	Statute of the International Tribunal for the former Yugoslavia, established by Security Council Resolution 827 (1993)
SUP	*Sekretarijat za Unutrašnje Poslove* - Secretariat of Internal Affairs
T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. In case of doubt the video-tape of a hearing is to be revisited.
UN	United Nations
UNDU	UN Detention Unit
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPROFOR	United Nations Protection Forces
VJ	Vojska Jugoslavije/ Army of Yugoslavia