UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-03-66-T

Date: 30 November 2005

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IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr Hans Holthuis**

Judgement of: **30 November 2005**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

JUDGEMENT

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I. INTRODUCTION

1. The Accused, Fatmir Limaj, Haradin Bala and Isak Musliu, are indicted with crimes allegedly committed by them and other members of the Kosovo Liberation Army ("KLA")[1] from May to around 26 July 1998 against Serbian civilians and Kosovo Albanian civilians who were perceived as Serbian collaborators in the Llapushnik/Lapusnik area in central Kosovo. The Indictment, as ultimately amended, alleges that at least thirty-five civilians were abducted by KLA forces, detained in a prison camp in the village of Llapushnik/Lapusnik for prolonged periods of time under inhumane conditions and routinely subjected to assault, beatings and torture. Fourteen named detainees are alleged to have been murdered in the course of their detention. Another ten were allegedly executed in the nearby Berishe/Berisa Mountains on or about 26 July 1998 when the KLA forces abandoned Llapushnik/Lapusnik and the prison camp came under attack from advancing Serbian forces. These allegations support five counts of violations of the laws or customs of war and five counts of crimes against humanity, under Articles 3 and 5 respectively of the Statute of the Tribunal, for imprisonment, cruel treatment, inhumane acts, torture and murder.

2. The Indictment charges the Accused Fatmir Limaj, aka Çeliku, with individual criminal liability under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting the aforementioned crimes, including through his participation in a joint criminal enterprise. He is alleged to have personally participated in the enforcement of the detention of civilians in the Llapushnik/Lapusnik 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/Berisa Mountains. Fatmir Limaj is further charged with superior responsibility pursuant to Article 7(3) of the Statute in respect of these offences, which is 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/Lapusnik prison camp.

3. The Indictment charges the Accused Haradin Bala, aka Shala, with individual criminal liability under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting the aforementioned crimes, including through his participation in a joint criminal enterprise. He is alleged to have personally participated in the enforcement of the detention of civilians in the Llapushnik/Lapusnik 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/Berisa Mountains. Haradin Bala is not charged under Article 7(3) of the Statute.

[1] "UÇK" in Albanian.

4. The Indictment charges the Accused Isak Musliu, aka Qerqiz, with individual criminal liability under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting eight of the ten aforementioned crimes, including through his participation in a joint criminal enterprise. He is 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/Lapusnik prison camp. Isak Musliu is further charged with superior responsibility pursuant to Article 7(3) of the Statute in respect of these eight offences, which is alleged to arise out of the position of command and control he then held over the KLA soldiers who acted as guards in the Llapushnik/Lapusnik prison camp. Isak Musliu is not charged, however, with the two offences alleging murders committed in the Berishe/Berisa Mountains on or about 26 July 1998.

5. The three Accused have pleaded not guilty to all counts against them.[2]

6. The term "prison camp" was used throughout trial as a convenient, though not necessarily very accurate, description. The Prosecution case, however, was that persons were held or detained by the KLA, in the months of May, June and July 1998, in a compound in the village of Llapushnik/Lapusnik. The alleged compound was walled, with a large metal double gate opening onto the loose-formed, narrow roadway which passed by the compound. Inside were two houses and various outbuildings around a yard.[3] It was the compound of a farming property. The Prosecution case is that most prisoners or detainees were held in a basement of one of the houses, referred to as the storage room, or in a room used to keep cows, referred to as the cowshed. A few were also detained in the main house. KLA soldiers who were guarding the prison congregated in this house and most interrogations and many beatings are alleged to have taken place in this house.[4] There was another compound, the property of one Bali Vojvoda, immediately adjacent, where it is alleged a KLA oath ceremony was held which the Accused Fatmir Limaj attended.[5] Immediately across the roadway is the compound of Gzim Gashi where it is alleged the KLA established a kitchen for feeding troops and where some KLA soldiers slept.[6] References in this decision to the prison camp, or to the prison, are to the first of these compounds described above in the village of Llapushnik/Lapusnik. References to prisoners, or to detainees, are to those who are alleged to have been held in this prison camp at various times relevant to this Indictment.

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2 The Accused Haradin Bala and Isak Musliu appeared initially on 20 February 2003 before Judge Liu and entered pleas of not guilty on all charges against them. The initial appearance of the Accused Fatmir Limaj was held on 5 March 2003 before Judge Liu and he also pleaded not guilty on all charges against him. On 27 February 2004, following amendment of the Indictment, the three Accused again pleaded not guilty to all charges against them before Judge Orie.

3 Exhibit P6.

4 *See infra,* paras 243-446.

7. References to a fighting point, or to a point, are to a position where (usually) a small group of KLA soldiers was positioned. These were typically and often trenched defence positions which had been prepared to offer protection to the KLA soldiers. Many of these were located at the approaches to a village to enable fire to be directed by the KLA soldiers to Serbian forces approaching the village.

8. The Serbian forces and the forces of the Federal Republic of Yugoslavia ("FRY") engaged in Kosovo in 1998 included forces of the Army of Yugoslavia ("VJ") and forces of the Ministry of the Interior ("MUP") of the Republic of Serbia.[7] The Chamber will refer to the specific forces involved in a particular operation when the identity of these forces is known from the evidence. However, where there is no evidence regarding the specific Serbian or FRY forces involved, the Chamber will refer to these forces, generally, as Serbian forces. This should be understood as meaning Serbian or FRY forces.

9. Further, the Chamber has referred to locations in Kosovo throughout the Judgement both by their Albanian names and by their names in BCS. The name of any given location therefore appears in the text in Albanian/BCS. In doing so, the Chamber has relied upon a list of locations which is in evidence in this case,[8] although it is apparent that the list is not always complete and that some locations might well be spelled differently in other documents. Finally, two maps are attached in Annexes to this Judgement. They show the general area relevant to the present case, as well as the location of the places material to the charges and frequently referred to in this decision.

[5] Elmi Sopi, T 6767-6768; Ruzhdi Karpuzi, T 3096-3098; 3175; Exhibit P128.
[6] Elmi Sopi, T 6729-6733; Ruzhdi Karpuzi, T 3087-3096; Exhibit P128.
[7] *See infra*, paras 93; 164-165; *see* also Exhibit P230, para 3.
[8] Exhibit P219.

II. CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

10. In the present Judgement, the Chamber is to determine the innocence or the guilt of each of the three Accused in respect of each of the counts with which each is charged in the Indictment, *i.e.* ten counts against each of Fatmir Limaj and Haradin Bala and eight counts against Isak Musliu. Article 21(3) of the Statute enshrines the presumption of innocence to which each accused is entitled. This presumption places on the Prosecution the burden of establishing the guilt of the Accused, a burden which remains on the Prosecution throughout the entire trial. In respect of each count charged against each Accused, the standard to be met for a conviction to be entered is that of proof beyond reasonable doubt.[9] Accordingly, the Chamber 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. In so doing, in respect of some issues, it has been necessary for the Chamber to draw one or more inferences from facts established by the evidence. Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.[10]

11. In the present case, one Accused, Haradin Bala, relies in part on an alibi defence.[11] 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".[12] 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".[13] 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.

12. The Chamber has been required to weigh and evaluate the evidence presented by all parties. It would emphasise that the mere admission of evidence in the course of the trial has no bearing on the weight which the Chamber subsequently attaches to it. The Chamber further observes that the seven years that have passed since the events in the Indictment have, in all likelihood, affected the accuracy and reliability of the memories of witnesses, understandably so. There were times,

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9 Rule 87(A) of the Rules provides, in its relevant part: "[…] A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt."

10 *Čelebići* Appeals Judgement, para 458.

11 On 1 March 2005, the Defence for Isak Musliu had also filed a notice of alibi pursuant to Rule 67 of the Rules.

12 *Vasiljević* Trial Judgement, para 15; *Čelebići* Appeals Judgement, para 581.

13 *Vasiljević* Trial Judgement, footnote 7.

however, where the oral evidence of a witness differed from the account he gave in a prior statement. It has been recognised that "it lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court."[14] Nevertheless, these matters called for careful scrutiny when determining the weight to be given to any such evidence.

13. In the present case, a number of former KLA members were subpoenaed to testify before the Chamber as Prosecution witnesses. In the course of the evidence of some of these witnesses, it became apparent that their oral evidence was, on certain points, materially different from a prior statement of the witness. Some of these differences were explained by the witnesses during their evidence. Some suggested the differences were due to the method of questioning when the prior statement was made, in particular, in several instances suggesting a lack of specificity as to the time period being referred to in a particular question. The Chamber was able to accept this possibility in some, but not all, cases. Other differences, however, remain unaccounted for. At times, it became apparent to the Chamber, in particular taking into account the demeanour of the witness and the explanation offered for the differences, that the oral evidence of some of these witnesses was deliberately contrived to render it much less favourable to the Prosecution than the prior statement. The evidence of some of these former KLA members left the Chamber with a distinct impression that it was materially influenced by a strong sense of association with the KLA in general, and one or more of the Accused in particular. It appeared that overriding loyalties had a bearing upon the willingness of some witnesses to speak the truth in court about some issues. It is not disputed that notions of honour and other group values have a particular relevance to the cultural background of witnesses with Albanian roots in Kosovo. This was expressed in the expert report of Stephanie Schwandner-Sievers:

> [The] Albanian concept of honour governs all relations that extend beyond blood kinship… Solidarity with those individuals that share the same "blood" is taken for granted, but faithfulness to a group or cause that reaches beyond the family needs to be ritually invoked. Honour can also be explained in terms of an ideal-type of model of conduct, and a man's perceived potential of protecting the integrity of the family or any wider reference group (such as the clan or a political party) against outside attacks … [The pledge of allegiance or *besa*] requests absolute loyalty, and it requires the individual's compliance with family and group values in general. At the same time it justifies the killing of those within the group who break this code… However… the members of a group can chose [sic] to avoid violence. The reaction to conflict, insult, treason, or other transgressions to group norms, depends on the members' interpretations of the facts and these may vary greatly.[15]

Some of these factors were also applicable, in the Chamber's assessment, to aspects of the evidence of some former KLA members who were called in the course of the Defence case. These are

[14] *Naletilić* Trial Judgement, para 10; *Vasiljević* Trial Judgement, para 21.
[15] Exhibit P201, pp 37-39.

matters which the Chamber has taken into consideration in assessing the personal credibility of particular witnesses in this case, an assessment which in many cases has been most material to the Chamber's acceptance or rejection of the evidence of a witness, whether in whole or in part.

14. However, the matter goes further. Indeed, the video-recordings and transcripts of the prior video-recorded interviews of two Prosecution witnesses, which revealed material inconsistencies with their oral evidence in court, were in the particular circumstances admitted as substantive evidence by decision of the Chamber.[16] The considerations discussed above have made the task of the Chamber, to determine where the truth lies in these inconsistent accounts, undoubtedly more complex. At times, the Chamber has been unable to make such determinations and has had to leave the evidence aside altogether. In any event, while the Chamber accepts that as a matter of principle, prior inconsistent statements may possibly have some positive probative force, at least if they corroborate other apparently credible evidence adduced from other witnesses during trial, the Chamber is not persuaded in this case that the prior inconsistent statements of these two witnesses can safely be relied upon as the sole or principal basis for proof of a material fact. In the case of these two witnesses, this is especially so because each witness, in oral evidence, disavowed, in very material respects, what previously had been stated in the interview.

15. The Chamber has also heard the evidence of a number of witnesses who may be characterised as "victim witnesses". The events as to which they testified in court were extremely traumatic events, involving at times matters of life or death. In evaluating the evidence given by these witnesses, the Chamber has taken into consideration that any observation they made at the time may have been affected by stress and fear; this has called for particular scrutiny on the part of the Chamber. The Chamber has also been conscious that many victim-witnesses with Albanian roots had family links in varying degrees to each other or were from villages located near to the village of another witness or witnesses. The cultural factors of loyalty and honour, discussed earlier, may also have affected their evidence as to the events, and the Chamber has, therefore, sought to take account of this. Further, witnesses might well have, and in some cases, testified as to having discussed the events with one another in the course of the years that have passed since the relevant events. The Chamber further observed that a significant number of witnesses requested protective measures at trial, and expressed concerns for their lives and those of their family. This context of fear, in particular with respect to witnesses still living in Kosovo, was very perceptible throughout the trial. The Chamber heard evidence about witnesses requesting to be interviewed by investigators at night to avoid the fact of an interview becoming known, or in a third language

[16] Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005.

rather than through Albanian interpreters, as they feared they would be compromised.[17] It is also the case that a number of victims who came to testify only did so in response to a subpoena issued by the Chamber. The Chamber has sought, *inter alia*, to give due consideration to these matters as it has undertaken the very difficult task, in this case, of evaluating the evidence.

16. Of particular importance in this case is the evidence as to the visual identification of each of the Accused and of detainees and victims in the Llapushnik/Lapusnik prison camp and in the nearby Berishe/Berisa Mountains on or about 26 July 1998. Throughout the trial, the Defence has challenged the reliability of this identification evidence and the methods by which it was obtained, particularly in so far as it relates to the three Accused.

17. It has become widely accepted in domestic criminal law systems that visual identification evidence is a category of evidence which is particularly liable to error. The jurisprudence in these systems recognises that errors may occur even with the most honest, confident and apparently impressive witnesses. Wrongful convictions based on mistaken eyewitness identifications have been known to result. As a consequence, visual identification evidence is treated with very special care.[18] In this Tribunal, the Appeals Chamber has drawn attention to the need for "extreme caution" in relation to visual identification evidence.[19] In doing so, it highlighted that the evaluation of an individual witness' evidence, as well as the evidence as a whole, should be conducted with considerations such as those enunciated in *Reg v Turnbull*[20] in mind. The Appeals Chamber has stressed the need to "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."[21] The Appeals Chamber has identified, albeit not exhaustively, a number of factors which may render a decision to rely on identification evidence 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

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17 Kaare Birkeland, T 1643; Anargyros Kereakes, T 4934-4937.

18 *See* for example, *Reg v. Turnbull*, [1967] QB 224, *Reid v. Reg* [1991] I AC 363 United Kingdom, *U.S. v Wade*, 388 U.S. 218 (1967) United States; Bundesgerichtshof, *reprinted in* Strafverteidiger 409 (1991); Bundesgerichtshof, *reprinted in* Strafverteidiger 555 (1992) Germany; Oberster Gerichtshof, 10 December 1992, 15 0s 150 / 92; 4 June 1996, 11 0s 59 / 96 and 20 March 2001, 11 0s 141 / 00 Austria.

19 *Kupreškić* Appeals Judgement, para 34.

20 *Reg v. Turnbull*, [1967] QB 224. *See* for example, *Reid v. Reg* [1991] I AC 363, United Kingdom; *Auckland City Council v. Brailey* [1988] 1NZLR 103, New Zealand; *R v Mezzo* [1986] 1 SCR 802, Canada; *Dominican v. R* [1992] 173 CLR 555 Australia.

assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others."[22]

18. Some witnesses have identified one or more of the Accused in the course of their evidence in the courtroom. Leaving aside other circumstances relevant to the reliability of an identification by each of these witnesses, circumstances which are considered later in this decision, the Chamber is 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.[23]

19. Reservations have also been expressed by another Trial Chamber with respect to the weight to be attached to identifications made using photo spreads.[24] In this case, the Chamber has considered with care the evidence of a Defence witness, Professor Willem Wagenaar. The Chamber found his evidence helpful, but not always entirely persuasive, especially to the extent that it sought to identify absolute categories as to the degree of reliability of visual identification evidence. A particular concern with a photo spread identification is that the photograph used of the Accused may not be a typical likeness even though it accurately records the features of the Accused as they appeared at one particular moment.[25] To this the Chamber would add, as other relevant factors, the clarity or quality of the photograph of the Accused used in the photo spread, and the limitations inherent in a small two-dimensional photograph by contrast with a three-dimensional view of a live person. It is also a material factor whether the witness was previously familiar with the subject of the identification, *i.e.* whether he is "recognising" someone previously known or "identifying" a stranger.[26] While the Chamber has not been prepared to disregard every identification made using a photo spread of one or more of the Accused in the present case, it has endeavoured to analyse all the circumstances as disclosed in the evidence, and potentially affecting such identifications, conscious of their limitations and potential unreliability, and has assessed the reliability of these identifications with considerable care and caution. Among the matters the Chamber regarded as being of particular relevance to this exercise was whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification, whether the identification was

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[21] *Kupreškić* Appeals Judgement, para 34.
[22] *Kupreškić* Appeals Judgement, para 40 (footnotes omitted).
[23] Professor Willem Wagenaar, T 7140; Exhibit DM7; *see also Vasiljević* Trial Judgement, para 19.
[24] This procedure was deemed "usually inherently unreliable where the witness was not previously familiar with the Accused", given that a photograph "records what a person looks like in the one split second when that person may have been moving his or her features, and which may not therefore always provide a safe impression of what that person really looks like", *Vasiljević* Trial Judgement, para 18.
[25] Professor Willem Wagenaar, T 7140; Exhibit DM7.

made immediately and with confidence, or otherwise, whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media,[27] and whether the procedure in some way may have encouraged the witness to make a positive identification despite some uncertainty, or encouraged the witness to identify an Accused rather than someone else.

20. With particular regard to the evidence of the visual identification of each of the Accused by various witnesses, it is to be emphasised that, like all elements of an offence, the identification of each Accused as a perpetrator as alleged must be proved by the Prosecution beyond reasonable doubt. This is to be determined, however, in light of all evidence bearing on the issue of identification, evidence both for and against. In a particular case, this could include, for example, an alibi or whether an identifying witness has a motive which would be furthered by a false identification. Evidence of the visual identification of an Accused by a witness is but one piece of what may be the relevant evidence in a particular case. The ultimate weigh 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.[28]

21. In some cases only one witness has given evidence on a fact material to this case. Of course, the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[29] Nevertheless, it has been the approach of the Chamber that any such evidence required particularly cautious scrutiny before the Chamber placed reliance upon it.

22. Further, the Chamber recalls Article 21(4)(g) of the Statute which provides that no accused shall be compelled to testify against him or herself. Two of the three Accused in the present case, namely Haradin Bala and Isak Musliu, did not give evidence at trial. The Chamber has not, of course, attached any probative relevance to their decision. Fatmir Limaj, however, testified in his own defence before the Chamber. He did so before any other Defence witnesses were called which

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[26] Professor Willem Wagenaar, T 7136; Exhibit DM7.
[27] Professor Willem Wagenaar, T 7136-7138; 7187-7190; 7216-7219; Exhibit DM7.
[28] *See Prosecutor v. Kunarac*, Decision on Motion for Acquittal, Case No. IT-96-23-T, 3 July 2000, where the Trial Chamber stated: "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", para 4.
[29] *Aleksovski* Appeals Judgement, para 62.

counts in his favour in the assessment of credibility. This decision to testify has not created any burden on the Accused to prove his innocence. Rather, the Chamber had to determine whether, notwithstanding the evidence of the Accused, the Prosecution's evidence is sufficiently strong to meet the required standard for a conviction.[30]

23. Measures to protect the identity of many witnesses, and members of their families, were ordered by the Chamber. Concerns for personal safety persuaded the Chamber that these protective measures were justified. For the same reasons many witnesses are referred to in this Judgement by a number, rather than by name, and other details which might lead to their identification, or to the identification of members of their families, have been omitted.[31]

24. At the time relevant to the Indictment, it was quite usual for members of the KLA to use a pseudonym rather than their own name. It has been necessary, therefore, to make extensive references in this decision to persons by the use of pseudonyms. Further, the evidence discloses that a number of witnesses of Albanian extraction were known by a variety of names, usually drawn from different family connections. Unfortunately, the evidence was, at times, confusing because of this cultural practice; the Chamber has sought to minimise the effects of this in this Judgement.

25. The Chamber observes that the Defence have raised a number of concerns regarding the credibility of particular witnesses in this case, in particular L96, Dragan Jašović, L64, Ramiz Qeriqi, L04, L06, L10 and L12.

26. L96 gave evidence to the Tribunal about his own abduction, a family member's abduction, his detention in the Llapushnik/Lapusnik prison camp and the alleged killings in the Berishe/Berisa Mountains. L96 testified to being one of two detainees of the Llapushnik/Lapusnik prison camp to have been present at the killings in the Berishe/Berisa Mountains and to have survived.[32] As a result, L96 has provided evidence relevant to important material facts in this case, some of which is uncorroborated. Some of L96's evidence is second-hand, some of it conflicted with that of other Prosecution witnesses and parts revealed internal inconsistency. In addition to these issues, one aspect of L96's testimony is of particular concern to the Chamber. L96 maintained throughout his *viva voce* evidence that he did not, and had not actively or voluntarily, collaborated with the Serbian authorities.[33] However, there are a number of pieces of evidence to suggest the contrary.[34] It is also

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[30] *Vasijlević* Trial Judgement, para 13.
[31] Whenever appropriate, the Chamber has also referred to protected persons as "personal relations" in this Judgement.
[32] L96, T 2397-2398.
[33] L96, T 2517, 2519, 2543, 2545.
[34] For example, there is evidence that L96's family was friendly with the Serbian authorities, Dragan Jašović, T 5305-5306, 5400-5402, 5407-5408; L96, T 2525 and that he volunteered information to the Serbian authorities, T 2426-2427, 5284, 5428; *see* also Exhibits DM9 and DM15.

significant that some of L96's own evidence becomes more plausible if it is accepted that he was a Serbian collaborator.[35] Similarly, much of the conflict between the evidence of L96 and that of others, as well as the internal inconsistencies in his own evidence, are more readily explained if he was a Serbian collaborator. The Chamber notes that L96 may have been motivated by a desire to protect himself and his family by maintaining that he did not willingly provide information to the Serbian authorities.[36] Nevertheless, the Chamber is left with the distinct impression that L96 did indeed give false testimony on this issue. His willingness to do so instils in the Chamber a general distrust of the credibility of this witness. As a result, the individual components of his evidence have been rigorously scrutinised and used with caution. The Chamber has not been prepared to accept and act on the evidence of L96 alone regarding any material issue and has only given weight to those parts of his evidence which are confirmed in some material particular by other evidence which the Chamber accepts.

27. Dragan Jašović has given evidence at this Tribunal in two trials. Within a short period of time, he appeared as a witness for the Prosecution in this case and he was called as a witness for the Defence in the *Milošević* trial. Dragan Jašović was presented as a credible witness for the Prosecution in this trial while, contemporaneously, OTP investigators obtained material with which to discredit Dragan Jašović a little later when he appeared for the Defence in the *Milošević* trial. The Chamber has previously noted that there was no subterfuge involved in the OTP's conduct.[37] The material gathered by OTP investigators was made available to the Defence in this trial at the earliest opportunity, indeed in time for use in the cross examination of Dragan Jašović.[38] The Chamber is nevertheless concerned that these conflicting strategies by the OTP in relation to the same witness are undesirable. They necessarily give rise to obvious problems in the way of accepting the witness as honest and reliable, and to serious internal policy concerns for the OTP. However, this Chamber is now tasked with analysing the credibility of Dragan Jašović by examining all the material placed before it. At the time relevant to the Indictment, Dragan Jašović worked as a crime investigation policeman in the Secretariat of the Interior in Ferizaj/Urosevac. Dragan Jašović regarded the KLA as an "illegal terrorist organisation"[39] and his work involved

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[35] For example, according to L96, after he escaped from the killings at the Berishe/Berisa Mountains, he walked 30-35 km, through KLA controlled areas to Ferizaj/Urosevac, T 2423-2424. He stayed with a cousin and after a couple of days was arrested and taken to the SUP and interviewed by Dragan Jasovič, T 2389. An alternative account is provided by Dragan Jašović who states that L96 turned himself over to Serbian authorities in Komaran/Komorane, considerably closer to the Berishe/Berisa Mountains, and which is corroborated by a report allegedly made by the Serbian authorities, T 2426-2427, 5284, 5428.

[36] In relation to L96's failure to mention to CCIU investigators that he had previously been to the Berishe/Berisa Mountains with the Serbian authorities, L96 stated that it was "not a valid thing because of my family and my friends, to tell them that I was taken there by the Serbs in Llapushnik", T 2453.

[37] Decision on Joint Defence Motion on Prosecution's Late and Incomplete Disclosure, 7 June 2005, paras 22-25.

[38] Decision on Joint Defence Motion on Prosecution's Late and Incomplete Disclosure, 7 June 2005, paras 22-25.

[39] Dragan Jašović, T 5331.

investigating the establishment and operation of the KLA, its leadership, staff and headquarters.[40] The Chamber's main concern pertaining to the credibility of Dragan Jašović relates to the manner in which he carried out his work and, in particular, the circumstances under which the "information" about which he gave evidence was obtained. In the course of searching cross-examinations, Dragan Jašović was confronted with a significant amount of material, including *viva voce* evidence of other witnesses,[41] documentary evidence[42] and a number of Rule 92*bis* statements,[43] which contain allegations of detention, interrogation, mistreatment and torture at the police station where Dragan Jašović served. Much of this evidence specifically refers to Dragan Jašović and the evidence reveals a number of compelling consistencies.[44] While Dragan Jašović refuted all allegations put to him, the Chamber is persuaded that the combined effect of this evidence is to raise serious doubts about his general credibility. As a consequence, the Chamber has not been prepared to accept as reliable the evidence of Dragan Jašović which is based on information "gained" by him from persons he interviewed, and regards the other evidence of this witness with the utmost caution.

28. L64 was declared a cooperative witness by an order of The District Court of Prishtina/Pristina, on 16 October 2003.[45] Pursuant to this Order, the pending charges against L64, of unlawful possession of firearms and possession of heroin, were discontinued. L64's detention in relation to these charges was terminated and L64's family was relocated out of Kosovo.[46] The Defence suggests that, motivated by a desire to cooperate for the above "inducements", L64's evidence was moulded to accord with the Prosecution's case.[47] The Chamber notes that counterbalancing this consideration, although to what degree is unknown, are the terms for the revocation of the Order as stipulated in that document, relevantly, the provision of false testimony. The Chamber also notes that much of L64's evidence about Llapushnik/Lapusnik, specifically in statements made to OTP investigators on 25 May 2003 and 17 and 18 June 2003, was given prior to his arrest on 13 June 2003 and the Order granting him cooperative witness status. Nevertheless, in assessing the general credibility of this witness, the Chamber considers that L64's prior criminal record,[48] criminal conduct[49] and history of personal drug use,[50] weigh very negatively in an

[40] Dragan Jašović, T 5198-5199.
[41] *See* L96, T 5420-5422.
[42] Figures issued by the Council for the Defence of Human Rights and Freedoms comprising a list of 371 alleged victims of mistreatment at the police station where Dragan Jašović worked between 1991-1999, T 5341-5344.
[43] Exhibit DM12; Exhibit DM16; Exhibit DM17; Exhibit DM18.
[44] The presence and use of "police sticks", L96, T 5420-5422, Dragan Jašović, T 5343; T 5348; Exhibit DM18; the presence and use of baseball bats, T 5348; Exhibit DM16; Exhibit DM17; the forced signing of statements, L96, T 2540-2542; Exhibit DM16; Exhibit DM17.
[45] Exhibit P166.
[46] L64, T 4688-4692.
[47] Defence Final Brief, para 808.
[48] L64, T 4319-4320; 4690.
[49] Weapons trading, L64, T 4318-4320; 4622; 4815-4820. Heroin trading, L64, T 4325-4328.
[50] L64, T 4324-4328; 4427-4436.

assessment of the trustworthiness of L64. The Chamber has also taken into consideration the allegations made against L64 concerning his own activities as a member of the KLA at the time relevant to the Indictment, including at the Llapushnik/Lapusnik prison camp.[51] These factors in combination leave the Chamber with an extremely negative view of the credibility of this witness. The Chamber has not been prepared to act on the evidence of L64 alone regarding any material issue and has only given weight to those parts of his evidence which are confirmed in some material particular by other evidence, which the Chamber accepts.

29. Ramiz Qeriqi, aka Luan, was also a KLA member at the time relevant to the Indictment and was summonsed by the OTP as a suspect in April 2003.[52] At the time of this trial no charges were pending against this witness. The Chamber was informed that no formal agreement had been concluded and no special sanctions or measures were imposed upon him in relation to his testimony. Ramiz Qeriqi stated, when he gave evidence at this trial, that he believed he was no longer a suspect.[53] While the Defence requested that the Chamber call on the Prosecution to clarify its position in relation to this witness, the Chamber declined to do so.[54] Serious allegations were levelled against Ramiz Qeriqi in the course of the trial. The Defence asserts that Ramiz Qeriqi's participation in the abduction of Serbs and Serbian collaborators, some of which may have been taken to the Llapushnik/Lapusnik prison camp, made him a "gatekeeper to the crimes alleged in the Indictment".[55] While Ramiz Qeriqi denied all culpability, the Prosecution acknowledges that there is considerable evidence to the contrary and that Ramiz Qeriqi may have been untruthful about his involvement in the kidnappings.[56] The Prosecution submits, however, that Ramiz Qeriqi provided reliable evidence in relation to the development and structure of the KLA.[57] The Prosecution claims that in this respect Ramiz Qeriqi has no motivation to be untruthful and has genuine pride in the KLA's achievements.[58] In the view of the Chamber, Ramiz Qeriqi's evidence is obviously motivated by a desire to avoid self incrimination. The pertinent question, however, is whether this motivation to avoid self incrimination may have resulted in the untruthful placement of blame on any of the Accused, by way of fabrication of evidence. Ramiz Qeriqi actively asserted in his evidence, when questioned about this, that he has not incriminated anyone by his evidence: "I have not accused anyone, and I haven't seen anyone committing any crimes. To my recollection, I have not accused anyone; I've just told the truth about KLA, of what I have seen with my own eyes."[59]

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51 L64, T 4832-4834; 4839-4844; 4867-4869.
52 Ramiz Qeriqi, T 3542.
53 Ramiz Qeriqi, T 3699.
54 T 3648-3649.
55 Defence Final Brief, para 144.
56 Prosecution Final Brief, para 29.
57 Prosecution Final Brief, para 29.
58 Prosecution Final Brief, para 29.
59 Ramiz Qeriqi, T 3718.

In the Chamber's assessment, parts of the evidence given by this witness are coloured by a motivation to avoid self-incrimination. The Chamber does not place reliance on these parts of the testimony. While other aspects of his evidence do not appear to be affected in their reliability, out of caution, the Chamber has both scrutinised these aspects with great care and tempered its reliance on this evidence accordingly. The Chamber regards Ramiz Qeriqi as a witness of diminished credibility.

30. Further, it is submitted by the Defence for Haradin Bala that a family tension may have influenced events in the prison camp and the credibility of the evidence of L10, L06, L04 and L12. These four witnesses are each members in some degree of one extended family. It is contended by the Defence for Haradin Bala that elements of the family were involved in a dispute over land with members of another family.[60]

31. There is evidence of such a dispute and that it had not been resolved by the time relevant to the Indictment.[61] Nevertheless, it remains undemonstrated and unsubstantiated that there is a link between this longstanding inter-family tension and the events in Llapushnik/Lapusnik. Two unsubstantiated matters are advanced by the Defence for Haradin Bala. It is submitted that L10 acknowledged there was a link in a statement he gave to ICTY investigators.[62] This was not his evidence before the Chamber, however, and that statement is not in evidence. Secondly, it is contended there is a link between one of the conflicted families and the Accused Haradin Bala, aka Shala.[63] The only evidence on this goes no higher, however, than that of L12, who said that Ramadan Behluli is a friend of Shala's brother-in-law.[64]

32. While accepting there is a special significance in Kosovo Albanian culture of family groups, and the relevance of community involvement in the settlement of disputes between families,[65] it has not been demonstrated by the evidence in this case that the Chamber should not accept the evidence of the four witnesses connected with one of the conflicted families because of a pre-war dispute with another family with which, at the highest, the Accused Haradin Bala is suggested to have a connection by virtue of an unsubstantiated friendship. Neither is the Chamber left in doubt about the credibility of these four witnesses on any such basis.

33. It is further submitted by the Defence for Haradin Bala that the evidence of the four witnesses connected with the family concerned should also be discounted or disregarded because

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60 Defence Final Brief, paras 653-661.
61 L06, T 986-987; L10, T 2905-2907; L12, T 1786-1788; 1831.
62 Defence Final Brief, para 654.
63 Defence Final Brief, para 660.
64 L12, T 1847-1849.
65 L12, T 1833-1836.

they live in some proximity to each other and had discussed matters relevant to the case before they came to the Tribunal to give evidence.[66]

34. L10 said he had discussed events in the prison camp with members of his family who knew about it. The questioning did not, however, seek to determine whether these included any of L06, L12 and L04.[67] L04 did not remember any discussion with L06 about his experience in the camp before coming to the Tribunal.[68] It was accepted in evidence that, at some time after July 1998, L10 had sought and received information about Shala's real name from his father and also from L96 (not from the same family).[69] L04 had also learned Shala's real name from a son of his cousin and also from another person (not from the family).[70]

35. The Chamber accepts the probability of some discussion by the four men who were prisoners with some members of their family over the years since July 1998. It would be unnatural for it to be otherwise, although the Chamber accepts that, as is also indicated in the evidence, there may well have been a personal reluctance to discuss in detail the harrowing experience. It would also not be surprising for there to have been at least some exchange between those who were called to give evidence before this Tribunal. There is nothing in the evidence, nor from the Chamber's appreciation of the demeanour of these witnesses, however, to provide any foundation for the contention that it should be concluded that some or all of these four witnesses colluded and fabricated or falsified their evidence relevant to the events in Llapushnik/Lapusnik or in the Berishe/Berisa Mountains because they were of the one family. The Chamber is not persuaded that the evidence of these four witnesses as to their respective experiences in Llapushnik/Lapusnik and in the Berishe/Berisa Mountains has been affected in its honesty by any family connection or discussion.

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66 Defence Final Brief, paras 670-672; 704-706; 728-731; 752.
67 L10, T 3016-3017.
68 L04, T 1226-1227.
69 L10, 3024-3030.
70 L04, T 1238-1241.

III. CONTEXT

A. Political context in Kosovo and emergence of the KLA

36. The crimes alleged in the Indictment took place in the territory of Kosovo, currently a United Nations-administered province within the Union of Serbia and Montenegro, bordering on the north and east the Republic of Serbia, on the south Macedonia and Albania, and on the west Albania and Montenegro.

37. Under the Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY") of 1974, Kosovo was an autonomous province within the Republic of Serbia and one of the constituent entities of the SFRY, thus enjoying a certain degree of self-management and autonomy.[71] Kosovo's status as an autonomous province within the Republic of Serbia was also recognized by the Constitution of the Republic of Serbia of 1974 which further proclaimed the province's autonomy to regulate certain administrative and linguistic matters.[72]

38. In November 1988 the Assembly of Serbia proposed amendments to the Constitution of Serbia that would limit Kosovo's autonomous powers.[73] The proposed amendments triggered a strong public reaction in Kosovo and marches against the proposals, attended by a large number of people, were held.[74] The protests intensified in February 1989 when many people in Kosovo went on strike or declared hunger strikes.[75] On 3 March 1989 the SFRY Presidency declared a state of emergency. Some days later the Assembly of Kosovo met in Prishtina/Pristina and, among protests and increased military presence, passed the proposed constitutional amendments.[76] On 28 March 1989 the Assembly of Serbia amended the Constitution of Serbia and thus effectively revoked Kosovo's autonomous status.[77]

39. In 1990 the Assembly of Kosovo and the provincial government were abolished.[78] In March 1990 the Assembly of Serbia adopted a series of measures which led to the dismissal of Kosovo Albanians from political and economic institutions and from large business establishments.[79] Education in Albanian language, especially secondary and higher education, was

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71 *See* Articles 1, 2 and 4 of the SFRY Constitution of 1974.
72 *See* Articles 1, 147, 240, 291-293 of the Constitution of the Republic of Serbia of 1974.
73 Exhibit P201, p 17; Fatmir Limaj, T 5862.
74 Exhibit P201, p 17; Fatmir Limaj, T 5862, 5865. *See* also Fadil Bajraktari, T 6888.
75 Exhibit P201, p 17; Fatmir Limaj, T 5862-5863.
76 Exhibit P201, p 17; Fatmir Limaj, T 5865.
77 *See* Exhibit P201, p 17.
78 Exhibit P201, p 17.
79 Exhibit P201, p 17; Shukri Buja, T 3727-3729; Elmi Sopi, T 6713-6715; Dr Zeqir Gashi, 5665; Fatmir Limaj, T 5866-5868. Exhibit P178, p 1; Exhibit DM12, paras 8 and 9.

curtailed.[80] Kosovo Albanian students and professors were denied access to universities and thus had to organise a parallel system of education with classes being held in private homes.[81] The number of human rights violations against Kosovo Albanians increased,[82] Kosovo Albanians were arrested and mistreated by the Serbian police.[83]

40. On 2 July 1990 the Kosovo Albanian delegates of the Assembly of Kosovo gathered outside the parliament building and declared that the revocation of Kosovo's autonomy was unlawful and that the province would participate in the Federation only if it was granted the same status as the other republics.[84] The statement was declared illegal by the Serbian authorities[85] but it provoked a feeling of euphoria among Kosovo Albanians.[86]

41. In this period several political parties and movements emerged. The Democratic League of Kosovo ("LDK"), a political party advocating for a peaceful solution of the Kosovo question through dialogue, was formed in 1989.[87] Its chairman was Ibrahim Rugova. At about the same time, in 1990, the Popular Movement for Kosovo ("LPK"), a successor of the Popular Movement for the Republic of Kosovo ("LPRK"), was established.[88] The LPK advocated for a solution of the Kosovo question through active means and did not exclude the possibility of armed action.[89] The LPK was active primarily among Kosovo Albanian communities in countries in Western Europe as its activities in Kosovo were conducted underground.[90] After the public appearance of the Kosovo Liberation Army ("KLA") in 1997,[91] the LPK's activities focused on supporting the KLA politically and financially.[92]

42. In September 1991 a referendum for independence was held in Kosovo, in which the Serbian population of the province did not participate. The overwhelming majority of the Kosovo Albanians voted for independence.[93] In May 1992 elections were held in Kosovo and the LDK led by Ibrahim Rugova won the majority of votes.[94] However, the Parliament never convened.[95]

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80 Exhibit P201, p 18.
81 Dr Zeqir Gashi, T 5598-5560; Fatmir Limaj, 5866-5868. *See* also Exhibit P201, p 56.
82 Exhibit P201, p 18.
83 Ruzhdi Karpuzi, T 3056-3057; Sylejman Selimi, T 2058-2059; Fatmir Limaj, T 5866 ; Exhibit P197, para 8; Exhibit DM12, paras 17-22.
84 Exhibit P201, p 18; *See* also Fatmir Limaj, T 5866.
85 Exhibit P210, p 18.
86 Fatmir Limaj, T 5866-5867.
87 Exhibit P201, p 50. *See* also Jakup Krasniqi, T 3298; Ramadan Behluli T 2653.
88 Shukri Buja, T 3724.
89 Shukri Buja, T 3731.
90 Shukri Buja, T 3731. *See* also Ramiz Qeriqi, T 3554-3556.
91 *See infra*, para 48.
92 Shukri Buja, T 3732.
93 Exhibit P201, p 18; Fatmir Limaj, T 5875-5876.
94 Fatmir Limaj, T 5876-5877; Exhibit P201, p 18.
95 Fatmir Limaj, T 5881; Jakup Krasniqi, T 3296.

43. In the meantime, discrete military formations were formed clandestinely. In 1991, Adem Jashari and an armed political formation in Prekazi/Prekaz, Skenderaj/Srbica municipality, organised the first armed action against the Serbian police and military forces.[96]

44. Following unsuccessful attempts to launch the work of the new Kosovo Parliament, the political opposition to the LDK and its policy for a peaceful solution of the Kosovo question grew stronger.[97] In the period 1991-1993 the emerging military formations and these political groups began to establish closer connections.[98] In March or April 1993 a meeting was held in Preqazi/Prekaze attended by Adem Jashari, representing the military formations, as well as by Jakup Krasniqi and other representatives of the political formations.[99] At the meeting the future roles of the political and the military formations were determined and the KLA was formed.[100] While the formation of the KLA was announced in 1994,[101] it did not become widely known in Kosovo until 1997.[102]

45. The KLA supported a solution of the Kosovo question through an active armed resistance to the official regime.[103] It was prohibited by the official authorities and operated underground.[104] Its activities aimed at preparing the citizens of Kosovo for a liberation war, at mobilizing the population throughout the entire territory, and at responding by armed action to the acts of violence of the Serbian authorities.[105] It was viewed by the Serbian authorities and some observers as a terrorist organisation,[106] while for its supporters the KLA was a guerrilla liberation movement targeting the Serbian police and army in Kosovo.[107]

46. The main governing body of the KLA was the General Staff. Among other activities, the General Staff issued statements on behalf of the KLA informing the public of its activities,[108] authorised military action,[109] and assigned tasks to individuals in the organisation.[110] The General Staff operated underground.[111] In the early years of the KLA's existence only a small number of its

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[96] Jakup Krasniqi, T 3293.
[97] Fatmir Limaj, T 5881.
[98] Jakup Krasniqi, T 3294-3296.
[99] Jakup Krasniqi, T 3306-3307.
[100] Jakup Krasniqi, T 3306-3307.
[101] Jakup Krasniqi, T 3296.
[102] *See* Rexhep Selimi, T 6592; Shukri Buja, T 3732.
[103] Jakup Krasniqi, T 3303-3304. *See* also Sylejman Selimi, T 2058-2060.
[104] Jakup Krasniqi, T 3307.
[105] *See* Jakup Krasniqi, T 3297; Fatmir Limaj, T 5884-5886.
[106] *See* John Crosland, T 1864. *See* also Fatmir Limaj, T 6200.
[107] Fatmir Limaj, T 6129-6130; 6200-6205; Jakup Krasniqi, T 3430-3431.
[108] Jakup Krasniqi, T 3314-3315.
[109] The fighting in both Rahovec/Orahovac and Bardhi i Madh/Veliki Belacevac for the Obliq/Obilić mine started without the authorisation of the General Staff of the KLA, Jakup Krasniqi, T 3415-3417, which may imply that usually military operations of this type required the authorisation of the General Staff.
[110] *See infra,* paras 94-104.
[111] Jakup Krasniqi, T 3305.

members were based in Kosovo, the majority operating from countries in Western Europe, from the United States, or from Albania.[112] In 1996, however, the General Staff expanded its operations in Kosovo.[113] The commander of the KLA from its inception until March 1998 was Adem Jashari.[114] After Adem Jashari's death on or about 5 March 1998 the KLA commander became Azem Syla.[115] In May 1998 the KLA's General Staff included also the following members: Sokol Bashota, Rexhep Selimi, Llahib Rrahimi, Xhavid Zeka, Hashim Thaci, Kadri Veseli, and Jakup Krasniqi.[116] Due to the difficult security situation and the fact that they had to operate underground the General Staff did not meet regularly.[117]

47. Between 1994 and 1997 the situation in Kosovo continued to deteriorate. Kosovo Albanians continued to be fired from political, economic and educational institutions.[118] Student demonstrations were held.[119] Individuals involved in political life were taken to police stations for questioning or "informative talks".[120] Kosovo Albanians were being arrested in large numbers. It is said they were often mistreated by the police.[121] Many were charged with illegal possession of arms. Thousands of people left Kosovo.[122] The exclusion of the Kosovo question from the Dayton Peace Agreement in 1995 further galvanised the more radical political movements.[123]

48. At the end of 1997 and the beginning of 1998 the tension in Kosovo exacerbated. In November 1997 during an armed clash between Serbian forces and the KLA in the village of Llaushe/Lausa, Halil Geci, a teacher, was killed.[124] At his funeral, which was attended by thousands of people and was broadcast on Kosovo television, three KLA members wearing masks appeared in public for the first time.[125] Their appearance made the KLA's existence known to the wider public in Kosovo.[126]

49. On 28 February and 1 March 1998 Serbian police forces launched an attack on the villages of Qirez/Cirez and Likoshan/Likosane, located two km apart, in the Drenica area.[127] Helicopters,

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[112] Jakup Krasniqi, T 3305-3306.
[113] Jakup Krasniqi, T 3309-3310.
[114] Jakup Krasniqi, T 3309-3310.
[115] Jakup Krasniqi, T 3310-3311.
[116] Jakup Krasniqi, T 3310-3311. S*ee* also Rexhep Selimi, T 6587-6588.
[117] Jakup Krasiqi, T 3310.
[118] Shukri Buja, T 3727-3729; Exhibit P197, para 11.
[119] Jan Kickert, T 659.
[120] *See* Shukri Buja, T 3727.
[121] *See* Fatmir Limaj, T 5886-5888. *See* also Ramadan Behluli, T 2648-2651, 2874-2876.
[122] Fatmir Limaj, T 5882-5883; Jakup Krasniqi, T 3298-3299.
[123] *See,* for example, Jakup Krasniqi, T 3303-3305; Fatmir Limaj, T 5882-5883.
[124] Fatmir Limaj, 6120.
[125] Fatmir Limaj, 6120; Jakup Krasniqi, T 3301-3303; Ramadan Behluli, T 2654-2655.
[126] Shukri Buja, T 3732. *See* also Ramadan Behluli, T 2654-2655; Ruzhdi Karpuzi, T 3223.
[127] Exhibit P212, tab 5, p 18.

armoured military vehicles, mortars and machine guns were used in the attack.[128] In both cases the Serbian special police forces attacked without a warning and fired indiscriminately at civilians.[129] On or about 5 March 1998 Serbian security forces attacked the family compound of the leader of the KLA, Adem Jashari, in Prekazi-i-Poshtem/Donje Prekaze, a village located not far from Likoshan/Likosane and Qirez/Cirez, also in the area of Drenica.[130] The fighting, in which armoured vehicles were used, continued for about 36 hours.[131] The evidence is that during the February-March 1998 attacks in the area of Drenica 83 Kosovo Albanians were killed.[132] Among the dead victims were elderly people[133] as well as at least 24 women and children.[134] During the attack on Qirez/Cirez a pregnant woman was shot in the face[135] and a baby was killed in Prekazi-i-Poshtem/Donje Prekaze.[136] Many of the victims were shot at a very close range.[137] Reports indicated that men were summarily executed in front of their homes and that some of the victims were shot dead while in police custody.[138] During the attack on Prekazi-i-Poshtem/Donje Prekaze the entire Jashari family, except for an 11 year old girl, was killed.[139]

50. The attacks on the three villages in the area of Drenica marked a turning point in the Kosovo crisis. The popular support for the KLA greatly increased. The funeral of the victims was attended by tens of thousands of people.[140] Jakup Krasniqi, at the time a member of the KLA's General Staff, delivered a speech.[141] Many people in Kosovo were joining the KLA and its support among Kosovo Albanian communities abroad was growing.[142]

51. In March 1998 a group of about 15 Kosovo Albanians living in Switzerland including Ismet Jashari, the Accused Fatmir Limaj, Hashim Thaci, Agim Bajram and Shukri Buja left for Kosovo.[143] They flew to Tirana in Albania and on the following day crossed the Kosovo-Albanian border on foot carrying bags loaded with ammunition.[144] They went to the Drenica zone where

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[128] Exhibit P212, tab 5, p 18.
[129] Exhibit P212, tab 5, p 18.
[130] Exhibit P212, tab 5, pp 18, 27; Sylejman Selimi, T 2063-2064; Rexhep Selimi, T 6592. *See* also John Crosland, T 1858-1860; Exhibit P92, tab 2.
[131] John Crosland, T 1863.
[132] Exhibit P212, tab 5, 18. *See* also Jan Kickert, T 758-760.
[133] John Crosland, T 1863.
[134] Exhibit P212, tab 5, 18. Jan Kickert believed that there were 10 children and 18 women among the casualties, T 758-759.
[135] Exhibit P212, tab 5, pp 18, 23; Jakup Krasniqi, T 3301-3303.
[136] Peter Bouckaert, T 5555-5556; Exhibit P212, tab 5, p 31.
[137] John Crosland, T 1863.
[138] Exhibit P212, tab 5, pp 20-21.
[139] Exhibit P212, tab 5, p 18; Peter Boukaert, T 5516-5517.
[140] Jaqup Krasniqi testified that the funeral of the victims in Likoshan/Likosane and Qirez/Cirez was attended by 200 000 people, T 3301-3303, 3386-3370. *See* also Peter Bouckaert, T 5516.
[141] Jaqup Krasniqi, T 3368-3370; 3305-3306; Exhibit P141.
[142] Sylejman Selimi, T 2067, 2198; Rexhep Selimi,T 6592; Ruzhdi Karpuzi, T 3223; Fadil Kastrati, T 2590, 2622; Jan Kickert, T 720; Peter Boukaert T 5516-5517; Shukri Buja, T 3734-3735; Fatmir Limaj, T 5901-5903.
[143] Fatmir Limaj, T 5908-5909, 5919; Shukri Buja, T 3738-3739.
[144] Fatmir Limaj, T 5907; Shukri Buja, T 3739-3740.

fighting in the Prekazi/Prekaze area was continuing, and which, in their understanding, was the only place where they could join the KLA.[145] Many other Kosovo Albanians living abroad were also returning to Kosovo at the time.[146]

52. The events that occurred in the area of Drenica in February and March 1998 marked a new stage in the development of the conflict in Kosovo. After the attacks in Drenica the Serbian forces began using typical military style equipment and tactics.[147] The fighting between Serbian forces and the KLA intensified and covered wider geographic areas.[148]

B. Development of the KLA units in various regions of Kosovo

53. After their arrival in Kosovo in March 1998, members of the KLA, including Shukri Buja, Fatmir Limaj, Hashim Thaci, Fehmi Lladrovci and Agim Bajrami, met in Tice/Tica and discussed the organisation of the KLA. Shukri Buja asked to be sent to the Lipjan/Lipljan and Shtime/Stimlje municipalities, which he knew best.[149] Agim Bajrami settled in Kacanik/Kacanik and Fatmir Limaj in Malisheve/Malisevo.[150] Shukri Buja decided to start organising a guerrilla movement from Mollopolc/Malopoljce in the Shtime/Stimlje municipality. He stayed there throughout March and April 1998.[151] After his return to Kosovo, Ramiz Qeriqi undertook the organisation of a unit in Kroimire/Krajmirovce.[152] Ismet Jashari, aka Kumanova, was asked to organise a KLA unit in Suhareke/Suva Reka.[153] In the evidence of Shukri Buja, Ismet Jashari was later based in Luzhnice/Luznica and Klecke/Klecka.[154] Agim Bajrami was organising a unit in the municipality of Kacanik/Kacanik.[155] In April 1998 Shukri Buja went to Ferizaj/Urosevac to help Imri Llazi to organise a guerrilla unit in the Ferizaj/Urosevac municipality.[156] In May 1998 the process of setting up the Shtime/Stimlje guerrilla unit was completed.[157]

54. In May 1998 Ramiz Qeriqi was organising people in the area of Kroimire/Krajmirovce. He had soldiers at fighting points in Carraleve/Crnoljevo, Zborc/Zborce, Fushtice/Fustica and Blinaje/Lipovica. There were barracks in Pjetershtice/Petrastica.[158] Ramadan Behluli was in

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145 Fatmir Limaj, T 5910-5911.
146 Shukri Buja, T 3739-3741.
147 Peter Boukaert, T 5516-5517.
148 Peter Boukaert, T 5516-5517.
149 Shukri Buja, T 3746-3749; 3751-3752. For the location of various places referred to in this section, *see* Annexes II and III.
150 Shukri Buja, T 4092-4093; Rexhep Selimi, T 6593-6594.
151 Shukri Buja, T 3756; 3761.
152 Ramiz Qeriqi, T 3563; 3565-3566; Shukri Buja, T 3812.
153 Shukri Buja, T 3928.
154 Shukri Buja, T 3794; 3812.
155 Shukri Buja, T 3768-3769.
156 Shukri Buja, T 3768-3769; 3772.
157 Shukri Buja, T 3777.
158 Ramiz Qeriqi, T 3577.

charge of six soldiers in Pjetershtice/Petrastica.[159] KLA members were digging trenches on the main road from Carraleve/Crnoljevo to Pjetershtice/Petrastica and building bunkers.[160] They were admitting new soldiers. By the beginning of June 1998 there were about 70 to 100 KLA members in the area of Kroimire/Krajmirovce.[161] In the end of May 1998 the unit in Kroimire/Krajmirovce was named "Sokoli" or "Petriti".[162] Shukri Buja testified that in June 1998, after the creation of that unit, a number of people wanted to join the KLA, which led to the setting up of another unit in Pjetershtice/Petrastica, covering also the area of Zborc/Zborce.[163] The number of soldiers under Ramadan Behluli's command increased to 17 by 17 June 1998.[164] At the end of May 1998, Shukri Buja took over the command of the area of Kroimire/Krajmirovce.[165] Ramiz Qeriqi became his deputy.[166] In June 1998, KLA units were established also in Fushtice/Fustica and Blinaje/Lipovica.[167] Further, as described later in this decision, a number of units were formed in the area of Llapushnik/Lapusnik.[168]

55. Sylejman Selimi testified that, at the end of May 1998, he was appointed commander of the 1st operational zone, the Drenica zone.[169] He was based in Likofc/Likovac.[170] From May 1998 onwards, the number of soldiers under Sylejman Selimi's command increased from around 200-300 to over a thousand by the end of 1998.[171] Rexhep Selimi stated that the Drenica operational zone was more advanced than other zones. The manner in which it was structured became a model for structuring other zones.[172]

56. The forming of the KLA structure appears to have been a slow process which was affected by factors independent of the local leaders. There were difficulties moving from one area to another because of the rugged terrain.[173] The KLA had insufficient weapons. Not every soldier had a weapon.[174] Shukri Buja was tasked to organise a supply line of weapons from Albania to Kosovo, to the municipalities of Kacanik/Kacanik, Lipjan/Lipljan, Shtime/Stimlje and Ferizaj/Urosevac.[175] The development of the KLA structure was also influenced by armed confrontations with the

[159] Ramadan Behluli, T 2659-2660.
[160] Ramadan Behluli, T 2661-2663; Ramiz Qeriqi, T 3575.
[161] Ramiz Qeriqi, T 3575.
[162] Shukri Buja, T 3777-3778.
[163] Shukri Buja, T 3777-3781.
[164] Ramadan Behluli, T 2659-2660; 2666.
[165] Ramiz Qeriqi, T 3578.
[166] Ramadan Behluli, T 2667.
[167] Shukri Buja, T 3789.
[168] S*ee infra,* para 702.
[169] Sylejman Selimi, T 2070-2072; The terms "zone" and "subzone" are used interchangeably in this decision, reflecting the actual evidence. Jakup Krasniqi stated that these two terms mean the same; T 3479.
[170] Sylejman Selimi, T 2072-2075.
[171] Sylejman Selimi, T 2075-2076.
[172] Rexhep Selimi, T 6691.
[173] Shukri Buja, T 3769-3772.
[174] Sylejman Selimi, T 2188.

Serbian forces.[176] A battle took place on 9 May 1998 in the area of Llapushnik/Lapusnik.[177] On 29 May 1998 the KLA again fought against Serbian forces in Llapushnik/Lapusnik.[178] On 14, 17 and 23 June 1998 there were clashes between the belligerent forces in Carraleve/Crnoljevo.[179]

57. Bislim Zyrapi testified that in mid June preparations for the structuring of the Pashtrik/Pastrik zone began.[180] Shukri Buja and Jakup Krasniqi stated that the zone was created in July 1998.[181] In his evidence the Accused Fatmir Limaj acknowledged that the Pashtrik/Pastrik zone existed in early July 1998.[182] However, a KLA communiqué in May 1998 had mentioned the Pashtrik/Pastrik "operational subzone".[183] Rexhep Selimi sought to explain this by distinguishing the term "operational subzone" from "zone". He explained that the term "operational subzone" was then used by the KLA in relation to a guerrilla body composed of small groups operating in various zones.[184] If this explanation is reliable, the mention in the communiqué may be unrelated to a later and more developed Pashtrik/Pastrik "zone" described by other witnesses. Rexhep Selimi placed the structuring of the Pashtrik/Pastrik zone as beginning in August 1998.[185] This is not consistent with the other evidence relating to this issue. In his testimony Rexhep Selimi appears to link the structuring of zones with the creation of brigades.[186] However, other evidence indicates that these two processes were distinct, brigades having been created later than operational zones.[187] For this reason, the Chamber does not accept the evidence of Rexhep Selimi that the structuring of this zone did not commence until August 1998.

58. Fatmir Limaj and Shukri Buja stated that Muse Jashari was appointed initial commander of the Pashtrik/Pastrik zone.[188] It was also the testimony of Jakup Krasniqi and Rexhep Selimi that Muse Jashari was the commander of that zone, before being replaced by Ekrem Rexha and, later, Tahir Sinani.[189] Jakup Krasniqi specified that Muse Jashari commanded the Pashtrik/Pastrik zone between July and November 1998.[190] During a pre-trial interview, Ramadan Behluli had made it clear that Fatmir Limaj was the commander of the Pashtrik/Pastrik zone.[191] However, when

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175 Shukri Buja, T 3773-3774.
176 Rexhep Selimi, T 6594-6595.
177 *See infra,* paras 76 and 77.
178 Ramiz Qeriqi, T 3573.
179 *See infra,* paras 156 and 157.
180 Bislim Zyrapi, T 6825.
181 Shukri Buja, T 3989; Jakup Krasniqi, T 3479-3482.
182 Fatmir Limaj, T 5963.
183 Exhibit P49; English translation - Exhibit P48, p U0038573.
184 Rexhep Selimi, T 6651-6652.
185 Rexhep Selimi, T 6687-6688.
186 Rexhep Selimi, T 6599; 6601-6602.
187 *See infra,* para 64.
188 Fatmir Limaj, T 5963; Shukri Buja, T 4097.
189 Jakup Krasniqi, T 3479-3482; Rexhep Selimi, T 6687-6688.
190 Jakup Krasniqi, T 3479-3482.
191 Exhibit P121, p 22-23.

questioned about this in his evidence, Behluli specifically denied knowing that this was so in June and July 1998.[192] L95 stated that when he met Fatmir Limaj in Novoselle/Novo Selo, he knew that Limaj was the commander of a zone, the territory of which, as described by the witness, corresponds roughly with at least parts of the Pashtrik/Pastrik zone.[193] The meeting took place, according to the evidence of both L95 and Fatmir Limaj, at the end of July 1998.[194] For reasons detailed later,[195] it is apparent that L95's knowledge in this respect was quite limited. His evidence does not, therefore, displace the consistent evidence that Muse Jashari was the commander of the Pashtrik/Pastrik zone.

59. Shukri Buja testified that in early July 1998 there were three subzones: Pashtrik/Pastrik, Nerodime/Nerodimlje and Drenica.[196] After a meeting with Jakup Krasniqi on 20 June 1998, Shukri Buja began organising the operational subzone of Nerodime/Nerodimlje.[197] On 6 July 1998 he became the commander of that subzone, which covered the municipalities of Shtime/Stimlje, Lipjan/Lipljan, Ferizaj/Urosevac and Kacanik/Kacanik.[198] Shukri Buja stated that in July 1998 the subzones of Pashtrik/Pastrik and Nerodime/Nerodimlje were on both sides of the Berishe/Berisa Mountains.[199] The municipality of Lipjan/Lipljan was divided between those two zones.[200]

60. In the testimony of Shukri Buja and Sylejman Selimi, a part of the division line between the subzones of Drenica and Pashtrik/Pastrik went along the Peje/Pec – Prishtine/Pristina highway.[201] Ramadan Behluli drew on a map the boundaries of his zone, which, as he explained, reflected the situation after August 1998. The boundary drawn by Ramadan Behluli in the area of Llapushnik/Lapusnik goes along the Peje/Pec – Prishtine/Pristina highway.[202] L95, testified, although not without hesitation, that the northern border of the zone, the headquarters of which was located in Klecke/Klecka, ran along the road to Prishtine/Pristina between Arlat/Orlate and Komoran/Komorane.[203] Bislim Zyrapi testified that Llapushnik/Lapusnik was at some point in the Pashtrik/Pastrik zone. However, he made it clear that his knowledge about the organisation of units in that area was limited.[204] The compound in Llapushnik/Lapusnik at which, according to the

[192] Ramadan Behluli, T 2770-2771.
[193] L95, T 4217-4218; 4286-4287.
[194] L95, T 4203-4212.
[195] *See infra*, para 593.
[196] Shukri Buja, T 3797.
[197] Shukri Buja, T 3795-3796.
[198] Shukri Buja, T 3798; Ramiz Qeriqi, T 3594; Jakup Krasniqi, T 3479-3482.
[199] Shukri Buja, T 3988.
[200] Shukri Buja, T 4153-4155.
[201] Shukri Buja, T 4153-4155; Sylejman Selimi, T 2148-2150.
[202] Ramadan Behluli, T 2682-2684; Exhibit P119.
[203] L95, T 4220-4221.
[204] Bislim Zyrapi, T 6834-6835.

Indictment, the prison camp operated, was located south of that highway.[205] The evidence of these witnesses would thus indicate that the camp was in the Pashtrik/Pastrik zone. There is, however, evidence pointing towards a different zone. Jakup Krasniqi specifically refuted the contention that Llapushnik/Lapusnik was in the Pashtrik/Pastrik zone. He stated that the entire municipality of Gllogoc/Glogovac, including Llapushnik/Lapusnik, was in the Drenica operational zone.[206] Fatmir Limaj confirmed and pointed out that the borders of zones corresponded with the borders of municipalities.[207] Shukri Buja also testified that that the zones were organised according to municipalities and each municipality had units.[208] It is to be noted, however, that Shukri Buja himself gave an example of a border between two zones which did not go along the boundaries of a municipality, but divided the municipality of Lipjan/Lipljan.[209] Further, zones clearly do not correspond with municipalities on a map created in 1998 by the Ministry of Defence of the United Kingdom, the general accuracy of which was accepted by Sylejman Selimi.[210]

61. There is an abundance of evidence to the effect that a boundary between areas of responsibility of various units went along the Peje/Pec – Prishtine/Pristina highway.[211] This is not, however, indicative of there being a zone border going along the highway, as the units on both sides of the road might have been in the same zone. It is not unlikely that at some point in time the border between the Pashtrik/Pastrik zone and the Drenica zone did go along that highway. Nonetheless, the evidence is too scarce and contradictory for a definite finding to be made. In addition, as demonstrated, the structure of the KLA was at the time in the process of formation, which makes it particularly difficult to precisely delineate the territorial division of responsibility at various stages of the development of the structure. In support of their contention that the border went along the highway, the Prosecution makes reference to an oath ceremony in Llapushnik/Lapusnik, attended by Muse Jashari, the first commander of the Pashtrik/Pastrik zone.[212] However, there is nothing to suggest that only commanders from the same zone would have attended to such a ceremony.

62. An offensive by Serbian military and police forces against KLA units to regain control of territory "occupied" by the KLA was initiated during the summer of 1998. On 19 July 1998 the KLA fought against the Serbian forces at Rahovec/Orahovac.[213] Subsequently, the town of Rahovec/Orahovac became the first town that the KLA took under its control, although for a brief

[205] Exhibit P4, image 8; Ole Lehtinen, T 461-463.
[206] Jakup Krasniqi, T 3341-3345; 3471-3475; 3488-3491.
[207] Fatmir Limaj, T 5964-5967; 6575-6576; Exhibit DL7.
[208] Shukri Buja, T 3796.
[209] *See* the preceding paragraph.
[210] Exhibit 1, map 10; Sylejman Selimi, T 2178-2179; Exhibit 1, map 4.
[211] Jakup Krasniqi, T 3403-3404; L64, T 4378-4385; Exhibit P170.
[212] Prosecution Final Brief, footnote 143.

period as it was quickly retaken.[214] Another battle between the KLA and Serbian forces took place on 25 and 26 July 1998, once again in the area of Llapushnik/Lapusnik.[215] At the same time, on 25 July 1998 KLA soldiers under the command of Ramiz Qeriqi defended Carraleve/Crnoljevo from another Serbian offensive. Eventually the Serbians stopped at Zborc/Zborce.[216] The advancement of the Serbian offensive in the summer of 1998 made a large number of people flee from their places of residence. The displacement began in the middle of July 1998, especially in Rahovec/Orahovac. In the villages of Kizhareke/Kisna Reka, Nekoc/Nekovce, Bajice/Banjica, Shale/Sedlare and Kroimire/Krajmirovice there were about sixty or seventy thousand of displaced people.[217] Human Rights Watch estimated that at least 300,000 people were displaced in that period in Kosovo.[218]

63. By the end of August 1998 there were seven KLA zones.[219] The Pashtrik/Pastrik zone comprised the municipalities of Malisheve/Malisevo, Rahovec/Orahovac, Prizren/Prizren, Sharri, the former Dragash/Gora, and Suhareke/Suva Reka.[220] The Dukagjin zone comprised the municipalities of Istog/Istok, Peje/Pec, Deçane/Decani and Gjurakovc/Đurakovac, as well as part of the Kline/Klina municipality. It was commanded by Ramush Haradinaj.[221] The other zones were the Nerodime/Nerodimlje, Shala, Llap and Karadak zones.[222]

64. After the offensive of 25 and 26 July 1998, brigades and battalions were formed.[223] As a zone commander,[224] Sylejman Selimi was charged with establishing the brigades in Drenica from the pre-existing points and units. He established the 111th Brigade operating in Likofc/Likovac, as well as the 112th, 113th and 114th Brigades.[225] The 121st Brigade was formed sometime in August 1998.[226] Fatmir Limaj stated that a proposal to that effect was made already on 6 August 1998. Its implementation was, however, suspended for twenty days because of an offensive launched by the Serbian forces.[227] Similarly, Ramadan Behluli testified that the 121st Brigade was created after the death of Kumanova at the end of August 1998.[228] Rexhep Selimi stated that it took place at the end

[213] L64, T 4533-4534; Peter Boukaert, T 5578.
[214] Jakup Krasniqi, T 3415-3417; 3486-3488.
[215] *See infra,* paras 78-82.
[216] Ramadan Behluli, T 2818-2821.
[217] Jakup Krasniqi, T 3482-3484.
[218] Exhibit P212, tab 3, p 16; Peter Bouckaert, T 5582.
[219] Jakup Krasniqi, T 3468-3470.
[220] Jakup Krasniqi, T 3479-3482.
[221] Jakup Krasniqi, T 3479-3482.
[222] Jakup Krasniqi, T 3479-3482.
[223] Ramiz Qeriqi, T 3692; Bislim Zyrapi, T 6824.
[224] Jakup Krasniqi, T 3479-3482.
[225] Sylejman Selimi, T 2076-2078; Rexhep Selimi, T 6601-6602.
[226] Shukri Buja, T 3989; Bislim Zyrapi, T 6831-6832.
[227] Fatmir Limaj, T 6012; 6014-6017; 6088.
[228] Ramadan Behluli, T 2765-2766.

of August or in September.[229] There is, however, a KLA letter of appointment of Ramiz Qeriqi "pursuant to the decision of the command of 121st Brigade" which is dated 16 August 1998.[230] This demonstrates, in the finding of the Chamber, that the brigade existed already by 16 August 1998. In any event, as the exact date of the creation of the 121st Brigade is of little relevance to the charges against the Accused, it suffices to conclude that this occurred in the second half of August 1998. The 121st Brigade was within the Pashtrik/Pastrik subzone.[231] In the testimony of Jakup Krasniqi, the territory within the bounds of the 121st Brigade was not identical to the subzones before August 1998.[232] The fighting point in Kroimire/Krajmirovice became the Ruzhdi Selihu battalion, which was part of the 121st Brigade.[233] Ramiz Qeriqi was appointed commander of that battalion.[234] Within the Pashtrik/Pastrik operational zone, apart from the 121st Brigade, the 122nd to 127th Brigades were also formed. The Dukagjin zone had the 131st to 138th Brigades, the Shale zone had the 141st and 142nd Brigades. The Llap zone had the 151st to 153rd Brigades. The Nerodime/Nerodimlje zone had the 161st and 162nd Brigades. The Karadak zone had the 171st and 172nd Brigades.[235]

65. While the formation of Brigades and Battalions at various times in the second half of 1998 represents a further and significant stage in the progressive development of a more formalised and more typical military type structure by the KLA, it should not be imagined that they were descriptive of a body of soldiers of the numerical strengths typically to be found in Brigades and Battalions respectively of modern European armies. Many KLA Brigades and Battalions, when first formed, were little more than a shell to which soldiers were recruited or transferred at various times; typically they comprised the existing KLA points in a given area. The rate of their growth in numbers of men appears to have varied considerably from place to place.

C. Taking of Llapushnik/Lapusnik by the KLA in May 1998

66. The village of Llapushnik/Lapusnik is located in Gllogovc/Glogovac municipality in central Kosovo. It lies in a gorge on both sides of the Peje/Pec-Prishtina/Pristina highway, which is one of the main roads connecting Prishtina/Pristina with the western parts of Kosovo, and with Albania. The Llapushnik/Lapusnik gorge was of strategic importance for the KLA: having control over the gorge provided the KLA with a corridor for the transportation of weapons and supplies from

[229] Rexhep Selimi, T 6674.
[230] Exhibit P155; Ramiz Qeriqi, T 3593.
[231] Shukri Buja, T 4152-4153.
[232] Jakup Krasniqi, T 3488.
[233] Ramadan Behluli, T 2891-2892.
[234] Ramiz Qeriqi, T 3593; 3668; Exhibit P155.
[235] Rexhep Selimi, T 6601-6602.

Albania and also enabled the free movement of citizens and soldiers.[236] The Llapushnik/Lapusnik gorge was also strategically important for the Serbian forces as it provided access to the villages bordering the Drenica zone,[237] as well as for preventing the KLA having the significant advantages just identified.

67. On 9 May 1998 Serbian forces attacked the villages in the Llapushnik/Lapusnik gorge including Llapushnik/Lapusnik, Komaran/Komorane and Krekova.[238] At about 0800 hours on 9 May 1998 Serbian police forces took positions at Gradines Guri,[239] a rock at Llapushnik/Lapusnik located south of the Peje/Pec-Prishtina/Pristina road, and at the village school from where they opened fire.[240] While the evidence is inconsistent as to the precise weapons used in the battle, it is clear from those present that the Serbian forces were far better equipped[241] and significantly outnumbered the KLA in the vicinity.

68. The fact of fighting in Llapushnik/Lapusnik soon became known in the nearby villages. Ruzhdi Karpuzi testified that on 8 May 1998, all other evidence indicates it was 9 May, from the village of Shale/Sedlare, located some nine km away from Llapushnik/Lapusnik, he heard shots, he thought coming from the direction of Komaran/Komorane and Nekoc/Nekovce. He went there and saw that fighting was taking place at Llapushnik/Lapusnik.[242] Ruzhdi Karpuzi went to the vicinity of the village of Kizhareke/Kisna Reka and from there took a route through the mountain to Llapushnik/Lapusnik. On his way he met five KLA members including Ymer Alushani, aka Voglushi, a KLA commander[243] from Komaran/Komorane, Enver Mulaku and Ramadan Zogu, who were fighting the Serbian forces.[244] Ruzhdi Karpuzi decided to join them and fought together with them on the Peje/Pec-Prishtina/Pristina road.[245]

69. Elmi Sopi said that on 9 May 1998 at about 1100 hours Ymer Alushani arrived at Llapushnik/Lapusnik with a group of seven or eight KLA soldiers. Elmi Sopi explained to him

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[236] Sylejman Selimi, T 2091-2095, 2147. Bislim Zyrapi testified that Llapusnik/Lapusnik was an important position for the KLA because the Llapusnik/Lapusnik gorge was a place from where the Pristina-Peje road could be blocked, T 6856. *See* also Bislim Zyrapi, T 6858. Exhibit P44, an interview with Fatmir Limaj states: "The maintaining of the strait of Lapusnik for our army and people has had special significance because this strait increased the importance of our army. This strait made it possible to transport the people and to arm them on a massive level and it became the organic linking point for the liberated territories."

[237] Sylejman Selimi, T 2091-2095, T 2150-2152.

[238] Sylejman Selimi, T 2091. *See* also L64, T 4345.

[239] Elmi Sopi, T 6720-6721.

[240] Elmi Sopi, T 6720-6721.

[241] On Elmi Sopi's evidence a helicopter of the Serbian forces was flying above the village (T 6721), while others testified that during the battle at Llapushnik the Serbian forces used artillery and other heavy weapon, Ruzhdi Karpuzi, T 3064; Fadil Kastrati, T 2594; Ramiz Qeriqi, T 3569-3571.

[242] Ruzhdi Karpuzi, T 3062-3063, 3225.

[243] L64 testified that Ymer Alushani was the commander of the Zjarri unit, T 4335.

[244] Ruzhdi Karpuzi, T 3063-3065.

[245] Ruzhdi Karpuzi, T 3063-3065.

what was happening and directed the group to the house of Haxhi Gashi where some young men from the village who had hunting guns were gathered.[246] About an hour later a group of 16 soldiers descended from the mountains and Elmi Sopi's brother led them to the same house, from where the soldiers were led to the positions of the Serbian forces.[247] Elmi Sopi further testified that at about 1300 hours he heard a noise and saw black smoke rising after which he saw the Serbian forces withdrawing towards Komaran/Komorane.[248] He then went to the site where the fighting was and saw that a Serbian police "Pinzgauer", an armoured personnel carrier, with a lot of ammunition, was in flames.[249]

70. Ramiz Qeriqi[250] and Fatmir Limaj[251] also testified that on 9 May 1998 during the battle at Llapushnik/Lapusnik they saw Ymer Alushani leading a group of 5-7 men who fought the Serbian forces on the Peje/Pec-Prishtina/Pristina.

71. It was the evidence of Fadil Kastrati that on 9 May 1998 he was in his home village of Blinaje/Lipovica (near Vershec/Vrsevce),[252] when he and some other men from his village were called to the house of Ymer Alushani[253] in Komaran/Komorane. Fadil Kastrati and his friends went on foot from Blinaje/Lipovica to Leletiq/Laletic, a little further from there they met Ymer Alushani with a group of men and continued together with them to Llapushnik/Lapusnik by car.[254] They arrived in Llapushnik/Lapusnik just before dusk and took positions at the rock located on the south side of the Peje/Pec-Prishtina/Pristina road where earlier that day the Serbian forces had been situated.[255]

72. The evidence of L64 describes similar events. In the afternoon of 9 May 1998 he was told that Ymer Alushani wanted him to go to Llapushnik/Lapusnik as fast as he could. At dusk L64 arrived at Ymer Alushani's house in Komaran/Komorane. Ymer himself arrived later, explained to L64 and other KLA soldiers who had gathered there that Serbian forces had attacked the villages in the Llapushnik/Lapusnik gorge, that he had gone there with some comrades upon hearing the first shots and that there had been fighting that continued until late in the afternoon. Ymer Alushani also told them to go to Llapushnik/Lapusnik before daylight.[256] L64 and the others set off on foot at about 0200 hours on 10 May 1998 and took positions at Big Guri, the rock situated on the south

[246] Elmi Sopi, T 6721.
[247] Elmi Sopi, T 6721-6722.
[248] Elmi Sopi, T 6722.
[249] Elmi Sopi, T 6722.
[250] Ramiz Qeriqi, T 3569-3571.
[251] Fatmir Limaj, T 5940.
[252] Fadil Kastrati, T 2631-2632.
[253] Fadil Kastrati, T 2591-2592.
[254] Fadil Kastrati, T 2632.
[255] Fadil Kastrati, T 2592-2593.

side of the Peje/Pec-Prishtina/Pristina road.[257] They waited there until midday on 10 May 1998. Serbian forces had not returned. L64 went to check the situation in Komaran/Komorane.[258]

73. In addition to the men who fought together with Ymer Alushani, other KLA members also came to assist in the battle at Llapushnik/Lapusnik. Ramiz Qeriqi testified that on 9 May 1998 from Klecke/Klecka he heard the sound of shots being fired coming from Llapushnik/Lapusnik and decided to go there to assist in the fight.[259] Three groups, each comprised of five KLA members, left from Klecke/Klecka to Llapushnik/Lapusnik.[260] Fatmir Limaj, Ramiz Qeriqi and Topi each led one of the three groups.[261] The group led by Fatmir Limaj left first. When the other two groups arrived at Llapushnik/Lapusnik, about 20 minutes after the group of Fatmir Limaj, the fighting was about to finish. A Serbian Pinzgauer was in flames.[262] Ramiz Qeriqi believed that the greatest success was scored by the KLA Pellumbi unit situated on the northern side of the Peje/Pec-Prishtina/Pristina road.[263]

74. The Accused Fatmir Limaj testified that on 9 May 1998 from Klecke/Klecka he intercepted radio communications between KLA members and, as the dialogue was incomprehensive, decided to find out what was going on.[264] Together with the Accused Isak Musliu, Sadik Shala, Nexhim Shalaand and Bardhi, Fatmir Limaj drove up to the Berishe/Berisa Mountains from where they saw several Serbian vehicles approaching the KLA forces at the village of Gjurgjice, which was situated next to Orlate. They also saw Serbian police forces firing from the northern side of the Peje/Pec-Prishtina/Pristina road.[265] Fatmir Limaj and his group decided to join the fighting, and leaving one of them to coordinate radio communications, they went down to the main road close to the place where the KLA members were fighting. They opened fire and shot at a Serbian Pinzgauer, which appeared to be loaded with ammunition. The Pinzgauer exploded and the Serbian forces withdrew in the direction of Drenica and Komaran/Komorane.[266]

75. The KLA were successful in resisting the Serbian attack at Llapushnik/Lapusnik on 9 May 1998 and the Serbian forces withdrew to their previously held positions in Komaran/Komorane.[267] On Fatmir Limaj's evidence, after the departure of the Serbian forces he

[256] L64, T 4344-4345.
[257] L64, T 4349-4350.
[258] L64, T 4350.
[259] Ramiz Qeriqi, T 3568.
[260] Ramiz Qeriqi, T 3568.
[261] Ramiz Qeriqi, T 3568.
[262] Ramiz Qeriqi, T 3568-3569.
[263] Ramiz Qeriqi, T 3568-3571.
[264] Fatmir Limaj, T 5936.
[265] Fatmir Limaj, T 5936-5937, 6075.
[266] Fatmir Limaj, T 5937-5938.
[267] Ramiz Qeriqi, T 3571.

and his group met the soldiers led by Ymer Alushani who had been fighting on the Gjurgjice-Llapushnik road and then returned to Klecke/Klecka.[268] The following day Ymer Alushani came to Klecke/Klecka, together with two civilians, and told Fatmir Limaj that the civilians in Llapushnik/Lapusnik were afraid that the Serbian forces would return and wanted them to go back to the village.[269] A group of KLA members went there voluntarily and a small unit was stationed in Llapushnik/Lapusnik.[270] This evidence is consistent with the evidence of Elmi Sopi who testified that after the withdrawal of the Serbian forces from Llapushnik/Lapusnik, the KLA soldiers wanted to leave but the people from Llapushnik/Lapusnik asked them to stay to protect them and offered to provide housing for them.[271] Ymer Alushani discussed this with his friends and soldiers were placed in the houses in Llapushnik/Lapusnik.[272]

76. While there are some inconsistencies in the evidence discussed above, inconsistencies primarily related to the time or the precise location of the described events, in the Chamber's view, the following has been established with respect to the taking of Llapushnik/Lapusnik by the KLA forces: In the morning of 9 May 1998 Serbian forces entered the Llapushnik/Lapusnik gorge. An exchange of fire between the Serbian forces and the KLA fighters and people of Llapushnik/Lapusnik broke out. At the sound of the shots Ymer Alushani from the nearby village of Komaran/Komorane sent people to other neighbouring villages to bring men who had joined or were willing to join, the KLA. Together with small KLA force from Komaran/Komorane they went to Llapushnik/Lapusnik. They took positions at the Peje/Pec-Prishtina/Pristina road and fought the Serbian forces there. Meanwhile information about the fighting reached KLA forces in Klecke/Klecka. Fatmir Limaj together with a total of about 15 men responded in Llapushnik/Lapusnik and joined the fight against the Serbian forces. In the early afternoon the Serbian Pinzgauer located in the middle of the village was hit and exploded. This appears to have caused the Serbian forces to withdraw. In the afternoon and the evening of 9 May 1998 more KLA fighters came to Llapushnik/Lapusnik. Following these events, at the request of the people in Llapushnik/Lapusnik village, KLA soldiers were positioned there and accommodated in various private houses in the village.

77. Immediately the KLA soldiers started to dig trenches and make other fortifications in Llapushnik/Lapusnik village.[273] The trenches were built at night with the help of some young

[268] Fatmir Limaj, T 5940.
[269] Fatmir Limaj, T 5940-5941.
[270] Fatmir Limaj, T 5941.
[271] Elmi Sopi, T 6722-6723.
[272] Elmi Sopi, T 6722-6723.
[273] Ruzhdi Karpuzi, T 3068-3069; Elmi Sopi, T 6723-6725.

people from the village.[274] The body of evidence establishes that from that time the KLA remained in Llapushnik/Lapusnik until 25 or 26 July 1998 when Serbian forces drove them from the village. In that period the strength of the KLA forces in the village and its vicinity grew considerably.

D. The fall of Llapushnik/Lapusnik in July 1998

78. The KLA lost control of Llapushnik/Lapusnik in a battle with Serbian forces which took place on 25 and 26 July 1998. In the evening of Friday, 24 July 1998, Serbian forces approached Llapushnik/Lapusnik on the Peje/Pec-Prishtina/Pristina road arriving from the direction of Prishtina/Pristina.[275] Elmi Sopi testified that at about 0400 hours on 25 July 1998 he received a phone call from a friend who informed him that a convoy of Serbian tanks and machinery was moving on the Peje/Pec-Prishtina/Pristina road. The convoy had stopped at the checkpoint in Komaran/Komorane.[276] Other Serbian forces positioned at Quake Komoranit, at the antenna of Radio Prishtina/Pristina in Komaran/Komorane, and at the chicken farm in Krajkove/Krajkovo, also had set off towards the Llapsuhnik/Lapusnik gorge.[277]

79. In the early morning of 25 July 1998 the Serbian forces opened fire on the KLA positions in Llapsuhnik/Lapusnik.[278] The Serbian forces were equipped with "Katyusha" rockets and 220 mm cannons.[279] About 140 Serbian tanks were involved in the operation.[280] Special MUP units, two detachments of 200 men each, and an anti-terrorist unit participated in the Serbian offensive at Llapushnik/Lapusnik.[281] Some evidence suggests that surface-to-surface rockets, mine launchers and "chemical poisons" were also used in the Serbian offensive at Llapushnik/Lapusnik.[282] The KLA forces were equipped with 60 mm, 82 mm as well as some 150 mm mortars.[283] They also made use of the trenches and other fortifications that had been built in the village earlier.[284]

80. The fighting continued the entire day of 25 July and on 26 July 1998. In the evening of 25 July 1998 the Serbian forces moved closer and the KLA started to withdraw.[285] The Serbian tanks were firing at the KLA positions. The KLA responded with mortar fire. At least on one

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[274] Elmi Sopi, T 6725, 6733.
[275] Ruzhdi Karpuzi, T 3211-3213; Elmi Sopi, T 6736.
[276] Elmi Sopi, T 6736.
[277] Elmi Sopi, T 6736.
[278] L64, T 4551-4552; Dr Zeqir Gashi, T 5632; Elmi Sopi, T 6736.
[279] Elmi Sopi, T 6736; Exhibit P44 and Ole Lehtinen, T 576-579.
[280] Elmi Sopi, T 6736; Exhibit P44 and Ole Lehtinen, T 576-579.
[281] Philip Coo, T 5734-5736;.
[282] Ruzhdi Karpuzi testified that the Serbian forces used blue shells, which made the soldiers drowsy, T 3221-3223. *See* also Exhibit P44, Ole Lehtinen, T 576-579.
[283] Philip Coo, T 5734-5736; Elmi Sopi, T 6736-6737.
[284] Philip Coo, T 5734-5736; *See* also *supra,* para 77.
[285] Ruzhdi Karpuzi, T 3211-3213; Elmi Sopi, T 6736.

occasion the KLA managed to hit a Serbian tank.[286] However, the KLA forces were unable to stand-up to the strength of the Serbian attack and, on 26 July, all KLA forces withdrew from Llapushnik/Lapusnik.[287] Ymer Alushani, a KLA leader, was killed in this battle.[288]

81. In addition, on 26 July 1998 virtually the entire population of Llapushnik/Lapusnik moved from the gorge to the Berishe/Berisa Mountains, especially to the villages of Negroc/Negrovce, Arlat/Orlate, and Terpeze/Trpeza.[289] Zeqir Gashi testified that he and the nurses working at his clinic fled to the village of Berishe/Berisa and from there to the village of Fshati-i-Ri/Novosel.[290] On Elmi Sopi's evidence, only some old people who could not leave remained in their houses, where later they were killed by the Serbian forces.[291]

82. The Chamber will discuss the ramifications of the fall of Llapushnik/Lapusnik for the individuals detained at the prison compound later in this decision.[292]

[286] Ruzhdi Karpuzi, T 3213-3214.
[287] Elmi Sopi, T 6736; Ruzhdi Karpuzi, T 3214; L64, T 4553.
[288] Dr Zeqir Gashi, T 5635; L64, T 4555-4556; Fatmir Limaj, T 5989.
[289] Elmi Sopi, T 6736; 6761-6762.
[290] Dr Zeqir Gashi, T 5632-5635.
[291] Elmi Sopi, T 6761-6762.
[292] *See infra*, paras 447-507.

IV. JURISDICTION UNDER ARTICLES 3 AND 5 OF THE STATUTE

A. Jurisdiction under Article 3

1. The existence of an armed conflict and nexus

(a) Law

83. In order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute, two preliminary requirements must be satisfied. There must be an armed conflict, whether international or internal, at the time material to the Indictment, and, the acts of the accused must be closely related to this armed conflict.[293]

84. The test for determining the existence of an armed conflict was set out in the *Tadić* Jurisdiction Decision and has been applied consistently by the Tribunal since:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[294]

Under this test, in establishing the existence of an armed conflict of an internal character the Chamber must assess two criteria: (i) the intensity of the conflict and (ii) the organisation of the parties.[295] These criteria are used "solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[296] The geographic and temporal framework of this test is also settled jurisprudence: crimes committed anywhere in the territory under the control of a party to a conflict, until a peaceful settlement of the conflict is achieved, fall within the jurisdiction of the Tribunal.[297]

85. The Defence submit that in determining the existence of an armed conflict for the purposes of the Tribunal's jurisdiction the Chamber may consider the insurgents' control over a determinate territory, the government's use of army against the insurgents, the insurgents' status as belligerents, and whether the insurgents have a State-like organisation and authority to observe the rules of

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[293] *Tadić* Jurisdiction Decision, paras 67, 70; *Tadić* Trial Judgement, paras 562, 572; *Kunarac* Appeals Judgement, para 55. *See* also *Čelebići* Trial Judgement, paras 184-185; *Krnojelac* Trial Judgement, para 51; *Naletilić* Trial Judgement, para 225.

[294] *Tadić* Jurisdiction Decision, para 70. *See* also *Tadić* Trial Judgement, paras 561-571; *Aleksovski* Trial Judgement, paras 43-44; *Čelebići* Trial Judgement, paras 182-192; *Furundžija* Trial Judgement, para 59; *Blaškić* Trial Judgement, paras 63-64; *Kordić* Judgement, para 24; *Krstić* Judgement, para 481; *Stakić* Trial Judgement, para 568.

[295] *See Tadić* Trial Judgement, para 562.

[296] *Tadić* Trial Judgement, para 562.

[297] *Tadić* Jurisdiction Decision, para 70; *Kunarac* Appeals Judgement, para 57.

war.[298] This submission draws on the International Committee of the Red Cross ("ICRC") Commentary to Common Article 3 of the Geneva Conventions, which is the basis for the charges brought under Article 3 of the Statute. In the relevant part, the Commentary lists different conditions for the application of Common Article 3 which were discussed at the Diplomatic Conference for the Geneva Conventions. The Commentary explicitly clarifies, however, that this list is "in no way obligatory" and is suggested merely as "convenient criteria" to distinguish a genuine armed conflict from an act of banditry or an unauthorised or short-lived insurrection.[299] It further states:

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.[300]

86. The drafting history of Common Article 3 provides further guidance. Several proposed drafts of what later became known as Common Article 3 sought to make its application dependant, *inter alia*, on conditions such as an explicit recognition of the insurgents by the *de jure* government, the admission of the dispute to the agenda of the Security Council or the General Assembly of the United Nations, the existence of the insurgents' State-like organisation, and civil authority exercising *de facto* authority over persons in determinate territory.[301] However, none of these conditions was included in the final version of Common Article 3, which was actually agreed by the States Parties at the Diplomatic Conference. This provides a clear indication that no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions.

87. The Chamber is also conscious of Article 8 of the Statute of the International Criminal Court (ICC) which, *inter alia*, defines, for its purposes, war crimes committed in an armed conflict not of an international character. Article 8, paragraph 2(f) of the ICC Statute adopts a test similar to the

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[298] Defence Final Brief, paras 205-207.
[299] ICRC Commentary to Geneva Convention I, pp 49-50.
[300] ICRC Commentary to Geneva Convention I, p 50.
[301] Thus the Australian amendment tended to apply the relevant provision only if "(a) the *de jure* government had recognized the insurgents as belligerents; or (b) the *de jure* government had claimed for itself the rights of a belligerent; (c) the *de jure* government has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) the dispute had been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression." The Delegation of the United States of America made the following proposal with respect to the applicability of what latter became Common Article 3: "- that the insurgents must have an organization purporting to have the characteristics of a State; - that the insurgent civil authority must exercise *de facto* authority over persons within a determinate territory; - that the armed force must act under the direction of the organized civil authority and be prepared to observe the ordinary laws of war; - that the insurgent civil authority must agree to be bound by the provisions of the Convention." *Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and Held at Geneva from April 21st to August 12th, 1949* ("Final Record of the Diplomatic Conference"), Vol. II, Section B, p 121. *See* also First

test formulated in the *Tadić* Decision on Jurisdiction. It defines an internal armed conflict by the same two characteristics, "protracted armed conflict" and "organised armed groups," without including further conditions.[302] As in the Tribunal's jurisprudence, Article 8(2)(d) of the ICC Statute further clarifies that the ICC Statute does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." A commentary on the ICC Statute further suggests that additional factors, such as the involvement of government forces on one side or the exercise of territorial control by the rebel forces, are not indispensable for the determination of an armed conflict.[303]

88. The Defence submit even further that the extent of organisation of the parties required for establishing an armed conflict, as well as, generally, the level of its intensity, have not yet been defined by the jurisprudence of the Tribunal.[304] They submit that the law does not require the impossible and that, in order to be bound by international humanitarian law, a party to a conflict must be able to implement international humanitarian law and, at the bare minimum, must possess: a basic understanding of the principles laid down in Common Article 3, a capacity to disseminate rules, and a method of sanctioning breaches.[305] They also refer to Additional Protocol II to the Geneva Conventions, which requires a higher standard for establishment of an armed conflict, and submit that in order for Additional Protocol II to apply it must be established that the insurgent party (in the present case, the KLA) was sufficiently organised to carry out continuous and persistent military operations and to impose discipline on its troops, that it exercised some degree of stability in the territories it was able to control and had the minimum infrastructure to implement the provisions of Additional Protocol II.[306]

89. The Chamber does not share this view. The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used "*solely for the purpose*, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian

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and Second Draft drawn up by the First Working Party, Annexes A and B to the 7th Report of the Joint Committee, Final Record of the Diplomatic Conference, Vol. II-B, pp 124-125.

[302] Article 8, paragraph 2(f) of the ICC Statute reads: "Paragraph 2(e) applies to armed conflicts not of an international character and thus not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups."

[303] Knut Dormann, "Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary," Cambridge University Press, 2002, pp 386-387 referring to G. Abi-Saab, "Non-international Armed Conflicts" in UNESCO/Henry Dunant Institute (eds.), *International Dimensions of Humanitarian Law* (Martinus, Nijhoff, Geneva, Paris and Dordrecht, 1988), p 237; C. Greenwood, "Scope of Application of Humanitarian Law" in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p 48.

[304] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, para 37; Closing Arguments, T 7371.

[305] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, para 38.

law."[307] Therefore, some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute. This position is consistent with other persuasive commentaries on the matter. A study by the ICRC submitted as a reference document to the Preparatory Commission for the establishment of the elements of crimes for the ICC noted that:

> The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria; the term 'armed conflict' presupposes the existence of hostilities between armed forces *organised to a greater or lesser extent*; there must be the opposition of armed forces and *a certain intensity* of the fighting.[308]

90. For these reasons the Chamber will apply the test enumerated in the *Tadić* Jurisdiction Decision to determine whether the existence of an armed conflict has been established. Consistently with decisions of other Chambers of this Tribunal and of the ICTR, the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis.[309] By way of example, in assessing the intensity of a conflict, other Chambers have considered factors such as the seriousness of attacks and whether there has been an increase in armed clashes,[310] the spread of clashes over territory and over a period of time,[311] any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict,[312] as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.[313] With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.[314]

91. Further, to meet the jurisdictional preconditions of Article 3 of the Statute, the Prosecution must establish not only the existence of an armed conflict but also a sufficient link between the

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[306] Defence Final Brief, paras 208-217.
[307] *Tadić* Trial Judgement, para 562 (emphasis added).
[308] ICRC, Working Paper, 29 June 1999 (submitted by the ICRC as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the ICC) (emphasis added).
[309] "The definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis." *Prosecutor v Rutaganda*, Case No ICTR-96-3, Judgement, 6 December 1999, para 93.
[310] *Tadić* Trial Judgement, para 565; *Čelebići* Trial Judgement, para 189; *Milošević* Rule 98*bis* Decision, para 28.
[311] *Tadić* Trial Judgement, para 566; *Milošević* Rule 98*bis* Decision, para 29.
[312] *Milošević* Rule 98*bis* Decision, paras 30-31. *See* also *Čelebići* Trial Judgement, para 188.
[313] *Tadić* Trial Judgement, para 567; *Čelebići* Trial Judgement, para 190.
[314] *Milošević* Rule 98*bis* Decision, paras 23-24.

alleged acts of the accused and the armed conflict.[315] The armed conflict need not have been causal to the commission of the crime charged, but it must have played a substantial part in the perpetrator's ability to commit that crime.[316] In determining whether such nexus exists the Chamber may take into account, *inter alia*, whether the perpetrator is a combatant, whether the victim is a non-combatant, whether the victim is a member of the opposing party, whether the act may be said to serve the ultimate goal of a military campaign, and whether the crime is committed as part of or in the context of the perpetrator's official duties.[317]

92. There is also the further Defence submission that Additional Protocol II does not apply in the present case as "there is a compelling argument that the KLA were in actual fact an armed group fighting for self-determination against alien domination and a racist regime," a situation covered by Article 1, paragraph 4 of Additional Protocol I.[318] As has already been indicated the nature of the armed conflict is irrelevant to the application of Article 3 of the Statute.[319] It is therefore, unnecessary to consider this submission any further.

(b) Findings

93. The Indictment alleges that an armed conflict between Serbian forces and the KLA existed in Kosovo not later than early 1998.[320] The Chamber heard evidence and is satisfied that the Serbian forces involved in Kosovo in 1998 included substantial forces of the Army of Yugoslavia ("VJ") and the Serbian Ministry of Internal Affairs ("MUP"),[321] *i.e.* the police, and, therefore, constitute "governmental authorities" within the meaning of the *Tadić* test. The Chamber will discuss below whether the Prosecution has established that the KLA possessed the characteristics of an organised armed group, within the meaning of the *Tadić* test, and whether the acts of violence that occurred in Kosovo in the material time reached the level of intensity required by the jurisprudence of the Tribunal to establish the existence an armed conflict.

(i) Organisation of the KLA

94. The Chamber has discussed the creation of the KLA and the establishment of its General Staff earlier in this decision.[322] It has accepted that at the material time there was a General Staff of the KLA and that its members included Azem Syla, Sokol Bashota, Rexhep Selimi, Llahib Rrahimi,

[315] *Tadić* Trial Judgement, paras 572-573.
[316] *Kunarac* Appeals Judgement, para 58.
[317] *Kunarac* Appeals Judgement, para 59.
[318] Defence Final Brief, paras 184-197.
[319] *See supra*, para 83.
[320] Indictment, para 4.
[321] Exhibit P230; Philip Coo, T 5697-5699, John Crosland, T 1910, 1877-1879, 1890, 1900; Exhibit P92, tabs 7 and 17. *See* also, *infra*, paras 161-165.

Xhavid Zeka, Hashim Thaci, Kadri Veseli, and Jakup Krasniqi.[323] While some evidence indicates that most of the regional commanders were represented in "the high command," described as the body within the KLA that took decisions for the whole KLA,[324] *i.e.* the General Staff, this evidence is insufficient to support a finding of the Chamber.

95. Further, as the Chamber has found earlier in this decision,[325] progressively from late May to late August 1998 the territory of Kosovo was divided by the KLA into seven zones: Drenica, Dukagjin, Pastrik, Shala, Llap, Nerodime, and Karadak.[326] Each zone had a commander and covered the territory of several municipalities.[327] The level of organisation and development in each zone was fluid and developing and not all zones had the same level of organisation and development; this was significantly influenced by the existence and extent of the KLA's presence in each zone before April 1998.[328]

96. The Chamber accepts from the evidence and finds that it was the General Staff of the KLA which appointed the zone commanders. As Sylejman Selimi testified, a meeting which took place at the end of May 1998 and which was attended by Rexhep Selimi, a representative of the General Staff, and individuals holding important positions in other units, nominated Sylejman Selimi to become the commander of the 1st Operational Zone. However, this proposal had to be approved by the General Staff and Sylejman Selimi was in fact appointed commander of the 1st Operational Zone by the General Staff.[329] The Chamber's finding is supported also by evidence that in mid June 1998 the General Staff began appointing zone commanders.[330]

97. In the Chamber's finding, every leader of an operational unit had an obligation to inform the General Staff about all developments in their respective areas of responsibility.[331] For example, the commander of the Drenica zone Sylejman Selimi, reported directly to the General Staff. There was no intermediate command level.[332]

98. While, not necessarily without fail, the Chamber accepts that, generally, zone commanders acted in accordance with directions from the General Staff. The "Provisional Regulations for the

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[322] *See supra,* paras 44 and 45.
[323] *See supra*, para 46.
[324] Peter Bouckaert, T 5513-5514.
[325] *See supra,* para 63.
[326] Initially the entire territory of Kosovo may have been referred to as Zone One and the other zones as sub-zones, Jakup Krasniqi, T 3322-3323. Jakup Krasniqi testified that the zones and the subzones were references to the same entities, T 3479-3482.
[327] Jakup Krasniqi, T 3479-3482.
[328] Jakup Krasniqi, T 3412-3415; T 3468-3470.
[329] Sylejman Selimi, T 2070-2072; 2212. *See* also Rexhep Selimi, T 6691.
[330] Shukri Buja, T 3797-3799.
[331] *See* Jakup Krasniqi, T 3412-3413.
[332] Sylejman Selimi, T 2072-2075; 2231-2232.

Organisation of the Army's Internal Life" of the KLA ("Regulations")[333] were distributed to the various units by the General Staff.[334] Sylejman Selimi testified that he started to create the zone and the military police upon a proposal from the General Staff.[335]

99. Further, the evidence indicates that the General Staff was active in making key individual appointments of importance for the development and functioning of the KLA. For example, after the arrival in Kosovo on 29 May 1998 of Bislim Zyrapi, the General Staff of the KLA appointed him to be responsible for the development and professionalisation of the KLA, a function he had from June to mid July 1998.[336] On 11 June 1998 Jakup Krasniqi was appointed by the General Staff to be the spokesperson of the KLA.[337] In July 1998 the General Staff appointed a civilian directorate in Malisheve/Malisevo.[338]

100. The General Staff was also active in organising issues of overall importance for the functioning of the KLA, such as the supply of weapons. So it was that in May 1998 Shukri Buja was ordered by the General Staff to organise the supply line of weapons from Albania to Kosovo and in particular to the municipalities of Kacanik/Kacanik, Lipjan/Lipljan, Shtime/Stimlje and Ferisaj/Urosevac.[339] This order came from the General Staff and was communicated to Shukri Buja by Hashim Thaci.[340]

101. Further, it was the General Staff that issued political statements and communiqués which informed the general public in Kosovo and the international community of its objectives and its activities. Political Statement No 2 of the KLA, issued by the General Staff on 27 April 1998 and published in the Kosovo newspaper "Bujku" two days later, described the KLA and its political goals as follows:[341]

> The KLA constitutes the integrity of the armed forces of Kosovo and its occupied territories, and its aim is the liberation and unification of the occupied territories of Albania.

Political Statement No 2 further proclaimed that the KLA had a defending and liberating character and that it condemned terrorism and other forms of violence over civilians and prisoners of war.[342]

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[333] Exhibit P156, *See infra,* paras 110-112.
[334] Ramiz Qeriqi believed that the Regulations must have come from the General Staff, T 3604.
[335] Sylejman Selimi, T 2212-2213.
[336] Bislim Zyrapi, T 6821.
[337] Jakup Krasniqi, T 3311-3313; Exhibit P48, ERN U0038475.
[338] Fatmir Limaj, T 5990-5991.
[339] Shukri Buja, T 3773-3774.
[340] Shukri Buja, T 3773-3774.
[341] Exhibit P142, Point 1; Jakup Krasniqi, T 3371-3373.
[342] Exhibit P142, Points 2 and 3.

102. From early June 1998 the KLA had an official spokesperson, Jakup Krasniqi,[343] whose duties were to communicate with the domestic and foreign media based in Kosovo and to present the KLA's political program.[344] Jakup Krasniqi was a member of the General Staff.[345]

103. The communications between the KLA and the public were generally conducted by communiqués. As a general rule the communiqués were issued by the General Staff. Infrequently, communiqués were released by a zone commander acting without the knowledge of the General Staff. This was explicitly stated in such a communiqué.[346] From the end of 1997 to August 1998 the General Staff of the KLA issued dozens of communiqués reporting military actions and operations undertaken by the organisation.[347]

104. At the time material to the Indictment, the KLA General Staff, also sometimes referred to in the evidence as general headquarters,[348] did not have a consistent place of location.[349] The KLA was forced to function as an underground organisation.[350] Members of the KLA and its General Staff and members were at constant risk of capture. Therefore, the General Staff met irregularly, and at different places, because of the security situation. Its members communicated primarily by telephone and fax.[351] There were, however, a number of local KLA headquarters in various places in Kosovo. The evidence indicates that major KLA headquarters were located in Malisheve/Malisevo,[352] in Klecke/Klecka,[353] and in the village of Divjake/Divljaka.[354] There were also headquarters in Jabllanice/Jablanica,[355] Carraleve/Crnoljevo,[356] Shale/Sedlare,[357] Vojnike/Vocjnak,[358] Likofc/Likovac,[359] Pjetershtice/Petrastica,[360] and Llapushnik/Lapusnik,[361] among other places.

105. Zone commanders of the KLA issued orders to the commanders of units within their zone. Sylejman Selimi's decisions as a commander were disseminated immediately when he was present

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[343] Jakup Krasniqi, T 3311.
[344] Jakup Krasniqi, T 3311-3313.
[345] Jakup Krasniqi, T 3310-3311.
[346] Jakup Krasniqi, T 3314-3315.
[347] Jakup Krasniqi, T 3319-3340.
[348] *See* Fatmir Limaj, T 5950-5952; Peter Bouckaert, T 5513-5514.
[349] Fatmir Limaj, T 5950-5952.
[350] Jakup Krasniqi, T 3305-3307.
[351] Jakup Krasniqi, T 3309-3310. *See* also Sylejman Selimi, T 2072-2073.
[352] John Crosland, T 1952-1952; Jan Kickert, T 675; Fatmir Limaj, T 5959-5960.
[353] L95, T 4218-4223, 4230-4231; Ramadan Behluli, T 2681-2686.
[354] Rexhep Selimi, T 6602; 6658-6659.
[355] John Crosland T 1959; L95, T 4185-4191.
[356] John Crosland T 1933, 1938; Jan Kickert, T 687-688.
[357] John Crosland, T 1907.
[358] John Crosland, T 1872, 1925.
[359] Jakup Krasniqi, T 3425-3426.
[360] L04, T 1119-1120.
[361] *See infra*, para 249.

and copies of orders directed to units were also generally copied to the General Staff.[362] It can be assumed from the evidence that because of the absence of adequate physical facilities, for security reasons and because the KLA lacked radio facilities, generally, orders were issued orally, but operational orders were later conveyed in writing.[363] Of course, at times it was not possible for subordinates to carry out orders due to fighting conditions.[364]

106. The evidence indicates that the General Staff gave the zone commanders responsibility for the establishment of the brigades. As the commander of the 1st Operational Zone, Sylejman Selimi was first charged with establishing the brigades in Drenica zone from the pre-existing fighting points and units. Accordingly he established the 111th, 112th, 113th and 114th Brigades.[365]

107. Zone commanders also authorised the movement of soldiers. Sylejman Selimi testified that soldiers would need a permission to move into another operational zone and this permission was granted by the commander of the unit.[366] Some evidence suggests, however, that soldiers did not need the approval of their unit commander to move from one unit to another.[367]

108. Relevant for establishing the level of organisation of the KLA is the capacity of the KLA units to coordinate their actions. At the end of July 1998 the commander of L95's unit, comprising 30 soldiers, ordered that the soldiers of this unit go to the Berishe/Berisa Mountains to assist the KLA forces there as they were likely to be attacked by Serbian forces.[368] Accordingly, L95 and the other soldiers from his unit went to the village of Novoselle/Novo Selo.[369]

109. Commanders of some units had the power to approve the appointment of commanders of smaller units within their operational zone. Ramiz Qeriqi, aka "Luan," who in the beginning of June 1998 was responsible for 70 to 100 persons in different fighting points: Carraleve/Crnoljevo, Zborc/Zborce, Fushtice/Fustica, Blinaje/Lipovica and Pjetershtice/Petrastica,[370] agreed that Ramadan Behluli should assume charge of Pjetershtice/Petrastica.[371] Ramadan Behluli was under Luan's command and Luan gave him orders.[372] These orders usually concerned the defence of the

[362] Sylejman Selimi, T 2231-2232.
[363] Sylejman Selimi, T 2076-2078. In support of his authority to issue written orders is an order of 1 August 1998 addressed to unit commanders and civilian authorities ordering that markets should be concealed and prohibiting the gathering of more than three people in public, Sylejman Selimi, T 2079-2081; Exhibit P93.
[364] Sylejman Selimi, T 2078.
[365] Sylejman Selimi, T 2076-2078.
[366] Sylejman Selimi, T 2150-2152.
[367] Elmi Sopi, T 6733-6734.
[368] L95, T 4203-4212.
[369] L95, T 4203-4212.
[370] Ramiz Qeriqi, T 3575, 3577.
[371] Ramadan Behluli, T 2665; 2851.
[372] Ramiz Qeriqi, T 3575-3576; Ramadan Behluli, T 2666, 2668.

existing positions and were conveyed to him in person.[373] In relation to some matters, such as the opening of new positions and trench digging, Ramadan Behluli acted from day to day on his own initiative but he did so with the approval of Luan.[374] Sometime in May or June 1998 Shukri Buja assumed command of Kroimire/Krajmirovce and, as Pjetershtice/Petrastica and Carraleve/Crnoljevo had come in the zone of responsibility of Kroimire/Krajmirovce, Luan became his deputy.[375] Luan knew that above him and Shukri Buja there was a higher command, and that the "organisational line" went from Likofc/Likovac (where the commander was Rexhep Selimi) to Klecke/Klecka (where the commander was Fatmir Limaj) to Kroimire/Krajmirovce and that the general commander was Azem Syla.[376]

110. The KLA Regulations[377] further support the existence of such an organisational structure and hierarchy. Although the Regulations are dated "1998" and the precise date of their promulgation is not identified, the Chamber accepts from the evidence, and finds, that at least by the end of June 1998 these Regulations were available and were being distributed among KLA soldiers at various positions. This is supported by the evidence of Ramiz Qeriqi, aka Luan, who testified that at the end of June 1998 he and Shukri Buja had the Regulations and had to give a copy of these Regulations to every soldier.[378] Fatmir Limaj also testified that at the end of June 1998 he received the KLA Reguslations.[379]

111. The Regulations, *inter alia*, established several ranks of KLA servicemen, defined the duties of the unit commanders and deputy unit commanders, as well as the duties of the company, platoon, and squad commanders, and created a chain of military hierarchy between the various levels of commanders.[380] It was declared in the Regulations that "obedience, respect and orders strictly follow the chain of military hierarchy."[381] The Regulations authorised an officer at a higher level "to demand from an officer beneath him the enforcement of the law, of regulations, of orders, instructions, etc." and provide that "a junior officer is obliged to carry out orders, decisions, instructions, etc."[382] Further, the Regulations contained explicit provisions directed to guaranteeing that orders would be executed down the hierarchy.[383]

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[373] Ramadan Behluli, T 2666, 2688.
[374] Ramadan Behluli, T 2666-2668.
[375] Ramadan Behluli, T 2667; Exhibit P116; Ramiz Qeriqi, T 3578.
[376] Ramiz Qeriqi, T 3578-3579.
[377] Exhibit P156.
[378] Ramiz Qeriqi, T 3604.
[379] Fatmir Limaj, T 6543; Exhibit P156.
[380] Exhibit P156, Chapters Five and Six.
[381] Exhibit P156, Chapter Five, Article 1.3.
[382] Exhibit P156, Chapter Five, Article 1.4.
[383] Exhibit P156, Chapter Five, Article 2.2: "Orders are not for discussion: they are carried out faithfully, quickly and exactly. A soldier is obliged to report the execution of an order to the officer. An officer is responsible for the

112. The Regulations revealed a significant step in the ongoing process of developing and enforcing greater coordination and consistency within the rapidly expanding KLA and between the KLA units. They were distributed to the units by the KLA's General Staff.[384] The Regulations provided that the first duty of a unit commander was, *inter alia*, to supervise obedience to and enforcement of the KLA's programme and regulations.[385]

113. Indicative of the extent of the KLA's developing formal organisation is the establishment of a military police, which, generally, were responsible for the discipline of the soldiers[386] and for controlling the movements of KLA servicemen.[387] The evidence concerning the date of the establishment of the military police ("PU" in Albanian) reflects the inconsistency evident about all aspects of the development of the KLA's organisational structure. Some witnesses testified that military police were not established until August 1998 or later. For example, the Accused Fatmir Limaj said that the military police started to operate independently in each zone in August 1998 and that the uniforms of the military police first appeared in mid December 1998.[388] However, Ramadan Behluli saw military police in Kroimire/Krajmirovce a little before the offensive in Zborc/Zborce, which took place on 25 and 26 July 1998.[389] They wore black uniforms with the PU insignia on their badges.[390] Ramiz Qeriqi accepted the proposition put forward to him by the Defence that military police as an organisation within the KLA did not exist until sometime after the brigades and the battalions were formed.[391] In contrast to this, Sylejman Selimi testified that as the commander of the Drenica zone he started to establish military police approximately two months after his appointment as a zone commander in May 1998, in other words in July 1998, and about the time when he recalled brigades being formed.[392] In the course of his evidence, however, Sylejman Selimi also accepted that he may have issued an order in respect of military police in May 1998,[393] which the Chamber finds, as noted in the next paragraph, did occur. Similarly, he also

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possible consequences resulting from the order given." Exhibit P156, Chapter Five, Article 2.5: "A commander is obliged to ensure the execution of an order."

[384] The nature of the Regulations and their self-evident purpose are enough in themselves to demonstrate that they were drown up and distributed by the KLA's one coordinating authority at the time, *i.e.* the General Staff. That was the understanding of Ramiz Qeriqi at the time, T 3604. The Regulations became available to the units at approximately the same time as is evident from the evidence of Ramiz Qeriqi and Fatmir Limaj who were with different units.

[385] Exhibit P156, Chapter Six, Article 1.2.

[386] Sylejman Selimi, T 2082-2084; Ramiz Qeriqi, T 3611.

[387] Ramadan Behluli, T 2793-2794.

[388] Fatmir Limaj, T 6091-6093.

[389] Ramadan Behluli, T 2793-2794.

[390] Ramadan Behluli, T 2793-2794.

[391] Ramiz Qeriqi, T 3669-3670.

[392] Sylejman Selimi, T 2082; 2186; 2195.

[393] Sylejman Selimi, T 2212-2213.

accepted that it was possible that by mid May 1998 there had been an order or an instruction from the General Staff for there to be a military police unit.[394]

114. The written record, scarce as it was and is, demonstrates that the recollections of the witnesses, so far as their recollections are disclosed in their oral evidence, on this issue of timing, are too conservative, and that in fact the movement to introduce military police in the KLA commenced earlier in time than many now indicate. A "Programme for Military Police" issued on behalf of Sylejman Selimi and signed by Shaban Shala was issued on 13 May 1998. The Programme obliged the commanders in the Drenica zone to inform their soldiers of the programme of the military police.[395] It was stated in the Programme that soldiers who leave the front line without the permission of the commander will be imprisoned by the military police. The Programme regulates the occasions when bearing of arms is not allowed, and authorised the military police to use physical force against a soldier disobeying orders.[396] The Programme provided that it would come into force on 20 May 1998.[397]

115. This Programme is consistent with the KLA Regulations, Chapter Eight of which deals with the military police. It is stipulated that the military police are organised in operational zones and sub-zones, and that their duties include, *inter alia,* keeping order and discipline in the military units and bases, controlling the movement of soldiers and their travel permits, controlling the movement of suspicious persons, securing the transportation of military materiel, and seizing the documents and the weapons of servicemen and soldiers who break the regulations.[398]

116. There is scant evidence as to the extent to which the regulations concerning the military police and the disciplinary rules were enforced in practice. Reports indicated that in the second half of June 1998 KLA police organised traffic in Malisheve/Malisevo.[399] The evidence about the actual enforcement of disciplinary procedures is scarce. Peter Bouckaert testified that during his visit to Kosovo between September and November 1998 he and another Human Rights Watch researcher had been told by KLA members that there were disciplinary procedures in place but throughout the entire period of their research, covering the time from late February to November 1998, they did not document a single case in which the KLA disciplined or punished its own troops.[400] Sylejman Selimi indicated that prior to the formation of the brigades there was no

[394] Sylejman Selimi, T 2212-2213.
[395] Exhibit P95, Sylejman Selimi, T 2214-2216; 2220-2230.
[396] Exhibit P95, Points 1-6.
[397] Exhibit P95.
[398] Exhibit P156, Chapter Eight, Article 1.3.
[399] Exhibit P92, tab 29.
[400] Peter Bouckaert, T 5518.

strict military discipline.[401] Fatmir Limaj suggested in his evidence that in the period from May to July 1998 he could only expel a soldier who misbehaved from the unit he was responsible for and, if a soldier had been given a weapon, he could have taken it back. It was his position that it was not possible for him to prevent a soldier he expelled from his unit from going to another.[402] While there is evidence that before the military police came into existence disciplinary sanctions could have been imposed on soldiers,[403] the evidence does not identify any instance of soldiers being removed from their units.[404]

117. In view of the above, the Chamber accepts and finds that in mid May 1998 the General Staff of the KLA formally moved to introduce military police within the KLA. While it is not apparent on the evidence before the Chamber that disciplinary rules were then consistently enforced in KLA units, the Chamber regards this step as affording clear evidence of the growing formality and effectiveness of the organisational structure of the KLA by mid May 1998, and of the progress of the General Staff towards ensuring that the KLA functioned as a disciplined and coordinated military force.

118. Of further relevance to the extent and effectiveness of the KLA's organisation at the relevant time is its ability to recruit new members. While the events in Kosovo from early 1998 had a positive impact on KLA membership,[405] it is apparent from the evidence that the KLA's General Staff made a consistent effort to persuade people to join the organisation. On 15 June 1998 at his first public statement as the official spokesperson of the KLA, made on Albanian television and reprinted in the Kosovo's newspaper "Bujku," Jakup Krasniqi presented part of the KLA's programme and called on the people of Kosovo to join the KLA.[406] He further testified that the aim of the KLA communiqués, as a propaganda material, was to increase the respect and authority of the KLA in the perception of the citizens, in order that the people would believe in it and would join.[407] Indeed, the number of people joining the KLA was increasing rapidly.[408] Reports of the VJ indicate that during the relevant period the KLA mobilised between 3500 and 4500 men.[409]

119. The evidence confirms that, generally, upon joining the KLA soldiers were provided with military training. As an illustration of this, after he registered with the KLA in mid May 1998, L95

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401 Sylejman Selimi, T 2175-2177.
402 Fatmir Limaj, T 6566-6569.
403 These sanctions included assignment of extra duty, a written notification, removal of the soldiers' guns or uniforms, and in case of a repeated mistake, removal from duty, Sylejman Selimi, T 2082-2086.
404 *See* also Sylejman Selimi, T 2082-2086.
405 *See supra*, paras 49-52.
406 Exhibit P139; Jakup Krasniqi, T 3355-3359.
407 Jakup Krasniqi, T 3340-3341.
408 *See,* for example, Shukri Buja, T 3779; Ramiz Qeriqi, T 3575.

received weapon and other training.[410] A training centre for volunteers was also set up in Klecka/Klecka by Fatmir Limaj. Ajet Kastrati was appointed by him to be responsible for the training there.[411] Basic military training of KLA forces was provided in the Albanian villages of Tropolja, Kukes, and Bajram Curi.[412]

120. At the end of June 1998 three experienced military officers, Bislim Zyrapi, Agim Qelaj, and a person identified only as "Hans" were sent by the General Staff to Klecka/Klecka and various other points including Lapushnik/Lapusnik, to assess the armament of the KLA soldiers and to give advice to the respective unit commanders on matters such as training, tactics, and the placement of defensive positions.[413]

121. In early 1998, including the period material to the Indictment, the KLA had mostly light weapons.[414] KLA soldiers were normally armed with AK-47 rifles, a standard weapon for the region, and rocket propelled grenades.[415] Other KLA armaments in limited supply were pistols, semi-automatic and automatic rifles,[416] some anti-tank weapons,[417] light infantry weapons of 7.62 and 7.9 calibre, other hand held weapons,[418] some 60 mm and 82 mm mortars,[419] as well as 150 mm and 250 mm mortars, hand grenades and some mines.[420]

122. Most of the KLA weapons were supplied from Albania.[421] Some weapons also came from Kosovo, as civilians who possessed weapons surrendered them to the KLA.[422] These were often hunting rifles. The KLA also used weapons of Yugoslav manufacture.[423] In the initial stages at least, many point and area commanders sought weapons on their own initiative. Others only recruited those who came with their own weapon.[424] At the same time and increasingly by May 1998 and thereafter, as discussed earlier, the General Staff was directly active in securing supplies of weapons and ammunition and their distribution.

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[409] Philip Coo, T 5792-5794. *See* also Exhibit P92, tab 17. The Chamber notes that it is suggested in the evidence that this number may have been exaggerated, Philip Coo, T 5794-5800; John Crosland, T 2009.
[410] L95, T 4197-4198.
[411] Fatmir Limaj, T 5970-5972.
[412] John Crosland, T 1960. *See* also Exhibit P92, tab 13.
[413] Fatmir Limaj, T 5973-5974, 6077-6078.
[414] Sylejman Selimi, T 2147; John Crosland, T 2010.
[415] Philip Coo, T 5726-5727. *See* also Ramadan Behluli, T 2851-2855.
[416] Bislim Zyrapi, T 6823. *See* also Elmi Sopi, T 6736-6737.
[417] Bislim Zyrapi, T 6823. *See* also Elmi Sopi, T 6736-6737.
[418] Rexhep Selimi, T 6597.
[419] Philip Coo T 5734-5736; Elmi Sopi, T 6736-6737.
[420] Fatmir Limaj, T 6011-6012.
[421] John Crosland, T 1885-1887, 1960; Exhibit P92, tab 10; Sylejman Selimi, T 2147-2148. *See* also Fatmir Limaj, T 5970-5971; Rexhep Selimi, T 6623-6624.
[422] Shukri Buja, T 4035-4036.
[423] Sylejman Selimi, T 2148.
[424] Ruzhdi Karpuzi, T 3070-3072.

123. The evidence varies considerably as to the supply and use of uniforms in the KLA in the period before August 1998. Some evidence indicates that by February 1998 most of the KLA soldiers had uniforms with badges identifying their allegiance,[425] although the evidence indicates that the military uniforms were of varying nature.[426] Some KLA soldiers wore some self-made uniforms.[427] Others had no uniforms at all.[428] As with most things the position regarding uniforms improved as the end of 1998 neared. While the existence of a uniform may be indicative of the existence of a well-organised entity, in the view of the Chamber, this factor alone is not determinative in this case of the existence of an organised military structure, as it has little bearing on the functioning of the KLA, especially having regard to its rapid expansion after March 1998 which undoubtedly placed unanticipated strain on the provision of commodities such as uniforms, at a time when other needs were clearly more relevant to the military functioning of the KLA.

124. The evidence is clear that at least until near the end of 1998 the KLA was not adequately equipped with communications equipment, either for linking headquarters with units or between units. For this reason, and because of security, much communication was by means of messenger.[429] There were some radio transmitters,[430] however, and some units came to use two way radios and mobile phones, often provided by individual members.[431] Others relied on basic means, such as gun shots, as a means of communication.[432]

125. Indicative of the extent of the KLA's organisation is its role in the negotiations with representatives of the European Community and foreign missions based in Belgrade. Jan Kickert, a diplomat with the Austrian Embassy in Belgrade, indicated that by the middle of 1998 it had become evident that a solution of the Kosovo crisis would not be achieved without the involvement of the KLA.[433] This was the assessment of his Mission, which is of particular relevance as Austria then had the Presidency of the European Union.

126. In July 1998 at the request of the Secretary-General of the Austrian Foreign Ministry, Albert Rohan, a meeting of representatives of the Missions of States of the European Community with KLA representatives was set up in Malisheve/Malisevo, which was known as the "capital" of the

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[425] Peter Bouckaert, T 5511-5513.
[426] John Crosland, T 1901, 1953.
[427] Ramadan Behluli, T 2851-2855. *See* also Elmi Sopi. T 6726.
[428] Elmi Sopi, T 6726.
[429] *See* Ramadan Behluli, T 2853-2855; Ramiz Qeriqi, T 3588; Jakup Krasniqi, T 3453-3455. *See* also Shukri Buja, T 3998-4001.
[430] Sylejman Selimi testified that the units of the Pastrik and Drenica zone were communicating via radio or in person, T 2148-2150.
[431] Exhibit DL13, para 44; Exhibit DL13, Addendum, p 6. *See* also L12, T 1792-1795.
[432] Shukri Buja, T 3998-4001.
[433] Jan Kickert, T 659-660.

so-called "free territories," *i.e.* those under the KLA control.[434] The meeting took place on 22 July 1998 and was attended, *inter alia*, by the Secretary-General of the Austrian Foreign Ministry, Albert Rohan, by the Director of the Balkans Department of the Austrian Ministry of Foreign Affairs, Gerhard Jandl, by Nick Turnbull, Jan Kickert and an observer from the European Community Monitoring Mission ("ECMM").[435] On the KLA side the meeting was attended by Gani Krasniqi, a civilian and the mayor of Malisheve/Malisevo and Kadri Veseli, who was introduced to the foreign delegation as Number 7.[436]

127. On the following day, 23 July 1998, a second meeting was held. Hashim Thaci, who was introduced as Number 3 and Kadri Veseli, introduced as Number 7 attended the meeting.[437] On 24 July 1998 Jan Kickert prepared a report to the Austrian Ministry of Foreign Affairs indicating, *inter alia*, that the KLA representatives had informed the Embassy of the KLA's resolve to cooperate with the other Kosovo parties and to participate in a government of national unity or a round table.[438]

128. On 30 July 1998 a third meeting between representatives of the foreign missions of States of the European Community and the KLA was held in Klecka/Klecka.[439] The 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.[440] At the meeting the creation of a united Kosovar political platform, a delegation from various political entities in Kosovo to enter into negotiations with Belgrade, was discussed.[441] A report to the Austrian Federal Ministry of Foreign Affairs prepared by Jan Kickert on 31 July 1998 indicated that at the meeting the KLA representatives confirmed a change in their tactics and proposed conditions for the KLA not to carry out offensive operations.[442] The report stated:

> The KLA representatives who were met with confirmed the change in their tactics: it is clear for them that a conventional war with well-defined front lines is not possible and they will therefore confine themselves to guerrilla actions. The threat was reiterated that actions in big towns, such as Pristina, could always be started.[443]

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[434] Jan Kickert, T 661.
[435] Jan Kickert, T 663; 749.
[436] Jan Kickert, T 663-664.
[437] Jan Kickert, T 669-670, 717.
[438] Exhibit P56, p 1; Jan Kickert, T 670-672.
[439] Jan Kickert, T 677, 749, 750; Jakup Krasniqi, T 3406-3408.
[440] Jan Kickert, T 680, 749; Jakup Krasniqi, T 3406-3408.
[441] Jan Kickert, T 688-689. *See* also Jakup Krasniqi, T 3409-3410.
[442] Exhibit P59, p 4; Jan Kickert, T 687-693.
[443] Exhibit P59, p 4; Jan Kickert, T 692.

The report further indicates that the KLA representatives named the following three conditions if the KLA was to exercise restraint: the withdrawal of the Yugoslav army, the return of all expelled persons, and the removal of Serbian checkpoints.[444]

129. As this evidence confirms, by July 1998 the KLA had become accepted by international representatives, and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis. This discloses and confirms that by that time the KLA had achieved a level of organisational stability and effectiveness. In particular this gave it the recognised ability to speak with one voice and with a level of persuasive authority on behalf of its members. Both the KLA's need for secrecy and the existence of an established hierarchy in its ranks is apparent from the circumstance that individuals involved in negotiations with foreign missions were referred to by a number, apparently corresponding to their level in the KLA hierarchy. Further, from the course of these discussions it appears that the KLA was able to formulate and declare a change of military tactics and also conditions for refraining from further military action. This is indicative that at the time the KLA had the ability to coordinate military planning and activities and to determine a unified military strategy, as well as the ability to conduct military operations of a larger scale.

130. The Chamber would observe that the significance of the presence of Fatmir Limaj at the third of these meetings is a matter of controversy. The Prosecution rely 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.

131. The Chamber heard evidence that representatives of foreign missions and international non-governmental organisations were sometimes unclear about the KLA's command structure. A report from the Austrian Embassy in Belgrade to the Austrian Federal Ministry of Foreign Affairs referred to US sources describing the KLA command structure as "a mystery" and "more a matter of diffuse horizontal command and coordination structure."[445] Jan Kickert testified that this indicated the difficulties the US and other foreign missions had in identifying their interlocutors.[446] Another report from the Austrian Embassy to the Austrian Ministry of Foreign Affairs referred to a statement of Richard Holbrooke indicating that it was not known to him whether the KLA had an internal chain of command.[447] Peter Bouckaert of Human Rights Watch testified that it was

[444] Exhibit P59, p 4; Jan Kickert, T 693.
[445] Exhibit P61, p 1; Jan Kickert, T 708.
[446] Jan Kickert, T 708.
[447] Exhibit P64, p 1; Jan Kickert, T 715.

difficult for him to understand who fitted into the KLA structure and for this reason he preferred to talk to regional and sub-regional commanders.[448]

132. In the Chamber's finding, this evidence does not establish the non-existence of a KLA organisational structure. Rather, it reflects the conditions under which the KLA operated at the time. The KLA was effectively an underground organisation, operating in conditions of secrecy out of concern to preserve its leadership,[449] and under constant threat of military action by the Serbian forces.[450] The members of the General Staff did not meet regularly because of the security situation and identified themselves not by their names but by numbers for the same reason.[451] In these circumstances it is of no surprise that the organisational structure and the hierarchy of the KLA were confusing, or not known, to outside observers, and that, to some, this suggested a state of confusion.

133. In evidence before the Chamber are various statements assessing the organisational level of the KLA in the period material for the Indictment. Robert Churcher's "Expert Report on Organisation of Kosovo Liberation Army and Events in Kosovo in 1998," concludes that the KLA was not capable of creating the command system or the discipline and training necessary to be considered an armed force in the legal sense of the Indictment, that the KLA was not capable to engage in war-like operations amounting to an armed conflict, and that the Serbian armed forces used massively inappropriate force against its own citizens.[452] The basis for this conclusion is the author's own impressions of the situation in Kosovo where he was present from June to December 1998 as well as for some time in 1993 and 1997, and the author's own assessment of the evidence before the Chamber.[453] Further, in evidence before the Chamber is a report of Human Rights Watch finding that at the material time the KLA was an organised military force for the purposes of international humanitarian law,[454] as well as a report from the Austrian Embassy to the Federal Ministry of Foreign Affairs of 7 July 1998 referring to a statement of Adem Demaqi that clear organisational structures and a hierarchy were present within the KLA.[455] The Chamber has

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[448] Peter Bouckaert, T 5513-5514.
[449] *See supra,* paras 45 and 46.
[450] *See infra,* para 172.
[451] *See supra*, paras 46 and 129.
[452] Exhibit DL13, p 18.
[453] Exhibit DL 13. Robert Churcher testified that the report was an analysis based on what he remembered, on what he knew, on what he read, and on the sources he was asked to read by the Defence team, T 6383-6384.
[454] Exhibit P212, tab 5, p 92. A report of Human Rights Watch described the KLA as follows: "although the UÇK is primarily a guerrilla army with no rigid hierarchical structure, and there are separate internal factions, during the period covered by this report [from February to September 1998] the UÇK was an organised military force for purposes of international humanitarian law."
[455] Exhibit P64, p 2. The report from the Austrian Embassy to the Federal Ministry of Foreign Affairs refers to a statement of Adem Demaqi, the head of the Parliamentary Party of Kosovo (PKK), one of the political parties opposing the LDK of Ibrahim Rugova, that a clear organisational structure and a hierarchy of the KLA was present and that he himself had met with persons identifying themselves with numbers. *See* also Jan Kickert, T 715, 717.

discussed the facts offered in support of these statements in its considerations on the level of organisation of the KLA above and has taken them into account in reaching its conclusions.

134. In the Chamber's finding, before the end of May 1998 the KLA sufficiently possessed the characteristics of an organised armed group, able to engage in an internal armed conflict.

(ii) Intensity of the conflict

135. Sporadic acts of violence between Serbian forces and the KLA occurred in Kosovo in 1997 and early 1998. Some of these acts of violence were discussed by the Chamber earlier in this decision.[456] The most significant of them was the attack at the end of February 1998 and in early March 1998 on the villages Qirez/Cirez, Likoshan/Likosane, and Prekazi-i-Poshtem/Donjie Prekaze located in the Drenica area, in the course of which 83 Kosovo Albanians were killed.[457] International observers present in Kosovo at the time testified that these events marked a turning point in the development of the conflict in Kosovo.[458]

136. Around 5 March 1998 a police action was carried out in the area of Kline/Klina-Laushe/Lausa, located southwest of Prekazi/Prekaze. Reports indicated that buildings were attacked with heavy weapons and mortars. A group of diplomats who visited Prekazi/Prekaze on 8 March 1998 reported great devastation to a limited number of buildings, continuing heavy police presence and a complete absence of civilian activities. Houses were torched, burned, or fired at. Serbian forces from the Ministry of the Interior ("MUP") and forces associated with Serbian special units equipped with armoured personnel carriers and other heavy vehicles were involved in the operation.[459]

137. Communiqué No 45 issued by the General Staff of the KLA on 11 March 1998 described military operations that took place in the course of the days around 7 March 1998 between KLA armed forces and Serbian military, police, and paramilitary forces in the area between Gllogoc/Glogovac, Kline/Klina, and Mitrovice/Kosovka Mitrovica in the east; as well as in the areas between Decane/Decani, Gjakove/Djakovica, and Kline/Klina; between Malisheve/Malisevo and Rahovec/Orahovac, and between Decane/Decani and Peje/Pec. Jakup Krasniqi referred to these military operations in his evidence.[460]

[456] *See supra*, paras 48 and 49.
[457] *See supra,* para 49.
[458] Philip Coo, T 5707-5709; Peter Boukaert, T 5516-5517; Exhibit P212, tab 5.
[459] John Crosland, T 1864-1865, Exhibit P92, tab 3.
[460] Jakup Krasniqi, T 3336.

138. Around 24 March 1998 exchanges of fire occurred in several villages between Decane/Decani and Gjakove/Djakovica, about 60 km west of Prishtina/Pristina. One Serbian policeman and five Kosovo Albanians were killed and one policeman and 10 Kosovo Albanians were injured. Shots from a police helicopter were heard in the village of Irzniq/Rznic, located 10 km southeast of Decane/Decani. There were two explosions followed by an exchange of fire that lasted 20 minutes.[461] At about the same time, an exchange of fire occurred in the Jashanice/Josanica area in Drenica, in which the Serbian special police was involved. At least 50 to 100 rounds were heard.[462] Reports indicate that heavy weapons, such as the "Praga" air defence system, were moved into the area, and that two platoons of police including a jeep equipped with a heavy machine gun were seen moving west from Skenderaj/Srbica towards Laushe/Lausa.[463] The Serbian forces also deployed in this area a BOV-3, a triple-barrelled weapon. While this weapon is designed primarily for anti-aircraft use, and not for anti personnel use,[464] its deployment indicates that it was for anti-personnel use as the KLA had no air power. Further, there were reports that around 25 March 1998, police armoured personnel carriers ("APC"s) were used in Gjakove/Djakovica and that at least four policemen and at least five Kosovo Albanians were killed in the exchange of fire there.[465]

139. On 13 April 1998 a police station in the Vranjevac suburb of Prishtina/Pristina was attacked by the KLA. One policeman was wounded and the building was substantially damaged.[466] Reports indicated that at the same time Serbian families were leaving the Decane/Decani area in large numbers as a result of threats from armed Kosovo Albanians.[467] Some 18 Serbian families left Decane/Decani on 14 April 1998 and the atmosphere among the Serbs was becoming very tense.[468]

140. On 22 April 1998 substantial shooting occurred in the area of Decane/Decani and Gjakove/Djakovica as a result of which many civilians, both Serbs and Kosovo Albanians, left the area.[469] Reports indicated a VJ presence in the area.[470] There were reports that Kosovo Albanians were abducting Serbs, that Kosovo Albanians attacked the VJ, and that Serbian forces were

[461] John Crosland, T 1869; Exhibit P92, tab 5.
[462] Exhibit P92, tab 5.
[463] Exhibit P92, tab 5; John Crosland, T 1871-1872.
[464] John Crosland, T 1873.
[465] Exhibit P92, tab 6.
[466] Exhibit P92, tab 9; John Crosland, T 1882.
[467] Exhibit P92, tab 9; John Crosland, T 1883.
[468] Exhibit P92, tab 9.
[469] Exhibit P92, tab11; John Crosland, T 1887.
[470] Exhibit P92, tab11.

attacking villages of Kosovo Albanians.[471] One report suggested that two Kosovo Albanians were killed following an attack on a VJ installation.[472]

141. Further, incidents occurred on the Kosovo-Albanian border. A diplomatic telegram of 24 April 1998 referred to VJ sources reporting a military action against a group of 200 persons entering Kosovo from Albania, which took place on 22 April 1998 in the area of Gjakove/Djakovica, as a result of which at least 16 of them were killed.[473] Other reports indicated continuing combat operations in the area and more casualties.[474]

142. On 3 May 1998 heavy fighting broke out in Ponoshec/Ponosevac, located near Decane/Decani, eight km from the Albanian border. The fighting continued for more than two days. There were reports of Kosovo Albanian casualties and a build-up of Serbian police forces.[475] At about the same time there were several clashes in villages in the Drenica area with casualties.[476] Heavy MUP and VJ forces were deployed in the area, including 80 to 100 special anti terrorist police in four separate locations.[477] According to John Crosland, the area between Ponoshec/Ponosevac to Junik/Junik had become a front line area where the Serbian forces attempted to clear the villages in order to use it as a free-fire area. This they did by attacks to damage the houses and to force people to leave the area.[478]

143. As discussed in more detail earlier in this decision, on 9 May 1998, fighting broke out in Llapushnik/Lapusnik between Serbian forces and KLA fighters.[479] At the end of the day, the KLA fighters destroyed a Serbian Pinzgauer, an APC, used in the fighting. The Serbian forces withdrew following which the KLA established a unit in the village.

144. In about mid May 1998 the KLA closed the two main roads leading to Peje/Pec: Mitrovice/Kosovska Mitrovica-Peje/Pec road and the Peje/Pec-Prishtina/Pristina road.[480] There is evidence that the third main road to Peje/Pec, (Prishtina/Pristina, Shtime/Stimlje, Suhareke/Suva Reka, Prizren/Prizren) was ambushed on a regular basis by the KLA[481] and that the KLA could also have closed it, if that had been their intention.[482]

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[471] Exhibit P92, tab 11.
[472] Exhibit P92, tab 11.
[473] Exhibit P92, tab 12.
[474] Exhibit P92, tab 12; John Crosland, T 1895-1897.
[475] Exhibit P92, tab 15; John Crosland, T 1909, 1911.
[476] Exhibit P92, tab 15; John Crosland, T 1909, 1911.
[477] Exhibit P92, tab 15; John Crosland, T 1909, 1911.
[478] John Crosland, T 1910.
[479] *See supra,* paras 66-77.
[480] John Crosland, T 1915-1916; Exhibit P60, pp 1-2.
[481] John Crosland, T 1915-1916, 1921.
[482] John Crosland, T 1943.

145. Checkpoints were set up by both the KLA and the Serbian forces on these roads. At the end of May 1998 there was a very heavy MUP presence on the Peje/Pec-Prishtina/Pristina road. New MUP checkpoints were set up around Ferisaj/Urosevac and Gjilan/Gnjilane.[483] The KLA also set up checkpoints on the road, sometimes in places just two km away from the MUP checkpoints.[484] To go through a KLA checkpoint, journalists and observers were required to have a KLA travel permission. These were issued by Adem Demaqi and were valid for one day.[485] This, of course, affords further evidence of effective KLA organisation.

146. Indicative of the growing intensity of the conflict is a report dated 13 May 1998 from Major-General Nebojša Pavković, the commander of the Pristina Corps, addressed to the command of the 3rd Army of the VJ. The report stated that the security situation in Kosovo was getting "more complex every day" due to increasingly frequent attacks on MUP members, citizens of Serbian nationality, and Kosovo Albanians "loyal to the system".[486] It was reported that the MUP forces had not managed to ensure the blockade and destruction of the KLA forces in Drenica, Gjakove/Djakovica and Decane/Decani, which had led to KLA "spilling over" into Rahovec/Orahovac, Suhareke/Suva Reka and Istog/Istok municipalities and into the areas of Kacanik/Kacanik, Lipjan/Lipljan and Ferisaj/Urosevac municipalities. It was the estimate of the VJ that even by then, the KLA held about 30% of Kosovo.[487] Philip Coo testified that this estimate was based on VJ's intelligence reports and that it was confirmed by ECMM reports.[488] In view of the situation, the report of Major-General Pavković proposed a broader engagement of the Pristina Corps units.[489]

147. Reports of 14 May 1998 described an attack by 50 armed Kosovo Albanians on a Serbian community near Kline/Klina in Drenica, during which one Serbian policeman was injured. At about the same time official Serbian forces reported that 10 Kosovo Albanians were killed at Smonice/Smonica, near the Albanian border, while Albanian sources claimed that the 10 men were killed by land mines.[490]

148. On 15 May 1998 heavy fighting broke out in the area of Gjakove/Djakovica, Ponoshec/Ponosevac and Junik/Junik, in which Serbian special-police forces were involved.[491] John Crosland was detained briefly by the KLA in Vojnok/Vojinovce and believed that the KLA

[483] John Crosland, T 1926. *See* also Oleg Safiulin, T 1714-1719.
[484] John Crosland, T 1926-1927.
[485] Peter Bouckaert, T 5514-5515.
[486] Exhibit P92, tab 17.
[487] Exhibit P92, tab 17.
[488] Philip Coo, T 5714-5717.
[489] Exhibit P92, tab 17; Philip Coo, T 5717.
[490] Exhibit P92, tab 18.
[491] John Crosland, T 1924; Exhibit P92, tab 19.

controlled at the time part of Drenica and other areas where they had taken over former MUP positions.[492]

149. On 18 or 19 May 1998 further fighting broke out in the Llapushnik/Lapusnik gorge. The Serbian forces attempted to take control of the gorge and used mortars, rockets, and mines in the fighting.[493] The engagement lasted the entire day and resulted in the death of two KLA soldiers.[494] On 20 May 1998 the village of Bokshiq/Boksic was shelled from both sides. Combat operations continued for the most part of the following day. There were Serbian and KLA casualties.[495] On 26 May 1998 a very heavy MUP presence was reported on the Peje/Pec-Prishtina/Pristina road.[496] On 29 May 1998 another fight between the Serbian forces and the KLA broke out in Llapushnik/Lapusnik.[497] The fighting began at 0700 hours and continued until 2100-2200 hours.[498]

150. On 29 May 1998, by an order of the command of the Pristina Corps, at least five or six Brigades of the Pristina Corps, were put on full combat readiness. They were prepared to deploy and conduct combat operations on a very short notice.[499] In the expert opinion of Philip Coo, this order indicated that the command of the Pristina Corps had assessed that the situation was extremely tense, because putting the units in full combat readiness tires the troops and involves a lot of resources.[500]

151. On 31 May 1998 an estimated 300 Serbian special police attacked the village of Novi Poklek, located near Gllogoc/Glogovac.[501] Ten men were seized by the police during the attack, one of whom was found later that day dead. The other nine were missing.[502]

152. At the end of May 1998 Serbian police and VJ forces launched a major offensive against a series of villages on the Kosovo-Albanian border, which appears to have been intended to cut off the supply routes of the KLA.[503] Villages from Peje/Pec in the north to Gjakove/Djakovica in the south were shelled, even though civilians were still present, and were later systematically destroyed.[504]

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[492] John Crosland, T 1925; Exhibit P92, tab 19.
[493] Ruzhdi Karpuzi, T 3072-3074.
[494] Ruzhdi Karpuzi, T 3072-3074.
[495] L95, T 4198-4201.
[496] Exhibit P92, tab 20.
[497] L64, T 4361-4363; Elmi Sopi, T 6726-6728.
[498] Elmi Sopi, T 6726-6728.
[499] Philip Coo, T 5720-5721.
[500] Philip Coo, T 5720-5721.
[501] Exhibit P212, tab 5, p 33.
[502] Exhibit P212, tab 5, p 33.
[503] Exhibit P212, tab 5, p 38.
[504] Exhibit P212, tab 5, p 38.

153. At about the same time, towards the end of May 1998, heavy fighting broke out in Decane/Decani and Drenica in Western Kosovo.[505] In and around Decane/Decani the fighting continued for four days.[506] Serbian reports claimed that the KLA had besieged the town.[507] On 7 June 1998 the Yugoslav Foreign Ministry organised a trip for foreign diplomats and military attaches to the area of Decane/Decani.[508] A report to the Austrian Federal Ministry of Foreign Affairs provided the following description of the area:

> Decani: considerable devastation, but by no means as drastic as described by the LDK ("80% destroyed", "a second Vukovar"); the town appeared dead (coffee-house patrons on the main square—some of them from Babaloq, [see below]—looked as though they were "on show"), most Kosovars seem to have left the town; atmosphere seems tense, strong police presence and fortifications in the town, armoured tanks, several fortified police stations in the surrounding area; a strikingly small number of bullet holes and other points of impact, and many fire-damaged houses (mostly only the upper floor)—probably arson, according to military colleagues-mutual accusations that this has been done for reasons of ethnic cleansing; colleagues who visited the Drenica region in March reported comparatively little destruction (no shelling with heavy weaponry).[509]

154. Reports from the end of May and early June 1998 disclose clashes taking place closer to the capital, Prishtina/Pristina.[510] Towards the end of May 1998 there were reports of attacks on the police checkpoint at Komaran/Komorane, 21 km west of Prishtina/Pristina on the Peje/Pec-Prishtina/Pristina road, and further clashes at Sllatine/Slatina, close to Prishtina/Pristina airport.[511]

155. On or about 8 June 1998 the village of Popoc/Popovac, located near Gjakove/Djakovica, came under attack, as a result of which a VJ soldier was killed and three were wounded.[512] Armed Kosovo Albanians attacked two Serbian villages in the Drenica valley, Banje/Banja and Suhogerlle/Suvo Grlo, where the fighting continued for several hours.[513]

156. On 14 June 1998 fighting broke out in Carraleve/Crnoljevo.[514] The Serbian forces were equipped with tanks, "Pragas," heavy mortar guns, machine-guns, and rocket launchers.[515] The fighting lasted at least three hours,[516] although there is evidence that it went on for the entire day.[517]

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[505] Exhibit P92, tabs 20 and 21; John Crosland, T 1929.
[506] Exhibit P92, tab 21.
[507] Exhibit P92, tab 21.
[508] Jan Kickert, T 698-699; Exhibit P60.
[509] Exhibit P60; Jan Kickert, T 698-699.
[510] *See* John Crosland, T 1931-1932.
[511] Exhibit P92, tab 21.
[512] Exhibit P92, tab 23.
[513] Exhibit P92, tabs 22 and 23.
[514] Ramadan Behluli, T 2795-2801; Ramiz Qeriqi, T 3582-3584. *See* also John Crosland, T 1931-1932; Exhibit P92, tab 22 and 24.
[515] Ramiz Qeriqi, T 3583-3584.
[516] Ramadan Behluli, T 2856.
[517] Ramiz Qeriqi, T 3583.

The Serbian forces suffered casualties,[518] while it appeared that no one on the KLA side was injured.[519]

157. On 18 June 1998 incidents were reported on the Kosovo-Macedonian border, as a result of which three Serbian policemen may have been killed.[520] A Serbian soldier and a policeman were killed in Carraleve/Crnoljevo on 18 June 1998.[521]

158. A regular operative report from the VJ Military Territorial Organisation in Kosovo to the 3rd Army dated 16 June 1998 described a KLA attack on the police station in Runik/Rudnik, Skenderaj/Srbica.[522] During the attack, the KLA used rocket launches, an indication of their ability to conduct more sustainable operations.[523] At the second half of June 1998, the MUP was forced to abandon most checkpoints in the area around Klina-e-Eperme/Gornja Klina, Kluvanje, Durakovac, and Runik/Rudnik.[524] There were reports of attacks in Fushe Kosova/Kosovo Polje, five km from Prishtina/Pristina.[525] Reports disclose that by this time KLA controlled about 35% of the territory of Kosovo and was able to operate in 65% of it.[526]

159. On or about 23 June 1998 the KLA took control of a coal mine and the village of Bardhi-i-Madh/Veliki Belacevac, 10 km west of Prishtina/Pristina.[527] Shooting could be heard in the area for the entire day and Kosovo Albanian residents were reported to have fled to Prishtina/Pristina.[528] Some reports indicated that the KLA had issued an appeal to local people not to abandon their homes as the KLA would guarantee their security.[529] About a week later the Serbian forces attempted to retake the mine.[530] Reports indicate that the Serbian forces used tear gas, that automatic gunfire and explosions were heard in the area, and that security forces, the VJ, and armed Serbian civilians were involved in this operation.[531] This was the first action in which the participation of the VJ was officially confirmed by the Serbian side.[532]

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[518] Ramiz Qeriqi, T 3582-3583.
[519] Ramadan Behluli, T 2855.
[520] Exhibit P92, tab 27; John Crosland, T 1939.
[521] John Crosland, T 1937.
[522] Philip Coo, T 5723.
[523] Philip Coo, T 5723.
[524] John Crosland, T 1941-1942.
[525] John Crosland, T 1943; Exhibit P92, tab 29.
[526] John Crosland, T 1941.
[527] John Crosland, T 1937-1938, 1945-1950; Exhibit P92, tab 30.
[528] Exhibit P92, tab 30.
[529] Exhibit P92, tab 30.
[530] Exhibit P92, tab 32; Exhibit P62; Jan Kickert, T 710.
[531] Exhibit P92, tab 32.
[532] Exhibit P62; Jan Kickert, T 710.

160. At about the same time fighting took place in Kline/Klina.[533] The KLA sought to take control of some Serbian villages in the area and thus to open up a corridor between Drenica and Decane/Decani. Around 800 Serbs were reported to have fled to Kline/Klina from the neighbouring villages.[534] At the end of June 1998 a blockade was set up by the KLA on the village of Kijeve/Kijevo, located along the main Peje/Pec-Prishtina/Pristina road.[535]

161. On 23 June 1998 further fighting took place in Carraleve/Crnoljevo.[536] The Serbian forces were equipped with tanks, two of which were damaged during the fighting, which lasted approximately two to three hours.[537] Fighting continued in early July 1998.[538] On Ramiz Qeriqi's evidence, between 17 June and 25 July 1998 there were six episodes of fighting in this Kroimire/Krajmirovce area all of which were successful for the KLA.[539]

162. On 19 July 1998 the KLA offensive was launched in Rahovec/Orahovac, an operation described as the KLA's first major attack on a larger city.[540] Evidence suggests that the fighting started locally without the authorisation of the KLA's General Staff, but following the commencement of the attack the General Staff supported the operation.[541] The KLA captured approximately 85 ethnic Serbs. Reports indicate that 40 of them were never seen again.[542] The Monastery of St. Cosmas and Damian in Zozishte/Zociste village, where some elderly Serbs took refuge during the fighting, was attacked with light artillery and machine guns for 45 minutes and the guest house was damaged by two grenades.[543] Rahovec/Orahovac remained under the KLA's control until the Serbian forces retook the town on 21 July 1998.[544]

163. Fighting between the Serbian forces and the KLA continued throughout the month of July 1998. A major offensive was undertaken by Serbian forces on 24 July 1998 in the area of Llapushnik/Lapusnik, Komaran/Komorane and east of Kline/Klina.[545] In the battle at Llapushnik/Lapusnik, on 25 and 26 July 1998, the Serbian forces used heavy military weaponry such as tanks, 220 mm cannons, and "Katyusha" rockets.[546] The fighting continued the entire day

[533] Exhibit P92, tab 30.
[534] Exhibit P92, tab 30.
[535] Exhibit P61; Jan Kickert T 707; Philip Coo, T 5731-5734.
[536] Ramadan Behluli, T 2816-2817.
[537] Ramadan Behluli, T 2816-2817.
[538] Jaqup Kraniqi, T 3345-3351.
[539] Ramiz Qeriqi, T 3584-3587.
[540] Exhibit P212, tab 5, p 79; Peter Boukaert, T 5578. *See* also Jakup Krasniqi, T 3486.
[541] Jakup Krasniqi, T 3415-3417.
[542] Exhibit P212, tab 5, p 79.
[543] Exhibit P212, tab 5, p 79.
[544] Peter Boukaert, T 5578-5579.
[545] Philip Coo, T 5743; John Crosland, T 1965-1967; Exhibit P92, tab 36.
[546] *See supra,* paras 78-82.

on 25 July and on 26 July 1998 until the KLA forces withdrew from the area.[547] Llapushnik/Lapusnik village then came under Serbian control. At about the same time there was a fighting in Zborc/Zborce and in Carraleve/Crnoljevo.[548]

164. As discussed earlier, the Serbian forces engaged in Kosovo in 1998 consisted primarily of units of the VJ and the MUP. The VJ was represented primarily by the Pristina Corps, which had a number of subordinated active armoured, motorised, and artillery brigades and reported to the 3rd Army, which was in turn subordinated to the General Staff of the VJ.[549] Elements of the 63rd parachute brigade, 72nd special forces brigade, and 1st armoured brigade from Belgrade were also deployed along Kosovo's western border.[550] A heavy VJ presence was observed in Kosovo by the end of April 1998.[551] A forward command post of the Pristina Corps was set up on 21 April 1998.[552] At the end of April 1998, in the area of Drenica, six artillery battery positions had been established, which indicates that the VJ was providing fire support to the ongoing field operations which at that time were conducted by the police in the area.[553] In mid May 1998, the VJ alone had almost 2000 personnel assigned to securing the border areas of Kosovo and another 2500 for "in-depth control of territory."[554]

165. The MUP forces consisted of the Special Police Units ("PJP"), which were equipped with armoured personnel carriers, heavy machine guns, and mortars, among other weapons; the Special Anti-Terrorist Unit ("SAJ"); and the Special Operations Unit ("JSO").[555] There were also the so-called local defence units, organisations formed to defend villages and small towns, which were composed of civilians, MUP reservists and representatives of the military territorial district.[556] In June 1998, by a decision of President Slobodan Milošević, a Joint Command for Kosovo was formed in order to ensure coordination and consistency between the Serbian political institutions, the civil affairs institutions, the MUP, and the VJ forces involved in Kosovo.[557]

166. As discussed earlier, tanks and armoured vehicles, heavy artillery weapons, air defence systems, APCs, machine guns, and explosives, among other weapons, were used in the conflict. There is also evidence that landmines were used in Kosovo in 1998. In September 1998 landmines

[547] *See supra,* paras 80-82.
[548] Ramiz Qeriqi, T 3584, 3590-3592.
[549] Exhibit P230, paras 4-6; Philip Coo, T 5694-5695.
[550] John Crosland, T 1890; Philip Coo, T 5694-5696.
[551] John Crosland, T 1897-1900.
[552] Philip Coo, T 5711-5714; Exhibit P230, paras 27-28.
[553] John Crosland, T 1900.
[554] Exhibit P230, para 27.
[555] Exhibit P230, paras 8-12; Philip Coo, T 5597-5599; John Crosland, T 1872.
[556] Exhibit P230, paras 15-21; Philip Coo, T 5702-5703.
[557] Exhibit P 230, para 17; Philip Coo, T 5704.

exploded on a road south of Likofc/Likovac in the Drenica area.[558] It is not clear, however, that these were laid by Serbian forces. Likofc/Likovac used to be a stronghold of the KLA and there is some suggestion that the mines had been planted earlier by Kosovo Albanians.[559]

167. The conflict in Kosovo in the relevant period resulted in a large number of people being displaced. The UNHCR in Podgorica reported in early May 1998 that 5 000 civilians have fled to Montenegro from Kosovo in recent weeks, 800 of whom had fled in the first days of May 1998.[560] On 26 June 1998 the same source reported that there were then 11500 refugees from Kosovo formally registered in Montenegro and their number was then estimated to reach 15000.[561]

168. The Defence submit that a series of regionally disparate and temporally sporadic attacks carried out over a broad and contested geographic area should not be held to amount to an armed conflict.[562] In the Chamber's view, the acts of violence that took place in Kosovo from the end of May 1998 at least until 26 July 1998 are not accurately described as temporally sporadic or geographically disperse. As discussed in the preceding paragraphs, periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area.[563]

169. The Defence further submit that a purely one-sided use of force cannot constitute protracted armed violence which will found the beginning of an armed conflict.[564] In the Chamber's view, this proposition is not supported by the facts established in this case. While the evidence indicates that the KLA forces were less numerous than the Serbian forces, less organised and less prepared, and were not as well trained or armed, the evidence does not suggest that the conflict was purely one-sided. KLA attacks were carried out against a variety of Serbian military, community and commercial targets over a widespread and expanding area of Kosovo.[565] Further, KLA forces were able to offer strong and often effective resistance to Serbian forces undertaking military and police operations.[566] While very large numbers of Serbian forces, well equipped, were deployed in the relevant areas of Kosovo during the period relevant to the Indictment, the KLA enjoyed a significant level of overall military success, tying up the Serbian forces by what were usually very effective guerrilla-type tactics.

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[558] Exhibit P212, tab 5, p 49.
[559] Exhibit P212, tab 5, pp 49, 75.
[560] Exhibit P92, tab 15.
[561] Exhibit P92, tab 31.
[562] Defence Final Brief, para 204. *See* also Limaj Defence Pre-trial Brief, para 15; Musliu Defence Pre-Trial Brief, para 15.
[563] *See supra,* paras 136-163.
[564] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, para 27.
[565] *See supra,* paras 147; 158; 159 and 162.
[566] *See supra*, paras 76; 142; 149; 153; 155; 156; 159 and 161.

170. Finally, the Defence submit that the strength of the Serbian forces does not indicate that their purpose was to defeat the KLA, but to ethnically cleanse Kosovo.[567] While it is true that civilians were driven out of their homes and forced to leave Kosovo as a result of military operations, the evidence discloses this to be true for both sides. Undoubtedly civilians fled as their homes and villages were ravaged and in some cases armed units of both sides set about ensuring this. It is not apparent to the Chamber, however, that the immediate purpose of the military apparatus of each side during the relevant period, was not directed to the defeat of the opposing party, even if some further or ultimate objective may also have existed. The two forces were substantially engaged in their mutual military struggle. While the Serbian forces were far more numerous and better trained and equipped, it appears they were ill-prepared to deal effectively with small guerrilla type forces that would not engage them in prolonged fixed engagements. Serbian military intelligence may also have overestimated the strength and capability of the KLA at the time so that the Serbian forces were arraigned in greater number and with greater military resources than was warranted by the actual KLA forces. In this respect, as revealed by the evidence, many combat operations were carried out in the area of Drenica where the KLA developed earlier and was probably best organised. But, most importantly in the Chamber's view, the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.

(iii) Conclusion

171. The Chamber is satisfied that before the end of May1998 an armed conflict existed in Kosovo between the Serbian forces and the KLA. By that time the KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organisation.[568] Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders.[569] Steps have been established to introduce disciplinary rules and military police,[570] as well as to recruit, train and equip new members.[571] Although generally inferior to the VJ and MUP's equipment, the KLA soldiers had weapons, which included artillery mortars and rocket launchers.[572] By July 1998 the KLA had gained acceptance as a necessary and valid participant in

[567] Closing Arguments, T 7490.
[568] *See supra,* paras 94; 96; 98; 99; 100 and 101-103.
[569] *See supra,* paras 105 and 109.
[570] *See supra,* paras 110-112 and 113-116.
[571] *See supra,* paras 118-120.
[572] *See supra,* paras 121; 122 and 158.

negotiations with international governments and bodies to determine a solution for the Kosovo's crisis, and to lay down conditions in these negotiations for refraining from military action.[573]

172. Further, by the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo-Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo-Macedonian border in the south and the municipality of Mitrovice/Kosovka Mitrovica in the north.[574] The ability of the KLA to engage in such varied operations is a further indicator of its level of organisation. Heavily armed special forces of the Serbian MUP and VJ forces were committed to the conflict on the Serbian side and their efforts were directed to the control and quelling of the KLA forces. Civilians, both Serbian and Kosovo Albanian, had been forced by the military actions to leave their homes, villages and towns and the number of casualties was growing.

173. In view of the above the Chamber is persuaded and finds that an internal armed conflict existed in Kosovo before the end of May 1998. This continued until long after 26 July 1998.

174. Further, in view of its findings made elsewhere in this decision, the Chamber is satisfied that the requisite nexus between the conduct alleged in the Indictment and the armed conflict has been established. In particular, the Chamber refers to its findings that the prison camp where the alleged crimes occurred was established after the KLA took control of the village of Llapushnik/Lapusnik,[575] that it was run by KLA members,[576] and that the camp effectively ceased to exist after the KLA lost control of the Llapushnik/Lapusnik gorge.[577] Those detained in it were principally, if not solely, those who were or who were suspected of being Serbians or Kosovo Albanians who collaborated with the Serbian authorities.

2. The Four *Tadić* conditions

175. The jurisprudence of the Tribunal has established that for an offence to fall under the scope of Article 3 of the Statute, four conditions must be met:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> (iii) the violation must be serious, that is to say that it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim;

[573] *See supra,* paras 125-129.
[574] *See supra,* paras 144-163.
[575] *See supra*, para 76.
[576] *See infra,* paras 273 and 276.
[577] *See infra*, para 278.

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[578]

176. In the present case, the three Accused are charged with four counts of violations of the laws and customs of war pursuant to Article 3 of the Statute, namely two counts of cruel treatment, one count of torture, and one count of murder. All four counts are based on Common Article 3 of the 1949 Geneva Conventions. It is settled by the Appeals Chamber that violations of Common Article 3 fall within the scope of Article 3 of the Statute.[579] In particular, it is settled jurisprudence that Common Article 3 forms part of customary international law,[580] that customary international law imposes criminal liability for serious violations of Common Article 3,[581] and that serious violations of Common Article 3 would at once satisfy the four *Tadić* conditions.[582] Further, as Common Article 3 protects persons taking no active part in the hostilities, the victims of the alleged violation must have taken no active part in the hostilities at the time the crime was committed.[583]

177. The Defence dispute the decisions of the Appeals Chamber and submit that the criminalisation of Common Article 3 has not yet acquired the status of customary international law.[584] In particular they dispute that state practice and *opinio juris* establish criminal liability for violations of Common Article 3,[585] and that the 1949 Geneva Conventions provide a basis for criminalising violations of Common Article 3,[586] and submit that international humanitarian law distinguishes between international and internal armed conflicts and, therefore, individual criminal responsibility for non-state actors may not be attached at international level.[587] The Defence submit that criminal responsibility for violations of Common Article 3 may violate the principle of *nullum crimen sine lege* as the criminalisation of Common Article 3 did not amount to a true reflection of customary international law at the time.[588] It is submitted further that pursuant to the test established in *Aleksovski* Appeal Judgement, the interests of justice require a departure from the previous rulings of the Appeals Chamber.[589]

178. The status of the decisions of the Appeals Chamber was established in the *Aleksovski* Appeal Judgement. Pursuant to this decision, the *ratio decidendi* of the decisions of the Appeals

[578] *Tadić* Jurisdiction Decision, para 94. *See* also *Aleksovski* Appeals Judgement, para 20; *Kunarac* Appeals Judgement, para 66.
[579] *Tadić* Jurisdiction Decision, para 89; *Čelebići* Appeals Judgement, para 136; *Kunarac* Appeals Judgement, para 68.
[580] *Tadić* Jurisdiction Decision, para 98; *Kunarac* Appeals Judgement, para 68.
[581] *Tadić* Jurisdiction Decision, para 134; *Čelebići* Appeals Judgement, paras 153-174.
[582] *Čelebići* Appeals Judgement, para 125; *Kunarac* Appeals Judgement, para 68.
[583] *Čelebići* Appeals Judgement, para 420; *Blagojević* Trial Judgement, para 540; *Kvočka* Trial Judgement, para 124 and *Jelisić* Trial Judgement, para 34.
[584] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, paras 47-58.
[585] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, paras 50-52.
[586] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, para 55.
[587] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, paras 56-57.
[588] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, paras 58-59.
[589] Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, para 48.

Chamber is binding on Trial Chambers.[590] The Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reason in the interests of justice.[591] Contrary to the submissions of the Defence, Trial Chambers may not depart from previous rulings of the Appeals Chamber.

179. In view of the above, the Chamber finds no need to discuss the Defence submissions in this respect any further. It will proceed on the basis of the Appeals Chamber jurisprudence establishing that with respect to serious violations of Common Article 3 the four *Tadić* conditions are met. The Chamber refers to its findings made elsewhere that the victims detained in the prison camp were not at the relevant time taking an active part in the hostilities,[592] and, therefore, finds that in the present case the jurisdictional prerequisites of Article 3 of the Statute have been established.

B. Jurisdiction under Article 5

1. Law

180. A crime listed in Article 5 of the Statute constitutes a crime against humanity only when "committed in armed conflict".[593] This requirement translates into a need for proof that there *was* an armed conflict at the relevant time and place, and that, objectively, the acts of the accused are linked geographically, as well as temporally, with the armed conflict.[594] Proof of a nexus between the underlying crimes and the armed conflict is not required. Although the acts or omissions must be committed in the course of an armed conflict, the only nexus required is that between the acts of an accused and the attack on the civilian population (a concept discussed in the following paragraphs).[595]

181. To qualify as crimes against humanity the acts of an accused must be part of a widespread or systematic attack "directed against any civilian population". It is established in the jurisprudence of the Tribunal that the general elements required for the applicability of Article 5 of the Statute are that: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic; and (v) the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts

[590] *Aleksovski* Appeals Judgement, para 113.
[591] *Aleksovski* Appeals Judgement, para 107.
[592] *See infra*, paras 279; 331; 340; 348; 359; 367; 376; 384; 398; 410; 415; 419; 423; 427; 430; 433; 436; 440 and 444.
[593] *Kunarac* Appeals Judgement, paras 82 and 86.
[594] *Tadić* Appeals Judgement, para 251; *Kunarac* Appeals Judgement, para 83; *Kordić* Trial Judgement, para 23.
[595] *Kordić* Trial Judgement, para 33.

fit into such a pattern (*i.e.* knowledge of the wider context in which his or her acts occur and knowledge that his or her acts are part of the attack).[596]

182. The concepts of "attack" and "armed conflict" are distinct and separate notions, although, under Article 5 of the Statute, the attack on any civilian population may be part of an armed conflict.[597] An attack has been defined as a course of conduct involving the commission of acts of violence.[598] Perhaps more usefully, in the context of a crime against humanity, the term "attack" is not limited to the use of armed force but also encompasses any mistreatment of the civilian population.[599] It can precede, outlast, or continue during the armed conflict, thus it may be, but need not be, part of the armed conflict as such.[600]

183. The attack must be either widespread *or* systematic, the requirement being disjunctive rather than cumulative.[601] The term "widespread" refers to the large scale nature of the attack and the number of victims, while the phrase "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[602] The Appeals Chamber has stated that patterns of crimes, namely the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.[603] In the Appeals Chamber's view,

> "the assessment of what constitutes a 'widespread' or 'systematic' attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore 'first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic'. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population."[604]

184. The existence of a policy or plan (or that the crimes were supported by a policy or plan to carry them out) may evidentially be relevant, but is not a legal requirement, to establish the widespread or systematic nature of the attack and that it was directed against a civilian population.[605]

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[596] *Kunarac* Appeals Judgement, para 85.
[597] *Vasiljević* Trial Judgement, para 30; *Kunarac* Appeals Judgement, para 86.
[598] *Naletilić* Trial Judgement, para 233.
[599] *Kunarac* Appeals Judgement, para 86; *Vasiljević* Trial Judgement, paras 29-30.
[600] *Kunarac* Appeals Judgement, para 86.
[601] *Kunarac* Appeals Judgement, para 97; *Naletilić* Trial Judgement, para 236; *Kunarac* Trial Judgement, para 431; *Kordić* Appeals Judgement, para 94. The Chamber notes that once it is convinced that either requirement is met, it is not obliged to consider whether the alternative qualifier is also satisfied, *Kunarac* Appeals Judgement, para 93.
[602] *Blaškić* Appeals Judgement, para 101.
[603] *Blaškić* Appeals Judgement, para 101, citing *Kunarac* Appeals Judgement, para 94.
[604] *Kunarac* Appeals Judgement, para 95 (footnotes omitted).
[605] *Kunarac* Appeals Judgement, para 98; 101. The Appeals Chamber considered that "neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan' […] It may be useful in establishing that the

185. The attack must be directed against a civilian population. As the Appeals Chamber has held,

> "[t]he expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.' In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."[606]

186. The Chamber recalls that there is an absolute prohibition against targeting civilians in customary international law.[607] The terms "civilian population" must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as "civilian" even if non-civilians are among it, as long as it is predominantly civilian.[608] The presence within a population of members of resistance armed groups, or former combatants who have laid down their arms, does not as such alter its civilian nature.[609] As a result, the definition of a "civilian" is expansive and includes individuals who at one time performed acts of resistance, as well as persons who were *hors de combat* when the crime was committed.[610] Relevant to the determination whether the presence of soldiers within a civilian population deprives the population

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attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be to prove these things by reference to other matters." The Appeals Chamber therefore tempered the finding of the *Blaškić* Trial Chamber with respect to the requirement of the existence of a plan or policy. Note that the Trial Chamber in *Blaškić* held that "the systematic character refers to four elements which for the purposes of this case may be expressed as follows: 1) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; 2) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; 3) the preparation and use of significant public or private resources, whether military or other; 4) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan (para 203). The Appeals Chamber held that the existence of a plan or policy may be evidentially relevant, but it is not a legal element of the crime, *Blaškić* Appeals Judgement, paras 100 and 120.

606 *Kunarac* Appeals Judgement, para 91 (footnotes omitted); *Naletilić* Trial Judgement, para 235.

607 *Blaškić* Appeals Judgement, para 109.

608 *Jelisić* Trial Judgement, para 54; *Kupreškić* Trial Judgement, paras 547-549; *Naletilić* Trial Judgement, para 235; *Kordić* Trial Judgement, para 180; *Kupreškić* Trial Judgement, para 549; *Blaškić* Trial Judgement, para 214; *Jelisić* Trial Judgement, para 54.

609 *Blaškić* Appeals Judgement, para 113. The Trial Chamber in that case was of the view (para 214) that the term 'civilian' population encompasses members of a resistance movement as well as former combatants (regardless of whether they wore uniform or not) provided they were no longer taking part in hostilities when the alleged crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. *See* also, *Jelisić* Trial Judgement, para 54; *Kordić* Trial Judgement, para 180 and *Naletilić* Trial Judgement, para 235.

610 *Galić* Trial Judgement, para 143.

of its civilian character are the number of soldiers as well as whether they are on leave.[611] There is no requirement that the victims are linked to any particular side of the conflict.[612]

187. It has been emphasised in the jurisprudence of this Tribunal that the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.[613] It is established that the targeting of a select group of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 5. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[614]

188. As the Appeals Chamber held in *Kunarac*, the required nexus between the acts of the accused and the attack, in effect, consists of two elements:

- the commission of an act which, by its nature or consequences, is objectively part of the attack; and

- knowledge on the part of the accused that there is an attack on the civilian population and that his or her act is part thereof.[615]

189. First, it must be proved that the alleged crimes were related to the attack on a civilian population occurring during an armed conflict. In other words, it must be established that the acts of the accused are not isolated,[616] but rather, by their nature and consequence, are objectively part of the attack.[617] The acts need not be committed in the midst of that attack provided that they are

[611] *Blaškić* Appeals Judgement, para 115.
[612] *Vasiljević* Trial Judgement, para 33.
[613] *Blaškić* Appeals Judgement, para 109; *Galić* Trial Judgement, para 143. In determining the scope of the term "civilian population," it is necessary to ascertain the state of customary law in force at the time the crimes were committed, by taking into account in particular Article 50 of Additional Protocol I which provisions may largely be viewed as reflecting customary law and are therefore relevant to the consideration at issue under Article 5 of the Statute. *See Kordić* Appeals Judgement, para 97.
[614] *Kunarac* Appeals Judgement, para 90.
[615] *Tadić* Appeals Judgement, para 271; *Kunarac* Appeals Judgement, para 99. *Blaškić* Appeals Judgement, para 126; *Kordić* Appeals Judgement, paras 99-100; *Kunarac* Appeals Judgement, paras 99-102.
[616] A crime would be regarded as an 'isolated act' when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack, *Kunarac* Appeals Judgement, para 100.
[617] *Kunarac* Appeals Judgement, para 96; *Kordić* Trial Judgement, para 178.

sufficiently connected to that attack.[618] Only the attack, not the individual acts of the accused, must be widespread or systematic.[619]

190. The second requirement to be established as part of the "nexus" requirement is the knowledge of the accused that there is an attack on a civilian population and that his or her acts are part thereof. Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case.[620] It does not suffice that an accused knowingly took the risk of participating in the implementation of a policy.[621] Nevertheless, the accused need not know the details of the attack or approve of the context in which his or her acts occur.[622] The accused merely needs to understand the overall context in which his or her acts took place.[623] The motives for the accused's participation in the attack are irrelevant[624] as well as whether the accused intended his or her acts to be directed against the targeted population or merely against his or her victim, as it is the attack, not the acts of the accused, which must be directed against the targeted population, and the accused need only know that his or her acts are parts thereof.[625]

2. Findings

191. The nature of the "attack" alleged by the Prosecution in this case covers a set of circumstances considerably different from those considered previously by this Tribunal when dealing with the application of Article 5. Due to structural factors and organisational and military capabilities, an "attack directed against a civilian population" will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a "widespread" scale, or upon a "systematic" basis. In contrast, the factual situation before the Chamber involves the allegation of an attack against a civilian population perpetrated by a non-state actor with extremely limited resources, personnel and organisation.

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618 *Tadić* Jurisdiction Decision, para 251; para 271; *Naletilić* Trial Judgement, para 234; *Kunarac* Appeals Judgement, para 100.
619 *Kordić* Appeals Judgement, para 94.
620 *Blaškić* Appeals Judgement, para 126.
621 *Blaškić* Appeals Judgement, paras 125-126.
622 *Kunarac* Appeals Judgement, para 102
623 *Kordić* Trial Judgement, para 185.
624 *Tadić* Appeals Judgement, paras 248-272 quoted in *Kunarac* Appeals Judgement, para 103: the Appeals Chamber considered that "[a]t most, evidence that [acts were committed] for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack."
625 *Kunarac* Appeals Judgement, para 103.

192. The Prosecution alleges the existence of a pattern of KLA attacks against civilians over a wide geographical area of Kosovo sufficient to constitute a widespread or systematic attack.[626] The Defence assert that the Prosecution has failed to prove that any attacks on civilians in Kosovo, other than those committed by Serbian forces against Kosovo Albanians and which are not the subject of this Indictment, demonstrated a widespread or systematic character.[627]

193. Before turning to consider the KLA's conduct, the Chamber would emphasise at the outset that the existence of an attack from one side involved in an armed conflict against the other side's civilian population does not justify an attack by that other side against the civilian population of its opponent.[628] The *tu quoque* principle has no application.[629] Nevertheless, the Chamber is conscious of the operations of the Serbian forces in Kosovo, which deployed tactics that included the razing of villages and the expulsion of civilians from villages, and which caused considerable and widespread civilian suffering.[630]

194. It has been emphasised, repeatedly, that the contextual element required for the application of Article 5 serves to exclude single, random or limited acts from the domain of crimes against humanity.[631] As already noted,[632] to amount to an "attack" the relevant conduct need not amount to a military assault or forceful takeover; the evidence need only demonstrate a "course of conduct" directed against the civilian population that indicates a widespread or systematic reach. Nevertheless, the existence of an attack is most clearly evident when a course of conduct is launched on the basis of massive state action. This can be seen from a number of examples. In *Prosecutor v. Nikolić* the Trial Chamber looked to the existence of discriminatory measures and an "authoritarian take-over" that installed a new "authoritarian power structure" as evidence of an attack in the relevant geographical region.[633] In *Prosecutor v. Mrkšić et al.,* the Trial Chamber looked to, as relevant factors in discerning the existence of an attack, a number of factors that included: the "massive land, naval and air offensive by the forces of the JNA"; intensive shelling of the city of Vukovar for a period of three months; and the deportation of women and children *en masse*.[634]

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[626] Prosecution Final Brief, para 264.
[627] Defence Final Brief, para 369.
[628] *Kunarac* Appeals Judgement, para 87 citing *Kupreškić* Trial Judgement, para 765.
[629] *Kupreškić* Trial Judgement, para 765.
[630] John Crosland, T 1871; 1920; 1926.
[631] International Law Commission, *1996 Draft Code of Crimes Against the Peace and Security of Mankind,* commentary on Article 18; *Tadić* Trial Judgement, paras 646, 648, 653; *Akayesu* Trial Judgement para 579.
[632] *See supra,* para 182.
[633] *Prosecutor v Dragan Nikolić a/k/a "Jenki",* Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No IT-94-2-R61, 20 October 1995, para 27
[634] *Prosecutor v Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin,* Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No IT-95-13-R61, 3 April 1996, para 33.

195. In contrast to these examples, in which the attacking force possessed overwhelming military superiority, the situation before the Chamber is markedly different. The present charges against members of the KLA involve allegations of an attack directed against a civilian population perpetrated by what may be most aptly described, at the time relevant to the Indictment, as a guerrilla force engaged in limited combat with superior, conventional military forces. The Chamber has found that the conditions existing during the timeframe contemplated by the Indictment were sufficient to give rise to a situation of internal armed conflict.[635] That internal armed conflict was fluid in nature. Each opposing force maintained control over different areas in Kosovo for short periods of time.[636] There were frequent transfers of territory, and localised pitched battles between the KLA and the Serbian forces were fought for one, two or three days throughout May, June and July 1998. This was due partly to the greater resources available to the Serbian forces, and partly to the nature of the KLA military structures and objectives. As a small, though rapidly expanding, insurgent force, the KLA put less emphasis on holding territory and concentrated on other forms of engagement.[637]

196. In Peje/Pec in March 1998, KLA elements launched acts described by one witness as putative retribution against businesses and businessmen believed to be collaborating with Serbs.[638] Businesses were bombed and their proprietors murdered.[639] In early April 1998, John Crosland noted Serbian state media reports of large numbers of Serbian families leaving the area of Decane/Decani due to continuous harassment by armed Kosovo Albanians.[640] While John Crosland stated that these reports were exaggerated, he also stated that they also contained some truth.[641] The security situation in Kosovo was deteriorating due to actions by both sides.[642]

197. John Crosland noted that six bodies were found in a forest near Rrahovec/Orahovac on 6 April 1998.[643] In his assessment, these people were probably murdered because of their failure to support the "Albanian cause", but it was impossible to determine this with any certainty because of the "fluid situation" at the time.[644]

198. On April 23 1998, in Decane/Decani and Gjakove/Djakovica, there were reports of civilians, both Serbs and Kosovo Albanians, leaving the area because of the increasing intensity of the

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635 *See supra*, paras 171-174.
636 John Crosland, T 1867; Peter Bouckaert, T 5592; Susanne Ringgaard Pedersen, T 3538.
637 Peter Bouckaert, T 5578-5579.
638 John Crosland, T 1867.
639 John Crosland, T 1867.
640 John Crosland, T 1883.
641 John Crosland, T 1883.
642 John Crosland, T 1885.
643 John Crosland, T 1881.
644 John Crosland, T 1882; 1890.

fighting between the two opposing forces in the armed conflict.[645] Houses in the Ponoshec/Ponosevac area were in a bad state of disrepair as they had been fired at continuously by the Serbian security forces.[646] Civilians fled the area in an attempt to find safety due to the density and scale of the fighting on both sides.[647]

199. Both sides utilised abduction tactics in an attempt to influence the military and strategic contest.[648] There were reports of incidents of Kosovo Albanians abducting Serbs, which were viewed as an "attempt to gain the upper hand" in circumstances of fluid and shifting sites of engagement.[649] The situation began to stabilise slightly in late April 1998.[650] The installation of checkpoints was an indication of the increasing stability of the conflict. The Serbian authorities armed civilians on occasion,[651] and elements of the Serbian forces sometimes dressed in civilian clothing for covert action.[652] Both sides also deployed tactics of questioning, arrest and detention of civilians as a way of asserting influence over areas in Kosovo.[653] The KLA also developed a strategy of attacking the Serbian special police forces operating in Kosovo.[654]

200. On 30 June 1998, a diplomatic telegram noted that forty Serbs had been kidnapped since the beginning of March.[655] John Crosland noted that it was an "ongoing phenomena [sic] that in order to increase the fear in Serbs, they were being kidnapped on a relatively regular basis."[656] Philip Coo agreed that kidnappings were one of the tactics deployed by the KLA, and were particularly frequent during June 1998.[657]

201. On 18 June 1998, a report was issued to the 3rd Army command from Lieutenant Colonel Dragoslav Maksimović detailing KLA operations against Serbian civilians at the Belacevac/ Belacevac mine, near Kopoliq/Obilic.[658] The KLA reportedly captured nine ethnic Serbian civilians on their way to work at the mine.[659] According to John Crosland, the KLA launched attacks from the Drenica valley against Serbian civilians who worked at the Belacevac/Belacevac mine.[660] There were reports that isolated Serbian homesteads in the area of the mine had been

[645] John Crosland, T 1887.
[646] John Crosland, T 1915.
[647] John Crosland, T 1910-1911.
[648] John Crosland, T 1940.
[649] John Crosland, T 1878-1889.
[650] John Crosland, T 1888-1889.
[651] John Crosland, T 2033.
[652] John Crosland, T 2033.
[653] John Crosland, T 1940; T 2042; Philip Coo, T 5725.
[654] Fatmir Limaj, T 5924.
[655] John Crosland, T 1951.
[656] John Crosland, T 1952.
[657] Philip Coo, T 5725.
[658] John Crosland, T 1936-1937; T 1945; T 1949-1950.
[659] Exhibit P212, tab 5.
[660] John Crosland, T 1937.

attacked; however, these reports were not confirmed.[661] On 19 June 1998, there were reports of expulsions of Serbs by Kosovo Albanians in Kline/Klina municipality.[662]

202. According to reports, the KLA captured approximately 85 ethnic Serbs, apparently civilians or those placed *hors de combat*, during fighting at Rahovac/Orahovac on 19 July 1998.[663] In this respect it is noted that the KLA later released a number of civilians who had been captured during battle.[664] There is evidence that on 22 July 1998, the KLA handed 35 Serbian civilians to the International Committee of the Red Cross.[665] The effect of the evidence, however, is that many persons, apparently civilians, were not released.

203. In addition to the abduction of Serbian civilians in areas of pitched battle, a number of civilians were abducted after the introduction of checkpoints in areas of strategic importance to the KLA.[666] By May 1998 both the Serbian forces and the KLA had set up checkpoints on main roads.[667] Kosovo Albanian civilians were apprehended at KLA checkpoints and detained for questioning or abducted from their homes in the night.[668] Individuals abducted and detained were often blindfolded or placed in the boots of cars and driven either to Llapushnik/Lapusnik directly, or to other premises where they were interrogated before being conveyed to Llapushnik/Lapusnik, or to another place of detention.[669] Those detained were subjected to interrogation; at times with physical abuse, many were accused of working as spies for the Serbian regime or accused of having knowledge of perceived collaborators operating in Kosovo.[670] Detentions occurred not only at Llapushnik/Lapusnik. The barracks at Jabllanice/Jablanica also served as a makeshift prison for those accused of collaboration with Serbian forces.[671] The barracks held those perceived to be collaborators and spies.[672] The International Committee of the Red Cross was denied access to a number of KLA detainees, raising questions about detainees' safety.[673]

204. The cumulative effect of this evidence demonstrates the use of insurgent tactics by the KLA in an attempt to gain the upper hand against the Serbian forces in Kosovo, which possessed superior military might and were able to deploy greater resources during the conflict. The evidence

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[661] John Crosland, T 1938.
[662] John Crosland, T 1939-1940.
[663] Exhibit P212, tab 5.
[664] Exhibit P212, tab5.
[665] Peter Bouckaert, T 5503-5504.
[666] Exhibit P212, tab 5.
[667] John Crosland, T 1926.
[668] L96, T 2283; T 2285; L06, T 978-979; L10, T 2909-2910; Ivan Bakrač, T 1397-1398; Oleg Safiulin, T 1723-1726; L07, T 774-776.
[669] L06, T 989-990; L10, T 2913-2917; L96, T 2285-2286; L07, T 779-780; L12, T 1788-1789; *see infra,* paras 243-282.
[670] L07, T 779; L10, 2916-2917; L10, T 2937-2938; Vojko Bakrač, T 1306-1308; L06, T 1007.
[671] L95, T 4255-4260.
[672] L95, T 4255-4260.

demonstrates the existence of a "course of conduct" that indicates that there was a military "attack" in the territory of Kosovo in the period relevant to the Indictment.

205. The Prosecution contends that the evidence of the duration and scope of the KLA attack demonstrates that the attack was "directed against" a civilian population.[674] The Prosecution further contends that the civilian population was the "primary object of attack."[675]

206. There appears to have been a number of abductions of Serbian civilians. As far as the evidence discloses, in most cases these occurred when an individual in a community or village was suspected of specific conduct adverse to KLA or Kosovo Albanian interests, or, in some instances, were undertaken by independent elements of the KLA not acting pursuant to a general KLA policy or direction.

207. Evidence before the Chamber indicates that a number of Serbs were abducted by the KLA who were perceived to have, or were suspected of having, a role in the political or governmental organs of Serbia, especially the military or police with which the KLA was directly engaged in conflict. For example, Stamen Genov, a member of the Serbian forces, was severely mistreated by KLA members after he was abducted and later while he was detained. Ivan Bakrač was told by KLA members inflicting this abuse on Stamen Genov that what was being done to him was similar to the mistreatment administered by the Serbian police to the Kosovo Albanian population.[676] It was Stamen Genov's status as a serving member of the Serbian forces, and his link thereby with the Serbian military apparatus, which led his attackers to inflict upon him extreme levels of violence.[677] Conversely, the Bakračs, and others who were found after enquiry to have no apparent connections with the Serbian regime, were released.[678]

208. The Chamber accepts that particular Kosovo Albanians were abducted and detained because of their perceived associations with Serbian authorities.[679] Kosovo Albanians suspected of collaboration were subjected to discrimination, harassment and abuse.[680] It was those Kosovo Albanians with perceived links with the Serbian military or police regime who were singled out for especially severe treatment in detention. Those accused of collaboration were referred to as "spies"[681] or as "traitors to their people."[682] Both L06 and L10 were asked, when being interrogated

[673] Exhibit P212, tab 5; Peter Bouckaert, T 5503.
[674] Prosecution Final Brief, para 374.
[675] Prosecution Final Brief, para 374-375.
[676] Ivan Bakrač, T 1428.
[677] Vojko Bakrač, T 1301; Ivan Bakrač, T 1407-1408.
[678] Vojko Bakrač, T 1348-1351; Ivan Bakrač, T 1474-1476.
[679] Peter Bouckaert, T 5488-5489; Exhibit P212, tab 5.
[680] John Crosland, T 1867; T 1883; Susanne Ringgaard Pedersen, T 3507.
[681] L10, T 2916-2917; L64, T 4504.

at Llapushnik/Lapusnik, about perceived spies and those alleged to have collaborated with Serbs in their village.[683]

209. In total, the International Committee of the Red Cross documented the abduction of 138 Serbs, apparently civilians or those placed *hors de combat*, whom it was believed were in KLA custody.[684] Human Rights Watch estimated that, from late February 1998 to late September 1998, between 100 and 140 Kosovo Albanians, Serbs and Roma, apparently civilians or those placed *hors de combat*, were abducted by KLA forces.[685] Most of these abductions took place in Drenica, in Malisheve/Malisevo, and in Rrahovec/Orahovac.[686] Aside from Serbian civilians affected by direct combat between the KLA and Serbian forces, there were also instances of Serbian civilians being apprehended at KLA checkpoints and removed from buses.[687] The specific factual circumstances surrounding some such abductions are detailed further in this Judgement and need not be discussed in detail here.[688] As will be apparent from other parts of this Judgement there is no evidence as to the circumstances in which a number of persons of Serbian ethnicity, who were apparently civilians, came to be in KLA custody, except insofar as some of these kidnapped persons, at least, may in fact have been detained in Llapushnik/Lapusnik and are the subject of specific evidence considered in this Judgement.

210. History confirms, regrettably, that wartime conduct will often adversely affect civilians. Nevertheless, the Chamber finds that, even if it be accepted that those civilians of whatever ethnicity believed to have been abducted by the KLA in and around the relevant period were in truth so abducted, then, nevertheless, in the context of the population of Kosovo as a whole the abductions were relatively few in number and could not be said to amount to a "widespread" occurrence for the purposes of Article 5 of the Statute.

211. The evidence discloses that there was at most a "systematic" attempt by the KLA to target Kosovo Albanian individuals believed to be, or suspected of, collaborating with the Serbian authorities, but no attempt to target a civilian population as such.

212. The existence of a plan or policy can be indicative of the systematic character of offences charged as crimes against humanity.[689] The existence of a "policy" to conduct an attack against a civilian population is most easily determined or inferred when a State's conduct is in question; but

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[682] Vojko Bakrač, T 1342.
[683] L10, T 2916-2917; T 2938; L06, T 1007.
[684] Peter Bouckaert, T 5483.
[685] Peter Bouckaert, T 5477; T 5482; T 5483.
[686] Peter Bouckaert, T 5482-5483.
[687] Ljiljana Mitrović, T 1602-1603.
[688] *See infra*, paras 243-282; 290-446.
[689] *Kordić* Trial Judgement, para 182.

absence of a policy does not mean that a widespread or systematic attack against a civilian population has not occurred. Although not a legal element of Article 5,[690] evidence of a policy or plan is an important indication that the acts in question are not merely the workings of individuals acting pursuant to haphazard or individual design, but instead have a level of organisational coherence and support of a magnitude sufficient to elevate them into the realm of crimes against humanity. It stands to reason that an attack against a civilian population will most often evince the presence of policy when the acts in question are performed against the backdrop of significant State action and where formal channels of command can be discerned.

213. Special issues arise, however, in considering whether a sub-state unit or armed opposition group, whether insurrectionist or trans-boundary in nature, evinces a policy to direct an attack. One requirement such an organisational unit must demonstrate in order to have sufficient competence to formulate a policy is a level of *de facto* control over territory.[691] As was said by the Trial Chamber in *Prosecutor v Tadić:*

> "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory."[692]

214. Evidence indicates the fluid nature of the engagements between KLA and Serbian forces and reversals of territorial acquisition. The Chamber notes the KLA's ability to erect checkpoints along main roads,[693] increasing examples of command and control in KLA ranks,[694] and the development of civilian structures, as evidence of its increasing control over, and ability to move within, much of Kosovo. It also notes of reports determining that, from April 1998 until mid July 1998, the KLA held as much as forty per cent of territory in Kosovo.[695] The Chamber is satisfied, on all of the evidence, that at least during the relevant timeframe the KLA had *de facto* control over parts of Kosovo and its forces were able to move within those parts and some other territory in Kosovo.

215. From the evidence before the Chamber, the KLA evinced no policy to target civilians *per se*. Peter Bouckaert stated that he never saw anything issued by the KLA which constituted an order to its members to target innocent civilians or to loot or destroy Serbian property.[696] Susanne Ringgaard Pedersen stated that she could not discern a broad policy to target civilians.[697] The

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[690] *Blaškić* Appeals Judgement, paras 100 and 120. *Kunarac* Appeals Judgement, para 98.
[691] *Kupreškić* Trial Judgement, para 552.
[692] *Tadić* Trial Judgement, para 654.
[693] *See supra,* para 145.
[694] *See supra*, paras 94-134.
[695] Exhibit P212, tab 5; Peter Bouckaert, T 5516.
[696] Peter Bouckaert, T 5564-5565.
[697] Susanne Ringgaard Pedersen, T 3532-3533.

Chamber accepts Jakup Krasniqi's statement that it was not part of KLA political or military policy to kidnap, torture or murder innocent civilians.[698] The evidence does not establish, or even indicate, a general policy of targeting civilians as such, whether Serbian or Kosovo Albanian.

216. The Chamber accepts that there was evidence of a KLA policy to target perceived Kosovo Albanian collaborators who were believed to be or suspected of associating with Serbian authorities and interests. As early as 1997, the KLA warned the "stooges of the Serb regime" not to undermine the "liberation war."[699] KLA communiqué number 43, published on 4 March 1998, contains the phrase "death to enemies and traitors."[700] KLA communiqué number 53 of 19 September 1998 refers to "punitive measures of various kinds" undertaken against "collaborationist elements that continue to serve the occupying power."[701] The Chamber accepts that communiqués were intended partly for propaganda purposes.[702] However, there was a KLA policy, linked to its military objectives, to target those individuals thought to be collaborating with the Serbian forces. Nevertheless, in the guise of giving effect to this policy, a number of Kosovo Albanian civilians may have been abducted for other reasons, such as personal revenge of individual KLA members and other motives. The KLA did not have the resources or the command structure to adequately control the implementation of this policy by its forces at the time relevant to the Indictment, and the Chamber accepts that individual cases of abduction, for reasons not within the collaborator policy, were carried out by rogue elements of the KLA.[703]

217. However, the effect of the evidence is to indicate that the KLA had a policy of targeting only those who were believed to have, or suspected of having, links with the Serbian regime. Evidence before the Chamber indicates there was a limited level of co-ordination and organisation to such targeted attacks. The existence of the Llapushnik/Lapusnik prison camp itself demonstrates the co-ordinated and organised nature of the targeting of suspected collaborators. However, the Chamber concludes that, whether these perceived or suspected collaborators were correctly identified or not, they were targeted as individuals rather than as members of a larger targeted population. The Chamber accepts, however, that there were also instances of abduction undertaken by local elements of the KLA, who were acting independently of any central KLA control because, at the relevant time, the KLA had only limited capacity to exert effective control.

218. The requirement that a "civilian population" be targeted has, as its objective, the exclusion from the realm of crimes against humanity the perpetration of crimes against a limited and

[698] Jakup Krasniqi, T 3439-3441.
[699] Jakup Krasniqi, T 3320.
[700] Jakup Krasniqi, T 3335-3336; Exhibits P48 and P49.
[701] Ole Lehtinen, T 589; Exhibits P48 and P49.
[702] Robert Churcher, T 6377.

randomly selected number of individuals. In this sense, the requirement that a "civilian population" be the target of an attack may be seen as another way of emphasising the requirement that the attack be of large scale or exhibit systematic features.

219. For Article 5 to apply, it must be established that those targeted by the attack were "civilians" in the relevant sense. This involves consideration of the meaning of the term "civilian." In its Joint Final Brief, the Defence assert that any "collaborators" targeted by the KLA referred to those taking active part in hostilities and who were therefore disentitled to civilian status.[704] They therefore contend that a "population" contemplated by Article 5 has not come under attack.

220. In support of their arguments, the Defence produced a number of examples in which KLA members in public statements and interviews distinguished between "civilians" and "collaborators."[705] Rexhep Selimi stated that, by "collaborators", he intended to refer to persons involved in the structures of the Serbian secret services.[706] Jakup Krasniqi defined a collaborator as a person who "was harmful to the KLA, when such a person is giving information on the movements of the KLA to the Belgrade regime."[707] Peter Bouckaert of Human Rights Watch understood "collaborators" to mean people who were working with the Serbian authorities, or people who were suspected of being informants to Serbian officials.[708]

221. In an interview, Jakup Krasniqi stated that the KLA never dealt with civilians, and that the KLA's rules of operation recognised the Geneva Conventions.[709] Yet Jakup Krasniqi, while professing that the KLA followed "all international rules of warfare", stated that "[c]ollaborators are warned that we will kill them if they continue to follow the wrong path."[710] Elsewhere, Jakup Krasniqi noted that "[e]ven if some people have suffered, these have been more Albanian collaborators than Serbian civilians. We do not deal with civilians, and we return those whom we take as prisoners of war…Those we have kidnapped are either announced in a list or reported to be executed, but we do not behave in a base fashion like Serbia."[711]

222. By adducing a number of similar statements, the Defence contend that the KLA drew a fundamental distinction between civilians, which the KLA deemed entitled to protection, and collaborators, who were to be treated as combatants. However, the Chamber does not have

[703] Susanne Ringgaard Pedersen, T 3532.
[704] Defence Final Brief, paras 362-368.
[705] Defence Final Brief, paras 362-368.
[706] Rexhep Selimi, T 6634-6639.
[707] Jakup Krasniqi, T 3324-3325.
[708] Peter Bouckaert, T 5488-5489.
[709] Jakup Krasniqi, T 3384-3385.
[710] Jakup Krasniqi, T 3362-3364.
[711] Ole Lehtinen, T 587-588.

sufficient evidence to conclude that those alleged to be collaborating with the Serbian regime possessed the characteristics that would deny them membership of the civilian population.

223. The Chamber is satisfied that the KLA definition of "collaborators" encompassed civilians as well as perceived combatants. The Chamber recalls that Article 50, paragraph 1 of Additional Protocol I to the Geneva Conventions (which the Defence invite the Chamber to apply in the present situation) states that "[i]n case of doubt whether a person is a civilian, that person shall be considered a civilian." The provisions of Article 50 have been considered by the Appeals Chamber to reflect customary international law.[712] The Chamber acknowledges, however, that the definition of "civilian" employed in the laws of war cannot be imported wholesale into discussion of crimes against humanity. In this regard the Chamber notes that the Trial Chamber in *Prosecutor v Tadić* determined that:

> [The] definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs or war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term 'civilian'.[713]

224. Taking account of these considerations, and in light of the evidence before the Chamber concerning those apprehended and detained because of their alleged or suspected acts of collaboration, the Chamber concludes that, at least as a general rule, perceived collaborators abducted by the KLA were entitled to civilian status.

225. To acknowledge the abduction of specific civilians, whether Serbian or Kosovo Albanian, as discussed and identified above, does not demonstrate, however, at least in the established circumstances of this case, that the KLA had a policy to target a "civilian population." The evidence does indicate that some abducted Serbs suspected of being military or police were subjected to considerable violence and otherwise mistreated as an interrogation technique as the KLA sought to verify suspicions. A number of abducted Serbs, apparently civilian, were later murdered by the KLA. Others have not been heard from since their abduction or since they were seen in KLA custody. However, some were released. The evidence does not allow a determination in most cases as to why some were released, but others not. Clearly, in many cases there was a process of decision by the KLA. On what basis that process of decision turned is not, however, established by the evidence. In many, but not all, cases, connection with the Serbian police or military or involvement in armed civilian or paramilitary forces engaged against the KLA may be a, or the, determinative factor. Whatever was the basis, the existence of a process of decision which

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[712] *Kordić* Appeals Judgement, para 97; *Blaškić* Appeals Judgement, para 110.
[713] *Tadić* Trial Judgement, para 639.

affected the consequences of KLA abduction tells with some force against the existence and perpetration of a general KLA strategy of abduction of the Serbian civilian population of Kosovo. The evidence does not establish that the abduction, detention or mistreatment of Serbian civilians was on a scale or frequency such that the attack could be considered to have been directed against a civilian population.

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

227. The means and methods used by the KLA in the period relevant to the Indictment, in the abduction of Serbian and Kosovo Albanian civilians (whether considered together or separately) do not evince characteristics of an attack directed against a civilian population. At least in most cases of which there is evidence, the individuals who were abducted and then detained were singled out as individuals because of their suspected or known connection with, or acts of collaboration with, Serbian authorities - and not because they were members of a general population against which an attack was directed by the KLA.

228. Upon consideration of the evidence before it, the Chamber finds that at the time relevant to the Indictment there was no attack by the KLA directed against a "civilian population", whether Kosovo Albanian or Serbian in ethnicity, and no attack that could be said to indicate a "widespread" scale; however, as indicated earlier there is evidence of a level of systematic or coordinated organisation to the abduction and detention of certain individuals. While the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, the Chamber finds that there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity. In the required sense discussed earlier in this Judgement, it has not been established by the Prosecution that the acts of the three Accused which are alleged to constitute the crimes against humanity charged in Counts 1, 3, 5, 7 and 9 in the Indictment were part of a widespread or systematic attack directed against a civilian population. It has not been established that Article 5 applies in the present case. Counts 1, 3, 5, 7 and 9 must therefore be dismissed.

V. THE CHARGES

A. Law on the crimes charged

1. Introduction

229. It is alleged in the Indictment that the three Accused Fatmir Limaj, Haradin Bala and Isak Musliu are responsible for the offences charged in Counts 1 to 8. Additionally, the Accused Fatmir Limaj and Haradin Bala are charged with Counts 9 and 10. All the offences charged are alleged to have been committed in a period from May to about 26 July 1998. The Accused are charged in the Indictment with unlawfully seizing at least 35 Serbian and Kosovo Albanian civilians from the municipalities of Shtime/Shtlimje, Glogovce/Gllogoc, and Lipljan/Lipjan in Kosovo, and forcibly taking them to the Llapushnik/Lapusnik prison camp.[714] The Indictment alleges that, at the Llapushnik/Lapusnik prison camp, the three Accused unlawfully detained these civilians for prolonged periods and interrogated the Kosovo Albanian civilians perceived as collaborators with the Serbian forces located in the area.[715] These allegations support one count of crimes against humanity under Article 5 of the Statute, namely imprisonment (Count 1), and one count of violation of the laws or customs of war under Article 3 of the Statute, namely cruel treatment (Count 2). The three Accused are further charged in the Indictment with holding these civilians in inhumane conditions at the prison camp and for routinely subjecting them to assault, beatings and torture.[716] In respect of these allegations, the three Accused are charged with criminal liability for torture as a crime against humanity under Article 5 of the Statute (Count 3), and as a violation of the laws and customs of war under Article 3 of the Statute (Count 4), inhumane acts as a crime against humanity under Article 5 of the Statute (Count 5), and cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute (Count 6). The three Accused are also charged with the murder of 14 civilians at or around the prison camp in the course of their detention.[717] These allegations support one count of violation of the laws or customs of war and one count of crime against humanity, namely murder under Articles 3 and 5 of the Statute (Counts 7 and 8). Finally, the Accused Fatmir Limaj and Haradin Bala are charged with the murder of 10 detainees in the Berishe/Berisa Mountains on or about 26 July 1998, as a violation of the laws or customs of war and a crime against humanity under Articles 3 and 5 of the Statute respectively (Counts 9 and 10).

[714] Indictment, paras 21-22.
[715] Indictment, paras 21-23.
[716] Indictment, paras 25-26.
[717] Indictment, paras 28-32.

2. Crimes against humanity (Counts 1, 3, 5, 7 and 9)

230. The offences in Counts 1, 3, 5, 7 and 9 are charged under Article 5 of the Statute of this Tribunal. As found earlier in this decision, the preliminary requirements for the applicability of Article 5 of the Statute have not been established.[718] It follows that that Counts 1, 3, 5, 7 and 9 must be dismissed.

3. Cruel treatment (Counts 2 and 6)

231. Cruel treatment under Article 3 of the Statute is defined as an intentional act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on human dignity, to a person taking no active part in the hostilities. As regards *mens rea*, the perpetrator must have acted with direct intent to commit cruel treatment or with indirect intent, *i.e.* in the knowledge that cruel treatment was a probable consequence of his act or omission.[719]

232. The Accused have been charged with cruel treatment under Article 3 of the Statute in both Counts 2 and 6. Leaving aside cruel treatment under Count 6 (which relates specifically to the alleged inhumane conditions of detention at the prison camp),[720] cruel treatment under Count 2 has been charged in relation to the "unlawful seizure", "unlawful detention for prolonged periods" and "interrogation" of Serbian and/or Kosovo Albanian civilians at the Llapushnik/Lapusnik prison camp.[721] These acts are charged *per se* as constituting a serious attack on human dignity, and therefore constituting cruel treatment under Article 3 of the Statute. The Chamber is of the view that whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis. The Chamber notes that the offence of cruel treatment has never been established before this Tribunal in relation to these specific acts.[722] In determining whether the "unlawful seizure", "unlawful detention for prolonged periods" and "interrogation" alleged in the instant case amount to cruel treatment, the Chamber has, therefore, taken into account all the circumstances of the instant case. The Chamber has come to the conclusion that, at least in the circumstances of this case, these acts in and of themselves do not amount to a serious attack on human dignity within the meaning of cruel treatment under Article 3 of this Statute. Count 2 must therefore also be dismissed.

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718 *See supra,* para 228.
719 *Strugar* Trial Judgement, para 261.
720 Indictment, para 26.
721 Indictment, paras 22-33.
722 In its Final Brief, the Prosecution refers to the "arbitrary deprivation of liberty without due process in law" as constituting a cruel treatment under Article 3. The "unlawful seizure" and "interrogation" of Sebian and/or Kosovo Albanian civilians are not mentioned. Nevertheless because these acts are charged in the Indictment, the Chamber has considered them, paras 390-932.

233. Because Counts 1, 2, 3, 5, 7 and 9 have been dismissed, the Chamber will proceed in evaluating the evidence relating to the offences of torture under Article 3 of the Statute when dealing with Count 4, cruel treatment under Article 3 of the Statute when dealing with Count 6, and murder under Article 3 of the Statute when dealing with Counts 8 and 10.

4. Torture (Count 4)

234. The Indictment charges the three Accused, *inter alia,* with torture as a violation of the laws or customs of war pursuant to Article 3, and as a crime against humanity pursuant to Article 5, of the Statute.

235. The law on torture is well settled by the jurisprudence of the Tribunal. For the crime of torture to be established, whether as a war crime or as a crime against humanity,[723] the following three elements must be met:

> (1) There must be an act or omission inflicting severe pain or suffering, whether physical or mental;
>
> (2) The act or omission must be intentional; and
>
> (3) The act or omission must have been carried out with a specific purpose such as to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[724]

236. An act or omission may constitute the *actus reus* of torture if it has caused severe pain or suffering. Mistreatment which does not rise to this level of severity may nevertheless constitute another offence under the jurisdiction of the Tribunal.[725] Further, it is not required that the act or omission has caused a permanent injury,[726] nor is there a requirement that the act or omission has caused a physical injury, as mental harm is a prevalent form of inflicting torture.[727]

237. With respect to the assessment of the seriousness of the acts charged as torture, previous jurisprudence of the Tribunal has held that this should take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and the

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[723] The definition of the offence is the same regardless of the Article of the Statute under which the accused ahs been charged. *See Brdanin* Trial Judgement, para 482; *Krnojelac* Trial Judgement, para 178; *Furundžija* Trial Judgement, para 139.

[724] *Kunarac* Appeals Judgement paras 142, 144 confirming *Kunarac* Trial Judgement, para 497. *See* also *Brdanin* Trial Judgement, para 481, *Krnojelac* Trial Judgement, para 179.

[725] *Čelebići* Trial Judgement, para 468; *Krnojelac* Trial Judgement, para 181.

[726] *Kvočka* Trial Judgement, paras 148.

method used and the position of inferiority of the victim.[728] Also relevant to the Chamber's assessment is the physical or mental effect of the treatment on the victim, the victim's age, sex, or state of health.[729] Further, if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole.[730] Finally, this Chamber concurs with the finding of the *Čelebići* Trial Chamber, made specifically in the context of rape, that in certain circumstances the suffering can be exacerbated by social and cultural conditions[731] and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.

238. As for the *mens rea* required for the crime of torture, the previous jurisprudence of the Tribunal establishes that direct intent is required: the perpetrator must have intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.[732] It is irrelevant that the perpetrator may have had a different motivation, if he acted with the requisite intent.[733]

239. For the crime of torture to be established, the alleged act or omission must have been carried out with a specific purpose: to obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person. The prohibited purpose needs not be the sole or the main purpose of the act or omission in question.[734]

240. And finally, the Chamber notes that while the earlier jurisprudence of the Tribunal has reached different conclusions as to whether, for the crime of torture to be established, the alleged act or omission must be committed by, or at the instigation of or with the consent or acquiescence of an official or person acting in an official capacity,[735] this issue is now settled by the Appeals Chamber. Under customary international law and the jurisprudence of the Tribunal it is not necessary that the perpetrator has acted in an official capacity.[736]

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[727] *Kvočka* Trial Judgement, paras 149.
[728] *Krnojelac* Trial Judgement, para 182.
[729] *Kvočka* Trial Judgement, para 143.
[730] *Krnojelac* Trial Judgement, para 182.
[731] *Čelebići* Trial Judgement, para 495.
[732] *Kunarac* Appeals Judgement, para 153.
[733] *Kunarac* Appeals Judgement, para 153.
[734] *Kunarac* Appeals Judgement, para 155, *Kvočka* Trial Judgement, para 153; *Krnojelac* Trial Judgement, para 184.
[735] *See* for example *Čelebići* Trial Judgement, para 494 and *Kvočka* Trial Judgement, paras 137-141.
[736] *Kunarac* Appeals Judgement, para 148; *Kvočka* Appeals Judgement, para 284.

5. Murder (Counts 8 and 10)

241. The three accused are charged with murder under Article 3 of the Statute.[737] Three elements are required to establish the offence of murder:[738] (a) the death of a victim, although it is not necessary to establish that the body of the deceased person has been recovered;[739] (b) that the death was the result of an act or an omission of the perpetrator; and (c) the intent of the perpetrator at the time of the act or omission to kill the victim or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission.[740]

B. Findings

242. The Chambers observes that the Prosecution alleged in the Indictment, in support of the charges of imprisonment and cruel treatment (Counts 1 and 2), that at least 35 individuals had been arrested and detained at the Llapushnik/Lapusnik prison camp.[741] However, only 24 individuals, alleged to be victims of murder, are expressly listed in the Indictment.[742] At the start of the trial, the Prosecution adduced a document containing the names and photographs of persons it submitted were victims detained at the Llapushnik/Lapusnik prison camp, among whom 28 had been killed, and 22 had survived.[743] The Chamber notes that this has created some confusion. In particular, with this document, the Prosecution appeared to be alleging the murder of a further four individuals, who were not mentioned in the Indictment. Given that these additional allegations of murder have not been adequately pleaded in the Indictment, the Chamber has not examined them in this decision.

1. Existence of a prison camp in Llapushnik/Lapusnik

243. The acts charged in the present Indictment are alleged to have occurred at or in relation to a prison camp established in the village of Llapushnik/Lapusnik shortly after KLA troops were located in the village in May 1998. The three Accused do not admit that a KLA prison camp existed in Llapushnik/Lapusnik at any time between early May and late July 1998. A number of Prosecution and Defence witnesses, including former KLA members, testified that they were not

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737 Indictment, paras 28-33; 34-37.
738 *See Kvočka* Appeals Judgement, paras 257 and 261.
739 *See Krnojelac* Trial Judgement, para 326, enhanced by the Appeals Chamber, in *Kvočka* Appeals Judgement, para 260, "The fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible." *See* also *Tadić* Trial Judgement, para 240.
740 *See Strugar*, Trial Chamber, para 236.
741 Indictment, para 22.
742 Indictment, paras 29-32 and Annexes I, II and III.
743 Exhibit P54.

aware of the existence of such a camp.[744] Fatmir Limaj testified that he never saw or heard of a prison camp in Llapushnik/Lapusnik. It was his evidence that he did not believe that there was one.[745] A former KLA member called as a Defence witness, Elmi Sopi, asserted that the whole village of Llapushnik/Lapusnik was taken by surprise at the allegation that a prison camp had existed there when this became known to them only after the arrest of the three Accused on the present Indictment.[746] It is necessary, therefore, for the Chamber to determine whether it has been established that a KLA prison camp existed in Llapushnik/Lapusnik and whether individuals were detained there at the time material to this Indictment.

244. A number of Prosecution witnesses testified about the circumstances of their abduction from various places in the municipalities of Gllogovc/Glogovac, Lipljan/Lipljan and Shtime/Stimlje and their subsequent detention in a farm compound in the period of June to July 1998. The Chamber will review below their evidence. Llapushnik/Lapusnik is in the municipality of Gllogovc/Glogovac. Lipljan/Lipljan and Shtime/Stimlje are municipalities immediately to the south-east of Gllogovc/Glogovac.

245. Witness L06 testified that on 13 June 1998, together with Witness L10 and two other individuals, he was stopped by two KLA soldiers wearing masks and carrying automatic weapons.[747] About an hour later four KLA soldiers wearing camouflage uniforms came and took L06, L10 and one of the two individuals to the house of Idriz Muharremi.[748] There were many soldiers there, including Ali Gashi and Ramadan Behluli.[749] L06 and L10 were put in the trunk of a car and the third individual was taken in another car.[750] L06 and L10 were driven to a place which L06 recognised was Llapshnik/Lapusnik. L06 recognised Llapushnik/Lapusnik because he knew the area, as he used to have relatives living there.[751] The trip took approximately three hours on a bumpy road.[752] Once there, L06 was taken into a room in which there was already a man from Carraleve/Crnoljevo, later identified as Emin Emini.[753] On the following day a man L06 referred to as Shala came into the room and tied L06 with a heavy chain.[754] It was established later that this room was the storage room of the farm compound where L06 was taken.[755] The room was about

[744] Fadil Kastrati, T 2620; Jakup Krasniqi, T 3475; Jan Kickert, T 696, 737-739; Peter Bouckaert, T 5586; Ramadan Behluli, T 2832-2835; Dr Zeqir Gashi, T 5631-5632; Elmi Sopi, T 6739; Rexhep Selimi, T 6606.
[745] Fatmir Limaj, T 6336.
[746] Elmi Sopi, T 6739.
[747] L06, T 974; 977-979.
[748] L06, T 983; 985.
[749] L06, T 983-984.
[750] L06, T 989-990.
[751] L06, T 994; 1068.
[752] L06, T 990.
[753] L06, T 990-992; Exhibit P54.
[754] L06, T 993-994.
[755] L06, T 1038-1039; Exhibit P6.

2 x 3 metres and had a concrete floor. There was manure on the floor and a hose. The ceiling was leaking. The room had only one very small window. There was a bucket which was used as a toilet.[756] The number of prisoners in the room grew towards the end of L06's detention, reaching a total of up to 12 or 13 people.[757] L06 remembered the names of two of them, Adem and Shevket,[758] and was able to recognize L96 as one of the prisoners held in the storage room.[759] Lutfi was also a prisoner in the same room, as was L07 for a few days.[760] Two guards, who L06 said were Shala and Murrizi, brought food and water to the prisoners.[761] Every three or four days Shala opened the door and let the prisoners walk for a little while.[762]

246. It was L06's evidence that he was kept in the storage room for approximately two months.[763] On his last day in detention, the camp was shelled by Serbian forces. L06 and other prisoners were told to come out of the storage room and made to walk to the mountains escorted by the prison guards Shala and Murrizi.[764] Outside the storage room were other prisoners, including Milajim from Recak/Racak, Witness L96, Hid, Witness L04, Witness L12, a man with a wounded leg, and Lumaj.[765] All were marched to the mountains. They arrived at a meadow surrounded by the Berishe/Berisa Mountains where they stayed for about two hours. The names of ten prisoners, including L06's, were called by the KLA guard. L06 said they were given papers with their names on it and told to go towards Kizhareke/Kisna Reka.[766]

247. Witness L10 testified that on 14 June 1998 he, together with Witness L06 and another individual, was stopped by two armed men wearing masks and KLA insignias in the vicinity of the village of Zborc/Zborce.[767] Three or four masked, armed men came an hour later and took the three men to the house of Idriz Muharremi, located nearby. There, L10 was made to get into the trunk of a car, which drove for about one hour and 30 minutes. The car stopped and L10 was taken to a "dark cellar." A little later the third individual taken together with L10 was brought in. He told L10 that they were in Klecke/Klecka.[768] After about an hour, L10 was blindfolded and again placed in the trunk of a car.[769] The car drove for about an hour before arriving in another place.[770] Once

[756] L06, T 990-993; 995-997.
[757] L06, T 999.
[758] L06, 999-1001; 1039-1045; Exhibit P54.
[759] L06, T 1039-1045; Exhibit P54.
[760] L06, T 1039-1045.
[761] L06, T 997-998; 1001, 1101-1102.
[762] L06, T 997-998.
[763] L06, T 990-993.
[764] L06, T 1025, 1028.
[765] L06, T 1033-1034; 1039-1045.
[766] L06, T 1028-1030.
[767] L10, T 2907-2909.
[768] L10, T 2913-2915.
[769] L10, T 2915-2916.
[770] L10, T 2916.

inside, the blindfolding was removed and L10 saw masked soldiers who asked him who was a spy in his village.[771] L10 was then placed into what he described as a cellar.[772] It was later clarified that this was the storage room of the farm compound where he was taken.[773] The room was 4 x 3 metres, had one window, an iron door and a concrete floor.[774] The door was always closed. There was a bucket that functioned as a toilet.[775] Two guards, whom L10 said were Shala and Murrizi, brought food and water.[776] At the beginning there were four people detained in the storage room, but later up to 15 people were held there.[777] L10 said that among them were Shefqet and Adem from Godanc/Godance, Lutfi from Breg-i-Zi/Crni Breg, Hyzri from the village of Belince/Belince, Witness L96, and two Serbs.[778] L10 was able to recognize the photographs of Bashkim from Godanc/Godance, Fehmi Xhema, Adem from Godanc/Godance and L96 as being among the prisoners held in the storage room.[779]

248. L10 testified that he spent approximately two months in the prison camp.[780] On his last day in the camp, shelling and fighting started. At 1000 or 1100 hours Shala and Murrizi came to the room where L10 was held, told the prisoners that a "bombardment" was going on, and took them outside to a courtyard.[781] There the prisoners were put into single file and told to walk uphill.[782] After about 40 minutes they stopped near a cherry tree. Based on the account of a relative of his, L10 deduced that this place was located in the Berishe/Berisa Mountains.[783] Shala, Murrizi and a third soldier were there with their automatic guns.[784] After about two hours, Shala split the prisoners into two groups, one was released there and the other group was to be released later.[785] L10 was in the group that was released. He remembered that the following persons were also in that group: Shefqet and Adem from Godanc/Godance, a man from Recak/Racak, Muje from Belince/Belince, Witness L04, Witness L06, and Witness L12.[786] They were given pieces of paper permitting their release, which were written by Shala before he told them that they were free to go.[787] They were told to go downhill, but instead they went to the village of Kizhareke/Kisna

[771] L10, T 2916-2917.
[772] L10, T 2916.
[773] L10, T 2927-2928.
[774] L10, T 2918-2920.
[775] L10, T 2918-2921.
[776] L10, T 2918-2922.
[777] L10, T 2922-2923.
[778] L10, T 2923-2925.
[779] L10, 2969-2973; Exhibit P54.
[780] L10, T 2921.
[781] L10, T 2960.
[782] L10, T 2960-2961.
[783] L10, T 2960-2966.
[784] L10, T 2962-2963.
[785] L10, T 2963.
[786] L10, T 2964.
[787] L10, T 2967.

Reka.[788] After his release L10 found out from a personal relation of his that he had been detained in Llapushnik/Lapusnik.[789]

249. The written statement of Witness L84, admitted as evidence pursuant to Rule 92*bis,* provides further evidence relevant to the existence of a prison camp in Llapushnik/Lapusnik. L84, a civilian, declared that sometime in June 1998 he was taken by KLA soldiers by car from Kizhareke/Kisna Reka to Llapushnik/Lapusnik.[790] A KLA soldier known as "Voglushi" drove the car.[791] When they arrived in Llapushnik/Lapusnik the car drove up from the Prishtina/Pristina-Peje/Pec road into the forest and arrived at a place where two compounds were divided by a narrow road.[792] "Voglushi" told L84 that the compound on the left side was the headquarters of the KLA in Llapushnik/Lapusnik. He was taken to that headquarters compound and stayed in the room located immediately on the right side of the gate. There was also a big main building and another smaller building in the yard. L84 was told there that this compound belonged to the family of "Vojvod."[793] At the compound L84 was questioned about people from his village and on the following day was taken to the compound located on the right side of the road, opposite to the headquarters compound.[794] This compound had a reddish colour double gate made of metal or wood. Besides the big gate there was a smaller gate and inside there were stairs leading to the room upstairs immediately on the right inside the gate.[795] Entering the upstairs room from the stairs there were two separate rooms.[796] The description of this second compound, and of the headquarters compound, and the physical juxtaposition of the two, is consistent with the description of the prison camp alleged by the Prosecution. L84 stayed in one of these rooms together with an old man.[797] In the other room there was a young boy from Carraleve/Crnoljevo. There was always a guard at the gate and at the stairs outside the room where L84 was kept.[798] One day L84 was asked by a guard to come out and he spoke with L64 who was wearing a KLA uniform.[799] L84 stayed in Llapushnik/Lapusnik for three nights, the last two in the second, guarded compound opposite the compound that served as KLA headquarters where he was first taken.[800] He was asked questions

[788] L10, T 2964.
[789] L10, T 2934-2935.
[790] Exhibit P197, paras 14, 17-22.
[791] Exhibit P197, para 22.
[792] Exhibit P197, para 23.
[793] Exhibit P197, paras 23-24.
[794] Exhibit P197, paras 25-28, 30.
[795] Exhibit P197, para 30.
[796] Exhibit P197, para 32.
[797] Exhibit P197, para 32.
[798] Exhibit P197, paras 30, 32.
[799] Exhibit P197, para 35.
[800] Exhibit P197, para 31.

about several persons.[801] L84 stated that before he was released he was threatened and asked not to tell anyone what he had seen.[802]

250. Witness L04 testified that on or about 28 June 1998, he was taken from his house by a group of soldiers dressed in black uniforms and wearing KLA insignias, among them Alush Gashi and Rrahman Tafa.[803] The soldiers and L04 first went to L12's house. From there the soldiers took L12 and together all then went to another man's house to look for a weapon.[804] After they found a gun in this house, two soldiers, Alush Gashi and Shukri Buja, who was also there, tied L04's and L12's hands behind their backs with a rope, put sacks on their heads, and made them get into a car.[805] They were first taken to a house in the village that served as a KLA headquarters and after that, to another KLA headquarters in the village of Pjetershtice/Petrastica.[806] There L04 and L12 were insulted and beaten with thin sticks, while still wearing the sacks on their heads.[807] L04 lost a tooth and was in pain.[808] After the beatings L04 and L12 were made to lie in the back of a van, still with sacks on their heads.[809] The van drove to the left for approximately one hour, after which it turned left again. L04 and L12 were taken out of the car. An individual, addressed by a soldier as "Shala," took the sacks off their heads.[810] L04 knew that they were in Llapushnik/Lapusnik.[811] He knew the village of Llapushnik/Lapusnik very well as he used to pass through it once a week.[812]

251. L04 was detained at the cowshed of a farm compound.[813] Other people were also detained in the cowshed, among them he said were Veseli and Shyqja from Godanc/Godance, Elmi Qerqini from Carraleve/Crnoljevo, Agim, Witness L12, two Serbs from the municipality of Suhareka/Suva Reka, a man from Kroimire/Krajmirovce and a person referred to as the Bosniak.[814] Shyqja from Godanc/Godance had a broken leg.[815] Milaim Kamberi from Recak/Racak, Hete from Petrove/Petrovo, and Xhela Halimi from Petrove/Petrovo were brought into the cowshed a few days later.[816] All prisoners were chained to the wall.[817] Shala was the guard of the cowshed, he brought

[801] Exhibit P197, paras 25-28.
[802] Exhibit P197, para 36.
[803] L04, T 1110-1113.
[804] L04, T 1113-1118.
[805] L04, T 1118-1119.
[806] L04, T 1119-1121.
[807] L04, T 1121-1122.
[808] L04, T 1122.
[809] L04, T 1123.
[810] L04, T 1124-1125.
[811] L04, T 1123-1124.
[812] L04, T 1272-1273.
[813] L04, T 1127-1130.
[814] L04, T 1131-1136, 1139.
[815] L04, T 1139.
[816] L04, T 1136-1138.
[817] L04, T 1140-1141.

food to the prisoners and he was always there.[818] L04 saw also other KLA soldiers in the prison camp, namely individuals referred to as Qeqizi, Tamuli, and Murrizi.[819] On one occasion L04 was taken out of the cowshed. He then saw the Berishe/Berisa Mountains and a small house within the compound.[820] This description is consistent with the prison camp alleged by the Prosecution.

252. Witness L04 said he spent 28 days in the prison compound.[821] On his last day in detention Murrizi came to the cowshed and unchained the prisoners. They were told to go to the courtyard and, together with other detainees, made to walk up into the Berishe/Berisa Mountains.[822] L04 saw other people in the yard, who apparently had also been detained in the prison camp, including Emin Emini, Hyzri, Safet, Luta, a female prisoner, Witness L06, and Witness L96.[823] The prisoners went up to the Berishe/Berisa Mountains and rested there for about one hour. Then Murrizi called the names of 11 prisoners, including L04's, and told them that they were free to go. The others were to be released later.[824] The names of the prisoners in the first group were Shefqhet, Milaim, Muje, Luma, a man from Kraishte/Krajiste, Afrim Queriqi from Kroimire/Krajmirovce, Witness L12, Witness L10, and Witness L04. Shala gave each of them a piece of paper which, L04 said, stated that Commander Çeliku had ordered their release. He told them to go Kizhareke/Kisna Reka.[825] The prisoners who were left behind in the Berishe/Berisa Mountains after this were Hete, Safet, Hyzria, Luta, Xhela, Hasan, Ibush, Shyqja, Witness L96 and a woman.[826]

253. Witness L12 also testified that one night in the summer of 1998 he was taken from his house by KLA soldiers. A group of KLA soldiers in military uniforms, all but three of whom were wearing masks, and Witness L04 came to his house at about 0130 or 0200 hours and took him to another house from where the KLA soldiers took a rifle, a generator, and a telephone.[827] L12 said that among the KLA soldiers were Shukri Buja, Ramadan Behluli, Sule Qeriqi, and Ali Ramadani.[828] There L12 and L04 were made to get into a car and were tied up together. A sack was put on L12's head and they were driven to the village of Pjetershtice/Petrastica by Ali Ramadani and Shukri Buja.[829] In the village L12 and L04 were taken to a house where they were beaten by KLA soldiers Rrahman and Alush Gashi. L12 was beaten on his back and his legs with

[818] L04, T 1175, 1177-1179.
[819] L04, T 1136, 1172-1173, 1175-1176, 1192-1194.
[820] L04, T 1183.
[821] L04, T 1173.
[822] L04, T 1192-1194.
[823] L04, T 1192-1194. The Chamber notes that the presence of a woman among the detainee has not been confirmed by the evidence.
[824] L04, T 1194-1195.
[825] L04, T 1197-1198; Exhibit P76.
[826] L04, T 1197-1198; Exhibit P76. The Chamber notes that the presence of a woman among the prisoners in the Berishe/Berisa Mountains has not been confirmed by the evidence.
[827] L12, T 1788-1792.
[828] L12, T 1788-1791.

heavy sticks. The soldiers swore at L12 and L04 while beating them.[830] After about 15 minutes L12 and L04 were placed in a car and driven to what L12 believed was Llapushnik/Lapusnik.[831] There, a person who L12 described as Shala, removed the sack from L12's head.[832]

254. Witness L12 was then detained in a cowshed.[833] It had one window on the left wall and a concrete floor with manure and blood on it.[834] There were other people in the cowshed, who were all chained.[835] When prompted, L12 remembered that the following persons were held with him: Elmi Qerqini, Xheladin, Hete from Petrove/Petrovo, Afrim Qirqiri from Krajmirovce, Muj from Belinze, Milaim from Recak/Racak, and Shefqhet Ramadani from Godanc/Godance.[836] The guard in the cowshed was a man referred to as Shala. He had the keys to the cowshed, he came every day and brought food. L12 saw also another guard in the prison camp, whose name L12 said was Murrizi.[837]

255. L12 testified that on his last day in detention, a shell exploded in the camp. Shala took all the prisoners out of the cowshed and took them to the Berishe/Berisa Mountains. The prisoners marched one by one through the mountains. Murrizi was leading the column and Shala came behind.[838] One of the prisoners had a foot injury and was unable to walk alone. The group arrived in a valley. There half of the prisoners including L12 were released but the other half remained there.[839] Those released were given a piece of paper.[840] After his release, as he was walking towards the hills, L12 recognised that he had been detained at Llapushnik/Lapusnik. He had visited the village many times and was very familiar with it.[841]

256. Vojko Bakrač testified that on 29 June 1998, one or two km after passing through Suhareke/Suva Reka, he and his then 18 year old son Ivan, were abducted by KLA soldiers from a bus travelling from Gjakove/Djakovica to Prishtina/Pristina.[842] They had lived in Croatia but they were of Serbian ethnicity. Vojko Bakrač, his son and two other Serbs, Zeljko Čuk, later identified as Đorđe Čuk,[843] and Stamen Genov, were taken from the bus and blindfolded. First Stamen Genov

[829] L12, T 1794-1795.
[830] L12, T 1797-1798.
[831] L12, T 1788-1791; 1797-1798.
[832] L12, T 1799.
[833] L12, T 1799.
[834] L12, T 1802-1803.
[835] L12, T 1799; 1803.
[836] L12, T 1820 -1823.
[837] L12, T 1800-1802.
[838] L12, T 1813-1815.
[839] L12, T 1815-1818.
[840] L12, T 1818.
[841] L12, T 1815-1816.
[842] Vojko Bakrač, T 1286-1297.
[843] Vojko Bakrač, T 1291-1294; Exhibit P54.

and Đorđe Čuk and later the two Bakračs, were driven to a village school.[844] Some time later Vojko Bakrač and his son were put in a van, blindfolded, and taken to a farm.[845] Stamen Genov and Đorđe Čuk were also put in the van and they were tied.[846] At the farm, Vojko Bakrač and his son entered the yard through a gate, the blindfolds were removed and they were taken to a small house, first through a kitchen and then to a dining room where there was some sponge bedding.[847] There were several soldiers in this room.[848]

257. Soon thereafter Vojko Bakrač and his son were placed in what he thought looked like a basement, located in the middle of the yard.[849] It was established later that this was the storage room of the farm compound.[850] The room was about 3 x 5 or 6 metres and had a small window and a door.[851] The floor, possibly made of concrete, was covered with straw and hay. There was a bucket by the door that served as a toilet facility. The door was guarded, although not all the time.[852] Together with the Bakračs, 13 people were detained there: three Kosovo Albanians, a Serb called Zeljko, an elderly, sick Serbian gentleman, two Serbian brothers called Krstić from Suhareke/Suva Reka, who were later identified by him as Milovan Krstić and Miodrag Krstić,[853] another Serbian man abducted from a bus, Vojko Bakrač and his son Ivan, Stamen Genov and Đorđe Čuk.[854] A man referred to as Shala was a guard in the prison camp, he communicated with the detainees, and brought them food and cigarettes.[855]

258. Vojko Bakrač and his son were held two or three days and nights in the storage room.[856] On the third or fourth day of Vojko Bakrač's stay in the prison camp, a man came to the storage room and told Ivan Bakrač to leave the storage room.[857] Later, a soldier took Vojko Bakrač to the main building where he saw his son drinking tea with the man who had told him to leave the storage room. Vojko Bakrač was returned to the storage room, but half an hour later he was taken again to an area of grass where he saw his son, and then to a room on the first floor of the main building where he and his son remained for five days until their release.[858] There were two or three Kosovo

[844] Vojko Bakrač, T 1291-1299.
[845] Vojko Bakrač, T 1304-1306.
[846] Vojko Bakrač, T 1304.
[847] Vojko Bakrač, T 1304-1306.
[848] Vojko Bakrač, T 1306-1307.
[849] Vojko Bakrač, T 1311-1314.
[850] Vojko Bakrač, T 1326-1329.
[851] Vojko Bakrač, T 1311-1314.
[852] Vojko Bakrač, T 1329.
[853] Vojko Barkarč, T 1314-1317; Exhibit P54.
[854] Vojko Bakrač, T 1311-1314.
[855] Vojko Bakrač, T 1330-1332.
[856] Vojko Bakrač, T 1329.
[857] Vojko Bakrač, T 1334-1336.
[858] Vojko Bakrač, T 1338.

Albanian men there, one of whom was called Gzim.[859] Vojko Bakrač and his son were asked to make written and video statements about the conditions in the prison camp.[860] They were told that they would be released as soon as the ICRC or UNHCR were able to accommodate them. On their last day at the farm compound they were asked to get into a jeep and were blindfolded. After 15 or 20 minutes their blindfolds were removed, the car continued driving and they were brought to Malisheve/Malisevo.[861]

259. Ivan Bakrač also testified about his abduction with his father, from a bus travelling from Gjakove/Djakovica to Prishtina/Pristina at the end of June 1998. Somewhere after Prizren/Prizren the bus was stopped by six soldiers armed with automatic rifles or bazookas. Three of the soldiers were in camouflage uniforms.[862] The soldiers boarded the bus, and checked the passengers' identification documents. Ivan Bakrač was asked to get off the bus and his father followed him. Two Serbian men, Stamen Genov and individual called Čuk, later identified as Đorđe Čuk,[863] were also told to get off the bus. The bus driver was told to continue his journey.[864] A car took Stamen Genov and Đorđe Čuk away. It returned after about 30 minutes or one hour. Ivan Bakrač and his father were then blindfolded by KLA soldiers, put in the car and driven through a forest. After approximately one hour they arrived in a village and stopped in front of what appeared to be a school building.[865] Stamen Genov and Đorđe Čuk were already there. They spent about five hours in the school. During this time the soldiers, about 10 of them, asked them questions.[866]

260. That night Ivan Bakrač, his father and the two Serbian men taken from the bus, were blindfolded again and placed in a van.[867] The journey lasted for approximately 45 minutes or an hour. The road was bumpy. The van stopped every few minutes, apparently to pass through checkpoints.[868] When they arrived at their destination the sack was removed from Ivan Bakrač's head and he saw a big brown fence and a gate. Ivan and the others were taken into a house and kept in a room on the ground floor for about one hour and 30 minutes.[869] Before the main room, there was a small corridor with a toilet to the left.[870] Inside the main room there were mattresses on the floor and some kind of stove next to the door. There were several soldiers in the room when Ivan

[859] Vojko Bakrač, T 1339-1342.
[860] Vojko Bakrač, T 1343-1345.
[861] Vojko Bakrač, T 1345-1351.
[862] Ivan Bakrač, T 1395-1397.
[863] Ivan Bakrač, T 1405, Exhibit P54.
[864] Ivan Bakrač, T 1397-1402.
[865] Ivan Bakrač, T 1403-1405.
[866] Ivan Bakrač, T 1403-1408.
[867] Ivan Bakrač, T 1410.
[868] Ivan Bakrač, T 1410-1411.
[869] Ivan Bakrač, T 1412-1416; 1428.
[870] Ivan Bakrač, T 1426-1427.

and his father were brought in. Ivan Bakrač and his father were interrogated.[871] After about an hour and a half Ivan Bakrač and his father were taken to the basement of the house next door, which was later identified as the storage room of the compound.[872] Ivan Bakrač described the storage room as being very small, about 4 x 2 metres. There was a shelf about 40 cm from the floor, which was about 30-40 cm wide. Next to the door there was a bucket which functioned as a toilet.[873] The floor was concrete and there was straw thrown over it.[874] When Ivan, his father and the two other Serbian men seized from the bus, Stamen Genov and Đorđe Čuk, were brought to the storage room, there were already six or seven people there: three Kosovo Albanians and three or four Serbs.[875] Ivan Bakrač and his father spent about three or five nights in the storage room.[876]

261. One day, Ivan Bakrač was told that he should leave the storage room. A man referred to as Shala and a man with a black mask said that they needed to talk to him. Ivan was taken to the room on the ground floor, where he was first brought for questioning. Shala and other soldiers brought him food. Ivan was permitted to speak briefly to his father, following which both he and his father returned to the room on the ground floor and spent some time there.[877] Then both of them were taken to a room on the first floor, located directly above the place they were sitting, where there was a young Kosovo Albanian male. Sometimes there were soldiers in the room, but for the most part it was only the three of them. The door was locked all the time. Ivan Bakrač and his father spent two or three nights in the room.[878] Before their release Ivan Bakrač and his father were asked to make a video statement about the conditions in the prison camp. Ivan and his father made separate statements before five or six armed soldiers who had come with cameras.[879] On the following day Ivan Bakrač and his father were blindfolded and taken by a jeep to a small town, where they were transferred to UNICEF jeeps and driven to a Serbian police station.[880]

262. Witness L07 testified that in July 1998 while travelling through Pjetershtice/Petrastica, he was stopped by members of the KLA.[881] L07 was not armed and was in civilian clothes.[882] He was then brought by two KLA soldiers to the school in Kroimire/Krajmirovce, located about 2 or two and a half km away from the place where he was stopped. L07 testified that upon his arrival Ramiz

[871] Ivan Bakrač, T 1426-1428.
[872] Ivan Bakrač, T 1441-1447.
[873] Ivan Bakrač, T 1443-1447.
[874] Ivan Bakrač, T 1450-1455.
[875] Ivan Bakrač, T 1443-1447.
[876] Ivan Bakrač, T 1450.
[877] Ivan Bakrač, T 1458-1460.
[878] Ivan Bakrač, T 1458-1464.
[879] Ivan Bakrač, T 1471-1474.
[880] Ivan Bakrač, T 1474-1476.
[881] L07, T 774-776.
[882] L07, T 778.

Qeriqi, aka Luan, interrogated him.[883] L07 was mistreated by a soldier and had one tooth broken. He was detained in the school building for about one or two hours.[884] L07 was then taken to the KLA headquarters in Kroimire/Krajmirovce in the trunk of his own car. L07 remained in the trunk for about 30 minutes before two soldiers dressed in KLA uniforms came and gave him some water. L07 was then taken to what he believed was Llapushnik/Lapusnik.[885] Two soldiers took L07, who was blindfolded at the time, to a cowshed where he stayed for about 10 minutes after which the hood that had been placed on his face was removed and he was taken outside. The hood was almost immediately placed back on his face and L07 was taken to another room. In the brief period of time when he was not blindfolded, however, L07 recognised the hills surrounding Llapushnik/Lapusnik. L07 was familiar with this area as he had relatives living in Berishe/Berisa.[886] In the other room L07 saw about five soldiers. Among them was Shukri Buja who recognised L07 and ordered his release.[887] A person who L07 described as commander Çeliku told a person addressed as "Shale," who was introduced to L07 as a prison guard, to let L07 go home and declared that L07 should feel at home.[888]

263. At about 1900 hours L07 and "Shale" went to the room located upstairs on the first floor to watch television.[889] L07 spent the night together with two "Croatians," a father and son, abducted from the road in Carraleve/Crnoljevo and two Kosovo Albanians, Faruk Gashi from Shtime/Stimlje and Gzim Emini from Carraleve/Crnoljevo who were wearing civilian clothes.[890] On the following day L07 was taken to a room, later identified as the storage room, where he was detained for two days and one night.[891] Six Kosovo Albanians and six Serbs were already detained in that room; Lutfi from Breg-i-Zi/Crni Breg, Witness L10, and Adem from Godanc/Godance, a Serb named Mija from Recani, Halim Budakova, a former Serbian policeman in Shtime/Stimlje who had been shot in both knees, and two other Serbs.[892] L07 was also able to recognize the photographs of Miodrag Krstić, Milovan Krstić and Slobodan Mitrović as having been among the prisoners held in the storage room.[893] L07 stated that the room was guarded by Shala.[894] There were other KLA

[883] L07, T 777-778.
[884] L07, T 778-779.
[885] L07, T 781, 846; Exhibit P71, para 11.
[886] L07, T 790-791; 847- 849, Exhibit P71, para 12.
[887] L07, T 791-796.
[888] L07, T 795-796; 808.
[889] L07, T 808-809; 812.
[890] L07, T 814-816.
[891] L07, T 817; 821.
[892] L07, T 817; 821-828. With respect to Mija from Recani, *see* also T 825; 828; Exhibit P54.
[893] L07, T 825; 828; Exhibit P54.
[894] L07, T 808; 831.

guards in the camp: a masked soldier called Hoxha who beat the prisoners on two occasions, and Murrizi.[895]

264. On his second day in the storage room L07 was brought back to the room with the two "Croats" and Gzim Emini.[896] L07 was released on the following day and was asked whether he could drive Elmi Qerqini from Carraleve/Crnoljevo back to his home, to which he agreed.[897] Before he left the compound he was asked to write and sign a statement obliging him not to reveal what he had seen in the camp under life threats.[898] The following morning at 0300 hours he was given the keys to his car. A KLA soldier drove L07's car with L07, Elmi Qerqini and Gzim Emini who were released the same day, to the Arlat/Orlate-Malisheve/Malisevo road. A second KLA soldier was following in another car. At the road the soldier returned the keys to L07 and went back in the direction of the prison camp in the second car with the other soldier driving.[899]

265. Witness L96 testified that on or about 18 July 1998 five KLA soldiers in camouflage uniforms, two of whom had KLA badges, came to his house.[900] The car stopped at the house of his personal relation who was abducted the same way. L96 was placed in the soldiers' vehicle and taken away in the direction of Rance/Rance and Lanishte/Laniste. During the journey, L96 was hit with a riffle butt several times.[901] After a while his head was covered with a blanket.[902] After a quick stop in Rance/Rance, they continued in the direction of Shtime/Stimlje, Kroimire/Krajmirovce, Shale/Sedlare, Nekoc/Nekovce and at Kizhareke/Kisna Reka they left the asphalt road and took a mountain road. They travelled for about one hour and arrived in front of a metal gate leading to a compound.[903] Inside the compound a person addressed as Shala led L96 and his companion up a staircase located on the right side of the building and placed him in a room with no lights.[904] The room where L96 was detained had a tap in the left corner, a window and another door at the other end. It had no furniture except for a carpet and some sponge mattresses.[905] L96 described that he was detained with Bajrush Rexhaj, Muje Musliu from Belince/Belince, Sahit Beqaj, Alush Luma, and a person from Varigove/Varigovce.[906] During the night soldiers dressed in KLA military uniform brought in an elderly gentleman, Shaban Hoti, a Russian teacher, who was

[895] L07, T 819; 834; 923.
[896] L07, T 839.
[897] L07, T 839.
[898] L07, T 839-840; Exhibit P71, para 27.
[899] L07, T 840-844; Exhibit P71, para 30.
[900] L96, T 2283-2285, 2515.
[901] L96, T 2285-2288.
[902] L96, T 2287-2288.
[903] L96, T 2290-2294; Exhibit P97.
[904] L96, T 2294.
[905] L96, T 2301-2302.

tied in chains and appeared to have been badly beaten.[907] The soldiers dragged him through the room where L96 was detained and took him to the room next door.[908] On the following day, Musli Musliu was brought in.[909] The room remained locked at all times and the detainees were escorted by a guard to the toilets located in the yard.[910] On these occasions L96 could see a house with a balcony and other prisoners.[911] He could also see and recognise the surrounding hills and he knew, he said, that he was in the area of Llapushnik/Lapusnik.[912] The prisoners were guarded by men addressed as Shala and Murrizi, and a man whose name was Avdullah, aka Seli, escorted them to the bathroom.[913]

266. On the second day of L96's detention he was placed in a room later identified as the storage room. L96 spent four nights and four days there.[914] The room had a low ceiling and was about 3 metres long. It had a concrete floor with some hay on it, two shelves and a window next to the door. A bucket used as a toilet was placed behind the door.[915] L96 testified that the following persons were detained in the storage room when L96 was brought there: Emin Emini, Hyzri from Belince/Belince, Luta from Breg-i-Zi/Crni Breg, Adem from Godanc/Godance, and Shefqet Ramadani.[916] L96 was able to recognize the photographs of L06, and L10 as being among the prisoners held in the storage room.[917] Shaban Hoti was brought into the room on the following day.[918] L96 was told that three Serbs, a road police officer in Shtime/Stimlje, who served in Suhareke/Suva Reka and was taken from a bus in Carraleve/Crnoljevo, Boban from Suhareke/Suva Reka, and Dragan from Zubni Potok, were detained in the room earlier, as well as Agim from Godanc/Godance and Vesel Ahmeti, but they were taken away before L96 was brought in. Dragan, however, had committed suicide.[919] Shala and Murrizi brought bread and water to the prisoners.[920] It is L96's evidence that he saw other persons in uniform at the camp, namely Qerqiz, Salihi, and a person called Hoxta.[921]

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[906] L96, T 2295-2298; 2301. L96 was also able to recognize the photographs of Bajrush Rexhaj, (T 2415, Exhibit P54), Sahit Begaj (T 2411, 2513; Exhibit P54), and Alush Luma (T 2414, Exhibit P54) as being among the prisoners held there.
[907] L96, T 2312-2315.
[908] L96, T 2312-2313.
[909] L96, T 2326-2328.
[910] L96, T 2303, 2309.
[911] L96, T 2303.
[912] L96, T 2304, 2319.
[913] L96, T 2302-2303; 2309.
[914] L96, T 2333.
[915] L96, T 2333.
[916] L96, T 2336-2337. With respect of Luta (Lutfi) *see* also T 2405-2409; Exhibit P54, and with respect of Adem from Godanc/Godance, *see* T 2415; Exhibit P54.
[917] L96, T, 2411, 2413; Exhibit P54.
[918] L96, T 2336.
[919] L96, T 2341-2345.
[920] L96, T 2338-2340.
[921] L96, T 2488.

267. L96 testified that on his last day of his detention, the man said to be Shala opened the door and ordered the detainees to go outside. L96 saw Shala opening the door of the house from where Alush Luma and the man from Varigove/Varigovce came out, and the door of the garage, from where Safet Hysenaj from Petrove/Petrovo came out. Shala opened the door of the cowshed and from there many prisoners came out, among them Xheladin Ademaj, Muje Musliu, Hasan Dobreva, Hasan Hoxha, Hetem Rexhaj, Witness L12, Milaim Hoxa from Recak/Racak who was holding Shyqeri, aka Shyq from Godanc/Godance whose leg was broken, a young man from Kroimire/Kraimirovce and an elderly man.[922] Shala ordered the detainees to line up and the column proceeded. Another KLA soldier, Murrizi was leading the column and Shala remained at the end of the line.[923] About 200 metres after they left the compound they turned left towards a mountainous path which went uphill.[924] At some point during the march Murrizi asked whether they were going to Berishe/Berisa or to Klecke/Klecka to which Shala responded "take a left." After about a km they were ordered to stop in front of a cherry tree and a well, where they stayed for about two to three hours.[925] Then Shala called the names of Shefqet Ramadani, Adem, Witness L10, the man from Varigove/Varigovce, Milaim Hoxha and Muje from Belince/Belince. Shala set off with this group and walked downhill in the direction of the road to Suhareke/Suva Reka.[926] After 40 minutes or two hours, there being an inconsistency in L96's evidence, Shala returned and called the names of L96, Hetem Rexhaj, Xheladin Ademaj, Hysri from Belince/Belince, Hasan Hoxha, Safet Hyseni, Banush, Alush Luma, Shyqri, Shaban Hoti, and Bashkim from Godanc/Godance and ordered Murrizi to lead the group to another point. They were led to a mountain clearing where Shala ordered the detainees to sit as they were lined up.[927] It is L96's evidence, discussed in more detail later in this decision, that Shala, Murrizi and a third soldier, who had joined them shortly after the group had left the prison camp, opened fire at the detainees and that L96 managed to make good his escape.[928]

268. Prosecution witness Dragan Jašović, a crime investigation policeman in Ferizaj/Urosevac, testified that in June and July 1998 he received reports about people being abducted and detained at Llapushnik/Lapusnik.[929] On 27 June 1998, a personal relation of Agim Ademi reported to him that Agim Ademi and Vesel Ahmeti had been kidnapped. In early July 1998 he received information from a "registered operative connection" that Agim Ademi, Vesel Ahmeti, Shyqyri Zymeri, and Ademi Ramadani were first taken to a prison in Klecke/Klecka and then transferred to a prison in

[922] L96, T 2347-2350, 2357, 2414.
[923] L96, T 2351-2352.
[924] L96, T 2363; 2484-2485.
[925] L96, T 2372-2374.
[926] L96, T 2376; 2385; 2387; 2486; 2413; Exhibit P108.
[927] L96, T 2377-2381; 2486; Exhibit P108.
[928] *See infra*, para 451.

Llapushnik/Lapusnik.[930] He further testified that the information that the police received regarding individuals abducted in the municipality of Shtime/Stimlje, including the villages of Carraleve/Crnoljevo, Belince/Belince, Petrove/Petrovo and Gornje Godance/Godanci-i-Eperm, indicated that these persons were taken to a prison in Llapsuhnik/Lapusnik, located in Gllogovc/Glogovac municipality either via Pjetershtice/Petrastica, Kroimire/Krajmirovce, Shale/Sedlare, or from Godanc/Godance through various villages to Klecke/Klecka.[931] Dragan Jašović also testified that he received information from two relatives of Hyzri Harjiri that the latter had been kidnapped and taken to a prison in Llapsuhnik/Lapusnik. In one case the information about Hyzri Harjiri's detention at Llapushnik/Lapusnik came from the KLA staff in Rance/Rance.[932] All of this information about a prison in Llapushnik/Lapusnik is, of course hearsay. Further, elsewhere in this Judgement, the Chamber has noted its views about the general credibility of Dragan Jašović.[933] Nevertheless, it is to be noted that the evidence he gave is not inconsistent with a substantial body of first hand evidence about a KLA prison camp in the village of Llapushnik/Lapusnik.

269. Dragan Jašović further testified that on 1 August 1998, he took a statement from L96 who described his detention at Llapsuhnik/Lapusnik.[934] The same day Dragan Jašović, L96 and another police officer, Momcilo Sparavalo, went to the secretariat of the interior in Prishtina/Prisitina and then to Llapushnik/Lapusnik to carry out an on-site investigation.[935] Following the directions of L96 they travelled on the Prishtina/Pristina-Peje/Pec road in the direction of Peje/Pec and about one km after Komaran/Komorane turned left. They reached a farm house and entered the compound. This description is consistent with the alleged location of the compound used as the prison camp. Dragan Jašović went inside the upper floor of the main building where there were two rooms. In the garage L96 found a foam mattress and explained that he had been sleeping there. L96 also explained that he had been detained in the room that was meant to be a larder. Dragan Jašović saw white caps and belts in front of the cowshed.[936] L96 confirmed that he visited the compound in which the prison camp was located with Dragan Jašović after he had escaped and that he recognised the brown metal doors of the compound and described places he had seen while in detention.[937]

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[929] *See* Exhibits P205 and 206.
[930] Dragan Jašović, T 5223-5224; 5231-5232.
[931] Dragan Jašović, T 5256.
[932] Dragan Jašović, T 5264-5271.
[933] *See supra*, para 27.
[934] Dragan Jašović, T 5279; 5284.
[935] Dragan Jašović, T 5285-5286.
[936] Dragan Jašović, T 5291-5298.
[937] L96, T 2391-2393.

270. Ole Lehtinen, an investigator with the Office of the Prosecutor, testified that he was told by witnesses the location of the prison camp in which they had been detained at Llapushnik/Lapusnik and that he had visited that location several times, the last one being in the summer and fall of 2003.[938] He presented photographs taken at various structures and spaces within this location in 2003.[939] These photographs were subsequently shown to witnesses who testified about their detention at Llapushnik/Lapusnik. Ivan Bakrač identified the main room in the main building, the storage room, and the toilet;[940] Vojko Bakrač identified the storage room where he and his son were taken;[941] L06 identified the storage room where he was held, the well, the toilet and the cowshed where he was beaten;[942] L10 identified the storage room where he was held and the place where he emptied the toilet;[943] L96 recognized the room on the upper floor of the house as the room where he was detained;[944] L04 identified the cowshed and other places he had seen while in detention as well as the KLA headquarters in another compound across the narrow roadway;[945] L07 recognised the room in the main building where he slept, the room where he saw the individuals he described as commander Çeliku and Shukri Buja, the yard, the building where he was detained and the kitchen;[946] L12 identified the gates of the compound.[947]

271. Some witnesses who testified about their detention at Llapushnik/Lapusnik were shown sketches, or, in the case of Ivan Bakrač, a photograph of the prison compound in Llapsuhnik/Lapusnik. These sketches were previously shown to the witnesses and each of them had identified and marked the specific locations where they had been detained.[948] All witnesses confirmed that they had recognised the place and personally marked the sketches. Ivan Bakrač, Vojko Bakrač, and L10 also had drawn sketches of the places occupied by various prisoners held in the same rooms with them and confirmed the authenticity of these documents.[949]

272. There are some inconsistencies in the evidence of some of the witnesses. For example, L10 testified that on the day of his abduction, he was first brought to Klecke/Klecka and was held there for about one hour before he was taken to Llapushnik/Lapusnik,[950] whereas L06 who was abducted

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938 Ole Lehtinen, T 449; 479.
939 Exhibit P5; Exhibit P6; Ole Lehtinen, T 466-48.
940 Ivan Bakrač, T 1426-1427 re Building A1 in Exhibit P6, T 1443-1447 re Building A5, T 1467-1471 re U008-3672.
941 Vojko Bakrač, T 1326-1329.
942 L06, T 1038-1039; Exhibits P5 and P6.
943 L10, T 2927-2932; Exhibit P6.
944 L96, T 2315-2316.
945 L04, T 1127-1130; Exhibit P5; Exhibit P6.
946 L07, T 800, 803.
947 L12, T 1815.
948 Ivan Bakrač, T 1412-1416; 1442-1443, Exhibit P79; L06, T 1035-1037; Exhibit P74; L10, T 2923-2925, Exhibit P123; L96, T 2353-2359; Exhibit P100, L07, T 798-799; 864-866, Exhibit P68.
949 Ivan Bakrač, T 1443-1447, Exhibit P82; Vojko Bakrač, T 1317-1318, Exhibit P78; L10, T 2925-2927, Exhibit P124.
950 L10, T 2909, 2913-2915.

together with L10, testified that he was taken straight to Llapushnik/Lapusnik.[951] L06 testified that the group of prisoners who were released at the Berishe/Berisa Mountains was told to go to Kizhareke/Kisna Reka,[952] while L10 testified that they were told to go downhill, but instead they decided to go the village of Kizhareke/Kisna Reka.[953] Further, L04 testified that on his last day in detention a guard named Murrizi unchained the prisoners held in the cowshed and later, when they went up in the Berishe/Berisa Mountains, Murrizi released 10 of them,[954] while L12, who was abducted together with L04, as well as other witnesses held in the camp, testified that it was Shala who took them out of the camp and who released them later at the meadow.[955] Further, while some witnesses testified that two guards, Shala and Murrizi, took them to the Berishe/Berisa Mountains on the last day of their detention and were there with the prisoners,[956] L96 and L10 testified that there was also a third soldier there.[957] The evidence of Vojko and Ivan Bakrač, while largely analogous, reveals some inconsistencies related to the circumstances in which Ivan Bakrač left the storage room and his and his father's transfer to a room in the main building, as well as to the international organisation to which they were released.[958] These inconsistencies do not concern important elements of the fact and circumstances of each witness' abduction and detention in a prison camp. Further, in view of the time passed between the described events and the witnesses' testimonies before the Tribunal, such inconsistencies are not surprising or unusual.

273. Nevertheless, in the Chamber's view, the stories of the witnesses confirm that each of these witnesses had been taken to or detained in a KLA run prison camp. The witnesses were abducted in similar circumstances: from a road,[959] or taken from their homes[960] by armed soldiers wearing camouflage or black uniforms,[961] black masks,[962] or KLA insignias.[963] Some of these soldiers were identified as Ali/Alush Gashi,[964] Ramadan Behluli,[965] Shukri Buja,[966] Rrahman Tafa,[967] Sule Qeriqi and Ali Ramadani, all of whom were KLA soldiers.[968] The witnesses were blindfolded, put in a car,

[951] L06, T 990.
[952] L06, T 1028-103.
[953] L10, T 2964.
[954] L04, 1192-1195.
[955] L12, T 1815-1818. *See* also L10, T 2963, L96, T 2375-2377.
[956] L06, T 1025, 1028; L04, T 1194-1195; L12, T 1813-1816.
[957] L96, T 2365; L10, T 2962-2963.
[958] *See* Vojko Bakrač, T 1334-1351; Ivan Bakrač, T 1458-1464, 1471-1474.
[959] L06, T 977; L10, T 2907-2909; Vojko Bakrač, T 1286-1290; Ivan Bakrač, T 1395-1397; L07, T 774-775.
[960] L04, 1110-1113; L12, 1788; L96, T 2282-2285.
[961] L06, T 983, 985; L04 T 1110-1113; L12 T 1788-1792; L07, T 781; L96, T 2283-2285.
[962] L06, T 979; L10, T 2907-2909; L12 T 1788-1792.
[963] L10, 2907-2909; L04 T 1110-1113; L96, T 2283-2285.
[964] L06, T 984; L04, T 1111.
[965] L06, T 984; L12, T 1790-1792.
[966] L04, T 1115-1118; L12, T 1789.
[967] L04, T 1112; 1122.
[968] L12, T 1788-1791.

sometimes in the trunk, and driven to a farm compound.[969] There, an individual referred to as Shala removed the blindfolds and led them to a room where they were held.[970]

274. The witnesses provided consistent descriptions of the two main rooms where prisoners were held and of the entire farm compound. L06, L10, Vojko and Ivan Bakrač, and L96 described the storage room where they were held as a small room, 2 x 3 metres or 3 x 4 metres, with a concrete floor, one small window and a bucket that functioned as a toilet,[971] with some hay and straw thrown over the floor.[972] L04 and L12 described the cowshed where they were held as a room where there were other people detained all of whom were chained.[973] Vojko Bakrač, Ivan Bakrač and L96 described the metal brown gates to the compound,[974] a description consistent with the account of L84.[975]

275. Further, many witnesses identified other witnesses who were detained with them or individuals who were held together with them in the same room at the same time. L06 saw L10 and L07 detained in the storage room.[976] L10 saw L06 and L96 in the storage room.[977] L07 saw L06 in the same room[978] and L96 saw L06 and L10 in the storage room.[979] All witnesses were detained there with a number of other individuals,[980] although the recollection of the precise number varied, including Adem from Godanc/Godance,[981] Lutfi (Luta) from Breg-i-Zi/Crni Breg,[982] and Hyzri from Belince/Belince.[983] Further, L04 and L12 described the cowshed where they were held as a room where there were other people detained all of whom were chained.[984] L04 and L12 both testified that they were held together with, *inter alia*, Shefqhet Ramadani (Shyqja) from Godanc/Godance,[985] Elmi Qerqini from Carraleve/Crnoljevo,[986] Milaim Kamberi from

[969] L06, T 990; L10, 2910-2911; 2913-1916; L04, T 1123; L12, T 1788-1791, 1797-1798; Vojko Bakrač, T 1304-1306; Ivan Bakrač, T 1410-1411; L07, T 778-781, 846; L96, T 2285-2288.
[970] L10, T 993-994; L04, T 1124-1125; L12, T 1799; L96, T 2294.
[971] L06, T 990-993, 995-997; L10, T 2918-2921; Vojko Bakrač, T 1329; Ivan Bakrač, T 1443-1444; L96, T 2333.
[972] Vojko Bakrač, T 1329; Ivan Bakrač, T 1443-1444; L96, T 2333.
[973] L04, T 1140-1141; L12, T 1802-1803.
[974] Vojko Bakrač, T 1304-1306; Ivan Bakrač, T 1412-1416; L96, T 2290-2294.
[975] Exhibit P197, para 30.
[976] L06, T 1039-1045.
[977] L10, T 2923-2925.
[978] L07, T 822.
[979] L96, T 2411; 2413.
[980] Vojko Bakrač, T 1311-1314; Ivan Bakrač, T 1443-1447.
[981] L06, T 999-1001; L10, T 2923-2925; L07 (only with respect to Adem from Godanc/Godance), T 821-828; L96, T 2346-2347, 2411, 2413.
[982] L06, T 1039-1045; L10, T 2923-2925; L07, T 817, 821-828; L96, T 2409, 2415.
[983] L10, T 2923-2925.
[984] L04, T 1140-1141; L12, T 1802-1803.
[985] L04, T 1131-1136, 1139; L12, T 1820-1823.
[986] L04, T 1131-1136, L12, T 1820-1823.

Recak/Racak,[987] Hete from Petrove/Petrovo,[988] and Xheladin (Xhela) Halimi from Petrove/Petrovo.[989]

276. The evidence of all witnesses is consistent with respect to the presence of guards in the compound. All witnesses testified that the guards in the prison were Shala or Shale and Murrizi,[990] although some witnesses saw also other uniformed men in the camp, namely Tamuli,[991] Qerqiz,[992] Avduallah,[993] Salihi and Hoxta,[994] and Witness L64.[995]

277. The Chamber notes that the evidence of Shukri Buja discussed in more detail elsewhere in this decision,[996] suggests that L07 was detained in Ymer Alushani's, aka "Voglushi"'s house in Llapushnik/Lapusnik. In view of the fact, however, that L07 provided a detailed description of the prison camp, identified the pictures of the prison camp, that he was seen there by L06 and that he himself saw prisoners there, among them, L06, the Chamber cannot accept the evidence of Shukri Buja in this respect and finds that L07 was in fact detained in the same prison camp as the other witnesses.

278. Finally, all witnesses provided an essentially similar account of the circumstances leading to their release. On what appears to be 25 or 26 July 1998[997] there was fighting in the vicinity of the prison compound,[998] Shala and Murrizi opened the doors of all rooms and structures in the compound and ordered the prisoners to come to the yard, then made them walk in a file up into the Berishe/Berisa Mountains,[999] where they stopped in a meadow near a cherry tree[1000] for about an hour. At that location a group of about 10 individuals was released and they went to Kizhareke/Kisna Reka.[1001]

279. In view of the above, the Chamber is satisfied and finds that the following individuals were among those detained in the KLA run prison camp: Witness L06, from 13 or 14 June 1998 to 25 or 26 July1998; Witness L10 from 13 or 14 June to 25 or 26 July 1998; Witness L04, from 28 June to

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987 L04, T 1136-1138; L12, T 1820-1823.
988 L04, T 1136-1138; L12, T 1820-1823.
989 L04, T 1136-1138; L12, T 1820-1823.
990 L06, T 997-998; 1001, 1101-1102; L10, T 2918-2922; L04, T 1175-1179, 1192-1194; L12, T 1800-1802; Vojko Bakrač, 1330-1332; Ivan Bakrač, T 1458-1460; L07, T 795-798; L96, T 2302-2303, 2309.
991 L04, T 1175-1176.
992 L04, T 1172-1173; L96, T 2488. *See* also L10, T 2917, 2922.
993 L96, T 2309.
994 L96, T 2488.
995 Exhibit P197, para 35.
996 *See infra*, paras 456-457.
997 *See supra*, paras 78-81.
998 L06, T 1025; L10, T 2960.
999 L06, T 1025-1028; L10, T 2960-2961; L04, T 1192-1194; L12, T 1813-1815; L96, T 2347-2349.
1000 L10, T 2960-2966; L96, T 2372-2374.
1001 L06, T 1028-1030; L10, T 2963-2964; L04, T 1194-1198; L12, T 1815-1818.

25 or 26 July1998; Witness L12, from 28 June to 25 or 26 July 1998; Vojko Bakrač, from 29 June 1998 to 6 July 1998; 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. The Chamber is persuaded that the above mentioned individuals were civilians.[1002] The circumstances of the detention of the victims named in the Indictment are considered later in this decision.[1003]

280. Further, in view of the combined effect of this body of evidence the Chamber is persuaded that the prison camp where the above mentioned individuals were held was located in the village of Llapushnik/Lapusnik. The descriptions of several witnesses of the distance and the road from the place of their abduction to the place where they were detained, either indicate Llapushnik/Lapusnik as the location of the prison camp, or are consistent with this conclusion. The car by which L04 was taken turned left from Pjetershtice/Petrastica and drove for about an hour before turning left again and arriving at its destination.[1004] L96 was taken from his village in the direction of Shtime/Stimlje, Kroimire/Krajmirovce, and Shale/Sedlare.[1005] When compared to a map of the area these accounts indicate that the witnesses may have been taken to Llapushnik/Lapusnik.[1006] At their release L04, L06, L10, and L12 were told by KLA guards to go to or went to Kizhareke/Kisna Reka,[1007] which is one of the villages neighbouring Llapushnik/Lapusnik.[1008] Further, witnesses such as L12 and L07, as well as L96, testified that they were able to recognise the landscape surrounding the prison camp from their previous association with Llapushnik/Lapusnik,[1009] or the mountains where they were taken on the last day of their detention.[1010] Others could recognise the prison camp where they were held on the basis of what they saw after their release. There were also witnesses who relied on information from their personal relations, on which the Chamber does not place reliance for this purpose.[1011]

281. Of further significance, in the view of the Chamber, is the consistency and the detail of the witnesses' description of the farm compound where they had been detained,[1012] descriptions which are clearly consistent with the farm compound alleged by the Prosecution. Further, virtually all

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1002 *See* L06, T 983; L10, T 2909; L12, T 1786.
1003 *See infra*, paras 319-446.
1004 L04, T 1123-1124.
1005 L96, T 2290-2294.
1006 *See* Exhibit P1, Map 5.
1007 L04, T 1196-1198; L06, T 1028-1030; L10, T 2964-2965; L12, T 1818.
1008 *See* Exhibit P1, Map 5.
1009 L06, T 1068; L04, T 1272-1273; L12, 1815-1816.
1010 L12, T 1815-1816; L07, T 790-791, 847, 849; L96, T 2304, 2319.
1011 *See* L10, T 2960-2966.
1012 *See supra,* para 274.

witnesses who testified about their detention at a farm compound recognised and identified the photographs of the alleged farm compound at Llapushnik/Lapusnik tendered by Ole Lehtinen.[1013]

282. On these bases, the Chamber is convinced and finds that from mid June 1998 at the latest to 25 or 26 July 1998 a prison camp conducted by the KLA existed in the village of Llapushnik/Lapusnik, to the south of the Peje/Pec-Prishtina/Pristina road. The Chamber accepts that the compound depicted on Exhibits P5 and P6 and marked as buildings and structures A1 to A9 was the location of the prison camp and the place of detention or imprisonment by the KLA of Witness L06, Witness L10, Witness L04, Witness L12, Vojko and Ivan Bakrač, Witness L07 and Witness L96, and many others.

2. Crimes in or around the Llapushnik/Lapusnik prison camp (Counts 4, 6 and 8)

283. The Prosecution alleges that, from about May 1998 through to about 26 July 1998, KLA forces under the command and control of the Accused Fatmir Limaj and Isak Musliu held the detainees at the Llapushnik/Lapusnik prison camp under conditions that were brutal and inhumane and routinely subjected them to physical and psychological assaults, including torture and beatings. The Prosecution submits that all three Accused participated in maintaining and enforcing the inhumane conditions at the prison camp, which included inadequate food and medical care, and participated in, or aided and abetted, the torture and beatings of the detainees.[1014] The Chamber previously found that Article 5 was not applicable in the present case, and that the offence of cruel treatment based on the unlawful seizure, interrogation and forcible transfer of individuals (Count 2) had not been established. Thus, the above allegations now support only one count of torture and one count of cruel treatment as a violation of the laws or customs of war (respectively Count 4 and Count 6). The Prosecution further alleges that from a date in or about June 1998 through to around 26 July 1998, the three Accused committed, or otherwise aided and abetted, the crime of murder of fourteen detainees at or around the Llapushnik/Lapusnik prison camp.[1015] These allegations now support one count of murder as a violation of laws or customs of war (Count 8).

284. The Chamber has established in previous sections of this Judgement that a number of individuals have been detained for varying periods of time in a compound located at Llapushnik/Lapusnik and used as a prison camp until 25 or 26 July 1998. Detainees were held in different locations at the prison camp, namely the storage room, the cowshed and some rooms located into the main house of the compound and in the garage.

[1013] *See supra,* para 270.
[1014] Indictment, paras 25-26.
[1015] Indictment, paras 29-32.

(a) Conditions of detention

285. The conditions of detention in the cowshed were, according to the witnesses who were held there, very difficult. Two former detainees testified that the room, which was hot,[1016] had only a small window; the floor was made of concrete and there was dung and blood on the floor.[1017] On L04's evidence, the detainees were not allowed to go to the toilet outside and those who were tied or chained, sometimes to other detainees, had to relieve themselves in their clothes where they sat and slept.[1018] There were no washing facilities.[1019] The atmosphere and smell were described as stifling.[1020] L12 stressed during the proceedings that they were at times only fed once every few days. They were, however, provided with some water in plastic bottles.[1021]

286. Prisoners held in the storage room were not proffered better treatment. Several witnesses testified that up to 13 or 15 detainees,[1022] some tied up,[1023] were confined all day in the storage room which was about 2 by 3 or 4 metres with a low ceiling.[1024] Ivan Bakrač explained that detainees were not allowed to speak to each other.[1025] Former prisoners testified that the room had only a small window and that the iron door was always closed.[1026] Witnesses testified that at the beginning, the room was cold and wet because of a leak in the ceiling, but after a few days it became intolerably hot, not only because it was summer but also because there was no ventilation;[1027] the temperature and the smell also soon became unbearable given that the prisoners had to sleep, relieve themselves and eat in that room.[1028] On L96's evidence, there was not enough space for the detainees to stretch out. Every three or four days, Shala would open the door to let the detainees walk a little outside in the evening.[1029] This was corroborated by L06[1030] and L07 who further explained that the window remained open all the time and the door would be opened from

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1016 L12, T 1802-1805.
1017 L12, T 1802-1803.
1018 L04, T 1140-1141.
1019 L04, T 1140-1141.
1020 L64, T 4901-4902.
1021 L12, T 1805.
1022 L07, T 821; Vojko Bakrač, T 1311-1318; Exhibit P78; L06, T 999; Exhibit P99.
1023 L10, T 2918-2921. L10 testified that some detainees were handcuffed to one another and that he was himself handcuffed to Fehmi Xhema. On L10's evidence, Emin Emini was tied to the window. L06 confirmed that two prisoners were tied by their hands with handcuffs and testified that he was himself tied with 10kg of chains and could not move, T 993-994.
1024 L96, T 2333; Ivan Bakrač, T 1443-1447 (according to him the room was about 2 metres by 4 metres); Vojko Bakrač, T 1311-1314; L07, T 829; L10, T 2918-2921; L06, T 995-996.
1025 Ivan Bakrač, T 1447-1449; Vojko Bakrač testified that the detainees only spoke when necessary and even then they whispered, T 1311-1314. On L06's evidence, prisoners did not dare to speak to one another because Shala warned them that they would be punished if they did, T 999.
1026 L10, T 2918-2921; L06, T 995-997.
1027 Ivan Bakrač, T 1450-1455; L10, T 2918-2921; L07, T 829; L06, T 995.
1028 L96, T 2333, 2339; Ivan Bakrač, T 1450-1455; L10, T 2918-2921; L06, T 995-997.
1029 L96, T 2339.
1030 L06, T 997-998.

time to time, which allowed some fresh air in.[1031] Further, witnesses testified to sleeping on a little carpet on the concrete floor, which was at first very wet, as they were not provided with any other bedding, although some hay was brought at some point.[1032] Former prisoners stressed that none of the detainees in the storage room were allowed to go to the toilet outside and that they therefore had to use a bucket placed behind the door.[1033] This was not regularly emptied. L06 testified that during the first two weeks of his detention, as there was no bucket yet, the detainees had to relieve themselves on the floor behind the door.[1034] On Ivan Bakrač's evidence, the detainees were confined in such an environment twenty four hours a day with no possibility to leave, and no facilities for washing or cleaning.[1035] The prisoners in the storage room testified to receiving some food, soup or bread, once or twice a day from guards they referred to as Shala or Murrizi, although at times they did not receive food every day.[1036] According to Ivan Bakrač, the food the detainees received looked more like animal fodder than anything that was fit for humans.[1037] However, L07 was of the view that, at the time he was there, the detainees received sufficient food and like L06, he stated that there was sufficient water available.[1038] In general, L07 testified that the detainees lived under "quite difficult conditions."[1039] On Ivan Bakrač's evidence, the detainees received cigarettes, in fact more than needed, and were allowed to smoke in the room.[1040] No medical care was provided, despite the fact that some detainees had sustained serious injuries when taken into custody by the KLA or in the prison camp when beaten by KLA members.[1041] It is to be noted that a medical clinic operated in the village from the end of May until 25 or 26 July 1998.[1042]

287. L96, L07, Vojko and Ivan Bakrač provided evidence with regard to the conditions of detention in the main house of the compound although they seemed to have been held in different locations in the house and in different circumstances.[1043] On L96's evidence, upon his arrival at the Llapushnik/Lapušnik prison camp, he was taken into a room where he was locked along with other prisoners. The door was only opened by men he referred to as Shala and Murrizi.[1044] L96 testified that the detainees had access to water, as there was a tap in the room, and that there was no furniture

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1031 L07, T 829; 832.
1032 L07, T 821; 828; Ivan Bakrač, T 1450-1455; Vojko Bakrač, T 1329; L10, T 2918-2921.
1033 Exhibits P82, P99 and P126; L10, T 2918-2921; 2931-2932; Ivan Bakrač, T 1443-1447; Vojko Bakrač, T 1329; L96, T 2333; L07, T 830-831.
1034 L06, T 996-997.
1035 Ivan Bakrač, T 1450-1455.
1036 L96, T 2338-2340; L10, T 2918-2921.
1037 Ivan Bakrač, T 1450-1455.
1038 L07, T 829; L06, T 997.
1039 L07, T 831.
1040 Ivan Bakrač, T 1450-1455.
1041 Ivan Bakrač, T 1450-1455; L06, T 997; L10, T 2918-2921; L07, T 825-828.
1042 Dr Zeqir Gashi, T 5604-5606.
1043 *See supra*, paras 257-258; 260-261; 263-266.
1044 L96, T 2309.

in the room, except for a carpet and some foam mattresses.[1045] Still on L96's evidence, the detainees received some food, which consisted of other peoples' leftovers. They were allowed outside to go to the toilet located in the yard, but only under escort and with the permission of the man he referred to as Shala.[1046]

288. It is apparent from the evidence presented in this trial, and the Chamber finds, that the material conditions of detention in the storage room and the cowshed were appalling. In the Chamber's view, it clearly emerges from the evidence that food and water were not provided regularly, and that there were no cleaning, washing or sanitary facilities. Both the cowshed and the storage room were not adequately ventilated and at times were overcrowded, especially the storage room. Even though the detainees were allowed outside the storage room once in a while to be able to have some fresh air, the atmosphere and conditions in the room remained deplorable. There were no sleeping facilities either in the storage room or the cowshed, which was exacerbated by overcrowding particularly in the storage room. Detainees in the cowshed were typically chained to the wall or tied to other detainees. No medical care was provided, although readily available.[1047]

289. Leaving aside for the present the question of the criminal responsibility of the three Accused, on the basis of the foregoing, the Chamber finds that the deplorable conditions of detention in both the storage room and the cowshed at the Llapushnik/Lapusnik prison camp, were such as to cause serious mental and physical suffering to the detainees, and constituted a serious attack upon the dignity of the detainees. Further, given the extensive period of time over which these conditions were maintained without improvement, the Chamber is satisfied that they were imposed deliberately. In the Chamber's finding, detention in either the cowshed or the storage room was in conditions which constituted the charged offence of cruel treatment (Count 6). On the limited evidence available, it appears that the conditions in the main house were not similar to those in the cowshed or the storage room. The evidence is not sufficient to demonstrate that detention in the main house, *per se*, constituted the offence of cruel treatment.

(b) Cruel treatment, torture and murder

(i) Vojko and Ivan Bakrač

290. The Chamber has already found that Vojko and Ivan Bakrač were detained by the KLA in the storage room at the Llapushnik/Lapusnik prison camp from 29 June 1998 to 6 July 1998.[1048]

[1045] L96, T 2301-2302.
[1046] L96, T 2302-2303.
[1047] Dr Zeqir Gashi, T 5604-5606.
[1048] *See supra*, para 279.

The Chamber is also satisfied, therefore, that Vojko and Ivan Bakrač were not taking an active part in hostilities during that time.

291. Neither Vojko nor Ivan Bakrač testified to being beaten at the Llapushnik/Lapusnik prison camp. Both men, however, testified to witnessing other prisoners being beaten by KLA soldiers on a daily basis, mostly at night.[1049] On Ivan Bakrač's evidence, prisoners would be woken up with flashlights and mistreated, sometimes several times a day.[1050] Vojko Bakrač testified that a fellow prisoner in the storage room, Stamen Genov, was taken out of the basement and brought back half an hour later, beaten up.[1051] On Ivan Bakrač's evidence, Shala was present during some of the beatings.[1052] Vojko and Ivan Bakrač recounted in particular how, one night, Stamen Genov begged other detainees to strangle him because he could not endure the beatings any longer. Ivan Bakrač put into words how none of the detainees could bring themselves to respond to Stamen Genov's plea and how traumatic it was to watch him suffer in his condition.[1053] Ivan Bakrač testified to being scared, like his father, not knowing whether his captors would kill them or eventually let them go.[1054]

292. The Prosecution argues that the fact that the Bakračs were forced to witness beatings, including in particular a mock execution,[1055] as well as the threat proffered to Vojko Bakrač that his son could be killed,[1056] constituted instances of torture, inflicted with a view to punishing, intimidating or discriminating against the victims.[1057]

293. The Chamber accepts that the Bakračs were personally affected by seeing detainees being beaten and the resulting injuries, as well as the fear each of them had in the circumstances, especially at times when each of them saw the other taken away, knowing then all too well, despite their short detention in the storage room, the fate that usually awaited prisoners who were taken out of the room. The detainees in general, and among them the Bakračs, were clearly compelled to live

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1049 Vojko Bakrač, T 1332-1334; Ivan Bakrač, T 1455-1458. *See* also, Exhibit P202.
1050 Ivan Bakrač, T 1456.
1051 Vojko Bakrač, T 1332.
1052 Ivan Bakrač, T 1457.
1053 Vojko Bakrač, T 1332-1333; Ivan Bakrač, T 1455-1458.
1054 Ivan Bakrač, T 1455.
1055 Vojko Bakrač described "an unpleasant situation" as they were forced to watch the beating of four or five men and a mock execution, as a result of which one of them was unable to stand at all. On Vojko Bakrač's evidence, a man armed with a pistol handed over the weapon to another soldier, telling him to kill the prisoners. The soldier complied and put the pistol next to one of the prisoner's forehead but the weapon had no bullet. On Vojko Bakrač's evidence, "[t]hey [the men who were beaten] were crying, begging for mercy. Then this first man took the pistol, put it next to the other man's forehead and fired it, but it was empty. I think it was some kind of psychological torture." Vojko Bakrač testified that he was then told that the men who were beaten were considered traitors to their people, T 1341-1342.
1056 Vojko Bakrač further explained that one evening, as his son and him heard gunshots outside the house, a man armed with a pistol came and told him that he could kill his son after which Vojko Bakrač explained that he was shocked, "started shaking and […] probably had a nervous breakdown" T 1345.
1057 Prosecution Final Brief, paras 418-419.

with the ever-present fear of being subjected to physical abuse, if not death, and in a constant atmosphere of anxiety enhanced by what seemed to them to be an arbitrary selection of detainees for abuse.

294. Leaving aside for the present the question of the criminal responsibility of the three Accused, the Chamber finds that, by virtue of their particular experiences, which have just been discussed, the Bakračs endured severe psychological suffering and that such suffering was deliberately imposed on them by their captors. In addition, the Chamber has already found that the conditions of detention in the storage room were in themselves such as to amount to cruel treatment.[1058] The offence of cruel treatment (Count 6) is therefore also established by virtue of these matters in respect of each Vojko and Ivan Bakrač. The Chamber is not able to be satisfied, however, that the evidence is sufficient to establish the infliction of psychological suffering serious enough to establish the offence of torture. Moreover, there is no evidence to demonstrate the perpetrators' specific purpose when these things occurred and more than one inference as to purpose is open on the evidence. Hence, the specific mental element of the offence of torture has not been proved in respect of either of the Bakračs (Count 4).

(ii) Witness L07

295. As found above, L07 was detained by the KLA in the Llapushnik/Lapusnik prison camp for three days in July 1998.[1059] The Chamber is also satisfied therefore, that L07 was not taking active part in hostilities during his detention.

296. L07 testified that upon his arrival at Llapushnik/Lapusnik prison camp, he was immediately taken by two soldiers to the cowshed.[1060] L07 further explained that later that evening, he was taken to the first floor of the main house.[1061] L07 testified that the next day, a man wearing a mask came in the middle of the night and ordered him to get dressed.[1062] L07 was then led outside where another man in military uniform was waiting next to a vehicle.[1063] The two men then started to beat him up,[1064] kicked him in the stomach,[1065] and while holding his arms, kicked him in the ribs.[1066] On L07's account, a man he says was Murrizi was also present, holding a firearm, but did not

1058 *See supra,* para 289.
1059 *See supra,* para 279.
1060 L07, T 790.
1061 L07, T 808-809; 812; Exhibit P71, paras 15-16.
1062 L07, T 816-817.
1063 L07, T 817.
1064 L07, T 816-817; Exhibit P71, para 18. L07 stated that the beating took place outside the building marked with the rooms "1" and "2" on Exhibit P68 and continued to the doorway in the building marked "P", T 820.
1065 L07, T 819.
1066 L07, T 817.

intervene.[1067] L07 was then taken into the storage room,[1068] where he was detained for two days.[1069] On L07's evidence, there were already twelve people in the room.[1070] L07 recounted that the detainees were physically mistreated on two occasions,[1071] when guards entered the storage room and slapped detainees,[1072] except L07 because the guard, whom he referred to as "Shale"[1073] or Shala,[1074] prevented the other guards from mistreating him.[1075] L07 testified that they were verbally abused while detainees were slapped.[1076]

297. Leaving aside for the present the criminal responsibility of the three Accused, as discussed earlier, the Chamber has found that the conditions of detention in the storage room were such that detention there constituted cruel treatment.[1077] The Chamber also accepts L07's evidence that he was beaten in the way he indicated while detained at the Llapushnik/Lapusnik prison camp. Therefore, on the basis of each of these personal mistreatments of L07, and his conditions of detention, separately or together, the Chamber finds that the offence of cruel treatment (Count 6) has been established in respect of L07. There is no evidence which indicates that L07 was beaten for a specific purpose or that the mistreatment reached the degree of seriousness required for the offence of torture. The Chamber therefore concludes the elements of the offence of torture (Count 4) have not been established in relation to L07.

(iii) Witness L10

298. The Chamber has already found that L10 was detained by the KLA in the storage room at the Llapushnik/Lapusnik prison camp for a period from 13 or 14 June 1998 to 25 or 26 July 1998.[1078] The Chamber is also satisfied, therefore, that he was not taking an active part in hostilities during that time.

299. L10 testified that upon his arrival at Llapushnik/Lapusnik prison camp, some people began to curse him, to shout at him "why are you here?" and to beat him.[1079] L10 explained that he was then brought the storage room where his hands were tied again.[1080] On L10's evidence, the blindfold was removed once he was inside and masked soldiers asked him to name spies in his

[1067] L07, T 819.
[1068] L07, T 819-820.
[1069] L07, T 798-799, 821, 829; Exhibits P6-A5, P68, P71, para 19; 24.
[1070] L07, T 821.
[1071] L07, T 833.
[1072] L07, T 833.
[1073] L07, T 796.
[1074] L07, T 810.
[1075] L07, T 833.
[1076] L07, T 834.
[1077] *See supra,* para 289.
[1078] *See supra,* para 279.
[1079] L10, T 2916.

village.[1081] L10 responded that he did not know, that he was himself not a spy and that he knew nobody who was one.[1082] Later during his testimony, when asked whether he was ever personally beaten after he arrived at Llapushnik/Lapusnik prison camp, L10 replied that he was beaten the "first time when they brought me out of the car and put me inside." L10 was then further asked whether he was ever beaten again to which he responded "[o]ne of them kicked me twice, but I can't exactly remember who he was. There was a masked person. After -- he kicked me twice. After that, no more. They didn't beat me anymore."[1083] It was also L10's evidence that on one occasion, when he emptied the bucket that served as a toilet, a guard he said was Shala pointed a gun at his head and told L10 not to raise his head or he would be killed.[1084] L10 further testified to witnessing the beatings of other detainees.[1085] He also explained that during his detention, he was taken, along with other detainees, by the individual he referred to as Shala to a location where they were forced to dig graves and bury the corpses of three individuals, "covered with blood, bruised in their faces […] half of their head was cut off."[1086] On L10's words, "it was a horrible sight to see."[1087]

300. The Chamber has already found that the conditions in the storage room were such that detention there constituted the offence of cruel treatment.[1088] The Chamber accepts L10's evidence outlined above. On this evidence, he was beaten at the Llapushnik/Lapusnik prison camp by KLA guards on two occasions although there is no evidence as to the precise circumstances or the perpetrators of these beatings. He was also compelled to bury other detainees' corpses, corpses which were disfigured by abuse before death which, in the Chamber's view, accentuated L10's suffering, as did the threat proffered to L10.

301. Leaving aside the question of the criminal responsibility of the three Accused, the Chamber finds that the elements of the offence of cruel treatment (Count 6) have been established in relation to L10, on the basis of each of the physical and psychological mistreatment inflicted upon him and the conditions of detention, whether separately or together.

302. The evidence is not clear however whether the KLA guards who interrogated L10 about spies in his village were the same persons who mistreated him, or whether the interrogation was associated with the mistreatment. On this basis, the Chamber is unable to conclude that the

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[1080] L10, T 2916.
[1081] L10, T 2916.
[1082] L10, T 2917.
[1083] L10, T 2935-2936.
[1084] L10, T 2920.
[1085] L10, T 2936-2937.
[1086] L10, T 2943-2944.
[1087] L10, T 2943-2946.

beatings were administered for a specific purpose. It necessarily follows that the elements of the offence of torture (Count 4) have not been established in relation to L10.

(iv) Witness L06

303. The Chamber found that L06 was detained by the KLA in the storage room at the Llapushnik/Lapusnik prison camp for a period from 13 or 14 June 1998 to 25 or 26 July 1998.[1089] The Chamber is also satisfied therefore that he was taking no active part in hostilities at the time.

304. L06 testified that during his detention, he had both his hands tied with a 10 kg chain, which made it almost impossible to move.[1090] L06 stated that, about a week after his arrest, an individual he referred to as Shala came to the storage room and untied his chains during the day.[1091] L06 testified that that night, Ali Gashi and Ramadan Behluli blindfolded him, tied his hands behind his back and took him to the manure. They asked him why he was selling wood to the Serbs and asked him to "talk about the spies".[1092] Still on L06's evidence, Ramadan Behluli then repeatedly struck him on his back with a club, and Ali Gashi beat him with his hand on both sides of the neck.[1093] L06 explained that the beating lasted for about twenty minutes, after which he was brought back to the storage room.[1094] On L06's evidence, he suffered pain in his head, neck and back for the next ten days.[1095] The Chamber notes that L06's account was generally confirmed by L10 as far as the beatings are concerned,[1096] although there are discrepancies in their testimony with respect to the identities and role of the assailants of L06, which are considered elsewhere in this decision.[1097]

305. Leaving aside for the present the question of the criminal responsibility of the Accused, the Chamber has already found that the conditions of detention in the storage room were such that detention there amounted to cruel treatment.[1098] These conditions of detention alone, and quite separately, the fact that L06 was shackled with a 10 kg chain for much of his detention and was severely beaten, lead the Chamber to find that the elements of the offence of cruel treatment have been satisfied with respect to L06 (Count 6).

306. The Chamber is further satisfied that a severe level of violence was inflicted upon L06 and that his assailants mistreated him for a specific purpose, *i.e.* punishing him and/or obtaining

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1088 *See supra*, para 289.
1089 *See supra*, para 279.
1090 L06, T 993-994.
1091 L06, T 1007.
1092 L06, T 1007-1008.
1093 L06, T 1010-1011.
1094 L06, T 1011.
1095 L06, T 1011.
1096 L10, T 2937-2939.
1097 *See infra,* paras 330 and 654.

information concerning so-called spies who were allegedly operating in his village. Leaving aside the criminal responsibility of the three Accused, the Chamber therefore finds that the elements of the offence of torture (Count 4) have been satisfied in relation to L06.

(v) Witness L96

307. L96 was, in the Chamber's finding, detained by the KLA in the main house and the storage room at the Llapushnik/Lapusnik prison camp for a short period of time before and until 25 or 26 July 1998.[1099] The Chamber is also satisfied, therefore, that he was taking no active part in hostilities at the time.

308. L96 testified to having been mistreated immediately upon his arrival at the Llapushnik/Lapusnik prison camp. On L96's evidence, when he was brought into the room located in the main house, he was beaten for about half an hour in the dark by a man he referred to as Shala.[1100] L96 testified that during his detention, a man L96 purported to identify as Isak Musliu, came to the room in the main house, accompanied by Murrizi and by a soldier armed with a Kalashnikov.[1101] L96 explained that the three men passed through the room where he was detained and went to the adjacent room.[1102] A few minutes later, Murrizi ordered L96 to come and to stand next to the wall. It was L96's evidence that the man said to be Isak Musliu then ordered Murrizi to tie L96's hands with a chain, and the soldier armed with the Kalashnikov slapped L96 on his face with such brutality that L96 fell on his knees. L96's evidence is that the man he purported to identify as Isak Musliu then made a karate move and gave him a really hard blow, making L96 fall on the ground with his hands tied.[1103] L96 explained that that same man then started to kick him "without any control on himself" and that for a short period, he lost consciousness because of the beating.[1104] L96 further testified that he was then brought to the storage room where he was detained, he believes, for four days and four nights, until the prison camp was evacuated, which the Chamber found was on 25 or 26 July 1998, and the detainees were all gathered in the yard and led under KLA escort to the Berishe/Berisa Mountains.[1105]

309. Elsewhere in this decision,[1106] the Chamber has recorded that it has significant reservations about the general credibility of L96, and the reasons for this. The Chamber is not able to accept the

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[1098] *See supra*, para 289.
[1099] *See supra*, para 279.
[1100] L96, T 2295-2296; 2299; 2512.
[1101] L96, T 2329-2330.
[1102] L96, T 2329.
[1103] L96, T 2329-2330.
[1104] L96, T 2330.
[1105] L96, T 2333.
[1106] *See supra*, para 26.

evidence of L96 on an issue, therefore, unless it is satisfied that there is other evidence which it accepts which confirms the evidence of L96 on that issue, at least in a material particular. Leaving aside for the present the question of the criminal responsibility of the three Accused, the Chamber has already found that the conditions of detention in the storage room were such as to constitute the offence of cruel treatment.[1107] As found above,[1108] the evidence of other detainees sufficiently confirms that L96 was detained in the prison camp as he says. The condition of his detention therefore leads the Chamber to conclude that the elements of the offence of cruel treatment have been established with respect to L96 (Count 6). The Chamber is, however, not able to be satisfied to the required standard that he was beaten and mistreated, as he described in his evidence, so that the offence of cruel treatment (Count 6), or the offence of torture (Count 4) have not been established on this basis with respect to L96.

(vi) Witness L04

310. L04 was, in the Chamber's finding, detained in the cowshed in the Llapushnik/Lapusnik prison camp from around the end of June to 25 or 26 July 1998.[1109] The Chamber is also satisfied, therefore, that he was taking no active part in hostilities at the time. It is in L04's evidence that in the course of his detention at the prison camp he was himself mistreated and witnessed other prisoners detained in the cowshed being continuously beaten by KLA soldiers at the camp.[1110]

311. In one instance, L04 testified, two KLA soldiers, whom he referred to as Tamuli and Shala, came to the cowshed, blindfolded him and took him to a room where a man, whom L04 said was Qerqiz, was waiting. It is L04's evidence that as soon as L04 entered the room, Qerqiz insulted him and began beating him with a stick while Tamuli kicked him.[1111] L04 testified that Qerqiz then threw him on the floor, kicked him and twisted his arm.[1112] L04 testified that up until today he has pain to his right leg and arm due to the beating he sustained.[1113] The Chamber accepts L04's evidence that he was mistreated on this occasion by KLA members.

312. L04 further testified that on another occasion, he and two other prisoners were taken by Shala from the Llapushnik/Lapusnik prison camp to an unknown location in the mountains where they were required to bury the bodies of three men.[1114] L04 testified that one of the men he was

[1107] *See supra*, para 289.
[1108] *See supra*, para 279.
[1109] *See supra,* para 279.
[1110] L04, T 1126-1127; 1172-1173; 1175-1177.
[1111] L04, T 1175-1176.
[1112] L04, T 1175-1176.
[1113] L04, T 1206-1207.
[1114] L04, T 1187-1189.

told to bury was Agim Ademi, a fellow detainee at the prison camp.[1115] He did not identify the other two bodies. As detailed elsewhere in this decision,[1116] L10 also gave evidence about this incident.[1117] The bodies showed evidence of maltreatment.[1118] The Chamber accepts that this incident occurred and that the circumstances would have subjected L04 to a degree of psychological trauma.

313. On the basis of the foregoing, leaving aside for the present the issue of criminal responsibility of the three Accused, the Chamber is satisfied that in the course of his detention by the KLA in the cowshed at the Llapushnik/Lapusnik prison camp, L04 was subjected to physical and mental mistreatment. The physical mistreatment sustained caused an impairment of his right leg and arm which, to the present day, still causes him pain. The Chamber also accepts that the circumstances surrounding the burial of corpses during L04's detention would have subjected L04 to a degree of physical suffering and psychological trauma, sufficient to amount to cruel treatment. Accordingly the Chamber is satisfied that the offence of cruel treatment (Count 6) has been established with respect to L04, both by virtue of the conditions of detention, and also because of the physical and psychological mistreatment inflicted on him. However, there is no evidence before the Chamber that the perpetrators acted pursuant to one or more of the purposes required to constitute the offence of torture. The offence of torture (Count 4) has, therefore, not been established with respect to L04.

(vii) Witness L12

314. L12 was, in the Chamber's finding, detained in the cowshed at the Llapushnik/Lapusnik prison camp from around the end of June 1998 until 25 or 26 July 1998.[1119] It has also been established, therefore, that L12 was not taking an active part in the hostilities at the time.

315. L12 testified that upon his arrival at the camp, a KLA soldier he referred to as Shala took him to the cowshed and chained him to the wall. He explained that his hands were tied to a wooden structure attached to the wall and that he was chained as if he were an animal.[1120] L12 testified that once he was chained to the wall, Shala began to beat him with a stick. It is L12's evidence that he was beaten on his ribs, hands, legs and head until he lost consciousness.[1121] L12 gave evidence that

[1115] L04, T 1187-1189. L04 speaks about "Agim from Godance". Later in his testimony, however, L04 identified Agim Ademi by photograph as the man he referred to as "Agim from Godance", T 1199.
[1116] *See infra*, paras 400-402.
[1117] L10, T 2943-2945.
[1118] L04, T 1189.
[1119] *See supra*, para 279.
[1120] L12, T 1799.
[1121] L12, T 1800.

the pain resulting from the beating lasted for three or four days.[1122] L04, who was detained in the cowshed with L12, testified that he witnessed this mistreatment. It is L04's evidence, that on L12's arrival in the prison camp in June 1998, L12 was beaten by a man L04 said was Shala with a stick until L12 lost consciousness.[1123] It is L04's evidence that L12 was hit "59 times with the same stick".[1124] The Chamber accepts that L12 was seriously mistreated on this occasion.

316. On L12's evidence, some days after his arrival at the camp, the individual referred to as Shala came to the cowshed, blindfolded L12 and took him to a barn located 500 metres away from the cowshed, where L12 was beaten.[1125] L12's evidence, however, is unclear as to whether he was beaten with the fists by two women or by four individuals.[1126] The Chamber cannot, therefore, make a finding as to the number or the identity of L12's assailants, although it accepts L12's evidence that Shala took him to the barn. The Chamber also accepts L12's evidence that he was seriously mistreated on this occasion. L12 testified that while he was beaten, he was asked about the whereabouts of an individual and that the beating stopped when he answered that "the Serbs [had] killed him".[1127] L12 explained that until the present day his body is covered with scars due to the beatings sustained at the Llapushnik/Lapusnik prison camp during his detention there and that he is unable to work because of the pain he still endures. [1128]

317. L96 also gave evidence that on his last day of detention at the Llapushnik/Lapusnik prison camp, which the Chamber found was on 25 or 26 July1998, he saw L12 amongst the other prisoners leaving the prison camp and on L96's evidence, L12 was in a "very bad shape."[1129]

318. On the basis of the foregoing, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is satisfied that during the period of his detention by the KLA in the cowshed at the Llapushnik/Lapusnik prison camp, L12 was subjected to physical mistreatment as described in his evidence, as a result of which L12 still endures pain. As found earlier,[1130] the Chamber is satisfied that the conditions of detention in the cowshed were such that detention there constituted the offence of mistreatment. Accordingly the Chamber is satisfied that the offence of cruel treatment (Count 6) has been established with respect to L12. This is established both by virtue of the detention, and quite separately or together, by virtue of the psychological and physical mistreatments inflicted on L12. In addition, the Chamber is of the view

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[1122] L12, T 1801.
[1123] L04, 1125-1126.
[1124] L04, 1125-1126.
[1125] L12, T 1808-1809.
[1126] L12, T 1808-1810.
[1127] L12, T 1808-1810.
[1128] L12, T 1829.
[1129] L96, T 2413-2414.
[1130] *See supra,* para 289.

that the mistreatment inflicted on L12 reached the degree of seriousness required for the offence of torture and was specifically inflicted to obtain information from him. The offence of torture has therefore been made out with respect to L12 (Count 4).

(viii) Ajet Gashi

319. Shefqet Gashi declared in a written statement that Ajet Gashi, a Kosovo Albanian, was arrested at the end of May 1998 when reporting to the KLA headquarters in Likofc/Likovac together with Rahim Kryesiu. It is not clear whether Ajet Gashi enlisted in the ranks of the KLA voluntarily or was summoned to the headquarters.[1131] It is Shefqet Gashi's understanding that Ajet Gashi was kept at the headquarters, supposedly because he was thought to be a spy working in collaboration with Serbian forces.[1132] Ajet Gashi was not seen again until his body was discovered near Leletiq/Laletic and his death reported by newspapers in mid June 1998.[1133]

320. Shefqet Gashi stated that he overheard a discussion conducted between unnamed KLA soldiers who mentioned Ajet Gashi's detention at a prison camp in the village of Llapushnik/Lapusnik.[1134] L64 testified that he first saw Ajet Gashi at the Llapushnik/Lapusnik prison camp sometime in early June 1998.[1135] L64 had heard talk of the presence of a "big spy" at the Llapushnik/Lapusnik prison camp.[1136] He was taken by Ymer Alushani to a room at the Llapushnik/Lapusnik prison camp;[1137] when Ymer Alushani opened the door, he made reference to "spies."[1138] According to L64, there were three or four persons in that room. One of the persons was lying on the floor, either unwell or somehow incapacitated.[1139] Ymer Alushani ordered him not to move.[1140] The individual appeared to have lost the ability to stand.[1141] L64 concluded that the individual who was lying on the ground was the "big spy" of whom he heard mention.[1142] L64 claimed that his name was Ajet Gashi, about whom various rumours circulated. Ajet Gashi was purportedly collaborating with the Serbian forces in Lipjan/Lipljan.[1143] L64 stated that he heard that Ajet Gashi received a salary for this work.[1144] L64 also heard rumours concerning Ajet Gashi's

[1131] Exhibit P183; L64, T 4475.
[1132] L64, T 4475.
[1133] Exhibit P183.
[1134] Exhibit P183.
[1135] Exhibit P183; L64, T 4456.
[1136] L64, T 4456.
[1137] L64, T 4456-4457.
[1138] L64, T 4458.
[1139] L64, T 4457.
[1140] L64, T 4457.
[1141] L64, T 4457-4458.
[1142] L64, T 4458.
[1143] L64, T 4457-4458; 4476.
[1144] L64, T 4476.

alleged mistreatment of a Kosovo Albanian student.[1145] L64 stated that Ajet Gashi was in the Llapushnik/Lapusnik prison camp for some time before he was executed.[1146]

321. The Chamber does not accept that Ajet Gashi was satisfactorily identified by L64 as being present at the Llapushnik/Lapusnik prison camp. In addition to the reservations expressed by the Chamber elsewhere in this Judgement about the general credibility of L64, in relation to his account of Ajet Gashi's detention the Chamber finds L64's testimony unpersuasive. L64 provides no discernable basis for claiming that the individual he saw at the Llapushnik/Lapusnik prison camp was Ajet Gashi.[1147] It is unclear how L64 learned that Ajet Gashi was the "big spy" being detained at Llapushnik/Lapusnik, as he did not know Ajet Gashi previously.[1148] L64 identified the man he believed to be Ajet Gashi only by inference and supposition.[1149] He apparently heard from individuals unknown to the Chamber that the "big spy" at Llapushnik/Lapusnik and Ajet Gashi were one and the same individual.[1150] However, in a previous statement to investigators, L64 stated that he did not know Ajet Gashi and was not aware that Ajet Gashi was held in Llapushnik/Lapusnik.[1151] No other *viva voce* witness called by the Prosecution identified Ajet Gashi or referred to him as a prisoner at the Llapushnik/Lapusnik prison camp. Shefqet Gashi's written statement notes that he overheard someone, who was not identified, saying that Ajet Gashi was detained at Llapushnik/Lapusnik.[1152] The Chamber can place little weight on this. In light of these circumstances, the Chamber is not satisfied that Ajet Gashi was a detainee at the Llapushnik/Lapusnik prison camp.

322. It is also necessary to comment upon the circumstances of Ajet Gashi's alleged murder and the testimony provided by L64 on this issue. The Prosecution alleges that Ajet Gashi was murdered on or about 12 June 1998.[1153] Ajet Gashi's body was found between Magure/Magura and Leletiq/Laletic on the side of the road.[1154] Shefqet Gashi, the victim's brother, stated that he learned from a German television broadcast that Ajet Gashi's body had been found between Magure/Magura and Leletiq/Laletic.[1155] Albanian newspapers also carried reports of Ajet Gashi's death in Leletiq/Laletic.[1156] The written statement of Shefqet Gashi appends a newspaper report of

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[1145] L64, T 4475.
[1146] L64, T 4490.
[1147] L64, T 4458.
[1148] L64, T 4768.
[1149] L64, T 4458.
[1150] L64, T 4457-4458.
[1151] L64, T 4768.
[1152] Exhibit P183.
[1153] Indictment, para 29.
[1154] Exhibit P183.
[1155] Exhibit P183.
[1156] Exhibit P183.

15 June 1998 stating that Ajet Gashi had been killed with five bullets to the chest.[1157] A court decision of 29 May 2002, also appended to Shefqet Gashi's written statement, confirmed that Ajet Gashi had been killed on 12 June 1998.[1158] Shefqet Gashi's relatives who viewed the body told him that Ajet Gashi's arm had been broken and there were signs of wounds to his stomach.[1159] There were also bruises and cuts on his hands.[1160] Forensic examination of the body by Dr José Pablo Baraybar confirms that the cause of Ajet Gashi's death was multiple gunshot wounds to the head and trunk.[1161] It also reveals that there were gunshot wounds to his upper limbs.[1162]

323. L64 testified that Ajet Gashi was executed.[1163] On L64's evidence, sometime in the first half of June 1998, Ymer Alushani arrived at Rexhep Vojvoda's house at Llapushnik/Lapusnik to ask L64 for gloves and a mask.[1164] A group was gathered at the house at the time. L64's brother was present, as were Fadil Kastrati, Zenel, Tamuli and others.[1165] Ymer Alushani told L64 that he would need the gloves and mask because he had to "remove something."[1166] Shortly thereafter, the group departed in vehicles.[1167] L64 drove in a convoy of cars with Ymer Alushani and others towards the direction of Leletiq/Laletic.[1168] L64 testified that he saw the other cars parked at the fork in the road towards Leletiq/Laletic and Magure/Magura.[1169] Fadil Kastrati's car was on the left side of the road towards Leletiq/Laletic; the other car was on the opposite side of the road leading to Magure/Magura.[1170] L64 testified that the boot of one of the cars was open.[1171] When L64 approached, he saw a man he says was Ajet Gashi lying on the road beside the car in a critical condition.[1172] Ymer Alushani then told L64 that they had orders to execute the man.[1173] L64 stated that he refused to take part in the execution.[1174] L64 testified that Ymer Alushani and Tamuli then shot the man dead with approximately 20 bullets.[1175] It is L64's evidence that Fadil Kastrati and L64's brother then went home, while Ymer Alushani and the others went to a wedding.[1176]

1157 Exhibit P183.
1158 Exhibit P183.
1159 Exhibit P183.
1160 Exhibit P183.
1161 Exhibit P111.
1162 Exhibit P111.
1163 L64, T 4490.
1164 L64, T 4490.
1165 L64, T 4490-4491.
1166 L64, T 4490.
1167 L64, T 4490.
1168 L64, T 4491-4492.
1169 L64, T 4492.
1170 L64, T 4492.
1171 L64, T 4492.
1172 L64, T 4492.
1173 L64, T 4492.
1174 L64, T 4492-4493.
1175 L64, T 4493.
1176 L64, T 4493.

324. There are newspaper reports documenting Ajet Gashi's death which state that shots were heard in the relevant area on the night of the 12th or 13th July,[1177] and L64's account as to the timing, location and cause of the murder he witnessed is consistent with the other evidence documenting Ajet Gashi's death.[1178] However, the Chamber has already expressed its reservations regarding the reliability of substantial parts of L64's testimony.[1179] For this reason the Chamber is left with reservations about the testimony of L64 regarding the circumstances of this murder, unsupported as it is by any other testimony. The Chamber accepts that Ajet Gashi is dead. However, the Chamber is not persuaded by L64's identification of Ajet Gashi at Llapushnik/Lapusnik and, similarly, is not persuaded by L64's evidence that the man whose murder he witnessed was in fact Ajet Gashi.

325. In the Chamber's finding the Prosecution has not established that Ajet Gashi was kept in detention at Llapushnik/Lapusnik. It therefore follows that the elements of torture (Count 4) and cruel treatment (Count 6) at the Llapushnik/Lapusnik prison camp relating to Ajet Gashi have not been established. On the basis of the forensic evidence, it appears that Ajet Gashi was murdered. However, as it has not been established that the man killed in the presence of L64 was Ajet Gashi, there is no other evidence as to the circumstances of his death or the persons responsible. For this reason, the elements of murder (Count 8) have not been established in relation to Ajet Gashi for the purposes of this Indictment.

(ix) Fehmi Xhema (also known as Fehmi Tafa)

326. L06 gave evidence that on 13 or 14 June 1998 he, along with Fehmi Xhema (aka Fehmi Tafa), an ethnic Albanian, and others, including L10, was stopped at a KLA checkpoint between Carraleve/Crnoljevo and Zborc/Zborce by two KLA soldiers wearing masks and carrying automatic weapons.[1180] L12 also gave evidence that Fehmi Xhema was kidnapped.[1181] They were then taken to Idriz Muharremi's house.[1182] Idriz Muharremi's house was approximately 200 or 300 metres from where they were apprehended by the KLA soldiers.[1183] At the house, Fehmi Xhema and L06 were put in separate cars;[1184] L06 and L10 travelled together.[1185] According to L10 the cars were driven first to a house in Klecke/Klecka.[1186] L10 stated that he was told by Fehmi Xhema that they

[1177] Exhibit P183.
[1178] Exhibit P183.
[1179] *See supra,* para 28.
[1180] L06, T 977-979.
[1181] L12, 1791; T 1824-1829; Exhibit P54.
[1182] L10, T 2913; L06, T 983. There are two different spellings of 'Idriz Muharremi' in the transcript.
[1183] L10, T 2913; L06, T 983.
[1184] L06, T 983; L10, T 2913.
[1185] L06, T 989; L10, T 2913.
[1186] L10, T 2915.

were in Klecke/Klecka.[1187] L10 stated that, after approximately half an hour or an hour, they were placed in the same car and then driven to another location.[1188]

327. As the Chamber has discussed, the discrepancies between the accounts of L06 and L10 regarding their apprehension do not concern important elements of the fact and circumstances of each witness' abduction.[1189] These discrepancies also do not affect the Chamber's finding that Fehmi Xhema was detained at Llapushnik/Lapusnik. A number of witnesses were able to attest to Fehmi Xhema's presence at the Llapushnik/Lapusnik prison camp.[1190] L06 identified Fehmi Xhema as being present in the storage room, where he was handcuffed.[1191] L10 was handcuffed to Fehmi Xhema.[1192] L10 also recognised Fehmi Xhema by photograph.[1193]

328. L06 testified that, seven days into his detention, he saw Fehmi Xhema taken out of the storage room by Ramadan Behluli and Ali Gashi and led towards the cowshed. It was L06's impression that Fehmi Xhema was gone for an hour.[1194] L06 testified that, when he was returned, Fehmi Xhema had been seriously beaten.[1195] He was brought into the room by his legs and "dumped" on the floor by his attackers.[1196] L06 knocked on the door to ask for water for Fehmi Xhema; Shala told him to stop knocking on the door or he would beat him "one hundred times".[1197] According to L06, Fehmi Xhema "did not have any injuries on his body", but his condition was such that he died some twenty minutes after being brought into the room.[1198] L06 testified that three days passed before Fehmi Xhema's body was removed from the room.[1199]

329. L10 provided an account of Fehmi Xhema's death that differs from the testimony provided by L06. L10 stated that, on the day after L06 was beaten, four individuals, who L10 stated were Shala, Murrizi, Qerqizi and another man, came into the room while the detainees were sleeping and tied Fehmi Xhema's hands, blindfolded him and took him out.[1200] The man said to be Qerqizi and the man L10 did not recognise were wearing masks. L10 heard Fehmi Xhema scream once. Fehmi Xhema was returned to the storage room after approximately twenty minutes by Shala, who

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[1187] L10, T 2915.
[1188] L10, T 2911-2916.
[1189] *See supra*, paras 245-248; 272-273.
[1190] L06, T 989-990; L10, T 2921; T 2971.
[1191] L06, T 993.
[1192] L10, 2921.
[1193] L10, T 2971; Exhibit P54.
[1194] L06, T 1010-1012.
[1195] L06, T 1011-1012.
[1196] L06, T 1011-1012.
[1197] L06, T 1012.
[1198] L06, T 1012.
[1199] L06, T 1013.
[1200] L10, T 2939.

instructed the detainees to remain silent.[1201] Fehmi Xhema was swollen all over from the wounds and was unable to stand.[1202] He was in a precarious and critical condition. L10 testified that he put some water on Fehmi Xhema's chest because he was about to die.[1203] L10 testified that Fehmi Xhema died a short time later.[1204] The next day, Shala and a number of others came into the room and dragged the body away. L10 could see a white "Omega" car and believes Fehmi Xhema's body was carried away in it, although he has no specific information about this.[1205]

330. The accounts given by L06 and L10 of Fehmi Xhema's death vary in important respects. L06 stated that Fehmi Xhema was taken out directly after having himself been beaten, while L10 stated that Fehmi Xhema was taken out the day after L06 was beaten. The testimonies also diverge as to the day on which Fehmi Xhema's body was removed from the cowshed. Most fundamentally, L06 and L10 gave inconsistent accounts of the identities of Fehmi Xhema's alleged assailants. L06 testified that Fehmi Xhema was removed and beaten by Ali Gashi and Ramadan Behluli; L10 stated that Shala, Murrizi, Qerqizi and another man were the individuals involved. Similarly, the testimonies also differ as to the identities of the men who beat L06.[1206]

331. Having given close attention to the evidence of L06 and L10, and especially to the evident discrepancies, and having taken into account their demeanour and the manner in which each of these witnesses gave their evidence, the overall tenor of their evidence, the circumstances of their captivity in the Llapushnik/Lapusnik prison camp and its duration, and the length of time since those events occurred, the Chamber assesses that both L06 and L10 were honest witnesses; but it is clear that some events have become confused in the mind of at least one of them. Whether this is due to the circumstances of their respective captivity, including their personal suffering, or to the intervening years, cannot be determined. As a consequence, the Chamber is not able to be confident of some matters dealt with in their evidence, in particular of the identity of the individuals who took Fehmi Xhema out of the storage room. The Chamber is satisfied, however, that Fehmi Xhema was detained by the KLA in the storage room at the Llapushnik/Lapusnik prison camp for a period from 13 June 1998 until an unknown date before 25 or 26 July 1998. The Chamber finds that, on one day of his detention, Fehmi Xhema was taken from the storage room and was returned later having been grievously beaten. For reasons discussed in following paragraphs, the Chamber further finds that Fehmi Xhema remained in the storage room for a matter of one to three days, during which time he appeared to both L06 and L10 to be dead. He was then finally removed from the storage

[1201] L10, T 2939-2941.
[1202] L10, T 2942.
[1203] L10, T 2942.
[1204] L10, T 2942.
[1205] L10, T 2942.
[1206] L06, T 1007-1008; L10, T 2938.

room and was not returned. While he was in the Llapushnik/Lapusnik prison camp Fehmi Xhema was not taking any active part in hostilities.

332. The Chamber finds that despite the seriousness of the mistreatment suffered by him, the Chamber has inadequate evidence to discern whether he was beaten for a specific purpose as required for the crime of torture. It remains open on the evidence that Fehmi Xhema was beaten purely for arbitrary motives.

333. The Chamber finds that Fehmi Xhema was subjected to cruel treatment while detained at the Llapushnik/Lapusnik prison camp. He was subjected to a significant level of violence which indisputably caused him extremely serious levels of physical suffering and injury. Given the circumstances, the Chamber is satisfied that his attackers acted deliberately. Aside from the physical outrages he endured, Fehmi Xhema was detained for many days in the storage room and was handcuffed to another prisoner, L10, which would have added to his discomfort.[1207] As the Chamber has discussed, the conditions in the storage room were deplorable, and were such as to cause serious physical and psychological suffering, or to constitute a serious attack on human dignity, sufficient to amount to cruel treatment.[1208]

334. The Prosecution alleges that, sometime in June or July 1998, Fehmi Xhema was murdered at the Llapushnik/Lapusnik prison camp.[1209] The death of Fehmi Xhema is not disputed. Forensic DNA analysis of a bone sample from remains recovered from a grave site in Mirene/Mirena establishes, in the Chamber's finding, the familial relationship with other members of the Xhema family.[1210] An autopsy report of 13 October 2003 on these remains determined that the cause of Fehmi Xhema's death was a gunshot wound to the thorax.[1211] Fehmi Xhema's death certificate similarly notes that the cause of death was a gunshot wound to the thorax.[1212] The grave site in Mirene/Mirena is not a great distance to the east of Llapushnik/Lapusnik. At the relevant time it was situated in the same area of KLA control as Llapushnik/Lapusnik. Mirene/Mirena can be reached from Llapushnik/Lapusnik by car.

335. The Defence assert that the forensic information is incompatible with the testimonies of both L06 and L10, which has been summarised earlier, raising fundamental doubts about their credibility as witnesses.[1213] The Chamber does not assess the evidence as to the cause of death in this way.

1207 L06, T 993; L10, T 2918-2923.
1208 *See supra,* para 289.
1209 Indictment, para 32.
1210 Exhibit P256.
1211 Exhibit P227.
1212 Exhibit P228.
1213 Defence Final Brief, para 909.

The witness testimony describing the nature of Fehmi Xhema's death is not necessarily inconsistent with the forensic evidence. The Chamber accepts that both L06 and L10 thought that Fehmi Xhema "died" after being returned to the storage room. These, however, are lay appreciations of Fehmi Xhema's physical condition; they are not pronouncements of medical fact. While it is clear that Fehmi Xhema was in a desperately low state when he was returned to the storage room, it is not necessarily the case that he was clinically dead. What L06 and L10 described as Fehmi Xhema's "death" may in fact have been a deep coma resulting from the severe beating he had just received.

336. The Chamber accepts from the evidence of L06 and L10 that there was no sign of Fehmi Xhema having been shot in the thorax when he was returned to the storage room. In the Chamber's finding he was shot after he was later removed from the storage room. The forensic evidence indicates the shooting was the clinical cause of death. The Chamber finds that this was so, even though Fehmi Xhema appeared to L06 and L10 to have already died before he was removed from the storage room. Whether the person or persons who killed Fehmi Xhema also believed him to be dead, or whether he was removed from the storage room so that he could be shot, is not clear on the evidence. When he was removed, Fehmi Xhema may have regained consciousness, or it may have been discovered, upon inspection of his body, that his vital organs were still functioning. Whether or not some such event occurred, in the Chamber's finding, the circumstances demonstrate that, having removed the near dead Fehmi Xhema from the storage room, he was at some later stage shot by those who had him in their captivity and his remains were then disposed of by burial at Mirene/Mirena.

337. It will be evident that, in these circumstances, it cannot be determined whether Fehmi Xhema was actually shot in the Llapushnik/Lapusnik prison camp or after he was moved from there. While the Indictment alleges he was murdered in the prison camp, that particular is not a material element of the charged offence of murder. The issue of whether one or more of the Accused have been shown to have killed him or are otherwise criminally responsible for his murder in one of the ways alleged, will be dealt with later in the Judgement.[1214] That issue aside for the present, the Chamber is persuaded in all the circumstances, and finds, that Fehmi Xhema was a detainee at the Llapushnik/Lapusnik prison camp when he was shot, and that the person or persons who shot him intended either to kill him or to inflict upon him grievous bodily harm or serious injury, with the reasonable knowledge that death was a likely consequence of the shooting.

338. Therefore, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber finds that the elements of the offence of cruel treatment (Count 6) have been

[1214] *See infra*, para 661.

established in respect of Fehmi Xhema on the basis both of the mistreatment of Fehmi Xhema, and of his conditions of detention. The elements of the offence of torture (Count 4), however, have not been established. Further, the Chamber is satisfied that the elements of the offence of murder (Count 8) have been established with regard to Fehmi Xhema.

(x) Milovan Krstić and Miodrag Krstić

339. Ljiljana Mitrović testified that, on 24 June 1998, Slobodan Mitrović and Milovan Krstić collected Miodrag Krstić from a hospital in Belgrade and departed for Reqan/Rečane in Kosovo.[1215] They were travelling in a navy blue Volkswagen Golf.[1216] They stopped at Krusheve/Krusevac.[1217] No more was heard from them. Having arrived in Kosovo to search for her husband, Slobodan Mitrović, Ljiljana Mitrović was told by Abdyl Kryeziu that Slobodan Mitrović and the Krstić brothers, all ethnic Serbs, had been kidnapped in Carraleve/Crnoljevo and taken in the direction of Malisheve/Malisevo.[1218] Slobodanka Krstić stated that her late husband's brother told her he saw Miodrag Krstić's car in Malisheve/Malisevo one month after the kidnapping, driven by a Kosovo Albanian from Malisheve/Malisevo called Liman.[1219]

340. Numerous individuals identified both Milovan Krstić[1220] and Miodrag Krstić[1221] as prisoners in the storage room at the Llapushnik/Lapusnik prison camp. Ivan Bakrač testified that Milovan Krstić recounted to him how he was brought there.[1222] Ivan Bakrač stated that Milovan Krstić told him that he was brought to a school in his own car, which Ivan Bakrač said was a navy blue Volkswagen Golf.[1223] Vojko Bakrač gave evidence that he heard the same account from the "Krstić brothers."[1224] Personal documents belonging to Milovan Krstić were apparently found at Llapushnik/Lapusnik.[1225] On the basis of this evidence, the Chamber is satisfied that Milovan Krstić and Miodrag Krstić were detained at the Llapushnik/Lapusnik prison camp by the KLA for an undetermined period of time beginning on 24 June 1998. The Chamber concludes that they were taking no active part in hostilities during that time.

341. The Chamber is satisfied from the evidence as to the conditions in which these and the other prisoners were kept, that the conditions of detention in the storage room were such as to constitute

1215 Ljiljana Mitrović, T 1596-1599; Exhibit P187.
1216 Exhibit P187.
1217 Ljiljana Mitrović, T 1599.
1218 Ljiljana Mitrović, T 1601-1602.
1219 Exhibit P187.
1220 Ivan Bakrač, T 1447-1449; Vojko Bakrač, T 1314-1317; L07, T 824; Exhibit P54.
1221 L07, T 821-824; Vojko Bakrač, T 1314-1317, Exhibit P54.
1222 Ivan Bakrač, T 1448-1449.
1223 Ivan Bakrač, T 1448.
1224 Vojko Bakrač, T 1313.
1225 Exhibits P244/245, tab 17.

cruel treatment (Count 6). There is, however, no evidence of direct and specific further mistreatment committed against Milovan Krstić or Miodrag Krstić.

342. The Prosecution alleges that Milovan and Miodrag Krstić were murdered at the Llapushnik/Lapusnik prison camp between 24 June 1998 and 26 July 1998.[1226] Since the bodies of Milovan and Miodrag Krstić have not been recovered, the Prosecution invites the Chamber to apply the factors listed in *Prosecutor v. Krnojelac* to determine that the elements of murder are satisfied.[1227] A number of years have elapsed since Milovan and Miodrag Krstić disappeared, and they have not contacted their family or others during that time. The Chamber has evidence of the disappearances of others detained at Llapushnik/Lapusnik. No evidence has been advanced indicating the mistreatment of Milovan Krstić or Miodrag Krstić during their detention in Llapushnik/Lapusnik, but the Chamber takes into account evidence of the general conduct towards those detained and the acts of violence perpetrated against certain detainees. The Chamber is also conscious of evidence that some persons who were detained in the prison camp were later released.

343. Nevertheless, the evidence led by the Prosecution does not enable the Chamber to be satisfied that the Prosecution has proved the elements of murder in relation to Milovan Krstić and Miodrag Krstić. There is no evidence before the Chamber that Milovan Krstić or Miodrag Krstić were killed in the Llapushnik/Lapusnik prison camp, by KLA guards from the prison camp, or that they were killed between the dates alleged by the Prosecution in the Indictment, that is, between 24 June 1998 and 26 July 1998. In fact, Slobodanka Krstić heard that Milovan and Miodrag Krstić were alive in August 1998.[1228] This, however, was by way of rumour. Further, in November 1998, Slobodanka Krstić's brother saw a television programme that showed KLA soldiers in Kukes, in Albania. Slobodanka Krštic's brother told her that he recognised Miodrag Krstić among them.[1229] Having regard to all the relevant circumstances the Chamber cannot be satisfied that the Prosecution has established that Milovan Krstić and Miodrag Krstić are in fact dead.

344. The elements of the offence of torture (Count 4) have not been established in relation to Milovan Krstić or Miodrag Krstić. Leaving aside the question of the criminal responsibility of the three Accused, the Chamber finds that the elements of the offence of cruel treatment (Count 6) have been established in relation to Milovan Krstić and Miodrag Krstić. The Chamber finds that the elements of the offence of murder (Count 8) have not been satisfied in relation to Milovan Krstić and Miodrag Krstić.

1226 Indictment, para 30.
1227 Prosecution Final Brief, para 462.
1228 Exhibit P187.
1229 Exhibit P187.

(xi) Slobodan Mitrović

345. Ljiljana Mitrović stated that, on 24 June 1998, Slobodan Mitrović, an ethnic Serb, and his cousin Milovan Krstić collected Miodrag Krstić from a hospital in Belgrade and departed for Reqan/Recane in Kosovo.[1230] Ljiljana Mitrović last saw her husband on 23 June 1998 in Arandjelovac.[1231] The Serbian authorities told Ljiljana Mitrović that a car matching the description of the Volkswagen Golf in which the men were travelling had been viewed crossing the border at Rurdare/Merdare.[1232] Ljiljana Mitrović headed for Kosovo on 25 June 1998, where she was told by Abdyl Kryeziu, from Suhareke/Suva Reka, that her husband and the Krstić brothers had been kidnapped in Carraleve/Crnoljevo and taken in the direction of Malisheve/Malisevo.[1233]

346. Slobodan Mitrović was recognised by others as being present at the Llapushnik/Lapusnik prison camp. L07 identified Slobodan Mitrović by photograph as one of the prisoners detained in the storage room at Llapushnik/Lapusnik.[1234] Vojko Bakrač stated that he was detained in the storage room with "the Krstić brothers, one of whom was called Slobodan,"[1235] although he was unable to identify Slobodan Mitrović by photograph. Documentation belonging to Slobodan Mitrović was apparently found at Llapushnik/Lapusnik.[1236]

347. Ivan Bakrač recognised a photograph of Slobodan Mitrović by photograph as one of the persons who was detained in the storage room at the Llapushnik/Lapusnik prison camp.[1237] He did not know by name the individual he recognised by photograph. According to Ivan Bakrač, Slobodan Mitrović had a bullet hole in his leg and told him that he had been shot while attempting to flee from a bus that had been stopped by the KLA.[1238] This does not accord with the account of Slobodan Mitrović's apprehension given by Ljiljana Mitrović and Slobodanka Krstić, who both understood that Slobodan Mitrović was travelling by car, not by bus.[1239] The Chamber notes that the circumstances which Ivan Bakrač described appear to accord with the Prosecution's case as to the apprehension and disappearance of Srboljub Miladinović, whom the Prosecution alleges was also detained at the Llapushnik/Lapusnik prison camp.[1240] There is obvious uncertainty in the evidence.

1230 Ljiljana Mitrović, T 1596-1599.
1231 Ljiljana Mitrović, T 1596.
1232 Ljiljana Mitrović, T 1600-1601.
1233 Ljiljana Mitrović, T 1601.
1234 L07, T 824; Exhibit P54.
1235 Vojko Bakrač, T 1311-1314.
1236 Exhibits P244/245, tab 7 and tab 17.
1237 Ivan Bakrač, T 1449; Exhibit P54
1238 Ivan Bakrač, T 1447-1449; Exhibit P54.
1239 Ljiljana Mitrović, T 1596-1599; Exhibit P187.
1240 Prosecution Final Brief, para 220; L96, T 2342.

348. Despite this, the Chamber is satisfied, on the basis of the evidence, that Slobodan Mitrović was identified as a detainee in the storage room at the Llapushnik/Lapusnik prison camp. The chamber is further satisfied that Slobodan Mitrović was detained in the storage room by the KLA for an undetermined period of time, beginning on 24 June 1998. The Chamber finds that Slobodan Mitrović was not taking any active part in hostilities during that time.

349. As the Chamber has discussed, the conditions in the storage room in the relevant period were such as to constitute the offence of cruel treatment. That aside, there is no evidence that Slobodan Mitrović was subjected to direct mistreatment or torture at Llapushnik/Lapusnik.

350. The Prosecution alleges that Slobodan Mitrović was murdered at the Llapushnik/Lapusnik prison camp sometime between 24 June 1998 and 26 June 1998.[1241] The Prosecution asks the Chamber to apply the factors set out in *Prosecutor v. Krnojelac* to the evidence before it. A number of years have elapsed since Slobodan Mitrović disappeared, and he has not contacted his family or others during that time. Further, the Chamber has evidence of the disappearances of others detained at Llapushnik/Lapusnik. Slobodan Mitrović's wife heard from a man who claimed to have seen Slobodan Mitrović, but this was apparently a hoax.[1242] Ljiljana Mitrović testified before the Chamber that she has not seen her husband since his disappearance and was confident that he has been killed.[1243] The Chamber has no doubt that Ljiljana Mitrović testified truthfully. However, her evidence does not provide sufficient certainty as to the circumstances of her husband's possible death so as to establish the elements of the offence of murder as charged.

351. The Chamber concludes that the elements of the offence of torture (Count 4) have not been established in relation to Slobodan Mitrović. Leaving aside the criminal responsibility of the three Accused, the Chamber finds that the elements of the offence of cruel treatment (Count 6) have been satisfied in relation to Slobodan Mitrović. The Chamber concludes that the elements of the offence of murder (Count 8) have not been established in relation to Slobodan Mitrović.

(xii) Miroslav Šuljinić

352. On 21 May 1998, Miroslav Šuljinić, an ethnic Serb, was returning from Doberdoll/Dobri Do to Viteje/Vidanje when he disappeared.[1244] Miroslav Šuljinić's brother, Jeremija Šuljinić, received information from the MUP that, on 21 May 1998, Miroslav Šuljinić had been crossing the MUP

[1241] Indictment, para 30.
[1242] Ljiljana Mitrović, T 1611.
[1243] Ljiljana Mitrović, T 1612-1613.
[1244] Exhibit P194.

Komoran/Komorane checkpoint towards Llapushnik/Lapusnik. His car was allegedly seen by three journalists in Llapushnik/Lapusnik that same day.[1245]

353. A note shown to Jeremija Šuljinić by investigators and appended to his written statement states: "I am Šuljinić, Miroslav, born on 08.06.1996 [sic]. Occupation worker. Captured by UČK in Lapošnik [sic] 21.05.1998."[1246] Jeremija Šuljinić stated that he recognised Miroslav Šuljinić's handwriting.[1247]

354. The Prosecution has called only one *viva voce* witness who was able to testify as to Miroslav Šuljinić presence in Llapushnik/Lapusnik.[1248] When shown a photograph of Miroslav Šuljinić, Ivan Bakrač stated that he recognised him as a man who was "always smiling" and who had been travelling in the dark blue Volkswagen Golf with Milovan Krstić.[1249] However, according to the written statement of Jeremija Šuljinić, Miroslav Šuljinić was not with Milovan Krstić when he was apprehended; according to Jeremija Šuljinić, Miroslav Šuljinić travelled alone to Doberdoll/Dobri Do to finish some work.[1250] Further, Jeremija Šuljinić stated that Miroslav Šuljinić was travelling in a Toyota Corolla, not a Volkswagen Golf.[1251] Later in his testimony, Ivan Bakrač was shown a photograph of Miroslav Šuljinić and asked if he recognised him as one of the men Ivan Bakrač spoke to when inquiring about the whereabouts and welfare of Stamen Genov.[1252] Ivan Bakrač agreed that Miroslav Šuljinić was one of the men he had spoken to.[1253]

355. The Chamber is satisfied that Ivan Bakrač testified truthfully. His recollection of what he was told of the circumstances of Miroslav Šuljinić's apprehension, however, does not accord with the written statement of Jeremija Šuljinić regarding Miroslav Šuljinić's apprehension. The Chamber has no adequate basis on which to determine how Miroslav Šuljinić was apprehended. One possibility, therefore, is that Ivan Bakrač misidentified Miroslav Šuljinić. No other *viva voce* witnesses called by the Prosecution have testified to the presence of Miroslav Šuljinić at the Llapushnik/Lapusnik prison camp. Further, the provenance of Miroslav Šuljinić's purported written statement, identified as such by Jeremija Šuljinić, is unknown. The Chamber is left, therefore, with doubt as to whether Miroslav Šuljinić was detained at the Llapushnik/Lapusnik prison camp.

[1245] Exhibit P194.
[1246] Exhibit P194.
[1247] Exhibit P194.
[1248] Ivan Bakrač, T 1469.
[1249] Ivan Bakrač, T 1449.
[1250] Exhibit P194.
[1251] Exhibit P194.
[1252] Ivan Bakrač, T 1469.
[1253] Ivan Bakrač, T 1469.

356. The Chamber therefore concludes that the elements of the offences of torture (Count 4), cruel treatment (Count 6) and murder (Count 8) have not been established in relation to Miroslav Šuljinić.

(xiii) Živorad Krstić

357. According to the written statements of Snežana Simonović and Stojan Stojanović, Živorad Krstić, an ethnic Serb, was taken off a bus on 25 June 1998 when returning from Prizren/Prizren to Prishtina/Pristina, after having attended a memorial service for his brother.[1254] Stojan Stojanović heard from Živorad Krstić's nephew that Živorad Krstić was taken off the bus in Carraleve/Crnoljevo.[1255] According to Stojan Stojanović, the bus was stopped by soldiers who introduced themselves as members of the KLA.[1256] Živorad Krstić's bag and identification documents were found on the bus.[1257] Živorad Krstić was kidnapped with two other unidentified Serbs.[1258]

358. Živorad Krstić's brother in law stated that he met with two men who had been released through the International Committee of the Red Cross.[1259] Both men, when shown a photograph of Živorad Krstić, recognised him as having been held in a detention camp with them.[1260] The identities of the two men are not made clear in the written statement, but their description and circumstances match those of the Bakračs. Snežana Simonović, Živorad Krstić's daughter, in a written statement noted that in October 1998 she was informed by an individual that prisoners at a camp somewhere near Suhareke/Suva Reka told him that there was a man in the camp with the name of Krstić, from Prishtina/Pristina, who had three daughters and was in poor health.[1261] Živorad Krstić had three daughters.[1262] Vojko Bakrač stated that there was an elderly, sick gentleman detained in the storage room at the Llapushnik/Lapusnik prison camp.[1263] He testified that the elderly gentleman had diabetes[1264] and had undergone eye surgery shortly before being apprehended.[1265] Vojko Bakrač identified Živorad Krstić by photograph as a detainee in the storage room.[1266] Vojko Bakrač stated that this elderly man was the only detainee who had grey hair.[1267]

1254 Exhibit P192; Exhibit P193.
1255 Exhibit P193.
1256 Exhibit P193.
1257 Exhibit P193; Exhibit P192.
1258 Exhibit P192.
1259 Exhibit P193.
1260 Exhibit P193.
1261 Exhibit P192.
1262 Exhibit P193.
1263 Vojko Bakrač, T 1311-1314.
1264 Vojko Bakrač, T 1312-1313.
1265 Vojko Bakrač, T 1312.
1266 Vojko Bakrač, T 1314-1317; Exhibit P54.
1267 Vojko Bakrač, T 1314-1317.

The written statement of Snežana Simonović confirmed that Živorad Krstić had undergone eye surgery approximately one month prior to his apprehension.[1268] In her written statement Snežana Simonović further stated that Živorad Krstić was taking medication for diabetes at the time of his apprehension.[1269]

359. The Chamber accepts that Živorad Krstić was detained by the KLA in the storage room at Llapushnik/Lapusnik for an unspecified period of time beginning on 25 June 1998. The Chamber accepts that he was taking no active part in hostilities at the time. The Chamber finds that Živorad Krstić was subjected to cruel treatment due to the general conditions in the storage room. The Chamber has accepted that those conditions were such that detention in the storage room constituted the offence of cruel treatment. The Chamber takes into account, specifically, Živorad Krstić's age and medical condition at the time of his detention. He was in poor health, suffering from diabetes, and recovering from eye surgery at the time he was apprehended. There is no evidence that Živorad Krstić was subjected to torture at the Llapushnik/Lapusnik prison camp.

360. The Prosecution alleges that Živorad Krstić was murdered between 24 June 1998 and 26 July 1998 at the Llapushnik/Lapusnik prison camp.[1270] Again, the evidence relied upon by the Prosecution is circumstantial; the Prosecution invites the Chamber to have regard to the factors in *Prosecutor v. Krnojelac*.

361. There is no evidence of Živorad Krstić's direct mistreatment at the Llapushnik/Lapusnik prison camp. Živorad Krstić has not contacted his friends or family since his disappearance. Snežana Simonović stated that she was informed that Živorad Krstić was alive in October 1998. In his written statement, Stojan Stojanović stated that Boško Buha told him sometime in 1999 that Živorad Krstić had died.[1271] Boško Buha could not tell Stojan Stojanović exactly when Živorad Krstić had died, or the circumstances of his death.[1272] However, Stojan Stojanović was told by Boško Buha that Živorad Krstić had died "some time ago."[1273] Stojan Stojanović also heard that Živorad Krstić's nephews, who had been trying to negotiate Živorad Krstić's release, were also told that he had died.[1274] While these hearsay accounts cannot establish that Živorad Krstić is dead, none of them provides any basis for believing he may still be alive. However, upon the evidence the Chamber finds that it it is unable to conclude, with sufficient certainty, that Živorad Krstić is dead.

[1268] Exhibit P192.
[1269] Exhibit P192.
[1270] Indictment, para 30.
[1271] Exhibit P193.
[1272] Exhibit P193.
[1273] Exhibit P193.
[1274] Exhibit P193.

362. If it be accepted, for the present, that Živorad Krstić died in the prison camp, two possible inferences would support the offence of murder, namely that he was deliberately killed by an individual or individuals, or that he died because medical care was deliberately withheld. There is insufficient evidence before the Chamber to support the first inference. On the evidence before the Chamber, the element of intent has not been established that would support the second inference. In the circumstances the offence of murder has not been established with respect to Živorad Krstić.

363. The Chamber therefore concludes that the elements of the offence of torture (Count 4) have not been established in relation to Živorad Krstić. Leaving aside the criminal responsibility of the three Accused, the Chamber concludes that the elements of the offence of cruel treatment (Count 6) have been established in relation to Živorad Krstić. The Chamber finds that the Prosecution has not established the elements of the offence of murder (Count 8) in relation to Živorad Krstić.

(xiv) Stamen Genov

364. It is the evidence of Vojko and Ivan Bakrač that Stamen Genov, an ethnic Serb and a member of the medical corps of the VJ, was taken by members of the KLA from a bus travelling from Gjakove/Djakovica to Belgrade on 29 June 1998, along with Vojko Bakrač, Ivan Bakrač, and Đorđe Čuk.[1275] Stamen Genov was wearing civilian clothes but was carrying a firearm in his bag.[1276] After being ordered off the bus, Stamen Genov and Đorđe Čuk were driven away in a blue vehicle.[1277] The vehicle soon returned to collect Vojko and Ivan Bakrač. They were then driven to a village school.[1278] When Vojko and Ivan Bakrač arrived, Stamen Genov was at the back of the room.[1279] After approximately one hour, the KLA soldiers began to beat Stamen Genov.[1280] This mistreatment intensified after Stamen Genov's military identification was discovered; he was beaten until nightfall and at one point lost consciousness.[1281] He was then tied and placed in a van along with Đorđe Čuk and the Bakračs.[1282] Vojko and Ivan Bakrač testified that they travelled in the van along with Stamen Genov and Đorđe Čuk for approximately one hour before arriving at a compound they have identified as the Llapushnik/Lapusnik prison camp.[1283] Vojko and Ivan

[1275] Vojko Bakrač, T 1291-1294; Ivan Bakrač, T 1395-1401.
[1276] Vojko Bakrač, T 1296.
[1277] Vojko Bakrač, T 1294.
[1278] Vojko Bakrač, T 1298.
[1279] Ivan Bakrač, T 1405-1406.
[1280] Ivan Bakrač, T 1407.
[1281] Vojko Bakrač, T 1299; Ivan Bakrač, T 1407-1408.
[1282] Vojko Bakrač, T 1304-1305; 1299-1302.
[1283] Ivan Bakrač, T 1410-1412; Vojko Bakrač, T 1305; Exhibits P5 and P6.

Bakrač, Stamen Genov and Đorđe Čuk were then taken to a room on the ground floor in the main house of the compound.[1284]

365. The severe mistreatment of Stamen Genov resumed immediately upon his arrival at the Llapushnik/Lapusnik prison camp.[1285] Ivan and Vojko Bakrač, Stamen Genov and Đorđe Čuk were in the room in the main house for approximately one and a half hours.[1286] During this time, Stamen Genov was beaten with rifle butts and kicked. The KLA soldiers beating Stamen Genov referred to him as the "Serbian police", and stated that the mistreatment of Stamen Genov was what Kosovo Albanians were forced to endure under the Serbs.[1287] Stamen Genov was asked, while being beaten, about the number of people he had killed as a member of the VJ.[1288] The beating was halted momentarily while a knife was brandished towards Stamen Genov's genitals.[1289] The beating resumed until Stamen Genov was incapacitated and had to be carried.[1290] Stamen Genov was then placed in the storage room of the Llapushnik/Lapusnik prison camp along with the Bakračs.[1291] Ivan Bakrač described how Stamen Genov was in dire physical condition as a result of the beatings administered. He was not able to move around properly and may have been suffering from broken limbs.[1292] Vojko Bakrač stated that Stamen Genov was beaten every day; hooded individuals would take him out of the storage room and return him after the beatings. Many times after these beatings Stamen Genov was semi-conscious; on one occasion he was unconscious.[1293] One night he was in such a desperate physical and psychological state that he asked Ivan Bakrač and Vojko Bakrač to strangle him.[1294] It seems that he was singled out for especially violent treatment on a regular basis.[1295]

366. Stamen Genov was a member of the medical corps of the VJ. The Chamber accepts the evidence of Ivan and Vojko Bakrač that Stamen Genov was viciously beaten on frequent occasions, although the identity of the perpetrators cannot be established. In the Chamber's finding Stamen Genov's captors inflicted physical and psychological abuse upon him with the intent to punish, interrogate and intimidate him. The Chamber concludes, therefore, that acts of torture were inflicted upon Stamen Genov. The mistreatment of Stamen Genov intensified upon his captors'

1284 Vojko Bakrač, T 1305 -1306; Exhibit P5-A1; Ivan Bakrač, T 1410 -1413; Exhibit P6-A8.
1285 Ivan Bakrač, T 1428.
1286 Ivan Bakrač, T 1428.
1287 Ivan Bakrač, T 1428.
1288 Vojko Bakrač, T 1307-1308.
1289 Vojko Bakrač, T 1309.
1290 Vojko Bakrač, T 1311.
1291 Ivan Bakrač, T 1441; T 1442; Vojko Bakrač, T 1311.
1292 Ivan Bakrač, T 1450.
1293 Vojko Bakrač, T 1332-1333.
1294 Vojko Bakrač, T 1333; Ivan Bakrač, T 1458.
1295 Ivan Bakrač, T 1457.

discovery of his military identification.[1296] In the Chamber's finding he was punished and interrogated because of this military affiliation. The evidence also discloses that a statement signed by Stamen Genov was found at Llapushnik/Lapusnik after the KLA evacuated detailing various structures and personnel of the VJ within Kosovo.[1297] The circumstances indicate, in the Chamber's finding, that this information was obtained through threats and applications of violent treatment.

367. The Chamber has found that Stamen Genov was detained at the Llapushnik/Lapusnik prison camp by the KLA for an undetermined period beginning on 29 June 1998 until an unknown date before 25 or 26 July 1998. He was thus taking no active part in hostilities at the time. The Chamber has already determined that the conditions in the storage room were such that detention there constituted the offence of cruel treatment. Stamen Genov was subjected to extreme levels of violence and savage abuse by unknown persons during the time of his detention in the storage room.

368. The Prosecution alleges that Stamen Genov was murdered sometime between 24 June 1998 and 26 July 1998 at the Llapushnik/Lapusnik prison camp.[1298] In its Final Brief, the Prosecution suggests that "it appears that Stamen Genov was killed by gunshot, although the evidence also certainly supports an inference that he would have died from the brutal and repeated beatings which he received…"[1299] No forensic evidence of Stamen Genov's death exists. The Prosecution invites the Chamber to rely on circumstantial evidence to conclude that the elements of the offence of murder have been established. The Chamber will have regard to those factors listed in *Prosecutor v. Krnojelac*.

369. The Bakračs, who shared the room with Stamen Genov for much of the time in which the latter was being beaten, were eventually taken from the storage room at the Llapushnik/Lapusnik prison camp. It is Vojko Bakrač's evidence that, one night, he heard shots ringing out, and assumed from these that Stamen Genov had been executed.[1300] But he also gave evidence of hearing from others that Stamen Genov may have been released.[1301] When the Bakračs were eventually released, Vojko Bakrač asked for the identification documents that were in Stamen Genov's wallet.[1302]

[1296] Vojko Bakrač, T 1301; Ivan Bakrač, T 1407-1408.
[1297] Exhibit P182; Exhibits P244/245, tab 1a.
[1298] Indictment, para 30.
[1299] Prosecution Final Brief, para 459.
[1300] Vojko Bakrač, T 1344-1345.
[1301] Vojko Bakrač, T 1343.
[1302] Vojko Bakrač, T 1348-1349.

Stamen Genov's wallet was still there. This suggested to him that Stamen Genov had been killed, because those who were released had their personal belongings returned.[1303]

370. Nevertheless, the evidence is uncertain regarding Stamen Genov's alleged murder. The testimonies of Ivan and Vojko Bakrač involve some tension. According to Ivan Bakrač, when he visited the basement when on his way to the cellar, he was told that Stamen Genov had been released.[1304] Further, Stamen Genov's cousin, Vasil Dimitrov, said in a written statement that Ivan Bakrač informed him that he once went past the basement to check if Stamen Genov was still alive and that he talked to Stamen Genov himself.[1305] This is not confirmed, however, by the evidence of Ivan Bakrač.

371. Further, according to Vasil Dimitrov's written statement, he was informed from a number of different sources that Stamen Genov is still alive. According to Vasil Dimitrov's written statement, on 27 August 2001, Stamen Genov's mother claimed to have received a telephone call from her son.[1306] Vasil Dimitrov purports to dispute whether it was Stamen Genov on the phone, but does not provide any basis for his disbelief of Stamen Genov's mother.[1307] Vasil Dimitrov's statement notes that he was informed by Jovica Kostov that Rehbedžej Redži had seen Stamen Genov alive in a detention camp somewhere near Tetovo in Macedonia in autumn of 2002.[1308] Jovica Kostov also provided information to Vasil Dimitrov that Mirjana Mitrović had seen Stamen Genov alive in the Tetovo camp in 2002.[1309] No remains of Stamen Genov have been recovered.

372. The nature of the evidence is such that the Chamber cannot make any positive finding as to the reality of the telephone call to Stamen Genov's mother, or as to the veracity of the claim that it was from Stamen Genov. Aside from this, there is no record of Stamen Genov having alleged or known contact with his friends or family since he was taken off the bus. The Chamber places little weight on the other unsubstantiated hearsay reports of his whereabouts. He was subjected to particularly brutal treatment while detained at the Llapushnik/Lapusnik prison camp. Consistent with this, the circumstances of his treatment suggest it is unlikely he would have been released. The Chamber accepts that Stamen Genov's assailants had, at minimum, intent to inflict very serious bodily harm upon him with the reasonable knowledge that their actions were likely to cause his death. Nevertheless, especially because of the apparent telephone call to Stamen Genov's mother,

[1303] Vojko Bakrač, T 1349.
[1304] Ivan Bakrač, T 1468.
[1305] Exhibit P182, para 13.
[1306] Exhibit P182, para 17.
[1307] Exhibit P182, para 17.
[1308] Exhibit P182, para 18.
[1309] Exhibit P182, para 18.

the Chamber is left with a sense of uncertainty about his death. No finding can therefore be made as to the fact and circumstances of his death.

373. Leaving aside the criminal responsibility of the three Accused, the Chamber finds that the elements of the offence of torture (Count 4), and the elements of the offence of cruel treatment (Count 6), have been established in relation to Stamen Genov. The Chamber finds that the elements of the offence of murder (Count 8) have not been established by the Prosecution in relation to Stamen Genov.

(xv) Đorđe Čuk

374. Đorđe Čuk was a Serbian refugee originally from the Krajina region of Croatia.[1310] It is the evidence of Vojko and Ivan Bakrač that, on 29 June 1998, Đorđe Čuk was travelling on a bus from Gjakove/Djakovica to Belgrade.[1311] He was taken from the bus along with Stamen Genov, Ivan Bakrač and Vojko Bakrač.[1312] After being ordered off the bus, Đorđe Čuk and Stamen Genov were driven off in a blue vehicle.[1313] The vehicle returned to collect Vojko and Ivan Bakrač and they were taken to the same destination, a village school.[1314] When the Bakračs arrived, they stated that Đorđe Čuk was banging his head against a wall, seemingly involuntarily.[1315] Along with Stamen Genov, Đorđe Čuk was tied and put in a van, and conveyed to a compound the Bakračs identified as the Llapushnik/Lapusnik prison camp. Once they arrived at the Llapushnik/Lapusnik prison camp, the beating of Đorđe Čuk resumed. The identity of the attackers is unknown. While this was severe indeed, as discussed earlier, Stamen Genov was the primary focus of violence.[1316] The four detainees were then taken to the storage room.[1317] Vojko Bakrač did not remember in his testimony before the Chamber any specific instances of beatings of Đorđe Čuk in the storage room.[1318] Documents apparently belonging to Đorđe Čuk were found at the Llapushnik/Lapusnik prison camp after the KLA evacuated.[1319] Other detainees recognised Đorđe Čuk as being held in the storage room at the Llapushnik/Lapusnik prison camp.[1320]

375. There is no evidence that permits the Chamber to conclude that the beatings inflicted upon Đorđe Čuk amounted to torture. It has not been shown that the beating of Đorđe Čuk were

[1310] Exhibit P181, para 5.
[1311] Exhibit P181, para 3; Vojko Bakrač, T 1291-1294.
[1312] Ivan Bakrač, T 1401; Vojko Bakrač, T 1294.
[1313] Vojko Bakrač, T 1294.
[1314] Vojko Bakrač, T 1298.
[1315] Vojko Bakrač, T 1299; Ivan Bakrač, T 1405.
[1316] Vojko Bakrač, T 1304-1307.
[1317] Ivan Bakrač, T 1441.
[1318] Vojko Bakrač, T 1428; T 1374.
[1319] Exhibits P244/245, tab 17.
[1320] L06, T 1042; L07, T 823.

administered to attain a specific purpose. Therefore, it has not been proved that the crime of torture was perpetrated against Đorđe Čuk at the Llapushnik/Lapusnik prison camp.

376. The Chamber finds that Đorđe Čuk was detained by the KLA at the Llapushnik/Lapusnik prison camp for an undetermined period of time beginning on 29 June 1998 until not later than 25 or 26 July 1998. The Chamber therefore finds that he was taking no active part in hostilities at the time. The Chamber finds that Đorđe Čuk was subjected to cruel treatment as a result of the conditions in the storage room at the Llapushnik/Lapusnik prison camp, where he was detained, and the beating that was inflicted upon him. The Chamber has determined that the conditions in the storage room were such that detention there, alone, constituted the offence of cruel treatment.

377. The Prosecution alleges that Đorđe Čuk was murdered sometime between 24 June 1998 and 26 July 1998 at the Llapushnik/Lapusnik prison camp.[1321] As just discussed, the Chamber has accepted that Đorđe Čuk was detained in the Llapushnik/Lapusnik prison camp. Đorđe Čuk was last seen in the camp. Of particular significance, he has not contacted his family in the seven years since his abduction and disappearance. Đorđe Čuk's brother has never heard rumours that Đorđe Čuk was still alive.[1322] In distinction to some other detainees, there is no other basis in the evidence for the view that he is still alive. However, no witness called has given evidence of his death, and there is no forensic evidence to confirm his death or its cause. The Chamber accepts he was not among the remaining prisoners who were marched from the prison camp into the nearby Berishe/Berisa Mountains by KLA guards on 25 or 26 July 1998 as Serbian forces advanced on Llapushnik/Lapusnik.

378. The Chamber has evidence of the beating of Đorđe Čuk at the Llapushnik/Lapusnik prison camp upon his arrival there,[1323] and is aware of the incidents of violence inflicted upon certain detainees. However, no specific evidence regarding the seriousness or circumstances of Đorđe Čuk's detention was advanced; while it is established that Đorđe Čuk was subjected to cruel treatment by virtue of his detention in the storage room, nothing more is known of further specific incidents of mistreatment while detained there. The evidence leaves the Chamber with a sense of uncertainty, and it considers that no finding can be made as to whether Đorđe Čuk is, in fact, dead. The Chamber must conclude, therefore, that the elements of the offence of murder have not been established in relation to Đorđe Čuk.

379. The Chamber concludes that the elements of the offence of torture (Count 4) have not been established in relation to Đorđe Čuk. Leaving aside the criminal responsibility of the three

[1321] Indictment, para 30
[1322] Exhibit P181, para 7.

Accused, the Chamber finds that the elements of the offence of cruel treatment (Count 6) have been established in relation to Đorđe Čuk. The Chamber finds that the elements of the offence of murder (Count 8) have not been established in relation to Đorđe Čuk.

(xvi) Siniša Blagojević

380. According to the brother of Siniša Blagojević, Ljubiša Blagojević, Siniša Blagojević was kidnapped by the KLA in June 1998. In a written statement Ljubiša Blagojević stated that, a few days before his disappearance on 24 June 1998, Siniša Blagojević's apartment in Vershec/Vrsevce was looted.[1324] Ljubiša Blagojević believes it was looted by the KLA.[1325] On the day of Siniša Blagojević's disappearance, there was apparently a KLA checkpoint in Vershec/Vrsevce.[1326] None of the witnesses was able to identify Šiniša Blagojević as a detainee at the Llapushnik/Lapusnik prison camp. The Prosecution has not been able to establish, therefore, that Šiniša Blagojević was detained in the Llapushnik/Lapusnik prison camp.

381. The Indictment alleges that Siniša Blagojević was murdered at the Llapushnik/Lapusnik prison camp between 24 June and 26 July 1998.[1327] However, in its Final Brief the Prosecution has conceded that it has not proved the murder of Siniša Blagojević.[1328]

382. The Chamber therefore concludes that the elements of the offence of torture (Count 4), cruel treatment (Count 6), and murder (Count 8) have not been established in relation to Siniša Blagojević.

(xvii) Jefta Petković and Zvonko Marinković

383. According to the written statement of Zvezden Marinković, Jefta Petković and Zvonko Marinković, two Serbs from Suhareke/Suva Reka, were driving from Belgrade to Suhareke/Suva Reka on 24 June 1998.[1329] They were driving a company truck for the "Balkan Belt" Company.[1330] The next day, in the afternoon, they disappeared somewhere between the towns of Aleksandrovac and Suhareke/Suva Reka.[1331] Jefta Petković's son, Bogoljub Petković, said in his written statement admitted in evidence that on 27 or 28 June 1998 he contacted the LDK President from Suhareke/Suva Reka, who contacted various organisations to determine what had happened to the

[1323] Vojko Bakrač, T 1307.
[1324] Exhibit P177, para 4.
[1325] Exhibit P177, para 4.
[1326] Exhibit P177, para 7.
[1327] Indictment, para 30.
[1328] Prosecution Final Brief, para 464.
[1329] Exhibit P189, paras 4-6.
[1330] Exhibit P191, para 3; Exhibit P189, para 4.
[1331] Exhibit P191, paras 4-5.

two missing men.[1332] Bogoljub Petković's written statement notes that, on the following day, the LDK President from Suhareke/Suva Reka contacted Bogoljub Petković to inform him that Jefta Petković and Zvonko Marinković had been kidnapped by the KLA in Carraleve/Crnoljevo on 24 June 1998 at approximately 1600 hours.[1333]

384. The Chamber accepts the evidence that Jefta Petković was detained by the KLA at the Llapushnik/Lapusnik prison camp; he was recognised by L04 by photograph as a Serbian gentleman from Suhareke/Suva Reka who was detained in the cowshed.[1334] L04 could not identify him by name. The Chamber finds that he was detained by the KLA at the Llapushnik/Lapusnik prison camp for an undetermined period of time beginning approximately on 24 June 1998 until his death on a date sometime before mid July 1998. The Chamber is satisfied that he was taking no active part in hostilities during that time. As the Chamber has held, the conditions in the cowshed were such that detention there was sufficient to constitute the offence of cruel treatment. There is no specific evidence that Jefta Petković was mistreated or tortured at Llapushnik/Lapusnik.

385. L04 was not able to identify a photograph of Zvonko Marinković.[1335] No other detainee recognised Zvonko Marinković. Although L04's recollection of one detainee in some respects matches the physical description of Zvonko Marinković, this was by no means conclusive and does not establish that Zvonko Marinković was detained at the Llapushnik/Lapusnik prison camp.

386. The Prosecution alleges that Jefta Petković and Zvonko Marinković were murdered sometime in mid July 1998 at the Llapushnik/Lapusnik prison camp.[1336] There is forensic evidence of the death of Žvonko Marinković, and forensic evidence of Jefta Petković's death from what would appear to be an execution. Jefta Petković's body was discovered in a secondary gravesite in a wooded area in Shtime/Stimlje municipality, near Rance/Rance village,[1337] which is to the south-east of Llapushnik/Lapusnik, beyond Carraleve/Crnoljevo. Forensic evidence showed that he had been killed by a gunshot wound to the head.[1338] Shell casings and bullets were found in the general vicinity of the secondary grave.[1339] DNA analysis by the International Commission on Missing Persons ("ICMP") confirmed his identity.[1340] The remains of Žvonko Marinković were recovered in November 2004 from the same secondary gravesite in Shtime/Stimlje municipality near

[1332] Exhibit P191, para 8.
[1333] Exhibit P191, para 9.
[1334] L04, T 1201.
[1335] L04, T 1201.
[1336] Indictment, para 31.
[1337] Exhibit P111, p 68.
[1338] Exhibit P111, p 71-72.
[1339] Exhibit P111, p 68.
[1340] Exhibit P225.

Rance/Rance village.[1341] The forensic evidence did not establish the cause of Zvonko Marinković's death.

387. L10 gave evidence that, approximately five weeks into his detention, a man known to him as Shala came and took him from the storage room. L10 was blindfolded and placed in a car along with L04 and another individual, whose identity L10 could not confirm.[1342] They travelled for an hour. L10, L04 and the unknown individual were then asked to dig a grave into which three corpses were placed.[1343] The bodies were bruised and covered in blood, and L10 did not recognise them.[1344]

388. L04 stated that he was taken from the cowshed by Shala on approximately 18 July 1998.[1345] A sack was placed over his head and he was driven into the mountains along with L10 and another individual. When they arrived, the sacks were removed and they were ordered to dig a grave with pickaxes.[1346] It took them an hour or more to dig the hole.[1347] Once they had completed digging, they put three corpses in the hole. L04 recognised one corpse as Agim Ademi, but did not recognise the other two.[1348]

389. Both L04 and L10 were unsure of the precise location of the burial. In his testimony concerning the burial of three bodies, which he said was pursuant to Shala's orders, L04 stated that the bodies were buried in a remote location, which they reached after driving into the mountains.[1349] L10 stated that they drove for approximately one hour, but does not know the location or the direction in which they travelled.[1350]

390. The Prosecution submits that two of the bodies which L04 and L10 were forced to bury were those of Zvonko Marinković and Jefta Petković.[1351] Neither L04 or L10, however, were able to identify any of the bodies they buried as those of Jefta Petković and Zvonko Marinković. Although L04 gave evidence that the ages of the corpses matched the approximate ages of Zvonko Marinković and Jefta Petković,[1352] L04 stated that he only recognised Agim Ademi among the three bodies and that he did not know the other two individuals he was forced to bury.[1353] In particular, L04 did not identify one of the bodies as that of Jefta Petković, even though L04 had

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[1341] Exhibit P111.
[1342] L10, T 2943.
[1343] L10, T 2944.
[1344] L10, T 2944-2945.
[1345] L04, T 1187-1188.
[1346] L04, T 1188.
[1347] L04, T 1188.
[1348] L04, T 1188-1189.
[1349] L04, T 1188.
[1350] L10, T 2943.
[1351] Prosecution Final Brief, para 465-468.
[1352] L04, T 1191.
[1353] L04, T 1189.

recognised him by photograph as a detainee at the Llapushnik/Lapusnik prison camp. L10 was unable to identify any of the three bodies.[1354]

391. Further, the forensic evidence does not assist the Chamber in determining whether two of the bodies L04 and L10 buried were those of Jefta Petković and Zvonko Marinković. The bodies of Zvonko Markinković and Jefta Petković were discovered in a secondary gravesite, along with a third, unidentified corpse. Forensic evidence indicating that the bodies of Jefta Petković and Zvonko Marinković were first buried in an unknown location creates considerable uncertainty surrounding the circumstances and timing of their deaths. That the corpse of Agim Ademi, which L04 stated he was forced to bury with the two other corpses, was not identified in the same gravesite where the corpses of Jefta Petković and Zvonko Marinković were found, accentuates the uncertainty surrounding the identities of two of the bodies that L04 and L10 buried. Consequently the Chamber is unable to conclude with sufficient certainty that two of the bodies L04 and L10 were forced to bury were those of Jefta Petković and Zvonko Marinković.

392. Nevertheless, as Jefta Petković was last seen at the Llapushnik/Lapusnik prison camp, the evidence supports the inference that he was killed at the Llapushnik/Lapusnik prison camp. He has not contacted his family or others since his disappearance. His body has been recovered. Forensic examination of his body indicates that he was executed. The Chamber concludes that the Prosecution has not established that one of the bodies buried by L04 and L10 was that of Jefta Petković. However, the Chamber is satisfied that the elements of the offence of murder have been established in relation to Jefta Petković and that he was murdered while a detainee at the Llapushnik/Lapusnik prison camp.

393. Zvonko Marinković's body has been recovered. However, the cause of his death has not been established. He was not identified as being present at the Llapushnik/Lapusnik prison camp. His remains were found with those of Jefta Petković and another corpse. The forensic evidence indicates that the three bodies were initially buried in an unknown location and were moved to the secondary site in Shtime/Stimlje municipality sometime later, when the bodies were heavily decomposed.[1355] Evidence that the bodies were initially buried at an unknown location increases the Chamber's uncertainty regarding the circumstances surrounding Zvonko Marinković's death. On that basis, the Chamber concludes that the Prosecution has not established that the elements of murder have been satisfied in relation to Zvonko Marinković.

[1354] L10, T 2944.
[1355] Exhibit P111.

394. The Chamber concludes that the elements of the offence of torture (Count 4) have not been established in relation to Jefta Petković. Leaving aside the criminal responsibility of the three Accused, the Chamber concludes that the elements of the offence of cruel treatment (Count 6), and the elements of the offence of murder (Count 8), have been established in relation to Jefta Petković.

395. The Chamber finds that there is insufficient evidence to conclude that Zvonko Marinković was detained at the Llapushnik/Lapusnik prison camp. The Chamber therefore concludes that Counts 4, 6 and 8 have not been established in relation to Zvonko Marinković.

(xviii) Agim Ademi

396. It was reported to Dragan Jašović that on 27 June 1998 unknown individuals kidnapped Agim Ademi and Vesel Ahmeti and took them to an unknown location.[1356] This account is in keeping with that of L96, who testified that he heard from Shefqet Ramadani about a man known as "Agim from Godance", who was held in Llapushnik/Lapusnik and who owned transportation buses in Godanc/Godance.[1357] Shefqet Ramadani said that Agim Ademi was taken away from Llapushnik/Lapusnik in a car, but he did not know whether Agim was still alive.[1358] L101 also heard of the kidnapping of Agim Ademi, which he heard had occurred in the Godanc/Godance area.[1359] According to the Prishtina/Pristina news centre, the KLA abducted Agim Ademi from Donji Godanc/Godance on 26 June 1998.[1360]

397. L04 also gave evidence of Agim Ademi's presence and disappearance at the Llapushnik/Lapusnik prison camp. L04 stated that "Agim" was held with L04 and others in the cowshed.[1361] He did not know Agim Ademi before being detained with him in the cowshed. L04 gave evidence that, on one evening, an individual he said was Qerqizi came in, tied Agim's hands with wire and took him outside.[1362] L04 does not know when this was.[1363] The next time L04 saw Agim was when he was forced to bury him.[1364] He believes this was on approximately 18 July 1998.[1365] L04 recognised Agim Ademi by photograph as the "Agim" he referred to as being present in the cowshed.[1366]

1356 Dragan Jašović, T 5224.
1357 L96, T 2345-2346.
1358 L96, T 2345-2346.
1359 Exhibit P224, para 8.
1360 Exhibit P212.
1361 L04, T 1139.
1362 L04, T 1186.
1363 L04, T 1186.
1364 L04, T 1187.
1365 L04, T 1187.
1366 L04, T 1199; Exhibit P54.

398. The Chamber was impressed by the demeanour of L04 as he gave this evidence and accepts his account to be honest and reliable. Even though no other detainee has confirmed the presence of Agim Ademi at the Llapushnik/Lapusnik prison camp, the Chamber is persuaded by the evidence of L04, and finds that Agim Ademi was indeed detained in the cowshed at the Llapushnik/Lapusnik prison camp. The Chamber finds that Agim Ademi was detained at the Llapushnik/Lapusnik prison camp from sometime in late June 1998 until sometime before 18 July 1998. He was therefore taking no active part in hostilities during that time. The Chamber finds that Agim Ademi was detained in the cowshed at the Llapushnik/Lapusnik prison camp and has found that conditions in the cowshed were such that detention there constituted the offence of cruel treatment. There is no evidence that Agim Ademi was subjected to torture while he was detained in Llapushnik/Lapusnik.

399. The Prosecution alleges that Agim Ademi was murdered at the Llapushnik/Lapusnik prison camp sometime in mid July 1998.[1367] L04 stated that he was forced to bury Agim Ademi along with two other bodies. Around 18 July 1998, L04 stated that a guard he said was Shala took L04 and two other men from the cowshed in order to bury Agim Ademi.[1368] He said Shala and others put sacks on their heads and took them into the mountains.[1369] The prisoners took pickaxes from the car, and went to a spot approximately one hundred metres from the car.[1370] Shala drew a place where a hole was to be dug and told the prisoners to dig.[1371] It took around an hour to dig the hole. When they finished digging, L04 saw three corpses lying on the ground. L04 testified that he recognised one of the corpses as Agim Ademi, with whom he had previously been detained.[1372]

400. L04 testified that, with the other two prisoners, he was then forced to put the corpses into the hole. L04 only recognised Agim Ademi, not the other two bodies. Agim Ademi was wearing red trousers.[1373] He was around 25 or 26 years old.[1374] L04 saw that the body of Agim Ademi had a gunshot injury on the left side.[1375] L10's account of the same incident corroborates L04's testimony,[1376] but L10 could not identify the corpses.[1377] He was not asked to look at Agim Ademi's photograph.[1378]

[1367] Indictment, para 31.
[1368] L04, T 1187.
[1369] L04, T 1188.
[1370] L04, T 1188.
[1371] L04, T 1188.
[1372] L04, T 1187-1188, T 1139.
[1373] L04, T 1189.
[1374] L04, T 1189.
[1375] L04, T 1189.
[1376] L10, T 2943-2946.
[1377] L10, T 2944.
[1378] L10, T 2970-2974.

401. It is unclear how the corpses came to be at the burial site. L04 testified to having seen a corpse on the ground after he had finished digging the hole, which he recognised as that of Agim whom he knew from the Llapushnik/Lapusnik prison camp.[1379] L10 stated that they were ordered to fetch the corpses to place in the hole,[1380] but he does not say where the bodies were "fetched" from. The evidence does not detail how the corpses were transported to the burial site and when the individuals were executed. As Agim Ademi was last seen by L04 at the Llapushnik/Lapusnik prison camp, the evidence supports the inference that Agim Ademi's death occurred in connection with his detention at the Llapushnik/Lapusnik prison camp.

402. The Chamber accepts L04's evidence on this incident and finds that Agim Ademi died after being shot on the left side. The Chamber finds that the person or persons who shot Agim Ademi in this manner must have acted deliberately, either with an intention to kill Agim Ademi or to cause him grievous bodily harm or serious injury, and acted with the reasonable knowledge that his death was a likely consequence of the shooting.

403. The Chamber finds, therefore, that the elements of the offence of torture (Count 4) have not been established in relation to Agim Ademi but, leaving aside the question of the criminal responsibility of the three Accused, does find that the elements of the offences of cruel treatment (Count 6), and murder (Count 8), have been established in relation to Agim Ademi.

(xix) Vesel Ahmeti

404. According to L97, at approximately 0100 hours on the morning of 27 June 1998, KLA soldiers came to his home in Godanc/Godance calling for Vesel Ahmeti, a Kosovo Albanian.[1381] He was taken from the house and led towards the gate by approximately ten soldiers.[1382] Later on, L97 learned that Vesel Ahmeti had been taken to the village of Zborc/Zborce where he spent the night in Syl Smajli's house. After this, he heard different accounts as to Vesel Ahmeti's whereabouts.[1383] Bajram Ademi reported to Dragan Jašović that, on 27 June 1998, unknown individuals kidnapped Agim Ademi and Vesel Ahmeti.[1384] Dragan Jašović testified that he heard in early July 1998 that Vesel Ahmeti was first taken to a prison in Klecke/Klecka, before being taken

[1379] L04, T 1188.
[1380] L10, T 2944.
[1381] Exhibit P221.
[1382] Exhibit P221.
[1383] Exhibit P221.
[1384] Dragan Jašović, T 5223-5224.

to the Llapushnik/Lapusnik prison camp.[1385] The Prishtina/Pristina news centre reported that Vesel Ahmeti was abducted on 26 June 1998 in Donji Godanc/Godance.[1386]

405. L04 testified to having seen "Vesel" from Godanc/Godance in the cowshed at the Llapushnik/Lapusnik prison camp.[1387] He stated that he found out that Vesel was from Godanc/Godance through speaking to him.[1388] However, he was unable to identify Vesel Ahmeti by photograph.[1389] He stated that a man who he said was Qerqizi arrived on one occasion at night, bound Agim Ademi's and Vesel's hands and led them out.[1390] L04 did not give any further evidence concerning Vesel's whereabouts after he was removed from the cowshed.

406. The Prosecution alleges that Vesel Ahmeti was murdered at the Llapushnik/Lapusnik prison camp sometime in mid July 1998.[1391] L96 testified that Shefqet Ramadani told him that Vesel Ahmeti was taken away by car from Llapushnik/Lapusnik at the same time as "Agim from Godance."[1392] L96 stated that he was asked by Shefqet Ramadani whether Vesel Ahmeti was "still alive"; L96 did not know.[1393] L96 recognised Vesel Ahmeti by photograph and stated that he knew Vesel Ahmeti from before the war, but not from his time at Llapushnik/Lapusnik.[1394]

407. The Chamber has no reason to disbelieve the account of L04 regarding those with whom he was detained at the Llapushnik/Lapusnik prison camp. L04 was unable to confirm that the "Vesel" he identified was in fact Vesel Ahmeti. In contrast to his identification of Agim Ademi, L04 was unable to identify Vesel Ahmeti by photograph.[1395] However, no other detainee saw Vesel Ahmeti at the Llapushnik/Lapusnik prison camp. For reasons given elsewhere in this decision the Chamber places little weight on the evidence provided by L96 and Dragan Jašović. It is also conscious that this evidence is unconfirmed hearsay. Without further evidence, the Chamber is unable to conclude with sufficient certainty that Vesel Ahmeti was detained at the Llapushnik/Lapusnik prison camp.

408. There is no evidence of the remains of Vesel Ahmeti having been found and there is no evidence to indicate that he was buried with Agim Ademi. As discussed in connection with Agim Ademi, L04 did bury two other corpses with that of Agim Ademi. However, he did not identify either of the other corpses, even though he had known "Vesel" from Godanc/Godance as a fellow

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1385 Dragan Jašović, T 5231-5232.
1386 Exhibit P212.
1387 L04, T 1132-1133; T 1135; Exhibit P54. L96 testified to recognising Vesel Ahmeti but was not sure when he last saw him, T 2405-2409.
1388 L04, T 1136.
1389 L04, T 1199.
1390 L04, T 1186.
1391 Indictment, para 31.
1392 L96, T 2345.
1393 L96, T 2345.
1394 L96, T 2405.

prisoner in the cowshed. In the absence of any further reliable evidence concerning Vesel Ahmeti, the Chamber finds that the Prosecution has not established that Vesel Ahmeti is dead.

409. For these reasons, the Chamber therefore concludes that the elements of the offences of torture (Count 4), cruel treatment (Cruel 6) and murder (Count 8) have not been established in relation to Vesel Ahmeti.

(xx) Emin Emini

410. Emin Emini was from the village of Carraleve/Crnoljevo.[1396] There is no evidence before the Chamber as to the circumstances of the alleged abduction of Emin Emini by the KLA or of his subsequent transfer to the Llapushnik/Lapusnik prison camp. Evidence, however, has been adduced as to Emin Emini's detention in the prison camp. L06 and L10 both described how upon their arrival at the prison camp, on about 13 June 1998, they were brought into the storage room[1397] and found a man there, who displayed injuries and appeared unable to speak as a result.[1398] L10 further recalled that the man in question was chained to the window, and that two masked KLA soldiers then asked L10 whether that man was a Serbian spy. L10 answered that he did not know.[1399] Both L06 and L10 identified Emin Emini by photograph in court as the man they found in the storage room.[1400] L96 also testified as to Emin Emini being detained by the KLA in the Llapushnik/Lapusnik prison camp. It is L96's evidence that shortly after he was brought to the prison camp, sometime around 20 July 1998, L96 was brought into the storage room[1401] and Emin Emini from Carraleve/Crnoljevo was there among other prisoners.[1402] L96 testified that Emin Emini was in a terrible condition and that he told L96 that he had been here for 55 days.[1403] L96 further recounted that Emin Emini was hiding a watch from a man referred to as Shala and was constantly afraid to be caught doing so.[1404] L96 testified to having known Emin Emini before the war, and identified him both by name and photograph in court as a fellow prisoner in the storage room.[1405] Of further relevance is the evidence of L04. L04 has been found to have been detained in another location at the Llapushnik/Lapusnik prison camp than Emin Emini.[1406] Nevertheless, L04

1395 L04, T 1199; Exhibit P54.
1396 L96, T 2333-2335.
1397 *See supra*, paras 245-247.
1398 L06, T 990-993; L10, T 2916-2918.
1399 L10, T 2916-2918.
1400 L06, T 992-993; L10, T 2969-2970; Exhibit P54. L06 named the man in the storage room Emin Muharemi, aka Emin Sadrija from Carraleve/Crnoljevo, T 992-993. L06 was however able to identify this man as being Emin Emini by photograph.
1401 *See supra*, para 266.
1402 L96, T 2333-2335.
1403 L96, T 2338.
1404 L96, T 2361-2362.
1405 L96, T 2405-2406; Exhibit P54.
1406 *See supra*, para 251.

testified that on his last day of detention, when the prisoners were evacuated under the attack of Serbian forces, which in the finding of the Chamber occurred on 25 or 26 July 1998,[1407] he saw Emin Emini in the courtyard of the prison camp.[1408] L04 further identified Emin Emini by photograph.[1409] This consistent evidence, combined with the fact that, as discussed later in this Judgement,[1410] Emin Emini was among the prisoners who stayed in the Berishe/Berisa Mountains under KLA escort on 25 or 26 July 1998 after others were released, and that his remains were found among those of other prisoners from the camp in a large grave at the execution site in the Berishe/Berisa Mountains, leaves the Chamber persuaded, and it so finds, that Emin Emini was detained by the KLA in the storage room at the Llapushnik/Lapusnik prison camp at least from mid June to 25 or 26 July 1998, at which point he was escorted with the other prisoners to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Emin Emini was not taking any active part to the hostilities during this period of time.

411. The Chamber heard evidence that Emin Emini was mistreated in the course of his detention at the Llapushnik/Lapusnik prison camp. As described above, when L06 and L10 were brought into the storage room, they found the man they identified as Emin Emini in a physical state which led them to believe that he had been severely beaten: his head was swollen, one eye was blinded.[1411] L06 testified that he later asked Emin Emini what had happened to him. On L06's evidence, Emin Emini said he had been beaten by a man called "Luan".[1412] There is no further evidence as to the identity of the assailant(s) of Emin Emini. It is apparent from L10's evidence that the two masked KLA soldiers who asked L10 whether Emin Emini was a spy were seeking to confirm their suspicions that he was. It is unclear from the evidence, however, whether Emin Emini had actually been beaten on the basis of these suspicions, or even by the same men. While the evidence leaves the Chamber persuaded that Emin Emini had been physically assaulted, and severely so, before L06 and L10 were brought into the storage room, the Chamber cannot be satisfied that this assault had been carried out for one or more of the specific purposes required for the offence of torture to be established.

412. L10 also dealt with what appears to be two further instances of mistreatment inflicted to Emin Emini in the course of his detention at the Llapushnik/Lapusnik prison camp. First, it is L10's evidence that on one occasion, KLA members he said were Shala, Qerqizi and Murrizi, took Emin Emini out of the storage room. On L10's evidence, Emin Emini was returned some forty

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1407 *See infra*, para 448.
1408 L04, T 1192-1194.
1409 L04, T 1199-1206; Exhibit P54.
1410 *See infra*, paras 458-461.
1411 L06, T 992-993; L10, T 2916-2918.
1412 L06, T 992-993.

minutes later; he was holding his stomach and told the other prisoners that he had been beaten.[1413] There is no other evidence of this specific event, nor of the identity of the three KLA members named by L10. In particular, although L06 is said by L10 to have been present at the time, L06 does not refer to this incident in his evidence. Because of the apparent inconsistency between the testimonies of L10 and L06 concerning this incident, the Chamber finds itself unable to be entirely satisfied as to the circumstances in which this specific assault occurred, or as to the identities of those named by L10. Secondly, L10 testified that Emin Emini once said he had been beaten by a man he referred to as Commander Çeliku.[1414] In the absence of any confirmation by other evidence, L10's hearsay account does not persuade the Chamber that this specific mistreatment occurred as described, if at all.

413. Nevertheless, forensic examination of the remains of Emin Emini revealed that he had suffered fractures to the sternum and ribs due to blunt force traumas, fractures which were inflicted about three weeks before death,[1415] *i.e.* while Emin Emini was detained by the KLA at the Llapushnik/Lapusnik prison camp.

414. On the basis on the foregoing, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is satisfied that during the period of his detention by the KLA in the storage room at the Llapushnik/Lapusnik prison camp, Emin Emini suffered severe beatings which caused multiple fractures and other injuries. While, as found above, the Chamber cannot be satisfied as to the specific circumstances in which some of these beatings occurred, or as to the perpetrators, in light of the forensic evidence and the general conditions in the prison camp, the Chamber is persuaded that Emin Emini endured serious mental and physical suffering and injury, and that the perpetrators acted deliberately. The Chamber therefore finds that the offence of cruel treatment (Count 6) has been established. The Chamber is however not satisfied on the evidence that the mistreatment of Emin Emini was carried out for any of the prohibited purposes required for the offence of torture (Count 4) to be established. The allegations that Emin Emini was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains are examined later in this decision.[1416]

[1413] L10, T 2935-2937.
[1414] L10, T 2935-2937; 2994-2996.

(xxi) Ibush Hamza

415. There has been no direct evidence adduced before the Chamber specifically as to the detention of Ibush Hamza in the Llapushnik/Lapusnik prison camp.[1417] However, for the reasons detailed later in this decision,[1418] the Chamber is persuaded that the reference by L04 to a fellow prisoner known to him as Ibushi and who remained with the small group of prisoners under KLA escort in the Berishe/Berisa Mountains after L04 was released,[1419] discloses, and the Chamber finds, that the man known to L04 as Ibushi was a fellow prisoner at the Llapushnik/Lapusnik prison camp and among the prisoners escorted by KLA guards to the Berishe/Berisa Mountains on 25 or 26 July 1998. The subsequent recovery of remains, identified to be those of Ibush Hamza, in the large grave at the execution site in the Berishe/Berisa Mountains[1420] leaves the Chamber satisfied, and it finds, that the man known to L04 as Ibushi was in fact Ibush Hamza, and that he was held by the KLA at the Llapushnik/Lapusnik prison camp for an undetermined period until 25 or 26 July 1998, at which point he was escorted with the other prisoners to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Ibush Hamza was not taking any active part to the hostilities during this period.

416. There is no evidence as to any mistreatment inflicted upon Ibush Hamza in the course of his detention by the KLA at the Llapushnik/Lapusnik prison camp. Equally, there is no evidence as to his exact place of detention within the prison camp. As was noted earlier, the conditions of detention varied significantly from one location to another.[1421] In the present case, the Chamber is therefore unable to conclude that the conditions in which Ibush Hamza was detained were so deplorable that they constituted serious mental or physical suffering or a serious attack on human dignity and amounted to cruel treatment. Accordingly, the Chamber finds that the offences of cruel treatment (Count 6) and torture (Count 4) have not been established with respect to Ibush Hamza. The allegation that Ibush Hamza was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains is examined later in this decision.[1422]

1415 Dr George Maat, T 5168-5171; Exhibit P200; *See* also, Exhibit P111.
1416 *See infra*, para 458-462.
1417 The Chamber notes in this respect that L96 referred to a former prisoner by the name of "Banush" or "Ibush" but L96 acknowledged that he was uncertain about the exact name, T 2502-2503.
1418 *See infra*, paras 463-466.
1419 Exhibit P76, L04, T 1197-1198.
1420 *See infra*, paras 463-466.
1421 *See supra*, paras 285-289.
1422 *See infra*, paras 463-467.

(xxii) Hyzri Harjizi

417. Hyzri Harjizi was from the village of Belince/Belince.[1423] The only evidence relating to the disappearance of Hyzri Harjizi is that of Dragan Jašović who testified that he received a report from a personal relation of Hyzri Harjizi who was present when Hyzri Harjizi was stopped by KLA members near the village of Petrove/Petrovo and taken to the KLA headquarters in Rance/Rance.[1424] It is the evidence of Dragan Jašović that another personal relation of Hyzri Harjizi reported that a man said to be called Dula, who was serving at the KLA headquarters in Rance/Rance, said Hyzri Hajrizi had been brought to a prison in the village of Llapushnik/Lapusnik.[1425] Given the nature of this evidence, however, and the reservations about the reliability of the evidence of Dragan Jašović,[1426] the Chamber is not prepared to make any positive finding, on the basis of this sole evidence, as to the exact circumstances of the arrest of Hyzri Harjizi.

418. Former detainees testified to being detained with or seeing Hyzri Hajrizi in the Llapushnik/Lapusnik prison camp. L10 gave evidence that a person he knew as "Hyzri from Belince", whom he identified by photograph which was of Hyzri Harjizi, was a fellow detainee in the storage room.[1427] This account is consistent with the evidence of L96 that he was detained in the storage room together with "Hyzri Harjizi from Belince".[1428] Finally L04 testified that on the last day of his detention, as the prisoners were gathered in the courtyard of the prison camp, he saw "Hyzri", whom he identified when shown a photograph of Hyzri Harjizi.[1429] This consistent evidence, combined with the fact that, as discussed later in this decision,[1430] Hyzri Harjizi was among the group of prisoners who stayed in the Berishe/Berisa Mountains under KLA escort on 25 or 26 July 1998, after others were released, and that his remains were found among those of other prisoners from the prison camp in a large grave at the execution site in the Berishe/Berisa Mountains, leaves the Chamber persuaded, and it so finds, that Hyzri Harjizi was detained by the KLA in the storage room at the Llapushnik/Lapusnik prison camp.

419. The Chamber notes that on L10's evidence, there was only one detainee, Emin Emini, in the storage room, when L10 was first brought into the room around mid June 1998.[1431] This could indicate that Hyzri Harjizi was arrested sometime after mid June 1998; it could also well be,

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[1423] L04, T 1199-1206; L10, T 2922-2925; 2969-2973; L96, T 2334-2335.
[1424] Dragan Jašović, T 5264-5268.
[1425] Dragan Jašović, T 5269-5271.
[1426] *See supra*, para 27.
[1427] L10, T 2922-2925; 2969-2973; Exhibit P54.
[1428] L96, T 2334-2335. L96, however, did not identify Hyzri Hajrizi by photograph, T 2405-2409; Exhibit P54.
[1429] L04, T 1192-1194; 1199-1200; Exhibit P54.
[1430] *See infra*, paras 468-471.
[1431] L10, T 2917-2918.

however, that Hyzri Harjizi had been previously detained in another location at the prison camp before being transferred to the storage room. In the absence of further evidence, the Chamber is not able to make any finding as to when Hyzri Harjizi was brought to the Llapushnik/Lapusnik prison camp. The Chamber is satisfied, however, that Hyzri Harjizi remained detained by the KLA at the prison camp until 25 or 26 July 1998, at which point he was escorted by KLA guards with the other prisoners to the Berishe/Berisa Mountains. In the finding of the Chamber, it has therefore been established that during this period, Hyzri Harjizi was not taking any active part to the hostilities.

420. L10 testified that masked men beat "Hyzri", the man he had identified as Hyzri Harjizi, in the Llapushnik/Lapusnik prison camp.[1432] This evidence lacked any specificity and there is no further evidence which could assist the Chamber in determining with confidence the circumstances, nature and extent of this physical assault upon Hyzri Harjizi, or by whom it was inflicted.

421. On the basis of the foregoing, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is not able to be satisfied that Hyzri Harjizi was subjected to physical mistreatment during his detention by the KLA at the Llapushnik/Lapusnik prison camp. Nevertheless, as described earlier,[1433] the Chamber is persuaded that the conditions of detention in the storage room were such that they caused serious mental or physical suffering to the detainees, including Hyzri Harjizi, or constituted a serious attack upon human dignity. The fact that these conditions of detention were maintained over an extensive period of time persuades the Chamber that they were imposed deliberately. In the finding of the Chamber, the offence of cruel treatment (Count 6) has therefore been established with respect to Hyzri Harjizi on the basis of the conditions of his detention in the storage room. The offence of torture (Count 4), however, has not been established. The allegation that Hyzri Harjizi was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains is examined later in this decision.[1434]

(xxiii) Shaban Hoti

422. Shaban Hoti was a professor proficient in the Russian language who lived in Prishtina/Pristina. A personal relation said in a written statement which is in evidence that on 20 July 1998, Shaban Hoti left his house in Prishtina/Pristina to meet a group of Russian journalists he was working with, and that he did not return.[1435] One of these Russian journalists, Oleg Safiulin, gave evidence that on 20 July 1998, he was travelling into KLA held territory with his crew and interpreter, Shaban Hoti, when they were stopped at a KLA checkpoint near

[1432] L10, T 2936.
[1433] *See supra*, para 289.
[1434] *See infra*, paras 468-472.
[1435] Exhibit P222.

Llapushnik/Lapusnik. It is Oleg Safiulin's evidence that he and his crew, including Shaban Hoti, were ordered to turn around, which they did. Subsequently, as they were shooting some footage about one km away from the KLA checkpoint, a unit of KLA soldiers stopped them again and brought them back to the KLA checkpoint.[1436] Oleg Safiulin testified that an unidentified KLA commander then arrived at the checkpoint and that his party was taken to a house on the southern side of the Prishtina/Pristina-Peje/Pec road.[1437] Oleg Safiulin testified that a few hours later, an unidentified commander, possibly the same commander he had seen at the checkpoint, arrived at the house and interrogated him. Shaban Hoti was interpreting; he had already been beaten, had blood on his shirt and looked terrified.[1438] Oleg Safiulin was released shortly thereafter and has no knowledge of what happened to Shaban Hoti after that.[1439]

423. L96 testified that during the first days of his detention at the Llapushnik/Lapusnik prison camp, while he was held on the first floor of the main house, *i.e.* sometime around 18 July 1998,[1440] unidentified KLA soldiers brought an elderly man into the room. On the next day, L96 heard from a KLA soldier he said was Shala, that this elderly man was Shaban Hoti, a Russian professor who was working as an interpreter for Russian journalists.[1441] It is L96's evidence that he subsequently heard from Shaban Hoti himself that he was from Prishtina/Pristina and that he was working with Russian journalists.[1442] L96 identified Shaban Hoti by photograph.[1443] Although it appears, on L96's evidence, that Shaban Hoti was later moved to the cowshed along with L96, none of the detainees who gave evidence has identified Shaban Hoti as a fellow prisoner. Nevertheless, given the supporting evidence that Shaban Hoti's remains were found in the large grave at the execution site in the Berishe/Berisa Mountains together with those of other detainees from the Llapushnik/Lapusnik prison camp,[1444] and the evidence of Oleg Safiulin, the Chamber is able to accept L96's evidence on this matter, and it finds, that Shaban Hoti was detained by the KLA in the prison camp, at least for part of the time in the room on the first floor in the main house of the prison camp, from around 20 July until 25 or 26 July 1998, at which time he was escorted with other prisoners by KLA guards to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Shaban Hoti was not taking any active part to the hostilities during this period of time.

1436 Oleg Safiulin, T 1728-1731; Exhibit P87.
1437 Oleg Safiulin, T 1739-1741; Exhibit P88.
1438 Oleg Safiulin, T 1741-1746.
1439 Oleg Safiulin, T 1746-1748.
1440 *See supra*, para 265.
1441 L96, T 2312-2314.
1442 L96, T 2346-2347.
1443 L96, T 2405-2409; Exhibit P54.
1444 *See infra*, paras 473-476.

424. L96 testified to Shaban Hoti being mistreated at the Llapushnik/Lapusnik prison camp. It is L96's evidence that when the unidentified KLA soldiers first brought Shaban Hoti into the room on the first floor of the main house, Shaban Hoti was tied in chains and had been severely beaten: he could not stand on his feet and his shirt was wearing blood stains.[1445] This account is, in part, consistent with that of Oleg Safiulin, who was with Shaban Hoti some hours before then. L96 further testified that despite the condition of Shaban Hoti at the time, the KLA soldiers then dragged him into the adjacent room and continued to beat him for about half an hour.[1446] L96 stated that he heard the soldiers ask Shaban Hoti: "Do you still translate for the Russian journalists?" On the next evening, L96 said, six unidentified KLA soldiers entered the room where Shaban Hoti was detained and started to mistreat him again. The soldiers were shouting and jumping on him; he was lying on the floor, his hands and feet tied. It is L96's evidence that the door to the room remained open throughout the incident, so that he was in a position to witness the events directly.[1447] There is no further direct evidence relating to these two incidents. As discussed later in this decision,[1448] although an initial autopsy of the body found to be that of Shaban Hoti in the Berishe/Berisa Mountains revealed numerous fractures to the skull, scapula, radius, femur and tibia,[1449] subsequent more detailed forensic examination found that these fractures were consistent with gunshot wound injuries,[1450] injuries which are more likely to have occurred at the time of death. It was also noted in the forensic examination of the remains of Shaban Hoti that there was a possibility of an ante-mortem fracture to a rib; however, no confirmation of this nor any assessment of the age of that possible fracture is provided.[1451] Having regard to all these circumstances, including the circumstances in which Shaban Hoti was first taken into KLA custody, the reason given for his apprehension and detention, his continued detention despite the release of the Russian journalist party, the treatment administered to him when first taken into custody, and the recovery of his remains, despite this absence of corroborating forensic evidence, the Chamber is persuaded it can accept L96's evidence as to the mistreatment inflicted upon Shaban Hoti in the main house at the Llapushnik/Lapusnik prison camp. The circumstances satisfy the Chamber and it finds that Shaban Hoti was targeted for grave mistreatment as a direct result of his acting as an interpreter for Russian journalists.

425. On the basis on the foregoing, and leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is satisfied that in the course of his detention by

[1445] L96, T 2312-2314; 2317.
[1446] L96, T 2312-2314; 2317.
[1447] L96, T 2322-2325.
[1448] Exhibit P110; *see infra*, para 475.
[1449] Exhibit P111; *see infra*, para 475.
[1450] Exhibit P111.
[1451] Exhibit P111.

the KLA at the Llapushnik/Lapusnik prison camp, Shaban Hoti suffered severe beatings causing serious mental or physical suffering, although the Chamber cannot be make any finding as to the identity of the assailants. The Chamber finds that the beatings were inflicted upon Shaban Hoti as a direct result of his acting as an interpreter for Russian journalists, and that the perpetrators acted deliberately and with the purpose of punishing and intimidating Shaban Hoti. Accordingly, the Chamber is satisfied that the offences of cruel treatment (Count 6), and torture (Count 4) have been established with respect to Shaban Hoti. The allegations that Shaban Hoti was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains are examined later in this decision.[1452]

(xxiv) Hasan Hoxha

426. Two personal relations of Hasan Hoxha gave statements in this trial about what they heard concerning the disappearance of Hasan Hoxha. According to their written statements, Hasan Hoxha was arrested on 17 July 1998 after he left his home by car with Alush Luma, and was initially questioned in a school in Pjetershtice/Petrastica.[1453] According to an undated OSCE missing person report, Hasan Hoxha and Alush Luma were arrested by the KLA around 17 July 1998 as they were driving in the village of Shale/Sedlare.[1454]

427. L96 testified that during his initial detention on the first floor of the main house at the Llapushnik/Lapusnik prison camp around 18 July 1998,[1455] he saw individuals he stated were Hasan Hoxha and Alush Luma in the room.[1456] L96 identified Hasan Hoxha by photograph as a fellow detainee.[1457] It is also L96's evidence that on the last day of his detention, as the prisoners were gathered in the courtyard, he saw Hasan Hoxha coming out of one of the rooms. He thought this was probably the cowshed.[1458] There is no other direct evidence of the detention of Hasan Hoxha in the prison camp. The Chamber has noted elsewhere the reasons for its reservations about the evidence of L96.[1459] However, as discussed later in this decision,[1460] human remains, which the Chamber finds were those of Hasan Hoxha, were recovered at the execution site in the Berishe/Berisa Mountains, albeit slightly away from the other bodies. This provides, in the Chamber's assessment, clear confirmation in a material respect of the evidence of L96 about the detention of Hasan Hoxha in the prison camp. For this reason, the Chamber is persuaded it should

1452 *See infra*, paras 473-477.
1453 Exhibits P185 and P186.
1454 Exhibits P46; P147.
1455 *See supra*, para 265.
1456 L96, T 2297-2298; 2301.
1457 L96, T 2405-2409; Exhibit P54.
1458 L96, T 2349-2350.
1459 *See supra*, para 26.
1460 *See infra*, paras 478-482.

accept the evidence of L96 regarding Hasan Hoxha. Accordingly, the Chamber finds that Hasan Hoxha was detained by the KLA at the Llapushnik/Lapusnik prison camp, from around 17 July until 25 or 26 July 1998, at which point he was escorted by KLA guards with the other prisoners to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Hasan Hoxha was not taking any active part to the hostilities during this period of time.

428. It is the evidence of L64 that he heard that Hasan Hoxha had been severely beaten.[1461] There is no other evidence which could enable the Chamber to determine the circumstances of this alleged mistreatment, or to confirm that it occurred at all.

429. On the basis on the foregoing, in the absence of other evidence on this issue, the Chamber is not satisfied that Hasan Hoxha was subjected to mistreatment in the course of his detention by the KLA at the Llapushnik/Lapusnik prison camp. As it cannot be determined on the limited evidence of L96 whether Hasan Hoxha was detained elsewhere than in the main house, and given the evidence as to the conditions in the main house,[1462] the Chamber cannot be satisfied that the conditions of his detention were such that they caused serious physical or mental suffering or constituted a serious attack on human dignity. Accordingly, the Chamber finds that the offences of cruel treatment (Count 6) and torture (Count 4) have not been established with respect to Hasan Hoxha. The allegation that Hasan Hoxha was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains is examined later in this decision.[1463]

(xxv) Safet Hysenaj

430. Safet Hysenaj was from the village of Petrove/Petrovo.[1464] There is no evidence before the Chamber as to the circumstances of Safet Hysenaj's arrest and transfer to the Llapushnik/Lapusnik prison camp. However, there is evidence from former detainees that Safet Hysenaj was held in the prison camp. L96 testified that on the last day of detention, on 25 or 26 July 1998, when the prisoners were gathered in the courtyard, he saw Safet Hysenaj coming out of the garage of the compound. It was the first time that L96 had seen him in the prison camp.[1465] This evidence is consistent with that of L04, who testified that on the last day of detention, when L04 was taken out of the cowshed, he saw "Safet from Petrove" in the yard.[1466] This evidence, combined with the fact

[1461] L64, T 4515-4518.
[1462] *See supra*, paras 287; 289.
[1463] *See infra*, paras 478-483.
[1464] L04, T 1199-1206; L96, T 2272; Dragan Jašović, T 5271-5273.
[1465] L96, T 2348; 2357-2358; Exhibits P100 and P101.
[1466] L04, T 1192-1194; 1199-1206. The Chamber notes that the man L04 identified by photograph as being "Safet from Petrove" is not Safet Hysenaj but rather Đorđe Čuk. In the assessment of the Chamber, however, the quality

that, as discussed later in this decision,[1467] Safet Hysenaj was among the prisoners who remained under KLA escort in the Berishe/Berisa Mountains on 25 or 26 July 1998, after others were released, and that his remains were found among those of other prisoners from the prison camp in a large grave at the execution site in the Berishe/Berisa Mountains, leaves the Chamber persuaded, and it so finds, that Safet Hysenaj was detained in the Llapushnik/Lapusnik prison camp, most likely in the garage, for an undetermined period of time until 25 or 26 July 1998, at which point he was escorted with the other prisoners by KLA guards to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Safet Hasenaj was not taking any active part to the hostilities at the time relevant to these proceedings.

431. There is no eyewitness evidence before the Chamber as to mistreatment inflicted upon Safet Hysenaj during his detention, or as to the conditions of his detention. This is consistent with the implication from L96's evidence that Safet Hysenaj was detained in the garage, apparently isolated from other detainees. The forensic examination of the remains of Safet Hysenaj found in the large grave in the Berishe/Berisa Mountains, revealed that he suffered multiple fractures in the mandible and maxilla, consistent with blunt force trauma and which probably occurred prior to death.[1468] The forensic evidence does not specify, however, how long before death these trauma are likely to have occurred and the Chamber cannot be persuaded, in the absence of further evidence, that these injuries were sustained by Safet Hysenaj while he was detained in the prison camp.

432. On the basis on the foregoing, the Chamber is not satisfied on the available evidence that Safet Hysenaj was subjected to serious mental or physical suffering in the course of his detention by the KLA at the Llapushnik/Lapusnik prison camp, or that the conditions of his detention were such that they constituted a serious attack on human dignity. Accordingly, the Chamber finds that the offences of cruel treatment (Count 6) and torture (Count 4) have not been established with respect to Safet Hysenaj. The allegations that Safet Hysenaj was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains are examined later in this decision.[1469]

(xxvi) Bashkim Rashiti

433. Bashkim Rashiti was from the village of Godanc/Godance.[1470] A personal relation of Bashkim Rashiti, in a written statement admitted into evidence, stated that on 11 July 1998, Bashkim Rashiti went to report to the KLA headquarters in Kroimire/Krajmirovce and did not

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of the two photographs and their resemblances are such that it is not persuaded that this misidentification is conclusive.

1467 *See infra*, paras 484-487.

1468 Exhibit P111.

1469 *See infra*, paras 484-488.

1470 L10, T 2969-2973.

return.[1471] Former detainees at the Llapushnik/Lapusnik prison camp, L06, L10 and L96 all identified Bashkim Rashiti, or "Bashkim from Godance", by photograph as a fellow prisoner in the storage room at the camp.[1472] This consistent evidence, combined with the fact that, as discussed later in this decision,[1473] Bashkim Rashiti was among the prisoners from the prison camp who were held under KLA guard in the Berishe/Berisa Mountains on 25 or 26 July 1998, after others were released, and that his remains were found among those of other prisoners from the camp found in a large grave at the execution site in the Berishe/Berisa Mountains, leaves the Chamber persuaded, and it so finds, that Bashkim Rashiti had been detained in the storage room at the Llapushnik/Lapusnik prison camp from about 11 July until 25 or 26 July 1998, at which point he was escorted under KLA guard with the other prisoners to the Berishe/Berisa Mountains.

434. There is no evidence as to specific mistreatment inflicted upon Bashkim Rashiti during his detention by the KLA. Nevertheless, as discussed above,[1474] the conditions of detention in the storage room were such that the Chamber is satisfied that they caused serious mental or physical suffering to the detainees, among whom was Bashkim Rashiti, and that they constituted a serious attack upon human dignity. The fact that these conditions of detention were maintained over an extensive period of time persuades the Chamber that they were imposed deliberately. In the finding of the Chamber, and leaving aside the issue of the criminal responsibility of the three Accused, the offence of cruel treatment (Count 6) is therefore established with respect to Bashkim Rashiti on the basis of the conditions of his detention. The offence of torture (Count 4), however, has not been established. The allegations that Bashkim Rashiti was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains are examined later in this decision.[1475]

(xxvii) Hetem Rexhaj

435. Hetem Rexhaj lived in the village of Petrove/Petrovo.[1476] L96 testified that he heard of the circumstances of Hetem Rexhaj's abduction from a personal relation of Hetem Rexhaj, who recounted to L96 that masked KLA soldiers came to Hetem Rexhaj's house one night in early July 1998, and told Hetem Rexhaj that Commander Luan had requested that he report to the KLA headquarters in Kroimire/Krajmirovce on the next day.[1477] Hetem Rexhaj is said to have met Commander Luan on the next day at the KLA headquarters in Kroimire/Krajmirovce with his personal relation. As the personal relation of Hetem Rexhaj left the headquarters, he witnessed five

[1471] Exhibit P223.
[1472] L06, T 1039-1045; L10, T 2969-2973; 2965-2966; L96, T 2407-2408; 2334-2335; Exhibit P54; Exhibit P108.
[1473] *See infra*, paras 489-492.
[1474] *See supra*, para 289.
[1475] *See infra*, paras 489-493.
[1476] L04, T 1136-1138; 1203; L96, T 2238; 2253; Exhibit P54.
[1477] L96, T 2259-2262.

unidentified KLA soldiers putting a sack over Hetem Rexhaj's head.[1478] This account was contradicted by Ramiz Qeriqi, aka Luan, who testified that he told Hetem Rexhaj to proceed to Shale/Sedlare after Hetem Rexhaj came to Kroimire/Krajmirovce to enlist, having been summoned to join the KLA.[1479] Ramiz Qeriqi denied having been present while a sack was put over Hetem Rexhaj's head.[1480] On the basis of this evidence, a number of issues remain unresolved, in particular the exact circumstances of Hetem Rexhaj's disappearance and the potential involvement of Ramiz Qeriqi, aka Luan. Nevertheless, whatever may be the correct resolution of these issues, on the balance of the evidence, in the Chamber's assessment, it is established that Hetem Rexhaj disappeared at some stage after having been summoned in early July 1998 to the KLA headquarters in Kroimire/Krajmirovce.

436. It is L04's evidence that he was taken to the cowshed at the end of June 1998.[1481] L04 testified that four days thereafter, "Hete from Petrove", whom L04 identified by photograph as Hetem Rexhaj, was brought into the room.[1482] This evidence is consistent with the finding of the Chamber as to Hetem Rexhaj's disappearance and reveals that he was brought to the Llapushnik/Lapusnik prison camp shortly after he disappeared. On L04's evidence, Hetem Rexhaj was still in the prison camp on the last day of detention, which the Chamber found was on 25 or 26 July 1998. On that day, the remaining prisoners were gathered in the courtyard before the march under KLA escort to the Berishe/Berisa Mountains.[1483] L96 also testified to seeing Hetem Rexhaj at the prison camp, although they were detained in different locations.[1484] It is L96's evidence that at the start of his detention, he heard from a KLA soldier he said was Shala, that Hetem Rexhaj was detained at the prison camp.[1485] But it was only on 25 or 26 July 1998, the last day of detention, that L96 saw Hetem Rexhaj for the first time; he was in the courtyard among the other prisoners.[1486] According to L96, Hetem Rexhaj "had changed completely" and "seemed like […] half [the] person he used to be, very weak, thin, unshaved… [h]e was in a horrible state."[1487] This evidence, combined with that of L04, L12 and L96 that Hetem Rexhaj was among the prisoners who remained under KLA guard in the Berishe/Berisa Mountains, after others were released,[1488] leaves the Chamber persuaded, and it finds, that Hetem Rexhaj was indeed detained by the KLA at the Llapushnik/Lapusnik prison camp for a period of time from early July 1998 until 25 or

[1478] L96, T 2262-2264.
[1479] Ramiz Qeriqi, T 3618-3619; 3706.
[1480] Ramiz Qeriqi, T 3707.
[1481] *See supra*, paras 250-251.
[1482] L04, T 1136-1138.
[1483] L04, T 1192-1194.
[1484] *See supra*, para 267.
[1485] L96, T 2295.
[1486] L96, T 2349; 2354-2355; 2360; Exhibits P98 and P100.
[1487] L96, T 2349.

26 July 1998, at which point he was escorted under KLA guard with the other prisoners to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Hetem Rexhaj was not taking any active part to the hostilities during this period of time.

437. L04 testified that he witnessed Hetem Rexhaj being beaten and questioned on three or four occasions by a KLA soldier, L04 said this was Shala,[1489] and on one occasion by a KLA soldier L04 stated was Qerqizi.[1490] There is no other evidence as to these specific instances of mistreatment. While the Chamber accepts the honesty of L04 in this and his other evidence, what he says about the circumstances of the beating and questioning is so lacking in precision and detail that the Chamber is left with a degree of uncertainty about what did occur. Further, while L96 spoke of the condition of Hetem Rexhaj, neither he nor other witnesses mentioned visible injuries or other signs of physical assault when Hetem Rexhaj was seen on 25 or 26 July 1998. In these circumstances, the Chamber is, in the end, not persuaded that it should find, on the available evidence, that Hetem Rexhaj was beaten on several occasions in the course of his detention by the KLA at the Llapushnik/Lapusnik prison camp.

438. On the basis of the foregoing, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is not satisfied that Hetem Rexhaj was subjected to physical mistreatment during his detention by the KLA at the Llapushnik/Lapusnik prison camp. Nevertheless, as described earlier,[1491] the Chamber is persuaded that the conditions of detention in the cowshed were such that they caused serious mental or physical suffering to the detainees, among whom was Hetem Rexhaj, or constituted a serious attack upon human dignity. The fact that these conditions of detention were maintained over an extensive period of time persuades the Chamber that they were imposed deliberately. In the finding of the Chamber, the offence of cruel treatment (Count 6) has therefore been established with respect to Hetem Rexhaj. The offence of torture (Count 4), however, has not been established. The allegation that Hetem Rexhaj was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains is examined later in this decision.[1492]

1488 *See infra*, para 494.
1489 L04, T 1136-1138; 1176-1177.
1490 L04, T 1173-1174.
1491 *See supra*, para 289.
1492 *See infra*, paras 494-497.

(xxviii) Lutfi Xhemshiti

439. Lutfi Xhemshiti, aka Luta, was a forest ranger from the village of Berg I Zi/Crni Breg.[1493] Two personal relations of Lutfi Xhemshiti said in written statements admitted in evidence that they were present when Lutfi Xhemshiti was arrested by KLA soldiers in his home during the night of 2 July 1998.[1494] There is evidence that a few nights before the arrest, KLA soldiers, among whom was Ramiz Qeriqi, aka Luan, came to Lutfi Xhemshiti's house and seized his rifle.[1495] Ramiz Qeriqi, however, denied in court being involved in the actual arrest of Lutfi Xhemshiti,[1496] and on the available evidence, the Chamber cannot make a positive finding on this issue.

440. Several former prisoners testified to having seen Lutfi Xhemshiti at the Llapushnik/Lapusnik prison camp. L07 testified that when he was brought into the storage room sometime in July 1998, there were several detainees already held there, among whom was "Lutfi from Breg I Zi".[1497] L06 also identified Lutfi Xhemshiti by photograph as one of his fellow detainees in the storage room.[1498] This evidence is further confirmed by that of L10 who testified that "Lutfi from Breg I Zi" was detained with him in the storage room,[1499] and by that of L96, who identified Lutfi Xhemshiti as a fellow detainee.[1500] On the basis of this consistent evidence, the Chamber is satisfied that Lutfi Xhemshiti was detained in the storage room at the Llapushnik/Lapusnik prison camp for a period from approximately 2 July until 25 or 26 July 1998, at which point he was escorted under KLA guard with the other prisoners from the prison camp to the Berishe/Berisa Mountains. This finding is further confirmed by the evidence, which is discussed later in this decision,[1501] that Lutfi Xhemshiti was among the smaller group of prisoners who remained under KLA escort in the Berishe/Berisa Mountains on 25 or 26 July 1998, after others were released, and that his remains were found among those of other prisoners in a large grave at the execution site in the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Lutfi Xhemshiti was not taking any active part to hostilities during this period of time.

441. There is no eyewitness evidence of mistreatment inflicted upon Lutfi Xhemshiti in the course of his detention by the KLA at the prison camp. However, L07 testified that when L07 was

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[1493] L96 testified that he knew Lutfi Xhemshiti before the war, T 2409. Dragan Jašović also testified to the same effect, T 5306-5307.
[1494] Exhibits P195 and P196.
[1495] Ramiz Qeriqi, T 3614-3618; Exhibits P195 and P196.
[1496] Ramiz Qeriqi, T 3614-3618.
[1497] L07, T 821-822.
[1498] L06, T 1039-1045; Exhibit P54.
[1499] L10, T 2922-2925.
[1500] L96, T 2409. L96 identified Lutfi Xhemshiti by photograph as "Luta" from "Crni Breg".
[1501] *See infra*, paras 498-501.

first brought into the storage room, Lutfi Xhemshiti appeared to have been severely beaten. Along with this evidence, there is also significant confirmation from forensic examination of the remains of Lutfi Xhemshiti, which revealed that he had suffered fractures to two ribs due to blunt force traumas inflicted about two weeks before death, *i.e.* while at the time he was detained by the KLA at the prison camp.[1502] There is no evidence, however, as to the specific circumstances of the mistreatment which caused these injuries, or as to the identity of the assailants.

442. On the basis on the foregoing, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is satisfied that during the period of his detention by the KLA in the storage room at the Llapushnik/Lapusnik prison camp, Lutfi Xhemshiti suffered severe beatings which caused multiple fractures to the ribs. While, as found above, the Chamber cannot make any findings as to the specific circumstances in which the mistreatment occurred, or as to the exact perpetrators, in light of the forensic evidence and the general conditions in the prison camp, the Chamber is persuaded that Lutfi Xhemshiti was subjected to serious mental or physical suffering or injury and that the perpetrators acted deliberately. The Chamber therefore finds that the offence of cruel treatment (Count 6) has been made out. The Chamber is, however, not satisfied on the evidence that the mistreatment of Lutfi Xhemshiti was carried out for any prohibited purpose, and therefore finds that the elements of the offence of torture have not been established (Count 4). The allegation that Lutfi Xhemshiti was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains is examined later in this decision.[1503]

(xxix) Shyqyri Zymeri

443. Shyqyri or "Shyqe" Zymeri was from the village of Godanc/Godance.[1504] One of his personal relations gave a statement that during the night of 26 June 1998, unidentified KLA soldiers came to the house of Shyqyri Zymeri, seized a rifle, questioned Shyqyri Zymeri about a pistol, and forcibly arrested him.[1505]

444. L04 testified to being detained in the cowshed at the Llapushnik/Lapusnik prison camp together with "Shyqja from Godance", whom he identified by photograph as Shyqyri Zymeri.[1506] L96 also stated that "Shyq from Godance", whom he identified by photograph as Shyqyri Zymeri,

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1502 Dr George Maat, T 5173-5175; Exhibit P200.
1503 *See infra*, paras 498-502.
1504 Exhibit P224.
1505 Exhibit P224; *see* also Exhibit P221. Further, it is the evidence of Dragan Jašović that he received a report that Shyqyri Zymeri was arrested together with a number of individuals by unknown individuals on 27 June 1998. Dragan Jašović testified that reports were received as to the alleged involvement of, among others, Ramiz Qeriqi, aka Luan, T 5223-5224; 5231-5243. Ramiz Qeriqi denied being involved in these arrests, T 3623. There is no further evidence, however, which could enable the Chamber to make a positive finding on this issue.
1506 L04, T 1131-1135; 1199-1206; Exhibit P54.

was at the Llapushnik/Lapusnik prison camp,[1507] although L96 appears not to have seen him prior to the last day, on 25 or 26 July 1998, when the prisoners were gathered in the courtyard and escorted to the Berishe/Berisa Mountains. Both L04 and L96 described how Shyqyri Zymeri was suffering from a broken leg, and how he had to be carried throughout the difficult march under KLA escort to the Berishe/Berisa Mountains.[1508] In this respect, the Chamber observes that L06 also recounted in his evidence that one of the prisoners taken to the Berishe/Berisa Mountains on the last day had a broken leg.[1509] This consistent evidence, combined with the fact that, as discussed later in this decision,[1510] Shyqyri Zymeri was among the smaller group of prisoners who remained in the Berishe/Berisa Mountains under KLA escort on 25 or 26 July 1998, after others were released, and that his remains were found among those of other prisoners from the camp in a large grave at the execution site in the Berishe/Berisa Mountains, leaves the Chamber persuaded, and it so finds, that Shyqyri Zymeri was detained in the cowshed at the Llapushnik/Lapusnik prison camp for a period from about 27 June 1998 until 25 or 26 July 1998, at which point he was escorted by KLA guards with the other remaining prisoners to the Berishe/Berisa Mountains. In the finding of the Chamber, it has also been established, therefore, that Shyqyri Zymeri was not taking any active part to the hostilities during this period of time.

445. Aside from the evidence just considered as to Shyqyri Zymeri's broken leg at the time of the evacuation of the prison camp, the forensic examination of his remains revealed that he also suffered multiple fractures to four ribs and to the right tibia due to blunt force traumas inflicted between two and three weeks before death,[1511] *i.e.* while he was detained by the KLA in the Llapushnik/Lapusnik prison camp. There is no evidence, however, as to the circumstances of this mistreatment, or as to the identity of the perpetrator or perpetrators.

446. On the basis of the foregoing, leaving aside for the present the issue of the criminal responsibility of the three Accused, the Chamber is satisfied that in the course of his detention by the KLA at the Llapushnik/Lapusnik prison camp, Shyqyri Zymeri suffered severe mistreatment which caused multiple fractures. While the Chamber cannot be make positive findings as to the circumstances in which this mistreatment occurred or as to the identity of the perpetrators, in light of the forensic evidence and the general conditions prevailing in the prison camp, the Chamber is persuaded that Shyqyri Zymeri endured serious mental or physical suffering or injury and that the perpetrators acted deliberately. The Chamber therefore finds that the offence of cruel treatment (Count 6) has been made out. The Chamber cannot be satisfied, however, that the mistreatment of

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[1507] L96, T 2409; Exhibit P54.
[1508] L04, T 1139-1141; L96, T 2349-2350; 2352; 2363; 2409.
[1509] L06, T 1025-1028.
[1510] *See infra*, paras 503-506.

Shyqyri Zymeri was carried out for any of the prohibited purposes required for the offence of torture (Count 4) to be established. The allegation that Shyqyri Zymeri was murdered by the KLA on or about 26 July 1998 in the Berishe/Berisa Mountains is examined later in this decision.[1512]

3. Crimes in the Berishe/Berisa Mountains (Count 10)

447. It is alleged in the Indictment that on or about 26 July 1998, ten Kosovo Albanian detainees from the Llapushnik/Lapusnik prison camp were murdered in the Berishe/Berisa Mountains.[1513] The names of the alleged victims are set out in Annex III of the Indictment. On the basis of these allegations, the Accused Fatmir Limaj and Haradin Bala are charged with two counts of murder as a violation of the laws or customs of war and as a crime against humanity, under Articles 3 and 5 of the Statute respectively (Counts 9 and 10). For reasons given earlier,[1514] Count 9 is dismissed in the present case.

448. As described earlier in this decision, on 25 and 26 July 1998, Serbian forces launched a large offensive against the KLA forces in the Llapushnik/Lapusnik area.[1515] As this offensive developed to the advantage of the Serbian forces, the departure of KLA forces from Llapushnik/Lapusnik and the prison camp was precipitated. It is not altogether clear from the evidence whether the prison camp was abandoned on 25 or 26 July 1998; this, however, does not bear upon the findings of the Chamber relating to the events subsequent to the departure from the prison camp. The evidence shows that in the morning of 25 or 26 July 1998, the two guards identified as Shala and Murrizi gathered the prisoners remaining at the time in prison camp from their respective places of detention into the yard.[1516] Shelling could be heard.[1517] Shala and Murrizi, both armed with Kalashnikov automatic weapons, ordered the twenty or so prisoners to walk towards the Berishe/Berisa Mountains. Murrizi led them towards the hills.[1518] Shala brought up the rear.[1519] Several witnesses have recounted before the Chamber that most of the prisoners were in a weak physical conditions, some worse than others.[1520] One of the prisoners, in particular, had a broken leg and had to be carried throughout the march.[1521]

1511 Dr George Maat, T 5164-5168; Exhibit P200. *See* also, Exhibit P111.
1512 *See infra*, paras 503-507.
1513 Indictment, paras 34-37.
1514 *See supra*, para 228.
1515 *See supra*, paras 78-81.
1516 L04, T 1192-1194; L12, 1813-1815; L06, T 1025; 1028; L10, T 2960-2961; L96 2347; 2515.
1517 L12, T 1813-1815; L06, T 1025; 1028; L10, T 2960.
1518 L12, T 1815-1818; L96, T 1485-2486.
1519 L12, T 1815-1818; L06, T 1107; L10, T 2960-2961.
1520 L06, T 1025; 1028; L10, T 2960-2961; L96, T 2349-2350.
1521 L06, T 1025; 1028; L10, T 2960-2961; L12, T 1815-1818; L96, T 2349-2350.

449. L96 testified that on the way, as the group was on a major path in the forest, a tractor passed by, carrying armed civilians.[1522] Shala was then close to L96. L96's evidence is that he heard Shala say that "Commander Çeliku" was coming and that he would ask him what he should do with the prisoners.[1523] Shala then ordered the prisoners to stop and went to talk to a man wearing a uniform;[1524] he then returned with one of the men accompanying the commander and ordered the prisoners to continue their march.[1525] As discussed later in this decision,[1526] although two of the prisoners testified to seeing a tractor as they marched, this account by L96 was not confirmed in any other respect by any of the witnesses who described the march.[1527]

450. The group arrived at a meadow in the Berishe/Berisa Mountains and stopped near a cherry tree.[1528] The accounts of the survivors of this day are consistent that after about two hours, Shala called out the names of about ten prisoners, that is about half of the group, who were taken aside some 100 metres away.[1529] They were each given a piece of paper confirming their release and told to go.[1530] While the evidence of most witnesses is that Shala was the one who selected the prisoners and released them, one witness testified that he was released by Murrizi.[1531] No examples of these pieces of paper are in evidence. In the finding of the Chamber, both Shala and Murrizi were engaged in the process of releasing this group of prisoners.

451. Only one witness, L96, gave direct evidence as to what happened to the prisoners who remained in the Berishe/Berisa Mountains after the first group was released. L96 testified that some forty minutes to two hours[1532] after the first group of prisoners was taken aside and released, Shala returned to the cherry tree, called out the names of the remaining prisoners and ordered Murrizi to lead them to another location.[1533] The group arrived at a clearing. The detainees were given some water and Shala ordered them to sit down.[1534] On L96's evidence, Shala was then accompanied by Murrizi and by another soldier, whom, L96 said, was sent by the man he claims was Commander Çeliku.[1535] Shala then said something to Murrizi and this third soldier, after which Shala stated to the prisoners, "This is your death penalty" and started to charge his weapon. The

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1522 L96, T 2364; Exhibit P106.
1523 L96, T 2364.
1524 L96, T 2364-2365.
1525 L96, T 2365.
1526 *See infra*,para 554.
1527 L04, T 1192-1195; L10, T 2966; L12 testified that during the march, he did not see anyone, T 1818; L06, 1025-1026.
1528 L06, T 1028-1029; L10, T 2962; L96, T 2372-2374; Exhibit P108; *see supra*, para 278.
1529 L06, T 1028-1030; L12, 1815-1818; L10, T 2962-2963.
1530 L06, T 1028-1030; L10, T 2962-2965; L12, T 1817-1818.
1531 L04, T 1194-1195.
1532 L96, T 2377; 2486.
1533 L96, T 2377-2379.
1534 L96, T 2379-2381; Exhibits P108 and P109.
1535 L96, T 2365.

two other men had taken position already. L96 stated that he immediately started to run in the opposite direction from the three men when he heard bursts of fire coming from two Kalashnikovs. He heard some screaming. It is his evidence that he managed to escape, rolling down the hill. After a while, no sound of fire or scream could be heard any longer. It is L96's evidence that it became clear to him that the prisoners were dead.[1536]

452. L96 testified that he later came to discover that another man, Xheladin Ademaj, also survived the execution.[1537] Xheladin Ademaj has not given evidence in this case. Kaare Birkeland, formerly a CCIU investigator, testified that he interviewed Xheladin Ademaj on 13 September 2000.[1538] During this interview, Xheladin Ademaj did not mention anything about an execution in the Berishe/Berisa Mountains; rather he stated that he was taken by KLA soldiers to the forest and told to go.[1539] Kaare Birkeland testified that when he confronted Xheladin Ademaj with L96's statement recounting the execution, Xheladin Ademaj orally admitted to Kaare Birkeland to having lied in his previous statement but did not want to have this on the record.[1540] However, two prisoners who were escorted to the Berishe/Berisa Mountains by the KLA soldiers on 25 or 26 July 1998, L04 and L12, testified that "Xhela", whom they recognised on a photograph of Xheladin Ademaj, was among the prisoners who remained behind after the first group was released.[1541] This evidence leaves the Chamber persuaded that Xheladin Ademaj was among the prisoners who remained under KLA escort at the Berishe/Berisa Mountains after some were released, and that Xheladin Ademaj either escaped the execution or was released on 25 or 26 July 1998. As is detailed later, the Chamber cannot exclude or confirm the possibility that Hetem Rexhaj also survived the execution.[1542]

453. The evidence of L96 as to the identity of the alleged perpetrators requires further exploration. For reasons detailed later in this decision, the Chamber is not able to accept as accurate and reliable, the evidence of L96 as to the encounter with Commander Çeliku.[1543] Neither is the Chamber persuaded that a third KLA soldier was present at the time of the shooting, a third soldier L96 described as sent by Çeliku, and who was with Shala and Murrizi at the time of the execution. The Chamber is not able to reach a positive finding one way or the other about the

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1536 L96, T 2381-2383.
1537 L96, T 2397-2398.
1538 Kaare Birkeland, T 1644-1648.
1539 Kaare Birkeland, T 1649-1650; Exhibit P85. Kaare Birkeland testified that the statement was based on notes he took during the interview on 13 September 2000 and was signed by Xheladin Ademaj on 21 September 2000, T 1647-1648. Kaare Birkeland's original notes were "destroyed" after he left Kosovo, T 1666-1667.
1540 Kaare Birkeland, T 1657-1659; 1677; 1687; 1690. Kaare Birkeland prepared a supplement to the original statement, but that supplement is not signed by Xheladin Ademaj, Exhibit P86.
1541 L04, T 1197-1198; L12, T 1824-1829; Exhibit P54. There is also evidence that Xheladin Ademaj was detained at the Llapushnik/Lapusnik prison camp, L04, T 1136-1138; L12, T 1820-1823.
1542 *See infra*, paras 494-497.
1543 *See infra*, paras 553-556.

presence of a third soldier. A significant further element of the evidence of L96 of the meeting and discussion between Shala and the man he said was Commander Çeliku on 25 or 26 July 1998, is that at that meeting, Commander Çeliku detached one of the soldiers who was with the tractor to provide a third guard with Shala and Murrizi, for the remainder of the march and eventually for the execution of some of the prisoners. Only one other prisoner, L10, mentions a third guard, although there is no indication in his evidence how this third soldier came to join the group.[1544] The forensic evidence as to what was discovered with, and in the immediate vicinity of, the buried bodies of most of the last group of prisoners in the Berishe/Berisa Mountains could also have afforded confirmation of the active presence of a third guard at the time the prisoners were executed. Buried with the bodies, and in the immediate vicinity, there were found a number of spent cartridge cases and bullets. A number of these are established to have been fired from the one Kalashnikov rifle. A further number of these are established to have been fired from a different Kalashnikov rifle, thus confirming the use of at least two similar weapons in the executions. Some cartridge cases and bullets were in such poor condition that no conclusions could be reached as to the weapon from which they were fired. There was another small group of cartridge cases and bullets. These were of the same calibre as a Kalashnikov rifle but their condition did not enable a conclusion to be drawn whether or not they were fired from one of the two weapons referred to above. Thus while the forensic evidence confirms that at least two Kalashnikov rifles were used to kill the prisoners, this evidence neither establishes, nor precludes, that a third Kalashnikov was used. The forensic evidence therefore neither confirms nor denies the active presence of a third guard in the Berishe/Berisa Mountains at the time of the executions. The evidence of L10 and L96 about the presence of a third guard may, or may not, be correct.

454. However, the Chamber is persuaded and finds from the general circumstances that KLA soldiers identified as Shala and Murrizi remained with the second group of prisoners in the Berishe/Berisa and were present and directly involved in shooting at the prisoners. This inference can be drawn from the body of evidence as to the role of both Shala and Murrizi in the prison camp,[1545] the fact that when Llapushnik/Lapusnik came under Serbian attack, both men escorted the remaining prisoners on the march to the Berishe/Berisa Mountains,[1546] their joint role in the release of the first group of prisoners,[1547] leaving the remaining prisoners, including L96, with Shala and Murrizi,[1548] and that the bodies of all of these remaining prisoners, with the exception of L96,

[1544] L10, T 2961-2963.
[1545] *See supra*, para 276.
[1546] *See supra*, paras 448; 450.
[1547] *See supra*, para 450.
[1548] *See supra*, para 450.

Hetem Rexhaj and Xheladin Ademaj, were later recovered in the vicinity.[1549] In the finding of the Chamber, 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.

455. L96 testified that sometime before he gave a second interview to the CCIU investigators in August 2001, he went back to Llapushnik/Lapusnik with two relatives in order to locate the place of the killings in the Berishe/Berisa Mountains. On the execution site, he said, bones and skulls could still be seen although soil had been added on the ground.[1550] It is L96's evidence that he later led the CCIU investigators to the site.[1551]

456. The circumstances surrounding the escape of L96 as he recounted them are quite unconvincing. L96 described three soldiers armed with Kalashnikovs standing about seven metres away from the twelve detainees sitting close to each other.[1552] L96 further testified that one of the soldiers was standing in front of him and suggested that perhaps this soldier deliberately did not shoot him.[1553] In these circumstances, it is difficult to imagine how L96 could have physically managed to escape the execution. A further concern, in the view of the Chamber, is the great lengths to which L96 went in the course of his evidence to avoid agreeing that he had previously had social and other contacts with Serbs.[1554] In particular, the Chamber finds itself unable to accept L96's evidence that he walked alone some 40 km through KLA held territory, after escaping from being shot in the Berishe/Berisa Mountains on 25 or 26 July 1998, to reach Ferizaj/Urosevac.[1555] It appears to the Chamber that in truth, L96 handed himself over to Serbian police manning the checkpoint in Komaran/Komorane, shortly after his escape, following which he gave a detailed interview to Serbian authorities.[1556] In the Chamber's view, the evidence given by L96 about what he did immediately after escaping and until he gave information to the Serbian authorities about his period of captivity with the KLA in the prison camp at Llapushnik/Lapusnik, and other aspects of his evidence including his singular account of how the marching group of prisoners met up with Fatmir Limaj and other KLA soldiers on a tractor in the Berishe/Berisa Mountains that day, was influenced by efforts by L96 to avoid admitting the true nature and extent of his relationship with some Serbs. As indicated earlier, the Chamber is left with strong reservations about some aspects

[1549] *See infra*, paras 457; 459; 464; 469; 474; 481; 485; 490; 499 and 504.
[1550] L96, T 2401-2402.
[1551] L96, T 2402-2403.
[1552] L96, T 2381-2383.
[1553] L96, T 2473-2474.
[1554] *See supra*, para 26.
[1555] L96, T 2388-2389; 2420-2425.
[1556] L96, T 2424-2428; Dragan Jašović, T 5284.

of his evidence and is generally unprepared to accept his evidence if it is inconsistent with what other reliable witnesses have said, or is not confirmed in significant respects by other evidence.[1557]

457. A large amount of evidence was adduced before the Chamber in relation to these events, including expert evidence. Judy Thomas, a Canadian police officer serving in the CCIU, detailed in a written statement, admitted into evidence by consent of the Defence, how initially eight bodies were recovered and exhumed from a remote location in the Berishe/Berisa Mountains between 20 and 24 August 2001,[1558] and how a ninth body came to be recovered and exhumed after a further inspection on 11 April 2002 about 14 metres away from the original grave site.[1559] Two civilians had led the investigators to the location.[1560] The remains of the eight bodies initially uncovered, and those of the ninth body found later, were all submitted to detailed forensic investigation.[1561] Judy Thomas further noted that there were no marked graves or holes in the location and that the bodies had been covered with soil which was not soil natural to the location. This and other findings led her to conclude that the victims, while killed in the location where the bodies were found, had been covered at some later time.[1562] The autopsy of the skeletal remains of the first eight bodies was conducted by an OSCE forensic anthropologist, Dr Tarja Formisto, between 5 and 12 September 2001; that of the ninth body was conducted by that same person on 16 April 2002.[1563] This autopsy established for all the bodies that death had occurred more than two years earlier, which is consistent with the time of the alleged murders.[1564] Two anthropological examinations of the remains were further carried out by a team of experts led by Dr Jose Pablo Baraybar between November 2002 and December 2003,[1565] and by Dr George Maat in July 2003.[1566] In May 2004, Dr Daniel Vanek of the International Commission on Missing Persons ("ICMP") submitted a report on the results of the DNA analysis of biological samples from eight of the nine bodies, which samples had been provided by the CCIU. An addendum to the report was further submitted in December 2004.[1567] The ballistic analysis of cartridge cases, bullets and fragments which, as the parties have agreed, were found at the exhumation site,[1568] reveals the presence of more than 30 cartridge cases of the calibre used in Kalashnikov automatic rifles, most of which were manufactured in Albania, a few in China and one in East Germany.[1569] As discussed

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1557 *See supra*, para 26.
1558 Exhibit P110; The location was identified by the Global Positional Satellite as 88467E-09500N.
1559 Exhibit P110, paras 41-42 of Judy Thomas's statement and memorandum 0323-2015.
1560 Exhibit P110, para 18 of Judy Thomas's statement.
1561 Exhibit P110, paras 41-42 of Judy Thomas's statement and memorandum 0323-2015.
1562 Exhibit P110, para 39 of Judy Thomas's statement.
1563 Exhibit P111.
1564 Exhibit P111.
1565 Exhibit P111.
1566 Exhibit P200.
1567 Both the report and the addendum were admitted as Exhibit P112.
1568 T 2580.
1569 Exhibit P113, p 7.

above, the conclusions of the ballistics expert, Wim Kerkhoff, seem to indicate that most of the cartridge cases were fired from two different Kalashnikov type weapons, but a few cartridge cases of similar calibre could not be positively determined to have been fired from either of those two Kalashnikovs. Another group of five bullets and a jacket stem were also analysed. However, not surprisingly, it could not be determined whether or not any of the bullets were fired from any of the cartridge cases or whether or not any had been fired from either of the two weapons previously mentioned, or, indeed, from a third weapon of similar calibre.[1570] A metal fragment was also recovered at the site, but nothing of significance stemmed from the ballistic examination of it.[1571] Six cartridge cases and five projectiles were found with the bodies themselves.[1572] All of these expert reports were admitted into evidence with the consent of the Defence, and the Defence have not challenged the validity or correctness of any of the findings made by these experts from their forensic, DNA and ballistic examinations.[1573] The location of the gravesites where the nine bodies were found, *i.e.* into the mountains, east of the Berishe/Berisa village near the road leading to Klecke/Klecka,[1574] accords generally with the prisoners' evidence, including that of L96.

(a) Emin Emini

458. The Chamber has found earlier in this decision that Emin Emini was detained in the Llapushnik/Lapusnik prison camp.[1575] There is oral evidence before the Chamber that Emin Emini was among the small group of prisoners who remained behind in the Berishe/Berisa Mountains when the first group was released. L04 testified that Emin Emini, whom he identified by photograph,[1576] was one of the prisoners who stayed behind in the Berishe/Berisa Mountains when he was released.[1577] L12, when prompted, remembered the names of a number of prisoners, including that of Emin Emini, whom he stated was in the group that was left behind in the Berishe/Berisa Mountains when he was released.[1578] L96 also identified Emin Emini by photograph as one of the prisoners of the group which was taken to be executed.[1579]

459. The DNA analysis conducted on bone samples from body 3 (NN987) retrieved from the large grave at the Berishe/Berisa Mountains execution site, when compared with the DNA from a

[1570] Exhibit P113, p 9.
[1571] Exhibit P113, p 9.
[1572] Exhibit P110.
[1573] T 2575-2581.
[1574] Exhibit P1, maps 6 and 7.
[1575] *See supra*, para 410.
[1576] L04, T 1199-1206; Exhibit P54.
[1577] L04, T 1196-1197; Exhibit P76.
[1578] L12, T 1820-1823. L12 identified Emin Emini by photograph, T 1824-1829; Exhibit P54.
[1579] L96, T 2405-2409; Exhibit P54. While the name of Emin Emini does not appear, as such, among the names of prisoners at the execution site which L96 listed, he appears to be identified on that list as "Emin Idrizi Gerrnalev", Exhibit P108.

blood sample given by a family member of Emin Emini, revealed that the probability of relatedness was greater than 98.8%.[1580] The Chamber is therefore satisfied that one of the bodies (body 3 - NN987) retrieved from the execution site in the Berishe/Berisa Mountains was that of Emin Emini.

460. The autopsy conducted by Dr Tarja Formisto on body NN987 on 6 September 2001 revealed a gunshot injury to the skull.[1581] The forensic examination of the skeletal remains of NN987 subsequently performed by Dr Jose Pablo Baraybar ascertained that death was caused by multiple gunshot wounds to the head.[1582] This conclusion was even further confirmed in substance by a further forensic examination by Dr George Maat, who found that the victim NN987 suffered multiple perimortem fractures due to mechanical traumas and consistent with gunshot wounds and blunt force traumas.[1583]

461. On the basis of the above evidence, the Chamber is satisfied that the body of Emin Emini was exhumed from the large grave at the execution site in the Berishe/Berisa Mountains and that Emin Emini was killed in that same location by multiple gunshots. Even if the account of L96 regarding the execution of the prisoners is left aside, the evidence as to the detention of Emin Emini in the prison camp, his presence among the last group of prisoners held at that general location in the Berishe/Berisa Mountains by the KLA soldiers known as Shala and Murrizi, both of whom were then armed, the manner in which he died (*i.e.* multiple gunshot wounds) and the number of victims who suffered the same fate leave no doubt in the Chamber's mind that Emin Emini was killed by others and that the perpetrators were the KLA members known as Shala and Murrizi, each of whom acted together and with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Emin Emini was detained by the KLA and was not taking any active part in any hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

462. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of the Accused Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Emin Emini.

(b) Ibush Hamza

463. The Chamber has previously found that the evidence relating to the identity of those held in the Llapushnik/Lapusnik prison camp, of itself, does not establish that Ibush Hamza had been

[1580] Exhibit P112, p 6 of the report and p 5 of the addendum.
[1581] Exhibit P111.
[1582] Exhibit P111.
[1583] Exhibit P200.

detained in the Llapushnik/Lapusnik prison camp.[1584] However, the name "Ibushi" appears on the list of persons whom L04 testified were left behind in the Berishe/Berisa Mountains upon his release.[1585] The clear inference is that a person known to L04 in the camp as Ibushi was a fellow prisoner in the camp, was one of the prisoners escorted on 25 or 26 July 1998 to the Berishe/Berisa Mountains, and was among the last group of prisoners left behind after a number of prisoners were released. The Chamber so finds.

464. The DNA analysis conducted on bone samples from body 1 (NN985) retrieved from the large grave at the Berishe/Berisa Mountains execution site, when compared with the DNA from blood samples given by family members of Ibush Hamza, revealed that there was a probability of relatedness greater than 99.9% with the DNA of body 1 (NN985).[1586] The Chamber is therefore satisfied that one of the bodies (body 1 – NN985) retrieved from the large grave at the execution site in the Berishe/Berisa Mountains was that of Ibush Hamza, known in the prison camp to L04 as Ibushi.

465. The autopsy conducted by Dr Tarja Formisto on body NN985 on 5 September 2001 revealed multiple gunshot injuries.[1587] The forensic examination of the skeletal remains of NN985 subsequently performed by Dr Jose Pablo Baraybar, ascertained that death was caused by multiple gunshot wounds to the chest and pelvis.[1588] This conclusion was confirmed by a further forensic examination by Dr George Maat, who found that the victim NN985 had suffered multiple perimortem fractures due to mechanical traumas.[1589]

466. On the basis of the above evidence, the Chamber is satisfied that the body of Ibush Hamza was exhumed from the large grave at the execution site in the Berishe/Berisa Mountains and that Ibush Hamza was killed in that location by multiple gunshots. Even if the account of L96 regarding the execution of the prisoners is left aside, the evidence of L04 as to the detention of the man known to him as Ibushi, the presence of this man among the last group of prisoners held at that general location in the Berishe/Berisa Mountains by the KLA soldiers known as Shala and Murrizi, both of whom were then armed, the manner in which he died (*i.e.* multiple gunshot wounds) and the number of victims who suffered the same fate leave no doubt in the Chamber's mind that Ibush Hamza was killed by others and that the perpetrators were the KLA members known as Shala and

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1584 *See supra*, para 415. Exhibit P54; L12, T 1824-1829; L04, T 1199-1206; L96, T 2405-2409; The name of Ibush Hamza does not appear on the list L96 gave of names of the prisoners at the execution site, Exhibit P108.
1585 Exhibit P76, L04, T 1197-1198.
1586 Exhibit P112, p 5 of the report and p 4 of the addendum. The identity of the donor of the reference blood sample was kept confidential.
1587 Exhibit P111.
1588 Exhibit P111.
1589 Exhibit P200.

Murrizi, each of whom acted together and with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Ibush Hamza was detained and was not taking any active part in any hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

467. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of the Accused Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Ibush Hamza.

(c) Hyzri Harjizi

468. The Chamber has already found that Hyzri Harjizi was detained in the Llapushnik/Lapusnik prison camp.[1590] Hyrzi Harjizi was among the prisoners who remained behind in the Berishe/Berisa Mountains after the first group was released. L04 identified Hyzri Harjizi by photograph[1591] and by name[1592] as one of the prisoners left behind when L04 was released. Although L96 did not identify Hyzri Harjizi by photograph,[1593] he testified that "Hyzri from Belince" was one of the prisoners in the group which remained at the cherry tree.[1594] The Chamber notes in this respect that L10 testified to being detained in the storage room with "Hyzri from Belince", whom he identified by photograph as being Hyzri Harjizi.[1595] L04 also identified Hyrzi Harjizi by photograph as the man he referred to in his evidence as "Hyzri from Belince".[1596]

469. The DNA analysis conducted on bone samples from body 5 (NN989) retrieved from the large grave at the execution site in the Berishe/Berisa Mountains, when compared with the DNA from blood samples given by family members of Hyzri Harjizi, revealed that the probability of relatedness was greater than 99.9%.[1597] Further, on 7 October 2001, Hyzri Harjizi's brother, Haxbi Harjizi, was shown photographs of the clothing recovered from the gravesite and identified the shirt found on body 5 (NN989) as that which his brother was wearing when he disappeared.[1598] In light of this evidence, the Chamber is satisfied that one of the bodies (body 5 - NN989) retrieved from the execution site in the Berishe/Berisa Mountains was that of Hyzri Harjizi.

1590 *See supra*, paras 417-419.
1591 L04, T 1199-1206; Exhibits P54.
1592 "Hyzrija" appears on the list of names L04 gave of prisoners who were left behind in the Berishe/Berisa Mountains, T 1197-1198; Exhibit P76.
1593 L96, T 2405-2409; Exhibit P54.
1594 L96, T 2377-2387; "Hyzri from Belince" appears on the list of names L96 gave of the prisoners at the execution site, Exhibit P108.
1595 L10, T 2922-2925; 2969-2973; Exhibit P54.
1596 L04, T 1199-1206; Exhibit P54.
1597 Exhibit P112, p 8 of the report and p 6 of the addendum.
1598 Exhibit P110, para 52 of Judy Thomas's statement.

470. The autopsy conducted by Dr Tarja Formisto on body NN989 on 10 September 2001 revealed a fractured skull.[1599] The forensic examination of the skeletal remains of NN989 subsequently performed by Dr Jose Pablo Baraybar ascertained that the skull presented fractures consistent with a tangential gunshot wound and that death was caused by a gunshot wound to the head.[1600] This conclusion is confirmed by a further forensic examination by Dr George Maat, who found that the victim NN989 suffered perimortem fractures to the skull due to mechanical traumas.[1601]

471. On the basis of the above evidence, the Chamber is satisfied that the body of Hyzri Harjizi was exhumed from the large grave at the execution site in the Berishe/Berisa Mountains and that Hyzri Harjizi was killed in that location by gunshot to the head. Even if the account of L96 regarding the execution of the prisoners is left aside, the evidence as to Hyzri Harjizi's detention in the prison camp and presence in the last group of prisoners held at that general location in the Berishe/Berisa Mountains by the KLA soldiers known as Shala and Murrizi, both of whom were then armed, the manner in which he died and the number of victims who suffered the same fate in the same location leaves no doubt for the Chamber that Hyzri Harjizi was killed by gunshot wound to the head and that he was shot by the KLA soldiers identified as Shala and Murrizi, who acted together and with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Hyzri Harjizi was detained by the KLA and was not taking any active part in any hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

472. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of the Accused Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Hyzri Harjizi.

(d) Shaban Hoti

473. The Chamber has already found that Shaban Hoti was detained in the Llapushnik/Lapusnik prison camp.[1602] Only one witness, L96, gave oral evidence before the Chamber that Shaban Hoti was among the prisoners who remained behind in the Berishe/Berisa Mountains when the first group was released. L96 testified that Shaban Hoti was one of the prisoners present at the execution site.[1603] None of the other prisoners who testified as to the march to the Berishe/Berisa

[1599] Exhibit P111.
[1600] Exhibit P111.
[1601] Exhibit P200; Dr George Maat, T 5160-5163; 5176.
[1602] *See supra*, paras 422-423.
[1603] L96, T 2377-2387; Shaban Hoti appears on the list of names L96 gave of the prisoners at the execution site, Exhibit P108.

Mountains was able to identify Shaban Hoti by photograph.[1604] None of them listed him either as one of the prisoners who remained in the Berishe/Berisa Mountains when the first group was released. In the Chamber's view, however, this may well be due to the fact that Shaban Hoti was detained in the main house in the Llapushnik/Lapusnik prison camp.[1605] Aside from L96 who was also held in the house during the first three days of his detention and had encountered Shaban Hoti at that time,[1606] it is to be expected that none of the other prisoners had contact with Shaban Hoti in the course of their detention at the prison camp so that he was unfamiliar to them in the Berishe/Berisa Mountains on the day of the execution.

474. The DNA analysis conducted on bone samples from body 4 (NN988) retrieved from the large grave at the execution site in the Berishe/Berisa Mountains, when compared with the DNA from blood samples given by family members of Shaban Hoti, revealed that the probability of relatedness was greater than 99.9%.[1607] The Chamber is therefore satisfied that one of the bodies (body 4 - NN988) retrieved from the execution site in the Berishe/Berisa Mountains was that of Shaban Hoti.

475. The autopsy conducted by Dr Tarja Formisto on body NN988 on 10 September 2001 revealed numerous fractures, including to the skull.[1608] A deformed projectile was recovered during the autopsy.[1609] The forensic examination of the skeletal remains of NN986 subsequently performed by Dr Jose Pablo Baraybar ascertained that death was caused by multiple gunshot wounds to the head and chest.[1610] This conclusion was confirmed by a further forensic examination by Dr George Maat, who found that the victim NN988 had suffered multiple perimortem fractures, including to the skull, due to mechanical traumas.[1611] All three examinations are consistent as to the injuries which led to the death of Shaban Hoti.

476. On the basis of the above evidence, the Chamber is satisfied that the body of Shaban Hoti was exhumed from the large grave in the vicinity of the execution site in the Berishe/Berisa Mountains and that Shaban Hoti was killed on 25 or 26 July 1998 in that same location by multiple gunshots. Even putting to one side the account of L96 regarding the execution of the prisoners, the fact that Shaban Hoti had been detained by the KLA at the Llapushnik/Lapusnik prison camp until

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[1604] L04, T 1199-1206; L06, T 1039-1045; L12, T 1824-1829; Exhibit P54. Further, Shaban Hoti does not appear on the list of names given by L04, of the prisoners who remained behind in the Berishe/Berisa Mountains when he was released, Exhibit P76.
[1605] *See supra*, paras 422-423.
[1606] L96, T 2312-2316; 2336; 2346-2347.
[1607] Exhibit P112, p 6 of the second report dated 12 December 2004. A previous DNA analysis of body 4 (NN988) had excluded the probability of relatedness with the family of Hetem Rexhaj, p 7 of the expert report.
[1608] Exhibit P111.
[1609] Exhibit P110.
[1610] Exhibit P111.

25 or 26 July 1998, the fact that he was found dead in the main grave in the vicinity of the execution site, the cause of his death and the number of victims who suffered the same fate in the same location, leaves no doubt in the mind of the Chamber that Shaban Hoti was killed by gunshot, and that the perpetrators were the KLA soldiers Shala and Murrizi who were armed and guarding the group of prisoners who remained after others were released. Given the circumstances, the Chamber is also satisfied and finds that Shala and Murrizi acted together to kill Shaban Hoti on 25 or 26 July 1998 and that each acted with an intent to kill him. The Chamber is also satisfied and finds that at the time of his death, Shaban Hoti was detained by the KLA and was not taking any active part in any hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

477. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of the Accused Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Shaban Hoti.

(e) Hasan Hoxha

478. The Chamber has found earlier in this decision that Hasan Hoxha was detained in the Llapushnik/Lapusnik prison camp.[1612] There is conflicting oral evidence before the Chamber about the fate of Hasan Hoxha and his alleged presence among the prisoners executed in the Berishe/Berisa Mountains. L96 identified Hasan Hoxha by photograph[1613] and by name[1614] as one of the prisoners remaining at the execution site after some had been released. "Hasani" further appears on the list of names of the prisoners whom L04 testified as remaining in the Berishe/Berisa Mountains on the day he was released.[1615] L04 was unable, however, to identify Hasan Hoxha by photograph.[1616] It is L64's evidence that sometime in July 1998, he saw three bodies near the village of Morine/Morina, one of which he believed to be that of Hasan Hoxha.[1617] L64 testified that he had seen Hasan Hoxha on a prior occasion, shortly before then, on the road in Llapushnik/Lapusnik.[1618] However, it is the Chamber's understanding of L64's evidence that he was in a car when he saw the bodies and that he did not get out of the car to look closely at the

[1611] Exhibit P200; Dr George Maat, T 5160-5163.
[1612] *See supra*, para 427.
[1613] L96, T 2405-2409; Exhibit P54.
[1614] L96, T 2406. The name "Hasan Hoxha Dobreve" appears on the list L96 gave of names of the prisoners at the execution site, Exhibit P108.
[1615] L04, T 1197-1198; Exhibit P76.
[1616] L04, T 1199-1206; Exhibit P54.
[1617] L64, T 4518-4519.
[1618] L64, T 4515-4518.

bodies so as to confirm his suspicion that one of the bodies was that of Hasan Hoxha.[1619] In these circumstances, the Chamber is not prepared to place any reliance on L64's evidence in this respect.[1620]

479. On 11 April 2002, in the course of a second exhumation of the site in the Berishe/Berisa Mountains, a ninth body (NN376) was recovered by a CCIU team about 14 metres away from the main grave location. The Chamber does not have any evidence that a DNA analysis was performed on the body. In a report dated 23 May 2003, however, CCIU investigator Andreas Manthey stated that the family of Hasan Hoxha positively identified the clothes recovered during the examination as those Hasan Hoxha was wearing the day of his disappearance.[1621] The identification photo sheet of the trousers recovered with the remains of NN376 show dark "adidas" tracksuit pants with white or yellow stripes.[1622]

480. In an undated Missing Person Report compiled by the OSCE, it is also stated that at the time of his disappearance, Hasan Hoxha was wearing a black tracksuit with yellow stripes and sneakers.[1623] Sometime in 2001, Hasan Hoxha's brother, Ramadan Hoxha, examined the clothes recovered with the previous eight bodies, and indicated at the time that Hasan Hoxha was wearing "adidas" training trousers.[1624] Sometime in 2002, Ramadan Hoxha and Nuhi Hoxha, Hasan's son, were called by the CCIU to identify clothes found with the ninth body and both stated that they positively identified the clothing, including the "adidas" tracksuit pants, underwear and vest, of their missing relative.[1625]

481. The Chamber accepts from this positive clothing identification by Ramadan and Nuhi Hoxha, which is not disputed by the Defence, and finds that the clothes retrieved from the site together with the ninth body NN376 are those of Hasan Hoxha. This is consistent with the evidence also outlined above. The "adidas" training trousers are readily recognisable on the photo sheet and match the description given by Hasan Hoxha's brother and that recorded in the Missing Person Report. Further, the evidence of Hasan Hoxha's detention by the KLA in the Llapushnik/Lapusnik prison camp and his identification by L96 at the execution site, which the Chamber is able to accept in light of the confirmation provided by the other evidence discussed, are also consistent with Hasan Hoxha's presence among the prisoners remaining at the execution site on 25 or 26 July 1998 after some had been released. The evidence offers no direct explanation for Hasan Hoxha's body

[1619] L64, T 4518-4519.
[1620] *See* also *supra*, para 28.
[1621] Exhibit P110.
[1622] Exhibit P111.
[1623] Exhibits P46 and P147.
[1624] Exhibit P110.
[1625] Exhibits P185 and P186.

being some metres from the main grave; this may simply be the position where Hasan Hoxha fell when shot. A forensic examination of the skeletal remains of NN376 conducted by Dr Jose Pablo Baraybar identified the cause of death of Hasan Hoxha to be a gunshot wound to the chest.[1626]

482. On the basis of the above evidence, the Chamber is satisfied that the body of Hasan Hoxha was exhumed from a grave at the execution site in the Berishe/Berisa Mountains and that Hasan Hoxha was killed on 25 or 26 July 1998 in that location by gunshot. Even leaving aside the account of L96 regarding the execution of the prisoners, the fact that Hasan Hoxha had been detained by the KLA at the Llapushnik/Lapusnik prison camp, the location in which his body was found, the manner in which he died (*i.e.* gunshot wound to the chest), and the number of victims who suffered the same fate and whose remains were found in that same location, leaves the Chamber with no doubt that Hasan Hoxha was killed at the execution site on 25 or 26 July 1998 by the two KLA armed soldiers who were escorting the prisoners, namely the individuals identified as Shala and Murrizi, and that each of them acted together with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Hasan Hoxha was detained by the KLA and was not taking any active part in the hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

483. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of the Accused Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Hasan Hoxha.

(f) Safet Hysenaj

484. The Chamber has already found that Safet Hysenaj was detained by the KLA in the Llapushnik/Lapusnik prison camp.[1627] The Chamber also has evidence that Safet Hysenaj was among the prisoners who remained behind in the Berishe/Berisa Mountains when the first group was released. L96 identified Safet Hysenaj by photograph as one of the prisoners present at the execution site.[1628] L04 also listed "Safeti" as one of the prisoners in the group which was left behind after others were released in the Berishe/Berisa Mountains.[1629]

485. The DNA analysis conducted on bone samples from body 8 (NN1000) retrieved from the main grave at the execution site in the Berishe/Berisa Mountains, when compared to the DNA from

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1626 Exhibit P111.
1627 *See supra*, para 430.
1628 L96, T 2406-2408; Exhibit P54. "Safet Hysenaj Petrove" appears on the list of names L96 gave of prisoners at the execution site, Exhibit P108.
1629 L04, T 1197-1198; Exhibit P76.

blood samples given by family members of Safet Hysenaj, revealed that the probability of relatedness was greater than 99.9%.[1630] The Chamber is therefore satisfied that one of the bodies retrieved from the execution site (body 8 – NN1000) in the Berishe/Berisa Mountains was that of Safet Hysenaj.

486. The autopsy conducted by Dr Tarja Formisto on body NN1000 on 12 September 2001 did not identify any injuries.[1631] The forensic examination of the skeletal remains of NN1000 subsequently performed by Dr Jose Pablo Baraybar did not identify the cause of death.[1632] However, the further forensic examination conducted by Dr George Maat in 2003 revealed that victim NN1000 displayed a perimortem fracture of the right scapula due to mechanical trauma. He also noted that the diagnosis as to the time of injury was uncertain.[1633]

487. On the basis of the above evidence, the Chamber is satisfied that the body of Safet Hysenaj was exhumed from the main grave at the execution site in the Berishe/Berisa Mountains. Safet Hysenaj suffered a fracture of the right scapula around the time of death. Further, it remains the case that Safet Hysenaj had been detained by the KLA in the Llapushnik/Lapusnik prison camp prior to his death and was among the prisoners escorted to the execution site by the armed KLA soldiers known as Shala and Murrizi. On the basis of this evidence taken together, the Chamber is satisfied that Safet Hysenaj was killed in the Berishe/Berisa Mountains on 25 or 26 July 1998 at the same time as the other victims. Further, even leaving aside the account of L96 regarding the execution of the prisoners, the fact that Safet Hysenaj was a prisoner at the time with a number of other victims who were executed at the same time at that location, leaves the Chamber satisfied, and it finds, that Safet Hysenaj was killed by the KLA escorts identified as Shala and Murrizi, who were acting together each with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Safet Hysenaj was detained by the KLA and was not taking any active part in any hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

488. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Safet Hysenaj.

1630 Exhibit P112, p 11 of the report and p 7 of the addendum.
1631 Exhibit P111.
1632 Exhibit P111.
1633 Exhibit P200; Dr George Maat, T 5158-5159.

(g) Bashkim Rashiti

489. The Chamber has already found that Bashkim Rashiti had been detained in the Llapushnik/Lapusnik prison camp.[1634] There is evidence before the Chamber that Bashkim Rashiti was among the prisoners who remained behind in the Berishe/Berisa Mountains when the first group was released. L10 testified that "Bashkim from Godance",[1635] whom he had previously identified as Bashkim Rashiti by photograph,[1636] remained at the cherry tree together with 10 to 12 other prisoners, after the first group of prisoners was released.[1637] L96 also identified Bashkim Rashiti by photograph as one of the prisoners remaining at the execution site.[1638] L04 did not name Bashkim Rashiti among the prisoners whom he testified were left behind in the Berishe/Berisa Mountains;[1639] however, as has been found earlier, L04 and Bashkim Rashiti had not been detained in the same room in the prison camp at Llapushnik/Lapusnik so that Bashkim Rashiti was not familiar to L04 from the prison camp.

490. The DNA analysis conducted on bone samples from body 2 (NN986) retrieved from the large grave at the execution site in the Berishe/Berisa Mountains, when compared with the DNA from a family member of Bashkim Rashiti whose identity was kept confidential, confirmed that body 2 was that of Bashkim Rashiti, the probability of relatedness being greater than 99.9%.[1640] The Chamber is therefore satisfied that one of the bodies (body 2 - NN986) retrieved from the main grave at the execution site in the Berishe/Berisa Mountains was that of Bashkim Rashiti.

491. The autopsy conducted by Dr Tarja Formisto on body NN986 on 6 September 2001 revealed a gunshot injury to the skull.[1641] The forensic examination of the skeletal remains of NN986 subsequently performed by Dr Jose Pablo Baraybar ascertained that death had been caused by a gunshot wound to the head.[1642] This conclusion was confirmed by a further forensic examination by Dr George Maat, who found that the victim NN986 had suffered a perimortem fracture to the skull due to mechanical traumas.[1643]

492. On the basis of the above evidence, the Chamber is satisfied, and finds, that the body of Bashkim Rashiti was exhumed from the main grave at the execution site in the Berishe/Berisa

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1634 *See supra*, para 433.
1635 In this respect, the Chamber notes that there is evidence that Bashkim Rashiti was indeed originally from the village of Godanc/Godance, Exhibit P224, para 8.
1636 L10, T 2969-2973; Exhibit P54.
1637 L10, T 2965-2966.
1638 L96, T 2407-2408; Exhibits P54 and P108.
1639 Exhibit P76.
1640 Exhibit P112, p 5 of the report and p 4 of the addendum. The identity of the donor of the reference blood sample was kept confidential.
1641 Exhibit P111.
1642 Exhibit P111.

Mountains and that Bashkim Rashiti was killed at that location on 25 or 26 July 1998 by gunshot to the head. Even leaving aside the account of L96 regarding the execution of the prisoners, the fact that Bashkim Rashiti had been detained by the KLA at the prison camp, the place where his remains were found, the manner in which he died and the number of other prisoners who suffered the same fate, leaves the Chamber satisfied, and it finds, that Bashkim Rashiti was killed by the two armed KLA escorts with the group of prisoners, namely individuals identified as Shala and Murrizi, who acted together and each with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Bashkim Rashiti was detained by the KLA and was not taking any active part in any hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

493. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Bashkim Rashiti.

(h) Hetem Rexhaj

494. The Chamber has already found that Hetem Rexhaj was detained in the Llapushnik/Lapusnik prison camp.[1644] The Chamber has heard oral evidence that Hetem Rexhaj was among the small group of prisoners who remained behind in the Berishe/Berisa Mountains under the escort of two KLA armed soldiers known as Shala and Murrizi, when the first group was released. L96 testified that Hetem Rexhaj was among the prisoners present at the execution site.[1645] This account is confirmed by the evidence of L04 who identified by photograph Hetem Rexhaj as one of the prisoners who remained in the Berishe/Berisa Mountains after he was released.[1646] L12, when prompted, also remembered the name of "Hete from Petrovo",[1647] who on his evidence was in the second group that remained in the Berishe/Berisa Mountains, after some prisoners were released.[1648]

495. The detailed forensic examinations which have been conducted of the mass gravesite containing the remains of eight bodies in the Berishe/Berisa Mountains, and the separate, nearby

[1643] Exhibit P200; Dr George Maat, T 5160-5163.
[1644] *See supra*, para 436.
[1645] L96, T 2377-2378. "Hete Rexhaj Petrove" appears on the list of names L96 gave of the prisoners present at the execution site, Exhibit P108.
[1646] L04, T 1192-1194; 1199-1206; Exhibit P54. "Heta" appears on the list of names L04 gave of the prisoners who remained in the Berishe/Berisa Mountains when he was released, T 1197-1198, Exhibit P76.
[1647] In this respect, the Chamber notes that L96 testified that the family of Hetem Rexhaj came from the village of Petrove/Petrovo, T 2238; 2253.
[1648] L12, T 1820-1823.

grave containing the remains of a further body, which was discovered in the following year and after the effects on the terrain of another winter, have not identified any remains of Hetem Rexhaj.[1649] It was the evidence of L96 that Hetem Rexhaj was left behind with the other members of the last group of prisoners when L96 made good his escape. L96 was not able to say what happened to Hetem Rexhaj after L96 escaped. There was no other evidence about what happened to Hetem Rexhaj.

496. The fate of the other prisoners in the group provides some basis for an inference that Hetem Rexhaj was also killed with the other prisoners. If that were so, there are two obvious explanations for the failure to identify his remains. First, his body may have fallen in a different position from most of the prisoners. This could well have occurred if he too, had been trying to escape when he was shot and killed, and his body was covered in due course where he fell. That is consistent with the apparent circumstances of the death of Hasan Hoxha whose body was found some 14 metres from the main mass grave. When it was found in 2002 some bones had become exposed, no doubt as a consequence of another winter, even though the existence of his body had not been discovered at the time of the exhumation of the remains in the mass grave in 2001, when the area was searched. The possibility remains that the body of Hetem Rexhaj remains in the vicinity but undiscovered. Secondly, his body may have been moved from the site. There is no evidence as to why this should have occurred or when, although there is some unsupported indirect evidence from L96 of people from Kizhareke/Kisna Reka who are said to have heard that a body was removed and other bodies covered on the orders of Shala.[1650] Further possibilities include that Hetem Rexhaj was not killed that day, he escaped or was spared, or that he was not among the group of prisoners which remained with Shala and Murrizi in the Berishe/Berisa Mountains that day, even though the evidence persuades the Chamber that he was a prisoner in the camp at Llapushnik/Lapusnik and that he was among the prisoners which were marched into the Berishe/Berisa Mountains on 25 or 26 July 1998 by Shala and Murrizi. There is also evidence that Hetem Rexhaj has not been seen again in the seven years that have passed since then.[1651]

497. The Prosecution seeks to maintain a circumstantial case of the murder of Hetem Rexhaj, based in particular on his presence as a prisoner in the camp at Llapushnik/Lapusnik, his poor physical condition on 25 or 26 July 1998 when he and the other prisoners were marched into the mountains, the execution of all the men who remained after some were released by Shala and

[1649] In particular, DNA analysis was performed on the bone samples of one of the bodies with a view to establishing whether the remains were those of Hetem Rexhaj, but this analysis excluded the probability of relatedness, Exhibit P112, p 7 of the expert report.
[1650] L96, T 2464-2467.
[1651] L96, T 2464-2465; 2467.

Murrizi, save for L96 who escaped, and Xheladin Ademaj, the pattern of lawlessness and murder by KLA members at the camp, of which it submits the events in the mountains on or about 26 July 2998 were an extension, and the lack of any subsequent sighting of him in the seven years to the present. While an inference of murder could be drawn from these facts, in the view of the Chamber other inferences which are not consistent with murder are also open. It necessarily follows, having regard to the onus of proof, that it has not been proved beyond reasonable doubt by the Prosecution that Hetem Rexhaj was murdered on 25 or 26 July 1998 in the Berishe/Berisa Mountains. The Chamber so finds.

(i) Lutfi Xhemshiti

498. The Chamber has already found that Lutfi Xhemshiti was detained in the Llapushnik/Lapusnik prison camp.[1652] There is consistent evidence before the Chamber that Lutfi Xhemshiti, also known as "Luta",[1653] was among the prisoners who remained behind in the Berishe/Berisa Mountains when the first group was released. L10 identified "Luta" as one of the prisoners in the group which was left behind at the cherry tree.[1654] "Luta" also appears in the list of names of the prisoners who L04 testified remained in the Berishe/Berisa when he was released.[1655] Lutfi Xhemshiti was further identified by L96 as one of the prisoners in his group at the execution site.[1656]

499. The DNA analysis conducted on bone samples from body 6 (NN990) retrieved from the mass grave at the execution site in the Berishe/Berisa Mountains, when compared with DNA from blood samples given by family members of Lutfi Xhemshiti, revealed a probability of relatedness greater than 99.9%.[1657] The Chamber is therefore satisfied that one of the bodies (body 6 - NN990) retrieved from the mass grave at the execution site in the Berishe/Berisa Mountains was that of Lutfi Xhemshiti.

500. The autopsy conducted by Dr Tarja Formisto on body NN990 on 11 September 2001 revealed injuries to the sternum and on the sternal ends of the ribs.[1658] The forensic examination of the skeletal remains of NN990 subsequently performed by Dr Jose Pablo Baraybar has not identified the cause of death.[1659] However, Dr George Maat performed a further forensic

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1652 *See supra*, paras 439-440.
1653 L96 testified that he knew Lutfi Xhemshiti as "Luta" from Breg I Zi/Crni Breg before the war, T 2409.
1654 L10, T 2965-2966.
1655 L04, T 1197-1198; Exhibit P76.
1656 L96, T 2409; Exhibit P54. "Lutfi nga Carrnabregv" appears on the list of names which L96 gave of prisoners at the execution site, Exhibit P108.
1657 Exhibit P112, p 9 of the report and p 6 of the addendum.
1658 Exhibit P111.
1659 Exhibit P111.

examination and found that the victim NN990 had suffered a perimortem fracture to the sternum due to mechanical traumas.[1660]

501. On the basis of the above evidence, the Chamber is satisfied that the body of Lutfi Xhemshiti was exhumed from the mass grave at the execution site in the Berishe/Berisa Mountains, and although the forensic evidence does not conclusively establish the precise cause of death, the Chamber finds that at the time of his death, Lutfi Xhemshiti had suffered mechanical traumas, traumas involving such force as to fracture his sternum and ribs,[1661] and which are generally consistent with traumas suffered by several other victims. Further, given the evidence of Lutfi Xhemshiti's detention in the Llapushnik/Lapusnik prison camp, and of his presence under KLA escort of Shala and Murrizi at the execution site, it is the Chamber's finding that Lutfi Xhemshiti was murdered on 25 or 26 July 1998 in the Berishe/Berisa Mountains together with the other victims with whom he was buried. The Chamber cannot determine whether he died immediately from his injuries or died after a time, having been left to die as a result of his injuries. Even leaving aside the account of L96 regarding the execution of the prisoners, the fact that Lutfi Xhemshiti was detained by the KLA at the time, the injuries sustained by him and by the other victims who died on 25 or 26 July 1998 in that place, leaves the Chamber satisfied, and it finds, that Lutfi Xhemshiti was killed by others and that the perpetrators, namely the KLA escorts identified as Shala and Murrizi, acted together and with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Lutfi Xhemshiti was detained by the KLA and was not taking any active part in the hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

502. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Lutfi Xhemshiti.

(j) Shyqyri Zymeri

503. The Chamber has already found that Shyqyri Zymeri was detained in the Llapushnik/Lapusnik prison camp.[1662] There is evidence before the Chamber that Shyqyri Zymeri was among the prisoners who remained behind in the Berishe/Berisa Mountains under KLA escort after the first group was released. L04 testified that "Shyqja from Godance", whom he identified by

[1660] Exhibit P200.
[1661] Exhibit P200.
[1662] *See supra*, para 444.

photograph as Shyqyri Zymeri,[1663] and who had a broken leg at the time, was one of the prisoners left behind in the Berishe/Berisa Mountains when L04 was released.[1664] L96 also identified Shyqyri Zymeri by photograph as one of the prisoners present at the execution site.[1665]

504. The DNA analysis conducted on bone samples from body 7 (NN991) retrieved from the mass grave at the execution site in the Berishe/Berisa Mountains, when compared with DNA from blood samples given by family members of Shyqyri Zymeri, revealed that the probability of relatedness was greater than 99.9%.[1666] The Chamber is therefore satisfied that one of the bodies retrieved from the execution site (body 7 - NN991) in the Berishe/Berisa Mountains was that of Shyqyri Zymeri.

505. The autopsy conducted by Dr Tarja Formisto on body NN991 on 11 September 2001 revealed numerous injuries to the mandibularis, the tibia and the radius.[1667] The forensic examination of the skeletal remains of NN991 subsequently performed by Dr Jose Pablo Baraybar has not identified the precise cause of death.[1668] However, in a further forensic examination, Dr George Maat found that the victim NN991 had suffered multiple perimortem fractures, including to the mandible, ulna and radius, due to mechanical traumas.[1669]

506. On the basis of the above evidence, the Chamber is satisfied that the body of Shyqyri Zymeri was exhumed from the mass grave at the execution site in the Berishe/Berisa Mountains and that Shyqyri Zymeri was killed at that location. Even leaving aside the account of L96 regarding the execution of the prisoners, the fact that Shyqyri Zymeri was detained by the KLA at the time, the multiple injuries he sustained around the time of death, and the number of other prisoners buried in the same grave who were killed at the same time in that location, satisfies the Chamber that Shyqyri Zymeri was killed on 25 or 26 July 1998 at that site by others and that the perpetrators, namely the KLA escorts identified as Shala and Murrizi, acted together at the time and with an intent to kill him. The Chamber is also satisfied that at the time he was killed, Shyqyri Zymeri was detained by the KLA and was not taking any active part in the hostilities. The possibility, which cannot be entirely discounted on the evidence, that there was also a third KLA soldier involved in the shootings does not, in the Chamber's view, affect these findings.

1663 L04, T 1199-1206; Exhibit P54.
1664 L04, T 1192-1195; 1197-1198; "Shyqa" appears on the list of names L04 gave of prisoners who remained in the Berishe/Berisa Mountains when he was released, Exhibit P76.
1665 L96, T 2409; Exhibit P54. "Shyqeria nga Godanci" appears on the list of names L96 gave of the prisoners at the execution site, Exhibit P108.
1666 Exhibit P112, p 10 of the report and p 7 of the addendum.
1667 Exhibit P111.
1668 Exhibit P111.
1669 Exhibit P200.

507. By virtue of the foregoing, and leaving aside for the present the question of the criminal responsibility of Fatmir Limaj and Haradin Bala, the Chamber finds that the elements of the offence of murder (Count 10) are established in relation to Shyqyri Zymeri.

VI. RESPONSIBILITY OF THE ACCUSED

A. Law on the forms of liability charged

508. It is alleged that the three Accused are responsible, under Article 7(1) of the Statute, for planning, instigating, ordering, committing, including through participation in a joint criminal enterprise, or otherwise aiding and abetting the planning, preparation, or execution of the crimes charged in the Indictment.[1670] The Accused Fatmir Limaj and Isak Musliu are also alleged to be criminally responsible, pursuant to Article 7(3) of the Statute, as superiors of the KLA members operating in the Llapushnik/Lapusnik prison camp.

1. Responsibility under Article 7(1) of the Statute

(a) Committing

509. "Committing" a crime "covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law".[1671] The Appeals Chamber has held that Article 7(1) "covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."[1672] The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in the Statute, through positive acts or omissions,[1673] whether individually or jointly with others. The requisite *mens rea* is that the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.

(b) Committing through participation in a joint criminal enterprise

510. Individual criminal responsibility arises under Article 7(1) of the Statute not only in respect of persons who perform the criminal act, but also, in certain circumstances, in respect of those who in some way make it possible for the perpetrator physically to carry out that act.[1674] When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise ("JCE") in relation to that crime. Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is

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1670 Indictment, para 6.
1671 *Krstić* Trial Judgement, para 601; *Tadić* Appeals Judgement, para 188; *Kunarać* Trial Judgement, para 390.
1672 *Tadić* Appeals Judgement, para 188.
1673 *Kordić* Trial Judgement, para 376.

part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for all the crimes committed in furtherance of that common purpose as a co-perpetrator.[1675]

511. Three types of joint criminal enterprise have been identified in the jurisprudence of the Tribunal. They all require, as to the *actus reus*, 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. In the first type of joint criminal enterprise the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators. In the second type, embracing the so-called "concentration camp" cases, or systemic JCE, the accused has knowledge of the nature of a system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp.[1676] In such cases the requisite intent may also be able to be inferred from proved knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp, as well as from the position of authority held by an accused in the camp.[1677] The third type concerns cases in which one of the participants commits a crime outside the common design. The *mens rea* in such cases is twofold. First, the accused must have the intention to take part in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly takes the risk that the crime might occur by joining or continuing to participate in the enterprise.[1678] The presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required.[1679]

512. The Appeals Chamber has said that responsibility for crimes committed beyond the common purpose of a JCE, but which were "a natural and foreseeable consequence thereof" (the third type of JCE), arises only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him. The Appeals Chamber pointed out that the question whether the crimes committed outside the common purpose

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1674 *Tadić* Appeals Judgement, para 192.
1675 *Kvočka* Appeals Judgement, para 90.
1676 *Tadić* Appeals Judgement, paras 196; 202-203; 227-228.
1677 *Kvočka* Appeals Judgement, para 243.
1678 *Tadić* Appeals Judgement, paras 204; 227-228; *Kvočka* Appeals Judgement, para 83.
1679 *Krnojelac* Appeals Judgement, para 81.

of the JCE were "a natural and foreseeable consequence thereof" must be assessed in relation to the knowledge of a particular accused.[1680]

(c) Planning

513. It has been said that "planning" implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.[1681] The *actus reus* of "planning" requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.[1682] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1683] A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute for planning.[1684]

(d) Instigating

514. In the jurisprudence of the Tribunal, the term "instigating" has been defined to mean "prompting another to commit an offence."[1685] Both acts and omissions may constitute instigating, which covers express and implied conduct.[1686] A *nexus* between the instigation and the perpetration must be demonstrated;[1687] but it need not be shown that the crime would not have occurred without the accused's involvement.[1688] The *actus reus* is satisfied if it is shown that the conduct of the accused was a factor substantially contributing to the perpetrator's conduct.[1689] The requisite *mens rea* for "instigating" is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.[1690]

1680 *Kvočka* Appeals Judgement, para 86.
1681 *Brdanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443.
1682 *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
1683 *Kordić* Appeals Judgement, para 26.
1684 *Kordić* Appeals Judgement, para 31.
1685 *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387.
1686 *Brdanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
1687 *Brdanin* Trial Judgement, para 269; *Blaškić* Trial Judgement para 280.
1688 *Kordić* Appeals Judgement, para 27.
1689 *Kordić* Appeals Judgement, para 27.
1690 *Kordić* Appeals Judgement, para 32.

(e) Ordering

515. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[1691] It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator; it is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.[1692] There is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.[1693] With regard to the *mens rea,* the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.[1694]

(f) Aiding and abetting

516. "Aiding and abetting" has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[1695] Strictly, "aiding" and "abetting" are not synonymous.[1696] "Aiding" involves the provision of assistance; "abetting" need involve no more than encouraging, or being sympathetic to, the commission of a particular act.[1697] These forms of liability have, however, been consistently considered together in the jurisprudence of the Tribunal.

517. The *actus reus* of aiding and abetting is that the support, encouragement or assistance of the aider and abettor has a substantial effect upon the perpetration of the crime.[1698] There is no requirement of a causal relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct was a condition precedent to the commission of the crime.[1699] An omission may, in the particular circumstances of a case, constitute the *actus reus* of aiding and abetting.[1700] Further, the assistance may occur before, during or after the principal crime

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1691 *Kordić* Appeals Judgement, para 28, citing *Kordić* Trial Judgement, para 388.
1692 *Brdanin* Trial Judgement, para 270.
1693 *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para 76, citing *Kordić* Trial Judgement, para 388; *Blaškić* Trial Judgement, para 281.
1694 *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30; *Brdanin* Trial Judgement, para 270.
1695 *Krstić* Trial Judgement, para 601; *Aleksovski* Appeals Judgement, para 162, citing *Furundžija* Trial Judgement, para 249.
1696 *Kvočka* Trial Judgement, para 254, citing *Akayesu* Trial Judgement, para 484.
1697 *Kvočka* Trial Judgement, para 254, citing *Akayesu* Trial Judgement, para 484.
1698 *Blaškić* Appeals Judgement, para 48; *Furundžija* Trial Judgement, para 249; *Kunarać* Trial Judgement, para 391.
1699 *Blaškić* Appeals Judgement, para 48.
1700 *Blaškić* Appeals Judgement, para 47. *See* also *Krnojelac* Trial Judgement, para 88; *Kunarac* Trial Judgement, para 391.

has been perpetrated.[1701] While each case turns on its own facts, mere presence at the scene of a crime will not usually constitute aiding or abetting. However, where the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, that may be sufficient. In a particular case encouragement may be established by an evident sympathetic or approving attitude to the commission of the relevant act. For example, the presence of a superior may operate as an encouragement or support, in the relevant sense.[1702]

518. The *mens rea* required is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence.[1703] This awareness need not have been explicitly expressed. It may, of course, be inferred from all relevant circumstances.[1704] The aider and abettor need not share the *mens rea* of the perpetrator, but he or she must be aware of the essential elements of the crime ultimately committed by the perpetrator,[1705] and must be aware of the perpetrator's state of mind.[1706] This is not to say that the aider and abettor must be aware of the specific crime that will be committed by the perpetrator. If the aider and abettor is aware that one of a number of crimes will probably be committed by the perpetrator, and one of those crimes is in fact committed, then he has intended to assist or facilitate the commission of that crime, and is guilty as an aider and abettor.[1707]

2. Responsibility under Article 7(3) of the Statute

519. Article 7(3) of the Statute provides:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law,[1708] applicable to both international and internal armed conflicts.[1709]

1701 *Brdanin* Trial Judgement, para 271; *Blaškić* Appeals Judgement, para 48; *Krnojelac* Trial Judgement, para 88.
1702 *Brdanin* Trial Judgement, para 271.
1703 *Furundžija* Trial Judgement, para 249; *Tadić* Appeals Judgement, para 229; *Blaškić* Appeals Judgement, para 49; *Vasiljević* Appeals Judgement, para 102.
1704 *Čelebići* Trial Judgement, para 328; *Tadić* Trial Judgement, para 676.
1705 *Aleksovski* Appeals Judgement, para 162; *Krnojelac* Trial Judgement, para 90: "The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's *mens rea*. However, the aider and abettor need not share the *mens rea* of the principal offender."
1706 *Brdanin* Trial Judgement, para 273; *Aleksovski* Appeals Judgement, para 162.
1707 *Blaškić* Appeals Judgement, para 50, citing *Blaškić* Trial Judgement, para 287; *Furundžija* Trial Judgement, para 246; *Brdanin* Trial Judgement, para 272.
1708 *Čelebići* Appeals Judgement, para 195; *Strugar* Trial Judgement, para 357.

520. It has been held that three elements need to be satisfied in order to invoke individual criminal responsibility under Article 7(3):

> (i) the existence of a superior-subordinate relationship;
> (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
> (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[1710]

(a) Superior-subordinate relationship

521. The superior-subordinate relationship lies in the very heart of the doctrine of a commander's liability for the crimes committed by his subordinates. It is the position of command over and the power to control the acts of the perpetrator which forms the legal basis for the superior's duty to act, and for his corollary liability for a failure to do so.[1711]

522. The existence of the position of command may arise from the formal or *de jure* status of a superior, or from the existence of *de facto* powers of control. It derives essentially from the "actual possession or non-possession of powers of control over the actions of subordinates."[1712] In determining the degree of control to be exercised by the superior over the subordinate, the Appeals Chamber endorsed the effective control standard, as the material ability to prevent or punish criminal conduct.[1713] The existence of a superior-subordinate relationship does "not […] import a requirement of *direct* or *formal* subordination".[1714] Likewise, there is no requirement that the relationship between the superior and the subordinate be permanent in nature.[1715] Further, the Chamber recalls that "the test of effective control […] implies that more than one person may be held responsible for the same crime committed by a subordinate."[1716]

1709 For application of the principle of command responsibility to internal armed conflicts, *see Prosecutor v Hadžihasanović et al.*, Case No IT-01-47-AR72, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para 31.

1710 *Čelebići* Trial Judgement, para 346. *See* also *Kordić* Trial Judgement, para 401; *Blaškić* Trial Judgement, para 294; *Kovčka* Trial Judgement, para 314; *Strugar* Trial Judgement, para 358.

1711 *Aleksovski* Appeals Judgement, para 76; *Strugar* Trial Judgement, para 359.

1712 *Čelebići* Trial Judgement, para 370; *Strugar* Trial Judgement, para 362.

1713 *Čelebići* Appeals Judgement, para 256. The Appeals Chamber has rejected the argument that a superior may be held criminally liable on the basis of his powers of influence as it held that "substantial influence as a means of control in any sense which falls short of possession of effective control over subordinates" *(i.e.* possession of material ability to prevent or to punish) has no standing of rule of customary law, especially such that may trigger criminal liability. *See Čelebići* Appeals Judgement, para 266.

1714 *Čelebići* Appeals Judgement, para 303.

1715 *Strugar* Trial Judgement, para 362.

1716 *Blaškić* Trial Judgement, para 303, referring to *Aleksovski* Trial Judgement, para 106; *see* also, *Strugar* Trial Judgement, para 365.

(b) Mental element: the superior knew or had reason to know

523. For a superior to be held responsible under Article 7(3) of the Statue for crimes committed by a subordinate, it must be established that he knew or had reason to know that the subordinate was about to commit or had committed such crimes.

524. While a superior's actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, it may be established by circumstantial evidence,[1717] including the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and location of the commander at the time.[1718]

525. In determining whether a superior "had reason to know" that his subordinates were committing or about to commit a crime, it must be shown that specific information was in fact available to him which would have provided notice of offences committed or about to be committed by his subordinates.[1719] The information must in fact be available to the superior who may not be held liable for failing to acquire such information in the first place.[1720] However the information in fact available need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes.[1721] It is sufficient that the superior be in possession of sufficient information, even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, *i.e.,* so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.[1722]

(c) Necessary and reasonable measures

526. The question of whether a superior has failed to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators thereof is connected to his possession of effective control. A superior will be held responsible if he failed to take such measures that are within his material ability. Whether the superior had explicit legal capacity to do so is immaterial provided that he had the material ability to act.[1723]

1717 *Čelebići* Trial Judgement, para 386; *Strugar* Trial Judgement, para 368.
1718 *Čelebići* Trial Judgement, para 386. *See* also *Kordić* Trial Judgement, para 427; *Blaškić* Trial Judgement, para 307; *Strugar* Trial Judgement, para 368.
1719 *Čelebići* Trial Judgement, para 393; *Strugar* Trial Judgement, para 369.
1720 *Blaškić* Appeals Judgement, paras 62-63, *Čelebići* Appeals Judgement, para 226.
1721 *Čelebići* Trial Judgement, para 393; *Strugar* Trial Judgement para 369.
1722 *Čelebići* Trial Judgement, para 393; *Kordić* Trial Judgement, para 437; *Strugar* Trial Judgement, para 370.
1723 *Čelebići* Trial Judgement, para 395 (footnotes omitted). *See* also *Kordić* Trial Judgement, para 443; *Strugar* Trial Judgement, para 372.

527. Under Article 7(3), the superior has a duty both to prevent the commission of the offence and punish the perpetrators. These are not alternative obligations.[1724] The duty to prevent arises from the time a superior acquires knowledge, or has reasons to know that a crime is being or is about to be committed, while the duty to punish arises after the superior acquires knowledge of the commission of the crime.[1725] A superior must act from the moment that he acquires such knowledge. His obligations to prevent will not be met by simply waiting and punishing afterwards.[1726]

528. Whether a superior has discharged his duty to prevent the commission of a crime will depend on his material ability to intervene in a specific situation. Factors which may be taken into account in making that determination include the superior's failure to secure reports that military actions have been carried out in accordance with international law,[1727] the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war,[1728] the failure to protest against or to criticize criminal action,[1729] the failure to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command,[1730] and the failure to insist before a superior authority that immediate action be taken.[1731]

529. A superior's duty to punish the perpetrators of a crime encompasses the obligation to conduct an effective investigation with a view to establishing the facts.[1732] The obligation on the part of the superior is to take active steps to ensure that the perpetrators will be punished. To that end, the superior may exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities.[1733]

B. Findings

1. Responsibility of Fatmir Limaj

(a) Was Fatmir Limaj identified at the Llapushnik/Lapusnik prison camp?

530. It is alleged in the Indictment that Fatmir Limaj, aka Çeliku (meaning "steel"), directed the operation of the Llapushnik/Lapusnik prison camp, that he personally participated in the enforcement of the detention of prisoners, their interrogation as well as brutal and inhumane

1724 *Blaškić* Appeals Judgement, para 83.
1725 *Blaškić* Appeals Judgement, para 83; *Kordić* Trial Judgement, paras 445-446.
1726 *Strugar* Trial Judgement, para 373.
1727 *Strugar* Trial Judgement, para 374.
1728 *Strugar* Trial Judgement, para 374.
1729 *Strugar* Trial Judgement, para 374.
1730 *Strugar* Trial Judgement, para 374.
1731 *Strugar* Trial Judgement, para 374.
1732 *Strugar* Trial Judgement, para 376.

treatment inflicted upon them. It is further alleged that Fatmir Limaj planned, instigated and ordered the murder of detainees at the prison camp and in the Berishe/Berisa Mountains.[1734] The Defence for Fatmir Limaj argues that the Accused Fatmir Limaj never knew of, or participated in, the establishment and organisation of such a prison camp.[1735] The Chamber has heard the evidence from several Prosecution witnesses who have purported to identify Fatmir Limaj as a person whom they saw in the Llapushnik/Lapusnik prison camp.

531. Vojko Bakrač and his son Ivan Bakrač have been found to have been held in the Llapushnik/Lapusnik prison camp for about a week in July 1998.[1736] It is their evidence that in the course of their detention, they encountered the "commander" of the prison camp on a number of occasions.

532. Vojko Bakrač testified that while he was detained with his son Ivan in the storage room,[1737] a man wearing a camouflage uniform came to fetch Ivan. The man was taller than the witness, in his thirties and he was wearing a small beard and an officer's satchel.[1738] Later, Vojko Bakrač was also called out of the storage room and brought to a room on the ground floor of the main building where he saw his son Ivan and the same man talking and drinking tea. The man told Ivan that the storage room was not a place for him.[1739] From then on, although Vojko Bakrač was taken back to the storage room for a brief period, both he and his son Ivan remained in a room upstairs in the house.[1740] Vojko Bakrač assumed that this man had "a superior position" as soldiers and guards were obeying him.[1741] Vojko Bakrač further testified that on a later occasion, he and Ivan were taken to the room on the ground floor of the house where they witnessed four or five men being beaten. On his evidence, the man he had identified as the "commander" was present and told him that these men were traitors to their people.[1742] The incident lasted around 45 minutes and, afterwards, Vojko and Ivan Bakrač were taken back to the room upstairs.[1743] It is the recollection of Vojko Bakrač that in the course of this second encounter, the "commander" told Vojko Bakrač that he was a lawyer.[1744] Vojko Bakrač testified that he met the "commander" on a further occasion before his release, when the "commander" asked him and his son Ivan to write a statement about

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1733 *Kordić* Trial Judgement, para 446; *Strugar* Trial Judgement, para 376.
1734 Indictment, para 10.
1735 Defence Final Brief, para 503.
1736 *See supra*, para 279.
1737 Vojko Bakrač described the room where he was detained as a "basement" but identified it as the storage room on Exhibit P5, T 1326-1329.
1738 Vojko Bakrač, T 1334-1335.
1739 Vojko Bakrač, T 1338.
1740 Vojko Bakrač, T 1338.
1741 Vojko Bakrač, T 1336.
1742 Vojko Bakrač, T 1341-1342.
1743 Vojko Bakrač, T 1342.
1744 Vojko Bakrač, T 1336; 1342.

the conditions in the prison camp.[1745] After he made the statement, Vojko Bakrač asked the "commander" to contact his mother-in-law and inform her that they would be released. It is Vojko Bakrač's evidence that the "commander" said he did so the next day,[1746] which appears to suggest a third encounter. 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 what the Chamber assesses to be a very recognisable photograph of Fatmir Limaj, albeit clean-shaven, rather than with the small beard the witness had described. In respect of this photograph, Vojko Bakrač stated at the time: "Number 2 looks familiar, but I don't know from where and I cannot connect him with this case."[1747] Number 2 was the photograph of Fatmir Limaj.

533. Ivan Bakrač, the then 18 year old son of Vojko Bakrač, testified that upon arrival in the Llapushnik/Lapusnik prison camp, he and his father were taken into a room inside the house,[1748] where they were interrogated by a man who appeared to be in charge.[1749] The "commander" was around 35 years old, about 180 to 185 cm tall, of medium build, with slightly longer hair, which was partly grey and combed back; he was clean shaven.[1750] On Ivan Bakrač's evidence, the "commander" was sitting about half a metre from them during the interrogation and behaved in a very professional manner, never indicating that he wanted to harm them. The interrogation lasted about 10 to 15 minutes.[1751] During that time, Stamen Genov was being beaten in the presence of the "commander", who appeared to condone that treatment although he did not take part in it directly.[1752] Ivan Bakrač had a second conversation with the "commander" later on, which took place in the room upstairs in that same house. That second encounter lasted about 15 to 20 minutes.[1753] The "commander" behaved in the same manner as previously and told them that they would be released[1754] but that they would have to make a statement beforehand.[1755] Sometime in the weeks following the events, Ivan Bakrač said that he and his father saw a picture on television of the "commander", in a marching column of KLA soldiers. It is not clear whether what was shown on the television was a still picture of the march or a video.[1756] It was his evidence that they

[1745] Vojko Bakrač, T 1343-1345.
[1746] Vojko Bakrač, T 1345-1348.
[1747] Agreed fact, T 1370-1371; Exhibit DB1 (photo spread A1).
[1748] Ivan Bakrač, T 1416; 1426. Ivan Bakrač identified the house and the room in Exhibits P5 and P6, T 1426-1427.
[1749] Ivan Bakrač, T 1428. Ivan Bakrač testified that everyone saluted this man and stood to attention when he approached, T 1430.
[1750] Ivan Bakrač, T 1430. Ivan Bakrač appeared later in his evidence to state that although the "commander" did not have facial hair, he was not "freshly shaven", T 1572-1573. It is not clear from this line of questioning, however, whether this description is that of the "commander" as he was in the camp itself, or on the photograph Ivan Bakrač found on the internet.
[1751] Ivan Bakrač, T 1431.
[1752] Ivan Bakrač, T 1431.
[1753] Ivan Bakrač, T 1432-1433.
[1754] Ivan Bakrač, T 1431-1432.
[1755] Ivan Bakrač, T 1471-1474.
[1756] Ivan Bakrač, T 1561-1562.

both recognised the "commander" of the prison camp.[1757] In 1999, Ivan Bakrač saw the same picture of the "commander" on the internet. He identified the picture in court.[1758] He did not, however, mention this fact to the Prosecution until a few days before his testimony,[1759] even though it appears that he had accessed the website and seen the same photograph hundreds of times between 1999 and 2003.[1760] In court, Ivan Bakrač further recognised the "commander" in a video of that same march as one of a column of KLA soldiers.[1761] In this video, Fatmir Limaj did appear in a marching column. He was, however, bearded. In cross-examination, Ivan Bakrač stated that he was never shown a photograph of the "commander" by the investigators when he was interviewed in January 2003.[1762] In court, he was shown a photo spread of eight persons, which included what the Chamber assessed to be a very recognisable photograph of Fatmir Limaj, clean-shaven, as this witness had described the man he saw in the prison camp. However, Ivan Bakrač stated that the "man is not on the photograph, I mean the same person who is on the internet."[1763]

534. The Chamber is quite satisfied that both Vojko and Ivan Bakrač testified honestly. There are circumstances, however, which can render the evidence of a particular witness unreliable even though that evidence was given in a perfectly honest fashion. In this case, in particular, the events which both Ivan and Vojko Bakrač went through at the camp were extremely traumatic. They occurred some years ago. In the intervening years, Ivan Bakrač, and possible Vojko Bakrač, have been influenced by television and internet coverage in which it appears that Fatmir Limaj was depicted. These considerations may well bear, in the Chamber's view, upon the ability of either or both of them to reliably identify one or more of the Accused. It is therefore necessary to look with particular scrutiny at their evidence, in particular in so far as Ivan Bakrač purports to identify Fatmir Limaj as the "commander" in the camp by reference to the picture of the marching column of KLA soldiers.

535. In the view of the Chamber, the evidence of Vojko and Ivan Bakrač, especially when considered together, reveals a number of inconsistencies. The effect of Vojko Bakrač's evidence is essentially that the man he regarded at the time as the "commander" was the one who came to fetch his son Ivan from the storage room and whom he later saw on two occasions in the room on the ground floor of the house. Ivan Bakrač, however, identified the man who took him out of the storage room and with whom he was talking in the house as Shala, whom he distinguishes from the

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1757 Ivan Bakrač, T 1561-1563.
1758 Exhibit P80; Ivan Bakrač, T 1433-1436; 1563-1564; 1584.
1759 Ivan Bakrač, T 1433-1437.
1760 Ivan Bakrač, T 1563-1566.
1761 Exhibit P35. A still photograph was made of the man Ivan Bakrač identified as Fatmir Limaj, Exhibit P81; Ivan Bakrač, T 1437-1438; 1568.
1762 Ivan Bakrač, T 1566; 1573.
1763 Exhibit DL1 (photo spread B1); Ivan Bakrač, T 1573-1575.

man he himself identifies as the "commander".[1764] The second encounter with the apparent "commander" which Vojko Bakrač describes in his evidence is when he and his son witnessed the beating of several men in the room on the ground floor of the house, in his recollection in the presence of the "commander". This incident is not mentioned by Ivan Bakrač in his testimony. The only account he gave of beatings in the presence of the "commander" relates to the time when he and his father first arrived in the prison camp and were being interrogated. It appears to the Chamber that Vojko and Ivan Bakrač are either referring to different "commanders", or have different recollections of the time and context in which their encounters with the "commander" occurred. In these circumstances, there would be, in the view of the Chamber, serious concerns in inferring from Vojko Bakrač's evidence that the man he thought to be the "commander", the same man who came to fetch his son from the storage room, was Fatmir Limaj. This concern is naturally exacerbated by the fact that Vojko Bakrač was unable to recognise Fatmir Limaj on the photo line-up which was shown to him during an interview with the CCIU investigators in January 2002.

536. In its final submissions, the Prosecution contends that Vojko Bakrač identified the image of Fatmir Limaj while he was still in the Llapushnik/Lapusnik prison camp.[1765] The only support offered for this submission, however, is the report of notes of an interview which Vojko Bakrač allegedly gave to the Serbian authorities on 8 July 1998, following his release.[1766] Vojko Bakrač is said to have explained that on one occasion during their detention, he and his son Ivan saw a column of KLA soldiers on television and recognised, at the head of this column, the commander who had frequently come to the camp, as well as several others.[1767] However, what the Prosecution relies on is what purports to be a record of notes taken by an unknown individual on behalf of the Serbian State Security Department Centre. The notes purport to be based upon information provided by Vojko Bakrač during an interview with Serbian authorities on 8 July 1998. Vojko Bakrač was not questioned about this passage in the notes during his evidence. The anonymous note taker has not given evidence. They are not signed by Vojko Bakrač. Despite lengthy questioning on Vojko Bakrač's recollection of the "commander" during his evidence, no mention was made of him recognising anyone on television whilst still in detention. Further, as stated above, Ivan Bakrač testified that he had recognised the "commander" on television together with his father. However, he was specifically asked in court when this recognition took place and it was his evidence that this occurred in the weeks following his and his father's release.[1768] In these circumstances, the Chamber is not able to attach any weight to the record of notes made by

[1764] Ivan Bakrač, T 1458-1464.
[1765] Prosecution Final Brief, para 150.
[1766] Exhibit P202.
[1767] Exhibit P202, p 5.
[1768] Ivan Bakrač, T 1561-1562.

someone on 8 July 1998 and is certainly unable to find that Vojko Bakrač identified the image of Fatmir Limaj while he was still in the Llapushnik/Lapusnik prison camp. Further, in the absence of direct evidence from Vojko Bakrač confirming that, in truth, he did recognise the "commander" when he and his son watched television some time after their release from the prison camp, the Chamber cannot be confident that this was a reliable identification by Vojko Bakrač, even if that was then the honest understanding of Ivan Bakrač.

537. Ivan Bakrač testified that he met the man he identified as the "commander" on two separate occasions in the prison camp, each of which lasted for ten to twenty minutes during which they appeared to have engaged in a private conversation. This reasonably prolonged exposure time, in such circumstances, could well found a subsequent accurate identification of the "commander".[1769] The Chamber notes, however, that while Ivan Bakrač stated that the "commander" was clean-shaven at the time of his detention in the Llapushnik/Lapusnik prison camp, the photograph on the internet from which he claims to have identified the "commander" is that of a man with a beard.[1770] Furthermore, the photograph on the internet is extremely small and, in the Chamber's view, the features of the man appearing in it are not readily recognisable.[1771] On the other hand, when shown a clear photograph of Fatmir Limaj when clean-shaven, which is how Ivan Bakrač recalled the "commander" appeared to him in Llapushnik/Lapusnik, Ivan Bakrač did not recognise the "commander".[1772] While the Chamber entirely accepts the honesty of both father and son Bakrač, it is conscious that the evidence of Vojko Bakrač did not fully deal with a number of matters relevant to identification and that, of the two, Ivan Bakrač appeared to have the clearer and more confident and reliable recollection of relevant issues. Nevertheless, for the reasons indicated, the Chamber finds itself unable to be confident about the reliability of Ivan Bakrač's purported identification of the Accused Fatmir Limaj.

538. L06 was detained, in the Chamber's finding, for several weeks in the storage room in the Llapushnik/Lapusnik prison camp.[1773] In the course of his evidence, L06 stated that a man came to the door of the storage room one day and asked why he was there. L06 gave an account of his situation and the man responded that he would look into the matter and warned L06 that if he was guilty, he would be killed, but if he was innocent, he would be released.[1774] L06 said that the same man came back a week later, told L06 that he could go home and that those who had brought him

[1769] Professor Willem Wagenaar, T 7157-7160; 7163.
[1770] Exhibit P80.
[1771] Exhibit P80.
[1772] Exhibit DL1 (photo spread B1).
[1773] *See supra*, paras 270; 279.
[1774] L06, T 1014; 1016.

here would suffer consequences.[1775] L06 described the man who ordered his release as taller and younger than him;[1776] the man did not have a beard and was wearing a KLA uniform.[1777] L06 stated that he did not know this man at the time, but that he subsequently recognised him on television, possibly a year after the war.[1778] On his evidence, this is how he came to know that the man's name was Fatmir Limaj.[1779] However, in a statement given in January 2002 to CCIU investigators, L06 apparently indicated that he was told by one of the prisoners while he was at Llapushnik/Lapusnik that the man was Fatmir Limaj.[1780] Thus, there is apparent inconsistency whether L06 found out, at the time of his detention, that the man was Fatmir Limaj or whether he saw Fatmir Limaj on television, possibly a year after the events, and thereby recognised him as the man who had ordered his release from detention. L06 maintained in court that there might have been a translation mistake in the January 2002 statement and that he only heard of Fatmir Limaj's name on television, well after the events.[1781] The Chamber further notes that L06 appears to have seen Fatmir Limaj a number of times on television in the intervening years between 1998 and the trial.[1782]

539. L06 testified that the man he later identified as Fatmir Limaj talked to both him and L10 on both occasions in Llapushnik/Lapusnik.[1783] L10, whom the Chamber has also found to have been detained in the storage room, together with L06,[1784] also gave evidence in court. His evidence is essentially that "Commander Çeliku" came twice to the storage room, and that on the second occasion, he told L10 that he would be released.[1785] This account of the encounters confirms an aspect of the evidence of L06. The description of "Commander Çeliku" by L10, however, differs: the man he purports to have seen was extremely tall, about 200 cm, wore a camouflage uniform and "a little beard, not too grown."[1786] L10 further stated that he had heard the name Çeliku twice in Llapushnik/Lapusnik. However, the association of that name with the man whom he met on these two occasions is not apparent from his evidence. It might be that L10 made such association on the basis that he received a piece of paper confirming his release, which he recalls was signed by "Commander Çeliku"[1787] but, this is not a factual finding which the Chamber is in a position to make because the piece of paper is not in evidence. Further, the existence of any such piece of

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1775 L06, T 1014.
1776 L06 testified that he was born in 1951, T 970. His height, namely 175.5 cm, was recorded as an agreed fact, T 5187-5188.
1777 L06, T 1016-1017.
1778 L06, T 1014-1015; 1021-1022.
1779 L06, T 1021-1022; 1058.
1780 L06, T 1058.
1781 L06, T 1054;1058; 1102-1106.
1782 L06, T 1014-1015; 1021-1022.
1783 L06, T 1073-1074.
1784 *See supra*, paras 270; 279.
1785 L10, T 2952-2953.
1786 L10, T 2952-2955.
1787 L10, T 2955-2957; 2963.

paper was omitted from L10's earlier statement about these events to the CCIU investigator in August 2001, and, perhaps more importantly, L10 did not mention anything about "Commander Çeliku" at that time.[1788] On L10's evidence, it is only after the events, although it is unclear when exactly, that he came to know Commander Çeliku's real name, when he saw Fatmir Limaj on television and then felt that he recognised him as the man he had seen in Llapushnik/Lapusnik.[1789] L10 also had seen Fatmir Limaj on television a number of times in the intervening years between 1998 and the trial.[1790]

540. Both L06 and L10 identified the Accused Fatmir Limaj in court as the man they were describing at Llapushnik/Lapusnik.[1791] Elsewhere in this decision, the Chamber has discussed the possibility of a mistaken identification of an accused person in a courtroom setting.[1792] In addition, with respect to both L06 and L10, it is apparent to the Chamber from their evidence that the identification of Fatmir Limaj by each witness in the courtroom may well have been, albeit unconsciously, influenced by the subsequent association each witness made between Fatmir Limaj appearing on television and the man they had seen in Llapushnik/Lapusnik. It is the reliability of the process by which L06 and L10 have come to subsequently recognise Fatmir Limaj on television as the man in Llapushnik/Lapusnik which remains of concern to the Chamber. The encounters in Llapushnik/Lapusnik each lasted only a few minutes. They occurred as L06 and L10 were sitting inside the storage room and the man alleged to be Fatmir Limaj was standing outside and speaking "through the door and the window".[1793] In these circumstances, there is only limited scope for reliable observation. The descriptions given by the two witnesses do not match; 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.[1794] Yet, despite these different recollections, both witnesses considered that they have identified the same man at some later time on television. Subsequently, they identified him in court. The circumstances in which both witnesses recognised Fatmir Limaj on television as the man they had seen in Llapushnik/Lapusnik have not been explored by the Prosecution or the Defence. There is no evidence before the Chamber relating to the nature of the television programmes which prompted this identification. Of course, it may well be that L06 and L10 were correct in their respective identifications of Fatmir Limaj on television as the man they met together in Llapushnik/Lapusnik,

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1788 L10, T 2974-2980; 3002.
1789 L10, T 2955-2957; 3000-3004.
1790 L10, T 2955-2657; 3001-3002.
1791 L06 identified Fatmir Limaj by the colour of his tie and his position in the courtroom in relation to the other Accused, T 1023-1024. L10, T 2955-2957.
1792 *See supra*, para 18.
1793 L10, T 2996-2997.
1794 The height of L06 has been agreed between the parties to be 175.5 cm, T 5187-5188.

despite their different recollections of his visual appearance. However, in the circumstances described above, this conclusion cannot be reached by the Chamber with confidence.

541. L04 was, in the Chamber's finding, detained in the cowshed in the Llapushnik/Lapusnik prison camp from around the end of June until 25 or 26 July 1998.[1795] It was his initial evidence that a soldier named Tamuli came to fetch him from the cowshed. He told him that "Commander Çeliku" was there and took him to the house.[1796] "Commander Çeliku" asked L04 who had brought him there and why, to which L04 responded that he did not know.[1797] "Commander Çeliku" then told Tamuli to take L04 back to the cowshed.[1798] Still on L04's evidence, later on the same day, "Commander Çeliku" came to the cowshed and asked for the prisoners' names. When L04's turn came, "Commander Çeliku" told him that he would be able to go home.[1799] Despite this, L04 remained in the Llapushnik/Lapusnik prison camp for another two weeks.[1800]

542. The Defence for Fatmir Limaj stress that this account presents a number of inconsistencies with L04's previous statements. The first inconsistency relates to the occurrence of the encounter itself with "Commander Çeliku". It appears that when L04 was interviewed by a CCIU investigator, Anargyros Kereakes, in January 2002, he made no mention whatsoever of being taken to see a commander, or more specifically, "Commander Çeliku".[1801] L04 does not have an explanation for this omission, other than that the interpreters might not have understood him.[1802] A second discrepancy relates to the person who took him to "Commander Çeliku". In court, L04 testified that that person was Tamuli[1803] while in a second statement he gave in March 2002, L04 asserted that the man who took him to see "Commander Çeliku" was Murrizi.[1804] When tested on this apparent inconsistency, L04 testified that he made a mistake because he "was suffering from the traumas of the war."[1805] In the same statement, L04 said that Shala was the person who first came to the cowshed and told him about the arrival of "Commander Çeliku".[1806] When prompted by the Defence, L04 corrected his evidence in court that he had heard this from Tamuli, and thereafter maintained it was Shala.[1807] A third discrepancy concerns the time between L04's conversation with "Commander Çeliku" and the subsequent visit of the commander to the cowshed

1795 *See supra*, paras 270; 279.
1796 L04, T 1182.
1797 L04, T 1183.
1798 L04, T 1183.
1799 L04, T 1183-1184.
1800 L04, T 1183-1184.
1801 L04, T 1209-1210.
1802 L04, T 1210.
1803 L04, T 1182.
1804 L04, T 1212.
1805 L04, T 1212.
1806 L04, T 1213.
1807 L04, T 1213.

during which L04's release was ordered. In his prior statement in March 2002, L04 stated that "Commander Çeliku" returned to the cowshed two days after the first encounter.[1808] In court, however, L04 indicated that this all happened on the same day as the first encounter.[1809] A fourth inconsistency relates to the nature of the exchange between L04 and "Commander Çeliku" in the course of the encounter. L04 testified that he was asked by the commander why he had been brought to the Llapushnik/Lapusnik prison camp. In court, L04 stated that his answer was that he did not know and that the meeting was limited to this extremely brief exchange.[1810] In his second statement dated March 2002, however, L04 gave a different account, namely that he had given "Commander Çeliku" a detailed explanation of the reason which he thought was behind his arrest. The explanation concerned an incident which occurred a year earlier and during which L04 and another individual had their tractors seized by two Serbian police officers as they were collecting wood illegally and the subsequent interaction between L04 and one of the police officers in order to retrieve their tractors.[1811] L04 indicated in his statement that he believed that this incident was the reason for his detention in the Llapushnik/Lapusnik prison camp.[1812]

543. It lies in the nature of criminal proceedings that there may be inconsistencies between the oral evidence of a witness and accounts given at previous times. A witness might have been asked different questions at different times; he might have forgotten or remembered certain details. While the credibility of a witness is not automatically affected by the presence of inconsistencies in the various accounts, they do call for careful scrutiny when determining the weight which ought to be attached to the witness' evidence. The nature of the subject matter of a discrepancy may be relevant to an assessment of its effect on the credibility of the witness. Matters which are in the nature of mere incidental details of relatively little significance when they occurred, for example, may well not be recalled, or recalled with precision, years after the events. Throughout his testimony, L04 stressed how memorable this meeting with Commander Çeliku was for him, as it led to his release being ordered.[1813] Yet it would seem that he omitted altogether to mention this encounter when first interviewed about these events by a CCIU investigator in January 2002. L04 has made clear in his evidence before the Chamber that, before the January 2002 interview, he had seen Fatmir Limaj appearing on television many times and had by this means concluded that Fatmir Limaj was Commander Çeliku.[1814] Thus, his failure to mention the meeting when interviewed in January 2002, especially if by then he knew it was with the very well known

[1808] L04, T 1217-1218.
[1809] L04, T 1183-1184; 1217-1218.
[1810] L04, T 1183.
[1811] L04, T 1216.
[1812] L04, T 1216.
[1813] L04, T 1209; 1210; 1212.
[1814] L04, T 1218-1219.

political figure in Kosovo, Fatmir Limaj, remains unexplained. Of course, the questions asked of him during that interview may have diverted his attention from the meeting with Commander Çeliku, but that is not an obvious explanation, given the importance L04 appears to attach to the meeting. Further, even when prompted by the Defence, L04 did not seem to recollect having given any explanation as he understood them about the reasons leading to his arrest, whether at the time of the meeting with "Commander Çeliku" or when further interviewed by an investigator in March 2002.

544. L04 also testified that the man he says was Commander Çeliku in the camp had a medium-size beard.[1815] When interviewed by CCIU investigators in 2002, L04 identified Fatmir Limaj as the man he thought to be "Commander Çeliku" from a photograph.[1816] However, this photograph is not in evidence so that the Chamber is not in a position to assess either the quality of the photograph or whether it matches the oral description given of "Commander Çeliku" by L04. L04 was not able to recall whether the person he identified by a photograph during the interview in 2002 had a beard or not.[1817] Given his numerous and quite frequent appearances on television and in the press after the war before 2002, Fatmir Limaj is likely to have been a familiar face to L04 by the time of the 2002 interview, and remains so.[1818] L04 stated himself that Fatmir Limaj's face and name were well known after the war.[1819] In these circumstances, the Chamber is concerned whether this may or may not have had a bearing on L04's subsequent identification of Fatmir Limaj in the course of the interview with investigators. The Chamber cannot be certain either way. Moreover, there is no evidence to enable the Chamber to determine whether the nature of the television programmes in which Fatmir Limaj appeared suggested any connection with the present case, a factor of potential significance to the issue of whether L04 could have been unconsciously influenced to associate Fatmir Limaj with the man he had identified as the commander in Llapushnik/Lapusnik. In particular, the Chamber does not know whether Fatmir Limaj was identified by the name of Çeliku in one or more of the media programmes and whether or not he was featured with or without a beard, or if so, what type of beard. That being so, even though L04 may well have honestly, and perhaps accurately, identified Fatmir Limaj when he saw him on television as the man he had seen in Llapushnik/Lapusnik, the Chamber is not able to be confident about this on the evidence given at trial.

545. L07 gave evidence in relation to the alleged presence of Fatmir Limaj in the Llapushnik/Lapusnik prison camp. He stated that upon his arrival in the camp, he was taken to a

[1815] L04, T 1220-1222.
[1816] L04, T 1184-1185.
[1817] L04, T 1219-1220; 1220-1222.
[1818] Exhibits DL17; DL18 and DL19.

room where he saw Shukri Buja, whom he personally knew, and "Commander Çeliku".[1820] L07 had been told that he was being taken to "Commander Çeliku" by the soldiers and he already knew of "Commander Çeliku" at this time because he was appearing in the press.[1821] On L07's evidence, Shukri Buja recognised L07 and asked Commander Çeliku to let him go,[1822] after which Shukri Buja and Commander Çeliku both left the room. Commander Çeliku returned five minutes later and summoned Shala, one of the soldiers present, to let L07 go home.[1823] This encounter lasted about 15 minutes.[1824] A day or two after the meeting, Commander Çeliku came to the storage room with another commander and was surprised to see L07 there.[1825] L07 was taken back to the room inside the house.[1826] On the next day, Commander Çeliku came to the house, told L07 that he was free to go. Commander Çeliku dictated and made L07 sign a statement that he would not reveal what he saw in the camp or he would be killed,[1827] and the following morning, L07 was released and left with his own car.[1828]

546. Shukri Buja gave a different account of these events to the Chamber. He testified that when he heard from L07's father that L07 had been arrested by Ymer Alushani, aka Voglushi, he went to Llapushnik/Lapusnik to inquire about him. Shukri Buja's evidence is that he went to Voglushi's house, and asked whether L07 was there. Voglushi responded in the affirmative and said that L07 had been arrested because addresses of Serbs had been found in his pocket, which were thought to belong to Serbian inspectors. Shukri Buja stated that he gave guarantees to Voglushi that L07's family had no connections with the police and L07 was called out and released immediately, although L07 insisted on leaving his car for the use of the KLA. On Shukri Buja's evidence, Fatmir Limaj was not present on that occasion and the event took place in a one-storey house, which suggests a different house from that in the Llapushnik/Lapusnik prison camp.[1829] There is evidence that Voglushi was a commander in the village of Llapushnik/Lapusnik.[1830] In his own evidence, Fatmir Limaj denied having been involved in or having ordered the release of L07. By way of an

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1819 L04, T 1218-1219.
1820 L07, T 792; Exhibit P71, para 13.
1821 L07, T 794.
1822 L07, T 795; Exhibit P71, para 14.
1823 L07, T 795-796; Exhibit P71, para 15.
1824 L07, T 796.
1825 L07, T 834-836; Exhibit P71, para 25.
1826 L07, T 836-838.
1827 L07, T 840.
1828 L07, T 840-841.
1829 Shukri Buja, T 4025-4032; Shukri Buja did not recognise the house in the Llapushnik/Lapusnik prison camp as the house where he met Voglushi that day, T 4144-4145; Exhibit P6.
1830 *See infra*, para 712.

explanation of L07's arrest, Fatmir Limaj said it must have been one of the brief detentions, which occurred frequently at that time.[1831]

547. The contradictions between these accounts are apparent, even though it is difficult for the Chamber to assess their significance. In reaching its earlier finding that L07 was in fact detained in the Llapushnik/Lapusnik prison camp, the Chamber considered the contrary evidence of Shukri Buja, suggesting a detention in a different house in Llapushnik/Lapusnik by commander Voglushi, but did not accept it, having regard to a body of other evidence.[1832] The Chamber is not in a position to conclude whether the evidence of Shukri Buja is mistaken, false or confused.[1833] It is also possible that Shukri Buja's evidence on this point was affected by his obvious loyalty to the KLA in general and to Fatmir Limaj in particular. In these circumstances, the Chamber is left with the question whether it can be satisfied that the man who was with Shukri Buja at the time L07's release was ordered was in fact the person he refers to as "Commander Çeliku", despite the contrary evidence given by Shukri Buja.

548. On L07's evidence, he was released in the presence of other prisoners, among whom were two "Croats".[1834] There is no doubt in the Chamber's mind based on the other evidence that the two "Croats" were Vojko and Ivan Bakrač. Although of Serbian ethnicity, they had been residents of Croatia, and the description L07 gave, namely that of a father and a son,[1835] as well as the room in the house in which L07 said they were detained, all confirm this.[1836] The Chamber notes that neither Vojko nor Ivan Bakrač dealt with this episode in their evidence.

549. L07 had never met Commander Çeliku at the time of his alleged encounter in the Llapushnik/Lapusnik prison camp. The evidence does not indicate that the man he met introduced himself as Commander Çeliku during the meeting. L07's recollection is that he had been told that he was being taken to Commander Çeliku and that he recognised Commander Çeliku immediately because he had seen him in the press at the time.[1837] In this regard, the Chamber notes that there 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.[1838] Fatmir Limaj was also seen as one of a column of soldiers in a

[1831] Fatmir Limaj, T 6336-6337.
[1832] *See supra*, paras 277-279.
[1833] The house described by Shukri Buja was on his evidence used by soldiers. There is evidence that this was also the case for the house in the Llapushnik/Lapusnik prison camp, *see infra*, para 694.
[1834] L07, T 839.
[1835] L07, T 812-816.
[1836] Vojko Bakrač, T 1338.
[1837] L07, T 794.
[1838] Fatmir Limaj, T 5956.

funeral march on 16 June 1998, which was broadcast.[1839] 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.[1840] It is again from the media that L07 subsequently came to the conclusion that Commander Çeliku was Fatmir Limaj.[1841]

550. L07 further identified Fatmir Limaj in court as the man he saw in Llapushnik/Lapusnik.[1842] The Chamber discusses elsewhere the need for extreme caution in assessing an identification of an accused made in a courtroom because of the possibility of mistake due to the suggestive environment.[1843] In 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.

551. The last witness whose evidence could directly associate the Accused Fatmir Limaj in the operation of the Llapushnik/Lapusnik prison camp is L96. The Chamber has already found that L96 had been detained in the storage room in the Llapushnik/Lapusnik prison camp for about a week in July 1998.[1844] L96's evidence is that he never saw Commander Çeliku in the Llapushnik/Lapusnik prison camp.[1845] However, he testified that on his last day of detention, as the prisoners were marched under escort to the nearby Berishe/Berisa Mountains, the prisoners and escorts reached a path in the forest where he saw a tractor carrying armed men.[1846] It is the evidence of L96 that at this time, Shala was close to L96 and L96 heard him say that "Commander Çeliku" was coming, and that Shala would ask him what he should do with the prisoners.[1847] Shala then ordered the prisoners to stop and went to talk to one of the men at the tractor who was wearing a uniform. L96 understood from this, he said, that this man was the "commander" Shala had mentioned. This man was quite young and had a beard of two or three weeks growth.[1848] L96 was

[1839] Exhibit P35; Fatmir Limaj, T 6299-6301.
[1840] Exhibit P37; Fatmir Limaj, T 6268.
[1841] L07, T 805-807; 860.
[1842] L07, T 806-807.
[1843] *See supra*, para 18.
[1844] *See supra*, para 279.
[1845] L96, T 2386.
[1846] L96, T 2364; Exhibit P106.
[1847] L96, T 2364.
[1848] L96, T 2364-2365.

not in a position to hear the conversation between Shala and the "commander".[1849] Following the conversation, Shala came back together with one of the men who had been accompanying the commander, *i.e* a third guard for the prisoners. Shala ordered the prisoners to continue their march.[1850]

552. It is only much later, at the end of 2000 or beginning of 2001, that L96 says he saw Fatmir Limaj on television for the first time. L96's evidence is that he then recognised "the man that [he] had seen on the way from Llapushnik/Lapusnik to Berishe/Berisa" and who was then said by Shala to be Commander Çeliku.[1851] Subsequently, L96 saw Fatmir Limaj, he said, in the media on many occasions.[1852] In February 2002, when interviewed by CCIU investigators, L96 identified a photograph of Fatmir Limaj on a photo spread shown to him, as the commander he had seen on the path in the Berishe/Berisa Mountains.[1853]

553. For a number of reasons, the Chamber is left with strong reservations about the evidence of L96 concerning that encounter on the path in the Berishe/Berisa Mountains with the man understood by L96 to be Commander Çeliku. In statements L96 gave in August 1998 and August 2000, there is no mention of that encounter, neither is the name of Çeliku referred to in this context.[1854] The only explanation L96 gave in evidence for these omissions is that, at the time he gave the statements, he was focused on the individuals responsible for the killings in the Berishe/Berisa Mountains and he "forgot" about Commander Çeliku.[1855] If this was the case, he did so despite his evidence that he believed, from what he then heard and saw, that it was this man, identified by Shala as Commander Çeliku, to whom Shala had turned during the encounter for orders about the fate of the prisoners. These prisoners included L96 and a personal relation of his. The Chamber also notes that this encounter in the Berishe/Berisa Mountains appears not to be the first time L96 had heard the name of Commander Çeliku. L96 testified to having been told prior to his detention that Commander Çeliku could release L96's personal relation.[1856]

554. There were more than twenty prisoners in the group escorted by Shala and Murrizi to the Berishe/Berisa Mountains on that day, 25 or 26 July 1998.[1857] A number of these prisoners gave evidence before the Chamber. None of them gave evidence of Shala stopping to meet a man, let

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[1849] L96, T 2365; 2373.
[1850] L96, T 2365.
[1851] L96, T 2399-2400.
[1852] L96, T 2456-2460.
[1853] L96, T 2366-2367; 2370-2371; Exhibit P104.
[1854] L96, T 2416-2418; 2437-2442.
[1855] L96, T 2418; 2440.
[1856] L96, T 2269-2271; 2455.
[1857] *See supra*, para 450.

alone to meet Commander Çeliku.[1858] L06 did refer to a vehicle which passed by the column of prisoners. On his evidence, however, it was driven by a civilian who asked Shala whether he should give a lift to one of the injured prisoners, which Shala refused.[1859] L10 testified that at one point during the march, a tractor carrying soldiers passed by the column of prisoners, but did not suggest in his evidence that the tractor stopped, or that Shala interrupted the march, or held a discussion with one of them.[1860] He did, however, mention the presence of a third guard at a later time that day, as discussed elsewhere.[1861] Despite the number of potential witnesses in a position to offer some confirmation of L96's evidence of the conversation between Shala and the person he said was Commander Çeliku, there is no other evidence to support that account. Also of relevance in this respect is the finding of the Chamber, for reasons given earlier in this decision,[1862] that it could not determine whether L96's account of the presence at the execution site in the Berishe/Berisa Mountains of a third KLA soldier who had been sent by the man L96 said was Çeliku in the course of that encounter of Shala with Çeliku, was correct.

555. It was for the first time in an interview L96 gave in August 2001, that L96 referred to the encounter involving Commander Çeliku in the Berishe/Berisa Mountains.[1863] This interview appears to have taken place after L96 says he had seen Fatmir Limaj on television. While this need not affect the reliability of L96's purported identification of a photograph of Fatmir Limaj in a subsequent interview, the question thereby arises whether L96 may have been mistaken in his identification by virtue of his viewing of Fatmir Limaj on television. This could have occurred quite unconsciously on the part of L96. The in-court identification of Fatmir Limaj by L96 as the man he saw during the journey to Berishe/Berisa[1864] is potentially affected by the same factor, in addition to the well-known risk of mistaken identification of an accused when this occurs in a court setting which the Chamber has discussed elsewhere.

556. Of further relevance in this context is the explanation L96 gave as to how he came to know that Çeliku was Fatmir Limaj. L96 stated that sometime in October 1998, he talked on the phone to the other man L96 said also survived the execution in the Berishe/Berisa Mountains, Xheladin Ademaj.[1865] On L96's account, the two men, as well as L96's uncle, met in August 2000 and in the course of their conversation, the other man told L96 that Commander Çeliku was Fatmir Limaj and

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[1858] L04, T 1192-1195; L10, T 2960-2966; L12 testified that during the march, he did not see anyone, T 1818; L06, 1025-1026.
[1859] L06, T 1025-1026.
[1860] L10, T 2962.
[1861] *See supra,* para 453.
[1862] *See supra*, para 453.
[1863] L96, T 2416-2418.
[1864] L96, T 2574.
[1865] L96, T 2397.

that he could often be seen on television or in the press.[1866] While it was put to L96 in cross-examination that the other man had signed a statement to the effect that no such meeting ever took place, the other man has not given evidence and no statement of his is in evidence. There is therefore no confirmation or refutation of L96's evidence in this respect. If the evidence of L96 as to this meeting is correct, it would appear to provide further reason for caution about the reliability of L96's identification of a photograph of Fatmir Limaj in 2002, as by virtue of what occurred at the meeting, L96 may have been conditioned to expect to recognise on television the man he saw in the Berishe/Berisa Mountains. Having regard to all of these considerations, as well as the important issues affecting the general credibility of L96 which are discussed elsewhere in this decision, the Chamber finds itself unable to be satisfied that the identification of a photograph of Fatmir Limaj in 2002, or that the identification of Fatmir Limaj in court in this trial, by L96 are reliable.

557. As mentioned elsewhere in this Judgement, Fatmir Limaj, in his evidence, denies any knowledge of a KLA prison camp at Llapushnik/Lapusnik.[1867] There is also the evidence of Fatmir Limaj that on 25 July 1998, he had suffered a sudden health attack, during which he lost consciousness. This occurred in Llapushnik/Lapusnik and he awoke later to find himself in Klecke/Klecka, where he had been taken by others.[1868] Hence, he denies having been in the Berishe/Berisa Mountains on 25 or 26 July 1998, whether on or off a tractor.[1869] The effect of Fatmir Limaj's evidence is that around midday on 26 July 1998, a soldier came to Klecke/Klecka and told him that Llapushnik/Lapusnik had fallen. Fatmir Limaj's immediate concern, he said, was that the Serbian forces would head towards Malisheve/Malisevo where thousands of people had taken shelter, so he drove there with his nephew Naser Sabit to warn the civilian population to flee to the Klecke/Klecka valley.[1870] Ferat Sopi confirmed in his evidence that on 25 July 1998, Fatmir Limaj came to the makeshift clinic in Llapushnik/Lapusnik in a very sick condition and lost consciousness. It is Ferat Sopi's evidence that Fatmir Limaj had to be administered an IV drip.[1871] The medical records of the makeshift clinic which are in evidence do not include any entry for the date of 25 July 1998.[1872] They can therefore neither confirm nor contradict the evidence just discussed.

[1866] L96, T 2398-2399.
[1867] Fatmir Limaj, T 6002; 6336.
[1868] Fatmir Limaj, T 5986-5987; 6084.
[1869] Fatmir Limaj, T 5986-5987.
[1870] Fatmir Limaj, T 5987-5989.
[1871] Ferat Sopi, T 7053-7054.
[1872] Exhibits P215; P216 and P217. The Chamber notes that the only entry which could have been made on 25 July 1998 also bears the date of 24 July 1998, Exhibit P217.

558. L64, a former KLA member, testified that he went to the prison camp in Llapushnik/Lapusnik on several occasions at the time relevant to this case.[1873] It is his evidence that although he saw Fatmir Limaj, *i.e.* Çeliku, on several occasions in the village of Llapushnik/Lapusnik,[1874] he never saw him in the prison camp.[1875] L64 indicated, however, that on one occasion, he saw a jeep outside the prison, and inferred from what was said by others that it was Çeliku's jeep.[1876] Who suggested that to be the case, and on what basis, is unknown. There is no other evidence bearing on this issue. In the Chamber's finding, this evidence does not establish either that Çeliku, or the Accused Fatmir Limaj, was in the Llapushnik/Lapusnik prison camp on that or any occasion.

559. The Defence for Fatmir Limaj has suggested, both in submission and in evidence, that Fatmir Limaj's character was thoroughly inconsistent with the allegations set forth in the Indictment. Essentially, the Defence for Fatmir Limaj submits that the metamorphosis of Fatmir Limaj from a responsible man into a "monster" for the sole time of three or four months would be quite extraordinary.[1877] This would not be, in the view of the Chamber, a very telling consideration, if there were satisfactory evidence to the contrary, especially having regard to Fatmir Limaj's manifest commitment to the achievement of the military and political objectives of the KLA.

560. For reasons given above, the Chamber is not able to accept any of the individual identifications made by these various witnesses of Fatmir Limaj to be a reliable identification on the basis of which the Chamber could find beyond reasonable doubt that Fatmir Limaj was the person they saw, or knew as Çeliku, in the Llapushnik/Lapusnik prison camp, or in the Berishe/Berisa Mountains on 25 or 26 July 1998.

561. The Chamber has also considered the combined effect of these several identifications to determine whether they, or some of them, in combination displace the risks of mistake in the individual identifications, so as to establish beyond reasonable doubt that Fatmir Limaj was that person. While accepting that a multiplicity of identifications by a variety of persons, at different times and in different circumstances, may, in a particular case, be enough to negate the risk of honest mistake present in respect of each separate identification when it is considered separately, that is neither a common nor a simple exercise. In the present case the difficulties stipulated with respect to a number of the identifications, and the nature of the risk of mistake for each respective identification, are of such significance, in the Chamber's considered view, that, notwithstanding the

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[1873] L64, T 4444.
[1874] L64, T 4356-4357; 4363; 4395-4396.
[1875] L64, T 4465-4466.
[1876] L64, T 4465-4466.
[1877] Closing Arguments, T 7430-7431.

strong possibility apparent on the evidence, it is on final analysis not able to be satisfied beyond reasonable doubt that Fatmir Limaj is identified to be the person referred to in their evidence by those persons, or any of them.

562. Indeed, rather than strengthening an identification of the man purported to be Commander Çeliku, the combined effect of the evidence serves to highlight the extent of the uncertainties and inconsistencies prevalent in the body of evidence relevant to this issue. The majority of the witnesses' physical encounters with the "commander", from which the identifications have been made, were limited in number and short in duration. It is significant that the two witnesses who potentially had the most extensive contact with the "commander", Vojko and Ivan Bakrač, gave inconsistent physical descriptions of the person they saw in Llapushnik/Lapusnik prison camp and could not positively identify the "commander" from respective photo spreads. When all the separate physical descriptions provided by the witnesses are considered cumulatively, instead of the emergence of any striking similarities, variations in respect of the "commander's" height, clothes and presence of, or lack of, a beard are arresting inconsistencies. Specifically, descriptions of the "commander's" face range from clean shaven to the presence of a small beard, a medium sized beard and a beard of two or three week's growth. Therefore, rather than reducing the risk of mistake evident in the individual identifications, their comparison leads to further uncertainty.

563. The Chamber would mention, in particular, that a significant factor in the Chamber's consideration of this critical issue, is the extent to which, by virtue of his active role in politics in Kosovo since the fighting, film showing Limaj has appeared on television and photographs of him have appeared in newspapers. In the Chamber's assessment, this fairly constant exposure of images of Fatmir Limaj in the media has given rise to a clearly recognisable risk that a number of the witnesses in this trial may have been unconsciously influenced by that degree of exposure to associate the media images with the person being remembered by the witness from Llapushnik/Lapusnik or the Berishe/Berisa Mountains in mid 1998. Because of that risk, much care was necessary with the process of subsequent identification, care that has not always been evident in course of interviews by different agencies over the years. Further, particular care is called for on the part of the Chamber in assessing whether, having regard to that and the other known risks of mistake with the various identifications discussed earlier, and in light of all the other relevant evidence, the Chamber is satisfied beyond reasonable doubt that Fatmir Limaj has been shown to have had any role in the events in the KLA prison camp at Llapushnik/Lapusnik or in the events concerning prisoners in the Berishe/Berisa Mountains on 25 or 26 July 1998. For the reasons indicated, the Chamber finds that in this critical respect the evidence falls short of establishing beyond reasonable doubt the role of Fatmir Limaj in or with respect to any of the offences charged.

564. In the absence of a proven identification of Fatmir Limaj as being present in the Llapushnik/Lapusnik prison camp, the only evidence relied on by the Prosecution to associate Fatmir Limaj with the operation of the camp is a document found in the Accused's apartment by OTP investigators in the course of a search on 19 February 2003.[1878] On its face, this document appears to be an unsigned record of notes made by an individual, identified only as Naim, sometime in November 1998. It contains information which seems to relate to the movements of suspected Kosovo Albanian collaborators and Serbian civilians. It includes the name of one of the victims listed in the Indictment: "Lutfi Xhemshiti is it possible his wife and four children /sic/".[1879] Fatmir Limaj's evidence is that he has no knowledge of this document. Fatmir Limaj's explanation as to how this document came to be in his apartment is that it must have been part of a number of documents from the Ministry of Defence, which was located across the road from the apartment and of which Fatmir Limaj was the spokesperson after the war, and which had been temporarily stored in his apartment.[1880] Regardless of the truthfulness of this explanation, the Chamber is not persuaded that this document establishes an association between the Accused and the fate of that particular victim. The mere mention of the name of that victim, in a document signed by a third party, in a context which remains unknown, and at a time some months after the alleged murder of that victim, is not a sufficient basis to establish any such association.

565. By virtue of the above, the Chamber finds that all allegations that Fatmir Limaj personally participated in the operation of the Llapushnik/Lapusnik prison camp fall away.

(b) Did Fatmir Limaj hold a position of command and control over the KLA soldiers in the Llapushnik/Lapusnik prison camp?

566. The Indictment alleges that the criminal liability of Fatmir Limaj also arises out of his position of a superior pursuant to Article 7(3) of the Statute. It is alleged that in this capacity, Fatmir Limaj exercised both *de jure* and *de facto* command and control over KLA members operating the Llapushnik/Lapusnik prison camp, and that he had the authority to discipline and punish those subordinates.[1881]

567. In this regard, the Prosecution has presented evidence with a view to establish that Fatmir Limaj was the commander of a large zone or region, which included the village of Llapushnik/Lapusnik, although based in Klecke/Klecka. A corollary allegation by the Prosecution is that, as such, Fatmir Limaj was also the overall commander of the Llapushnik/Lapusnik prison

[1878] Ole Lehtinen, T 518-522.
[1879] Exhibit P30, p 1.
[1880] Fatmir Limaj, T 6338-6339.
[1881] Indictment, paras 14-16.

camp. The Defence for Fatmir Limaj disputes both these assertions, and submits that at the time relevant to this Indictment, Fatmir Limaj was merely leading a unit in Klecke/Klecka known as Çeliku 1.

568. The issue whether Fatmir Limaj was exercising command in the Llapushnik/Lapusnik prison camp is to be approached in the context that in 1998, there was a gradual emergence of a structure within the KLA, a structure which took progressive forms and evolved differently in various areas. By virtue of this, the state of affairs at any one particular time was often somewhat unclear and differed from place to place. The Chamber has discussed these matters in detail earlier in this decision.[1882] With respect to the role of Fatmir Limaj in particular, it is not disputed by his Defence that, at some time, he commanded at least one KLA unit in Klecke/Klecka; that not earlier than August 1998 and perhaps as late as September 1998, he became the commander of the 121st Brigade, also from Klecke/Klecka; and that in November 1998, he became a member of the KLA General Staff. The issue before the Chamber, however, is whether it has been established by the Prosecution that between May and July 1998, Fatmir Limaj was a commander of a zone or region which extended beyond Klecke/Klecka and included at least the southern part of the Llapushnik/Lapusnik village where the prison camp was located. The evidence relevant to this is often unclear, it varies in very significant respects from witness to witness, and is at times imprecise as to time. The notion of "commander" itself may have been understood loosely by some KLA personnel at the time as some purport to have used the term merely as a mark of respect or to acknowledge influence.[1883] In the case of other witnesses, the issue arises whether their earlier references to Çeliku or Fatmir Limaj as commander were grounded in reliable knowledge or merely in rumour or their "understanding". Evidence the Prosecution apparently anticipated from two of its witnesses, two former KLA members, Shukri Buja and Ramadan Behluli, seems to have been the substantive basis of the Prosecution case as to the position of Fatmir Limaj as commander. Each of these two witnesses, however, said in their oral evidence before the Chamber that, on reflection, what they had said earlier in their respective interviews with the OTP was mistaken in material respects. In evidence, each of these witnesses placed events relevant to the command of Fatmir Limaj later in time than the apparent effect of their earlier statements, in each case later than the time material to the Indictment. The circumstances and the nature of their evidence suggested the possibility that this partial disavowal was the result of what could be perceived as a sense of loyalty towards the KLA in general, and Fatmir Limaj in particular, on the part of Shukri Buja and Ramadan Behluli. The effect was to remove the foundation of the Prosecution case in this respect. The Prosecution in essence was forced to submit that the Chamber should disbelieve the evidence

[1882] *See supra*, paras 53-65.
[1883] *See* L95, T 2610; 2612; 2614.

given in court by these two witnesses and, instead, accept the truth of and make factual findings on the basis of the earlier interviews with the OTP, despite their express disavowal. For reasons dealt with by the Chamber in a decision in the course of the trial,[1884] in the particular circumstances the contrary accounts given by these two witnesses provided a basis which justified the admission as substantive evidence of the accounts each had given to the OTP on previous occasions. Nevertheless, it remains a significant consideration that in evidence each of the two witnesses expressly disavowed the relevant passages in the earlier interviews on which the Prosecution seeks to rely. In the circumstances, for reasons detailed later,[1885] the Chamber is not able to be so convinced of the truth and reliability of the earlier statements as to make findings contrary to the oral evidence of each of the two witnesses. At least on this issue, the evidence of Shukri Buja and Ramadan Behluli is, in effect, neutralised.

569. The evidence of L64 is the only evidence before the Chamber which, if accepted, would directly suggest that Fatmir Limaj was exercising command in Llapushnik/Lapusnik. L64 testified before the Chamber that sometime around mid May 1998, Çeliku came to the Llapushnik/Lapusnik village. On L64's evidence, the soldiers were lined up and Çeliku gave a speech. Çeliku, L64 said, introduced himself as the person responsible for the area and announced that Qerqizi would be the person responsible for the fighting position in Llapushnik/Lapusnik.[1886] The effect of L64's evidence is essentially that, in his perception, Çeliku was exercising functions of command. L64 testified that Çeliku came a number of times to Llapushnik/Lapusnik, although the exact number is a subject of numerous inconsistencies between the witness' oral evidence and his previous statements.[1887] In particular, L64 said that Çeliku was present there at two oath ceremonies which L64 attended.[1888] Further, it was L64's evidence that Qerqiz regularly reported to Çeliku about the situation in Llapushnik/Lapusnik.[1889] L64 stated that on 25 July 1998, for instance, Qerqiz and Ymer Alushani, aka Voglushi, went to Klecke/Klecka, where it is accepted by the Defence that Fatmir Limaj was in command of a unit, for reinforcements and returned with a cannon.[1890] This could suggest that assistance was coordinated from Klecke/Klecka. L64 also gave an account of being summoned to Klecke/Klecka to hand over his weapon, following an operation to collect weapons undertaken in Lladroc/Ladrovac without Çeliku's knowledge.[1891] L64 stated that he was

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1884 Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005.
1885 *See infra*, paras 581-582; 586.
1886 L64, T 4356-4357.
1887 In a statement L64 gave in May 2003, he stated that Çeliku came to Llapushnik/Lapusnik three or four times during the relevant period, T 4697. In a further statement dated June 2003, L64 stated that Çeliku came between 10 and 15 times, although the witness only saw him 7 or 8 times personally, T 4899. In court, L64 testified that he saw Çeliku about 10 times in Llapushnik/Lapusnik between May and July 1998, T 4395.
1888 L64, T 4420-4421.
1889 L64, T 4398.
1890 L64, T 4399.
1891 L64, T 4400-4402.

told by Qerqiz about the summons but that he refused to go to Klecke/Klecka.[1892] On his account, however, other KLA soldiers from Llapushnik/Lapusnik who took part in this operation in Lladroc/Ladrovac told him that they had been disarmed by Çeliku for 15 days.[1893] When it was put to L64 by the Defence, in cross-examination, that L64 had in fact been disarmed by Çeliku but that this was because it had been discovered that he had been intending to leave Llapushnik/Lapusnik to murder someone, L64 acknowledged that indeed he was part of a plan to murder one or possibly two individuals from his village.[1894] In the Chamber's view the evidence about this episode left serious doubt about the reliability of L64's evidence. In any event, L64's evidence in relation to this incident would tend to indicate that Çeliku's material ability to discipline "subordinates" was in fact limited and not consistent with that expected of a commander.

570. In court, L64 identified a diagram which he had drawn depicting roughly the organisation of the KLA in the geographic area relevant to this case.[1895] L64 confirmed that the various units identified on the diagram, which included those of Llapushnik/Lapusnik and Kroimire/Krajmirovce, were all under the command of Klecke/Klecka and Fatmir Limaj.[1896] However, it became clear to the Chamber, in the course of his cross-examination, that L64's evidence as to this "command" of Fatmir Limaj was based largely on no more than hearsay and rumours and that he had no reliable knowledge of the regional structure of the KLA at the time.[1897]

571. A notebook or diary of L64 is also in evidence.[1898] This notebook appears to include a short summary of the witness' childhood and life, followed by more specific entries dated May and July 1998 as well as throughout 1999. However, its evidential utility is problematic. A number of entries do not mention the year in which they are supposed to have been recorded. Other entries appear misplaced in time.[1899] L64 explained in court that the notes in the diary were not contemporaneous; rather, they were a later transcription of other notes made during the war.[1900] It is striking that the diary does not include a complete record of events in Llapushnik/Lapusnik from May to July 1998. It does, however, refer to a couple of incidents of potential relevance. In particular, L64 recounts how sometime at the end of July 1998, he was told by Qerqizi that, by Çeliku's order, one of his soldiers was appointed commander of L64's position and L64 was to act as his deputy.[1901] L64 described his frustration with this decision, which he saw to be an

[1892] L64, T 4402.
[1893] L64, T 4401.
[1894] L64, T 4839-4840; 4842-4843; 4867-4869.
[1895] Exhibit P173.
[1896] L64, T 4530-4532.
[1897] L64, T 4707-4712.
[1898] Exhibit P169.
[1899] L64, T 4416.
[1900] L64, T 4365-4366; T 4699-4705.
[1901] Exhibit P169, p 14; L64, T 4414-4416.

appointment purely on the basis a family connection with Fatmir Limaj. His frustration continues today. The entry concerning this episode in the diary is not specifically dated in July 1998. It is apparent, on the witness' own admission, that it was not recorded contemporaneously and that the witness found it "impossible to put the events in order".[1902] Other events which could be considered as memorable are not recorded in the diary. For instance, there is no mention, in May 1998, of any speech given by Çeliku in the Llapushnik/Lapusnik village, in which he announced that he was responsible for the area. Having regard to these circumstances, and in light of the general reservations which the Chamber has concerning this witness, which are discussed elsewhere,[1903] the Chamber is not persuaded that it can treat this evidence of L64 as reliable.

572. Reliance is further placed by the Prosecution on evidence which, in its submission, goes to prove that Fatmir Limaj was in command of a larger area around Klecke/Klecka, including Kroimire/Krajmirovce and Llapushnik/Lapusnik. To that end, the Prosecution first relies on the evidence of Ramiz Qeriqi, aka Commander Luan. Ramiz Qeriqi testified before the Chamber that he returned to Kosovo at the end of March 1998 and received instructions from the general commander of the KLA, Azem Syla, to go to Likofc/Likovac and meet with Rexhep Selimi.[1904] On Ramiz Qeriqi's evidence, he brought a letter to Rexhep Selimi stating where he was supposed to go.[1905] Ramiz Qeriqi stated that after a week in Likofc/Likovac, he went to Klecke/Klecka for a couple of days, where he met Çeliku and Sadik Shala.[1906] There is no suggestion in Ramiz Qeriqi's evidence that he received instructions from Çeliku at the time. Ramiz Qeriqi then proceeded to Kroimire/Krajmirovce, his birthplace. He described his tasks as follows: "I went by myself simply to organise things, to call my friends from the past and I was told – I had the message with me to pass to them so that we all mobilise and stop the Serbian forces from penetrating in villages in that area and stop them maltreating the population."[1907] Ramiz Qeriqi testified that in May 1998, he was the commander in Kroimire/Krajmirovce and his soldiers were building positions and digging trenches in various points including Carraleve/Crnoljevo, Zborc/Zborce, Fushtice/Fustica and Blinaje/Lipovica.[1908] At the end of May 1998, however, Shukri Buja became the commander in Kroimire/Krajmirovce and Ramiz Qeriqi acted as his deputy.[1909] A material aspect of Ramiz Qeriqi's evidence is that he knew, he said, that there was a higher command above him and Shukri Buja. He described an "organisation line" from Likofc/Likovac to Klecke/Klecka to Kroimire/Krajmirovce. It is his evidence that Fatmir Limaj was the commander in Klecke/Klecka,

[1902] L64, T 4416.
[1903] *See supra*, para 28.
[1904] Ramiz Qeriqi, T 3561-3563.
[1905] Ramiz Qeriqi, T 3563.
[1906] Ramiz Qeriqi, T 3563-3565.
[1907] Ramiz Qeriqi, T 3565.
[1908] Ramiz Qeriqi, T 3575.

that Rexhep Selimi was the commander in Likofc/Likovac and that the general commander of the KLA was Azem Syla.[1910] It is apparent from the evidence that, as of mid August 1998, Ramiz Qeriqi became the commander of the Ruzhdi Salihaj Battalion within the 121st Brigade,[1911] and as such, reported to Fatmir Limaj, who by then was the commander of the 121st Brigade.[1912] There are, however, a number of uncertainties in Ramiz Qeriqi's evidence as to the position, before mid August 1998. In this respect, Ramiz Qeriqi testified that between May and July 1998, he only very rarely went to Klecke/Klecka and was not taking any orders from Fatmir Limaj. This, he explains, was because he was no longer the commander in Kroimire/Krajmirovce;[1913] Shukri Buja was. Ramiz Qeriqi was reporting to and taking orders from Shukri Buja.[1914] When asked in examination-in-chief who Shukri Buja got his orders from, Ramiz Qeriqi answered plainly: "This I don't know. You might ask Shukri about this."[1915] This is an answer which he maintained when cross-examined, saying: "How can I speak on his behalf? I think he can tell you better than me because I informed him – I reported to him about the positions, about the soldiers. And probably he had to report this to someone else."[1916]

573. In the Prosecution's submission, the area drawn by the witness on Exhibit P154, which includes Llapushnik/Lapusnik, was the area under the command of Klecke/Klecka, that is it suggests of Fatmir Limaj, from May 1998 onwards.[1917] Ramiz Qeriqi's own description of the drawing, however, suggests some degree of confusion as to the time period on which he was relying for his memory:

> Q. What does that line represent?
> A. This represents the zone -- part of the zone where I served. That is, it represents the four battalions that were in Klecke.
> Q. And –
> A. Under Klecke.
> Q. And is this the zone as it existed at the time that we've just been talking about, May/June 1998?
> A. This zone existed even before that time but my battalion was not organised in the way that I have drawn it here.
> Q. And at the time -- at the time that we're talking about or even earlier, as you've said, was this zone under the command of Klecka?
> A. It was under the command of Klecka, but when I drew it it was as a battalion and I led that battalion.[1918]

1909 Ramiz Qeriqi, T 3578.
1910 Ramiz Qeriqi, T 3579.
1911 Exhibit P155; Ramiz Qeriqi, T 3593; Fatmir Limaj, T 6089.
1912 Ramiz Qeriqi, T 3593-3595; Ramiz Qeriqi testified that as of his appointment as commander of the Ruzhdi Salihaj Battalion on 16 August 1998, he reported in writing to Fatmir Limaj and meetings would be held every week, T 3711; *see* also Fatmir Limaj, T 6013.
1913 Ramiz Qeriqi, T 3579-3580; 3711.
1914 Ramiz Qeriqi, T 3711.
1915 Ramiz Qeriqi, T 3582.
1916 Ramiz Qeriqi, T 3711-3712.
1917 Closing Arguments, T 7256.

This was not further clarified, whether in examination-in-chief or in cross-examination. While a literal interpretation of one answer of Ramiz Qeriqi would suggest that the zone he drew on Exhibit P154 was under the command of Klecke/Klecka prior to the establishment of his battalion, *i.e.* before mid August 1998, the general effect of his evidence gave the Chamber the impression that he linked the exercise of that command to the creation of the battalions. His immediate and spontaneous description in evidence was that the zone he drew represented the "four battalions … in Klecke/Klecka". This manifestly relates to a period subsequent to that relevant to this Indictment.

574. Further reliance is placed by the Prosecution on Ramiz Qeriqi's evidence that sometime in June 1998, while he was in Klecke/Klecka, he received instructions from Fatmir Limaj to go to assist in the fighting in Ratkoc/Ratkovac.[1919] Ramiz Qeriqi's evidence on this point is indeed that Fatmir Limaj was the one issuing instructions in Klecke/Klecka.[1920] The further step which the Prosecution attempts to make, however, that this evidence shows that Fatmir Limaj was in command over the larger area around Klecke/Klecka, including Kroimire/Krajmirovce[1921] and Llapushnik/Lapusnik, is not supported by his evidence. Ramiz Qeriqi qualified his evidence that all instructions coming from Klecke/Klecka were coming from Fatmir Limaj, by adding that the same applied to him in Kroimire/Krajmirovce and to others in other places.[1922] In the view of the Chamber, therefore, this evidence does not necessarily indicate more than that Fatmir Limaj was the commander in Klecke/Klecka and, in that capacity, he instructed Ramiz Qeriqi to assist in Ratkoc/Ratkovac.

575. Finally, the Prosecution relies on Ramiz Qeriqi's evidence that Fatmir Limaj was in charge of three units involved in the fighting in Llapushnik/Lapusnik on 9 May 1998.[1923] Ramiz Qeriqi testified that he was in Klecke/Klecka that day and that he and others went to Llapushnik/Lapusnik to assist in the fighting because they had heard the shooting:

> Q. Who else went to Lapusnik, if anybody?
>
> A. We were three groups that left from Klecke. Each group had five persons.
>
> Q. Were there persons in charge of each group?
>
> A. One group was chaired by me, one by Topi, and one by Çeliku.
>
> Q. Was anybody in charge of all three groups?

[1918] Ramiz Qeriqi, T 3581.
[1919] Prosecution Final Brief, para 28.
[1920] Ramiz Qeriqi, T 3574-3575.
[1921] Prosecution Final Brief, para 28.
[1922] Ramiz Qeriqi, T 3575; 3589.
[1923] Prosecution Final Brief, para 103.

A. It was not that there was some person in charge. In Klecke there was Fatmir, Çeliku, who was in higher position, who was in charge.

Q. And with respect to the three groups that you said travelled to Lapusnik from Klecka, was anybody in charge of those three groups at that time? Just for the fighting in Lapusnik.

A. When we went to Lapusnik, Fatmir went with the first group. Then Topi and myself went with our respective groups. Topi had a radio transmitter; Fatmir didn't. We came later, maybe 20 minutes or so later.

Q. But my question is, Mr. Qeriqi: Was there any one person who was in charge of the three groups who travelled from Klecka to Lapusnik?

A. Fatmir was in charge in Klecka, not myself, neither Topi.

Q. So you're saying that he was in charge of the three groups?

A. Yes, because he was responsible for the people who were in Klecke.[1924]

While the above evidence does support a finding that Fatmir Limaj was the commander in Klecke/Klecka, the further implication which the Prosecution wishes to make, that Fatmir Limaj was thereby, or also, the commander of all KLA forces in Llapushnik/Lapusnik, appears to be beyond the scope of this evidence. Approached in the most favourable light, it could at the most go to proof that Fatmir Limaj was in charge of the three groups of soldiers from Klecke/Klecka who fought in Llapushnik/Lapusnik on 9 May 1998. Later in his evidence, Ramiz Qeriqi further testified that the soldiers who went from Klecke/Klecka to Llapushnik/Lapusnik that day were not ordered to do so but did so on a strictly voluntary basis,[1925] which detracts from any inference that Fatmir Limaj was actually in command of the three groups assisting in Llapushnik/Lapusnik on that day.

576. The Defence for Fatmir Limaj further points to the evidence of several witnesses that Ramiz Qeriqi, aka Luan, was a "central figure in the organisation and execution of kidnappings" in Kroimire/Krajmirovce.[1926] In the Chamber's appreciation, Ramiz Qeriqi was attempting in the course of his evidence to negate or minimise his own involvement in the kidnappings of civilians during the spring and summer 1998. His evidence, therefore, must be approached with caution. The Prosecution submits, however, that Ramiz Qeriqi had no reason to mislead the Chamber when it comes to the organisation of the KLA or the role of Fatmir Limaj. However, his description of a structure and his placing of individuals as commanders in that structure at the time could well be an aspect of his apparent attempts to minimise his own role. Having regard to these several considerations, the Chamber is not persuaded that it can be satisfied from the evidence of Ramiz

[1924] Ramiz Qeriqi, T 3568-3569.
[1925] Ramiz Qeriqi, T 3658.
[1926] Defence Final Brief, paras 144-146.

Qeriqi that Fatmir Limaj was commander of a wide area or zone which included Llapushnik/Lapusnik at the time material to the Indictment.

577. Shukri Buja gave evidence before the Chamber. He testified that he returned to Kosovo, at the same time as Fatmir Limaj, in March 1998. Both men were part of a larger group travelling back to Kosovo. The members of the group received weapons and ammunition whilst in Albania, crossed the border on foot and headed towards the Drenica area.[1927] Shukri Buja's evidence is that both he and Fatmir Limaj proposed to go to their respective places of birth, the areas they knew best, a view which was endorsed by Hashim Thaci.[1928] Shukri Buja went to set up a KLA unit in Mollopolc/Malopoljce and his understanding is that Fatmir Limaj would have been organising the KLA movement in Klecke/Klecka.[1929] His evidence is that both men communicated through couriers in order to keep contact with the General Staff through Hashim Thaci. Fatmir Limaj would generally escort Shukri Buja to meet Hashim Thaci as he knew the area well.[1930] Shukri Buja further testified that when he stayed in Klecke/Klecka sometime around mid April 1998, there were a few KLA soldiers guarding the village; these soldiers, he believes, later became part of the Çeliku, or possibly the Çeliku 1, unit.[1931] There is no suggestion in Shukri Buja's oral evidence that he was subordinated to, or receiving orders from, Fatmir Limaj at that time.

578. Shukri Buja further stated that at the end of May 1998, he went to Kroimire/Krajmirovce, where he set up a unit called "Sokoli" or "Petriti".[1932] Shukri Buja testified, however, that in the month of June 1998, he had no access to communication lines and was not in a position to communicate with Fatmir Limaj.[1933] His evidence is essentially that he does not know whether there was, in May and June 1998, a command structure above the units, aside from the General Staff, and that the situation started to change with the development of sub-zones as of mid June 1998.[1934] On 6 July 1998, Shukri Buja was appointed commander of the Nerodime/Nerodimlje subzone.[1935] His evidence is that in this period, the commander of the Pashtrik/Pastrik zone was Muse Jashari and that Fatmir Limaj remained in Klecke/Klecka with the Çeliku unit.[1936] It is Shukri Buja's evidence that he would at times send individuals who had been arrested at

[1927] Shukri Buja, T 3738-3746.
[1928] Shukri Buja, T 3751.
[1929] Shukri Buja, T 3756-3757.
[1930] Shukri Buja, T 3758-3760.
[1931] Shukri Buja, T 3767-3768.
[1932] Shukri Buja, T 3777-3781.
[1933] Shukri Buja, T 3785-3786.
[1934] Shukri Buja, T 3795-3797.
[1935] Shukri Buja, T 3798.
[1936] Shukri Buja, T 3799.

checkpoints to Klecke/Klecka, because "there were people who could know them. There were also people from General Staff…"[1937]

579. Shukri Buja's oral evidence differed in material respects from what he had said in an earlier interview with an OTP representative in April 2003. The effect of these differences was that the oral evidence given by the witness was significantly less favourable to the Prosecution than the earlier interview. While Shukri Buja maintained that he had generally sought to tell the truth during the OTP interview, he now believed that there were mistakes in what he told the OTP. These he corrected in his evidence before the Chamber and it was these corrections, he said, which explained the material differences between his evidence and his earlier statement.

580. The Prosecution essentially seeks to rely on what Shukri Buja said in his prior interview, rather than on his evidence given in court, to establish that Fatmir Limaj was exercising an intermediary command, from Klecke/Klecka, between the General Staff and the various units in a zone which included Kroimire/Krajmirovce and Llapushnik/Lapusnik.[1938] Elsewhere in this decision and, principally, in the Chamber's decision, given during the trial, to admit as substantive evidence the earlier interview of Shukri Buja, the Chamber has dealt with the considerations which persuaded the Chamber to take this unusual evidentiary course. The decision to admit this earlier interview is not, of course, in any way determinative of the weight the Chamber attaches to it. From its viewing of the videotape of the earlier statement, and from the evidence of Shukri Buja, the Chamber is satisfied that the earlier statement was made freely. Further, the Chamber is not impressed with the cogency of the reasons given by Shukri Buja for the changes evident in his testimony. Rather, the Chamber considers from its careful observations of the witness as he gave his evidence, that the evident sense of bondship he displayed physically and revealed in his evidence, for the KLA in general, and for Fatmir Limaj in particular, may well explain the changes from his earlier interview so as to place the relevant time for the KLA structure he earlier described outside the period relevant to the Indictment.

581. For these reasons the Chamber is not able to accept the truth of the evidence of Shukri Buja given in court as to the time frame at which Fatmir Limaj first assumed a position of command of a zone or area that included the prison camp at Llapushnik/Lapusnik. That is the only evidence on this subject to which the witness purports to adhere. He has expressly disavowed in the relevant respects what he said earlier when interviewed. While the Chamber has strong suspicions, in all the circumstances, it is not able to make positive findings in favour of the Prosecution on the basis of what Shukri Buja said in the relevant parts of his expressly disavowed earlier statement.

[1937] Shukri Buja, T 4052.

582. The Chamber would also observe that, were it able to be satisfied as to the truth and honesty of the relevant parts of what Shukri Buja said in the earlier statement, which is not the case, there remain some further difficulties in accepting from this that Fatmir Limaj had command of an area or zone which included the Llapushnik/Lapusnik prison camp at the time relevant to the Indictment. The manner of his questioning on that earlier occasion appears to have influenced important answers. Some answers, which can be understood as expressing a caveat, were not followed up in the questioning to make clear what was intended.[1939] At one point Shukri Buja describes Fatmir Limaj's role as one of coordination, a function he spontaneously equated with his own role in Kacanik/Kacanik.[1940] Elsewhere the role is described as consultative.[1941] These references leave unclear whether Fatmir Limaj had a command role in the relevant sense.[1942] Further, there are passages which leave unresolved whether Fatmir Limaj or Ismet Jashari, aka Kumanova, was the person with ultimate responsibility in Klecke/Klecka.[1943]

583. Ramadan Behluli testified that he joined the KLA in Kroimire/Krajmirovce on 20 April 1998, and that with the agreement of Ramiz Qeriqi, aka Luan, he took charge of a unit in Pjetershtice/Petrastica.[1944] Ramadan Behluli's evidence is that he was receiving orders from Ramiz Qeriqi, aka Luan, when it came to the defence of the existing positions. It is Ramadan Behluli's evidence that in May, June and July 1998, Ramiz Qeriqi, aka Luan, was not receiving any orders from anyone, but would rather take decisions himself.[1945] Most importantly, Ramadan Behluli testified that it was his understanding that there was no general commander in the months of May to mid August 1998. On his evidence, such command first existed when the 121st Brigade was formed in August 1998, with Fatmir Limaj as its commander and Klecke/Klecka as headquarters.[1946] However, he accepted that answers given in an interview with the OTP in April 2003 could be understood as indicating that there was a general commander between May and August 1998 in the area relevant to this case. In this respect, Ramadan Behluli offered the explanation that matters were only addressed generally in the interview and that relevant dates were not specified, or at least not always clearly specified. The witness testified that the area he drew on a map during the interview, and which included Llapushnik/Lapusnik, reflected the zone under the

1938 Prosecution Final Brief, paras 33-36 and 41.
1939 Exhibit P160, pp 36-37.
1940 Exhibit P160, pp 36-37; 51.
1941 Exhibit P160, p 43.
1942 *See* Exhibit P160, p 51.
1943 Exhibit P160, p 43.
1944 Ramadan Behluli, T 2656-2657; 2659-2660.
1945 Ramadan Behluli, T 2668-2670; 2678.
1946 Ramadan Behluli, T 2681-2682.

command of Fatmir Limaj at the end of 1998 and early 1999, rather than between May and August 1998.[1947]

584. In the prior interview on 25 April 2003, he was asked to describe the KLA structure as it was in the spring and summer 1998. In doing so, Ramadan Behluli clearly, in the Chamber's view, placed Fatmir Limaj as the commander of the Pashtrik/Pastrik zone.[1948] One sentence in this passage, however, referred to Ramiz Qeriqi being a battalion commander.[1949] This is indicative of a time-period subsequent to that relevant in this case. It raises the issues whether Ramadan Behluli properly understood the time-period he was asked to deal with, or whether his knowledge of the development of the KLA structure at the time was sufficient to enable him to appreciate that there was a material difference between the various periods. These issues were not clarified during the earlier interview.

585. Later in the interview, Ramadan Behluli was asked to draw on a map the zone under the command of Klecke/Klecka in July 1998.[1950] The zone he drew was only roughly depicted and referred to as the Pashtrik/Pastrik zone.[1951] It clearly goes up to the Prishtina/Pristina-Peje/Pec road and includes the part of the Llapushnik/Lapusnik village on the southern side of that road.[1952] Ramadan Behluli drew the zone on the map prior to being asked whether this was the situation in July 1998.[1953] However, when specifically asked if this was the situation in July 1998, he answered: "This is… the zone under the Klecka command."[1954]

586. It is the view of the Chamber that Ramadan Behluli's evidence, especially its emphatic assertion that there was no general commander in the months of May to mid August 1998, represented a clear and very significant change from the answers he gave in the April 2003 interview. It may be true that a few answers might have been affected by some uncertainty about the time period by Ramadan Behluli in this regard, but despite this, the general tenor of the relevant parts of the earlier interview are in marked and rather fundamental contrast to the positive assertion he made in his oral evidence that there was no general commander in the months May to mid August 1998. As with Shukri Buja, the Chamber was persuaded to admit the prior interview of Ramadan Behluli as substantive evidence in the particular circumstances of this case. The Chamber had viewed a video tape of that earlier interview and is satisfied it was freely given. It is necessary

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1947 Ramadan Behluli, T 2682-2684; Exhibit P119.
1948 Exhibit P121, p 22-23.
1949 Exhibit P121, p 22.
1950 Exhibit P121, p 51-52.
1951 With respect to the Pashtrik/Pastrik zone, *see supra*, paras 57-63.
1952 Exhibit P119.
1953 Exhibit P121, p 51.
1954 Exhibit P121, p 51.

at this point to determine the weight to be given to the earlier interview, which is now expressly contradicted or disavowed by Ramadan Behluli in the parts that are relevant for present purposes. There are some differences of emphasis between the position of Ramadan Behluli and that of Shukri Buja. Nevertheless, having weighed all the relevant evidence and especially the demeanour of the witness as he dealt with these matters, the Chamber is not prepared to accept the submission of the Prosecution that it should accept what was said in the 2003 interview as true and, on this basis, find that Fatmir Limaj was a general commander over an area or zone which included the Llapushnik/Lapusnik prison camp in the months relevant to the Indictment. Neither is the Chamber able to accept the truth and reliability of the relevant oral evidence of Ramadan Behluli in the trial on this issue. As with Shukri Buja, the witness' evident regard for or bond with the KLA in general, and Fatmir Limaj in particular, may have influenced his evidence in court and explain the differences. Whether that is the case, or not, the Chamber is not prepared to rely on his evidence in this respect, or on his earlier interview.

587. In the Prosecution's submission, the Chamber should also infer from a conversation between Ramadan Behluli and Fatmir Limaj on 17 June 1998, that Fatmir Limaj could give orders to Ramadan Behluli because he was the overall commander.[1955] The words relied on are perhaps capable of being understood as an order, but more readily appear to be an informal suggestion as to how Ramadan Behluli should act in the future.[1956] Ramadan Behluli characterised the conversation as "an informal talk"[1957], which manifestly contradicts the Prosecution's suggestion that Fatmir Limaj was in fact issuing an order to Ramadan Behluli. Also telling against the inference which the Prosecution argues for is a direct statement of the witness in his April 2003 interview that he was not receiving orders from anyone else but Ramiz Qeriqi, aka Luan, and certainly not from Fatmir Limaj.[1958]

588. Fadil Kastrati testified that while in Blinaje/Lipovica, he had an argument with one of the villagers. On his account, this incident was reported to Shukri Buja, and some time later, Commander Çeliku came to Blinaje/Lipovica and ordered that Fadil Kastrati's weapon be removed for 15 days because he was disturbing the order in the village. Çeliku allegedly explained to Fadil

[1955] Prosecution Final Brief, para 32.
[1956] In his prior interview, Ramadan Behluli stated: "Even though Fatmir Limaj too encouraged me a little… when we were travelling on the road there, he had asked me how the situation was… I was saying… and I told him what the situation was like, that the police were still active in Carraleve… He said to me, why don't you attack… I said, I haven't received orders. Then he replied to me… he said that if I saw a Serbian uniform, never mind whether it's a police or a soldier, you yourself… don't ask around and attack.", Exhibit P121, p 43; Ramadan Behluli, T 2808-2810.
[1957] Ramadan Behluli, T 2809-2810.
[1958] Exhibit P121, pp 23 and 28.

Kastrati that there were KLA regulations and that discipline had to be maintained.[1959] This meeting occurred, on the witness' recollection, before the Serbian offensive in July 1998.[1960]

589. Fatmir Limaj recalled confiscating Fadil Kastrati's weapon sometime before the end of July 1998. He said that Shukri Buja, then commander of the Nerodime/Nerodimlje zone, and he were in Blinaje/Lipovica, when a relative of Fadil Kastrati, then the commander in Blinaje/Lipovica, asked Shukri Buja to take Fadil Kastrati's weapon away because he feared that Fadil Kastrati would be killed in a blood feud with one of the villagers. Shukri Buja stated that he could not remove that weapon as it belonged to Fadil Kastrati. They decided that Fatmir Limaj would intervene, as he was not familiar with Fadil Kastrati. Fatmir Limaj said that he told Fadil Kastrati that there was an order from above that his weapon be taken away from him.[1961]

590. The Chamber accepts that Fatmir Limaj did disarm Fadil Kastrati sometime before the end of July 1998 in Blinaje/Lipovica. It remains unclear from these accounts, however, whether in doing so, Fatmir Limaj was exercising powers of discipline over Fadil Kastrati, as submitted by the Prosecution, or simply intervened, invoking a purported order from above, when asked to, in order to resolve a difficult personal situation. Whether this particular incident reflected true powers of discipline rather than mere personal influence of Fatmir Limaj, or depended on the purported invocation of orders from above, cannot be determined on the evidence.

591. Ruzhdi Karpuzi testified that, between May and July 1998, he was a KLA soldier in the Çeliku 3 unit in Llapushnik/Lapusnik.[1962] In the course of his evidence, he described an oath ceremony which he recalls took place at the end of June or early July 1998 in the yard of Bali Vojvoda in Llapushnik/Lapusnik.[1963] It is Ruzhdi Karpuzi's evidence that a man named Çeliku had been selected by the soldiers to make a speech. Çeliku allegedly talked about defending Kosovo by all means and respecting the civilian population, regardless of its ethnicity. This speech was welcomed by the soldiers although some laughed at the suggestion that all civilians were entitled to equal treatment. The essential effect of Ruzhdi Karpuzi's evidence is that, although he was approached by a group of soldiers to become their leader, Çeliku refused.[1964] The witness further stated that he saw Çeliku in Llapushnik/Lapusnik on two or three occasions during battles in the period between the oath ceremony and the fall of the gorge at the end of July 1998. Çeliku was then fighting on the frontline as a regular soldier and was known as Daja (meaning "Uncle").[1965]

[1959] Fadil Kastrati, T 2616-2817.
[1960] Fadil Kastrati, T 2618.
[1961] Fatmir Limaj, T 6569-6572.
[1962] Ruzhdi Karpuzi, T 3078-3081.
[1963] Ruzhdi Karpuzi, T 3096-3098; 3175; The witness marked the location of the yard with an "X" on Exhibit P128.
[1964] Ruzhdi Karpuzi, T 3103-3107.
[1965] Ruzhdi Karpuzi, T 3104-3106; 3139-3140; 3200.

On Ruzhdi Karpuzi's evidence, he only heard of Çeliku being referred to as a commander sometime in the fall, following the formation of the 121st Brigade.[1966] He had never heard of him being the commander of Çeliku 1.[1967]

592. A number of material differences were revealed between Ruzhdi Karpuzi's oral evidence and his prior statement dated July 2003.[1968] The first of these differences relates to Çeliku's response to the soldiers upon being asked to be their leader during the oath ceremony. Ruzhdi Karpuzi's prior statement indicates that the speech of Çeliku inspired the soldiers to respect him and to want him as their leader; Çeliku's answer was, essentially, that his preparedness to become their leader was conditional upon them respecting what he had said.[1969] There was no indication in the statement, however, of soldiers laughing at Çeliku's words. A second difference between the witness' oral evidence and his prior statement concerns the time at which Çeliku became known to him as Commander Çeliku. In court, Ruzhdi Karpuzi stated that he heard people addressing Çeliku as Commander Çeliku sometime in September, October or November 1998, following the formation of the 121st Brigade.[1970] In the prior statement, Ruzhdi Karpuzi said that this happened after the oath ceremony, without specifying any date.[1971] A third inconsistency relates to the presence and role of Çeliku on the few occasions he visited Llapushnik/Lapusnik after the oath ceremony and before the fall of the gorge on 26 July 1998. Ruzhdi Karpuzi's statement suggests that Çeliku came to visit the soldiers in the fighting positions to see how the trench-digging was proceeding.[1972] This could well imply a position of leadership of Çeliku; it is, however, absent from Ruzhdi Karpuzi's oral evidence, which merely placed Çeliku as a regular soldier fighting along with the others on the frontlines.[1973]

593. Of further relevance is the evidence of L95 that in the end of July 1998, by order of the commander of his unit, L95 and other soldiers went to Novoselle/Novo Selo in order to assist the forces of Commander Çeliku which were likely to be attacked by the Serbian forces.[1974] L95 recounted that on that same day, or possibly the next day, the members of his unit met Commander Çeliku near a school in Novoselle/Novo Selo towards Divjake/Divljaka.[1975] On L95's evidence, Commander Çeliku called out L95 by his pseudonym, put him in charge of the unit in the absence

[1966] Ruzhdi Karpuzi, T 3106-3107.
[1967] Ruzhdi Karpuzi, T 3278.
[1968] Exhibit P136. In February 2005, immediately prior to his testimony, Ruzhdi Karpuzi reviewed his statement and proposed a few corrections, none of which have any material bearing on the present issues, Exhibit P137.
[1969] Ruzhdi Karpuzi, T 3125-3130; Exhibit P136, para 11.
[1970] Ruzhdi Karpuzi, T 3106-3107; 3137-3138; 3192-3199.
[1971] Exhibit P136, para 6.
[1972] Ruzhdi Karpuzi, T 3178-3182; Exhibit P136, para 12.
[1973] Ruzhdi Karpuzi, T 3104-3106; 3139-3140; 3178-3181; 3200.
[1974] L95, T 4203-4209.
[1975] L95, T 4213-4214.

of the leader and told him that he could come to the headquarters in Klecke/Klecka should he need anything.[1976] L95 testified that he knew that man was Commander Çeliku because, he said, "we were under Çeliku's command. We were there to assist them. So when he came to meet [us], we knew that he was Commander Çeliku."[1977] L95 further testified that Commander Çeliku was at the time "commander of a zone".[1978] However, the limitations of the witness' knowledge as to this particular aspect of his evidence, including of the boundaries of that alleged zone, were very apparent from his evidence. L95 acknowledged himself that he was uncertain about the boundaries of the zone which he says was under the command of Çeliku,[1979] 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.[1980] L95's evidence concerning the meeting with Commander Çeliku in Novoselle/Novo Selo certainly suggests that at that particular point in time, Commander Çeliku had a position of authority over L95. L95's evidence itself, however, most readily explains this on the basis that his unit had been ordered to go join Çeliku's unit and lend assistance to its members in the attack from Serbian forces then anticipated. In this way, he came under Çeliku's command. In the Chamber's view, this evidence does not demonstrate that Commander Çeliku had a position of command and authority which extended geographically beyond the command of his local unit.

594. The Prosecution also seeks to rely on a number of media interviews given by Fatmir Limaj and other KLA members at various points in time. In a RTK (Radio and Television of Kosovo) television documentary on the KLA produced after the war, possibly in 2002,[1981] a former KLA member, Skender Shala, who was not called as a witness, explained how on 9 May 1998, he went to Llapushnik/Lapusnik and saw that a Pinzgauer belonging to the Serbian forces had been attacked by "Çelik's unit" and was on fire.[1982] In this context, Skender Shala referred on a couple of occasions to "Commander Çelik".[1983] If it is accepted that Çelik is a reference to Fatmir Limaj, as to which there is no direct evidence, this extract could be interpreted as an indication that Fatmir Limaj then exercised some degree of command over at least "Çelik's unit" in Llapushnik/Lapusnik. This is, of course, entirely consistent with other evidence given earlier, and Fatmir Limaj's own evidence, that

[1976] L95, T 4214-4215.
[1977] L95, T 4215.
[1978] L95, T 4217.
[1979] L95, T 4218; 4221.
[1980] L95, T 4218.
[1981] Fatmir Limaj, T 6197.
[1982] Exhibit P34, p 8.
[1983] Exhibit P34, pp 8 and 9.

along with soldiers from Klecke/Klecka, he went to Llapushnik/Lapusnik on that day to help in the fighting.[1984]

595. It should also be observed that this is an *ex post facto* documentary. As such, it might well not reflect with reliability precise factual details. A review of the entire interview reveals, for instance, that Fatmir Limaj is at times referred to as "Uncle", *i.e.* Daja, "Çeliku", "Commander Çeliku" or "Commander Limaj";[1985] similarly, although the context of the documentary is clearly set in May to July 1998, his soldiers are sometimes referred to as belonging to "Çelik's unit" or "the 121st Brigade".[1986] An *ex post facto* reference in 2002 to Fatmir Limaj as a commander does not assist in determining whether in mid 1998, he was, as he accepts, commander of the Çeliku 1 unit based in Klecke/Klecka, or a regional or zone commander, as is alleged by the Prosecution. Despite the implication from the documentary, the 121st Brigade had not been formed at the time relevant to the Indictment. Further reliance is placed by the Prosecution upon an interview which Fatmir Limaj gave to the newspaper Zeri y Kosoves in September 1998.[1987] In recalling the KLA success in Llapushnik/Lapusnik, the journalist suggests that Fatmir Limaj was "in command" there.[1988] Fatmir Limaj's answer does not deny this suggestion, but neither does it confirm it. He only mentions the "fighting spirit of our three units",[1989] which is consistent with his and other evidence noted earlier that three units travelled from Klecke/Klecka, or with the evidence that the KLA had more than one commander in Llapushnik/Lapusnik during the actions described.

596. A further Prosecution witness, Sylejman Selimi, was, on his evidence, appointed commander of the first operational zone, the Drenica zone, at the end of May 1998.[1990] Sylejman Selimi testified that in this capacity, he was responsible for organising the various units, which were then acting in a more or less independent fashion, into what were later to become brigades.[1991] On his evidence, the Drenica zone was to the north of the Prishtina/Pristina-Peje/Pec main road, but included Llapushnik/Lapusnik. It would appear from his overall evidence, however, that this refers to the part of the village of Llapushnik/Lapusnik to the north of the road, rather than the southern part where the prison camp was located, and that the main road through Llapushnik/Lapusnik was the actual boundary of the zone.[1992] A significant aspect of Sylejman Selimi's oral evidence is that

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1984 Fatmir Limaj, T 5936-5938. Fatmir Limaj in particular referred to the incident with the Pinzgauer and stated that the group of KLA soldiers was fortunate to have hit it, as it led the Serbian forces to withdraw, T 5936-5938.
1985 Exhibit P34, pp 8; 11; 12-13 and 14.
1986 Exhibit P34, pp 8 and 11.
1987 Exhibit P44.
1988 Exhibit P44, p 2.
1989 Exhibit P44, p 2.
1990 Sylejman Selimi, T 2071.
1991 Sylejman Selimi, T 2076.
1992 Sylejman Selimi, T 2086-2090; 2149-2150; Sylejman Selimi confirmed the boundaries of the Drenica and Pashtrik/Pastrik zones as they appear on Exhibit P1, map 10. *See* also *supra*, paras 57-63.

from May to July 1998, there was not a single command, or commander, over the Çeliku units; rather, the units were fighting independently from each other.[1993] Sylejman Selimi stressed that the reason why he stated in a previous interview with the OTP that Fatmir Limaj was the commander of the Çeliku units is because the questions he was asked then related to the KLA activity during both 1998 and 1999 and he was not sufficiently prepared at the time to be able to distinguish between the structural changes at various points in time.[1994] His evidence in court is that he only came to know of Fatmir Limaj as Commander Çeliku in the course of the formation of the 121st Brigade.[1995]

597. This account is largely confirmed by the evidence of Jakup Krasniqi who testified that, at the time relevant to these proceedings, there was no overall commander in the area which was to become the Pashtrik/Pastrik zone. On his evidence, in July 1998, Muse Jashari was appointed commander of the Pashtrik/Pastrik zone.[1996] Jakup Krasniqi's evidence is that Fatmir Limaj was the commander of a unit in Klecke/Klecka at that time.[1997]

598. Defence witnesses were called to support the case that Fatmir Limaj was the commander of the Çeliku 1 unit in Klecke/Klecka at the time relevant to this Indictment. Fatmir Limaj himself testified to that effect. He explained how in March and April 1998, there were only three men in Klecke/Klecka, namely Haxhi Shala, Ismet Jashari, aka Kumanova, and himself.[1998] Fatmir Limaj described how at the end of April 1998, Rexhep Selimi brought two radios and it was then decided that Fatmir Limaj would use the radio call sign or code Çeliku 1, while Ismet Jashari would use Çeliku 2; this, on Fatmir Limaj's evidence, is how he came to be known as Çeliku and his unit came to be called Çeliku 1.[1999] Among the soldiers, however, it was his evidence that he was then known as Daja, meaning "Uncle".[2000] Fatmir Limaj denied having coordinated, from Klecke/Klecka, the events leading to the taking of Llapushnik/Lapusnik in May 1998, and more generally, the assistance between the various units during fighting in June and July 1998.[2001] The effect of his evidence is that in May 1998, the only institutional mechanism was the General Staff and that there was no intermediate level of command between the General Staff and the various units.[2002] Fatmir Limaj indicated that in the months of June and July 1998 he often went to Llapushnik/Lapusnik, up

[1993] Sylejman Selimi, T 2155-2156.
[1994] Sylejman Selimi, T 2156-2157.
[1995] Sylejman Selimi, T 2163-2164.
[1996] Jakup Krasniqi, T 3479-3481.
[1997] Jakup Krasniqi, T 3402.
[1998] Fatmir Limaj, T 5925-5926.
[1999] Fatmir Limaj, T 5935-5936; 5938-5939; 6255.
[2000] Fatmir Limaj, T 5938-5939.
[2001] Fatmir Limaj, T 5946-5948; 6286-6287.
[2002] Fatmir Limaj, T 5950-5951; 6277-6278. Fatmir Limaj rejected the suggestions by the Prosecution that there was a chain of command going from Likofc/Likovac to Klecke/Klecka to Kroimire/Krajmirovce between May and July 1998 and that Fatmir Limaj was giving orders to Shukri Buja and Ramiz Qeriqi, T 6264-6266.

to twenty times, sometimes on his way to Likofc/Likovac.[2003] Finally, Fatmir Limaj's evidence is that he was never the commander of the Pashtrik/Pastrik zone; rather, in early July 1998, Muse Jashari was appointed commander of that zone by the General Staff.[2004]

599. Fatmir Limaj's evidence is supported by that given by Rexhep Selimi, Bislim Zyrapi and Elmi Sopi. Rexhep Selimi testified that at the time relevant to these proceedings, Fatmir Limaj was based in Klecke/Klecka and was leading a unit called Çeliku 1.[2005] Rexhep Selimi confirmed Fatmir Limaj's account that the name Çeliku 1 was a radio communication code.[2006] Between April and August 1998, on Rexhep Selimi's evidence, Fatmir Limaj did not carry the general task of coordinating KLA units in the area, nor had he the power to do so.[2007] Bislim Zyrapi also testified that, in June 1998, Fatmir Limaj was member of a unit based in Klecke/Klecka and ready to intervene along the position lines in the Berishe/Berisa Mountains; however, at the time, the ambit of Fatmir Limaj's responsibility did not extend beyond the unit in Klecke/Klecka.[2008] Bislim Zyrapi further testified that his understanding was that Ymer Alushani, aka Voglushi, was in charge of Llapushnik/Lapusnik, not Fatmir Limaj.[2009] Similarly, on Elmi Sopi's evidence, he never heard of Fatmir Limaj issuing orders in Llapushnik/Lapusnik and only saw him there during fighting.[2010]

600. Also before the Chamber is a body of evidence from witnesses previously detained in the Llapushnik/Lapusnik prison camp and who purport to have identified Fatmir Limaj as present in the camp and exercising some kind of authority over its operation. That evidence has been examined in detail earlier in this decision, and, for the reasons given above, the Trial Chamber was unable to conclude that the Accused Fatmir Limaj had been reliably identified as the person these witnesses saw in the Llapushnik/Lapusnik prison camp.[2011]

601. For the reasons identified in the preceding paragraphs, the Chamber is not able to be satisfied beyond reasonable doubt that the Prosecution has established that in the period from May to 26 July 1998, the Accused Fatmir Limaj held a position of command in the KLA which included command of KLA soldiers in the village of Llapushnik/Lapusnik or, in particular, in the prison camp which existed at that time in the southern part of that village. That is so whether each relevant piece of evidence is considered separately, or in combination. As has been indicated, even though there is a strong possibility apparent on the evidence that Fatmir limaj was active as a

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2003 Fatmir Limaj, T 5972-5974.
2004 Fatmir Limaj, T 5963-5967.
2005 Rexhep Selimi, T 6597-6598.
2006 Rexhep Selimi, T 6694-6695.
2007 Rexhep Selimi, T 6593-6595; 6669-6673; 6693-6694.
2008 Bislim Zyrapi, T 6825-6826.
2009 Bislim Zyrapi, T 6826.
2010 Elmi Sopi, T 6728.
2011 *See supra*, paras 530-562.

commander in the prison camp at times relevant to the Indictment, the Chamber's role and duty remains clear. It is to determine whether the Prosecution has been able to prove its case beyond reasonable doubt in so far as it alleges that Fatmir Limaj exercised command, *de jure* or *de facto*, or effective control, in the prison camp and over the KLA soldiers conducting the camp or over the KLA guards who escorted the remaining prisoners from the prison camp to the nearby Berishe/Berisa Mountains on 25 or 26 July 1998. In the finding of the Chamber, on very careful final analysis, the evidence falls short of establishing these essential matters to the required degree, which is beyond reasonable doubt.

602. Having 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.

2. Responsibility of Haradin Bala

(a) Was Haradin Bala identified at the Llapushnik/Lapusnik prison camp?

603. The Prosecution alleges in the Indictment that Haradin Bala, who, it is not contested, is also known as Shala, personally participated in the enforcement of the detention of Serbian civilians and perceived Kosovo Albanian collaborators in the Llapushnik/Lapusnik prison camp, in the interrogation of the camp inmates and in their brutal and inhumane treatment. It is further alleged that Haradin Bala participated in the murder of some of the detainees in the camp and the murder of others committed in the Berishe/Berisa Mountains.[2012] The Defence for Haradin Bala denies these allegations and, in particular, submits that the prison guard referred to as Shala in the evidence is not the Accused Haradin Bala.[2013]

604. One of the detainees in the Llapushnik/Lapusnik prison camp, Vojko Bakrač testified that he met Shala in the camp on a number of occasions. He described Shala as a man aged 45 or 50, around the same height as Vojko Bakrač, with dark hair and a black moustache.[2014] In the evidence of Vojko Bakrač, Shala was wearing a red and black hat with the insignia of the KLA.[2015] It was Vojko Bakrač's testimony that Shala was a guard, who brought food and cigarettes to the prisoners.[2016] Vojko Bakrač testified that, when asked by the "commander" to give a statement

[2012] Indictment, para 12.
[2013] Defence Final Brief, paras 610.
[2014] Vojko Bakrač, T 1330-1332.
[2015] Vojko Bakrač, T 1372-1374.
[2016] Vojko Bakrač, T 1330-1332.

about the conditions in the camp, his son Ivan mentioned that he played chess with Shala.[2017] The witness stated that he spoke with Shala. During those talks Vojko Bakrač looked at Shala directly.[2018] However, at an interview with UNMIK investigators in January 2002 the witness did not identify anyone on a photo spread shown to him. This contained a photograph of Haradin Bala as one of eight photographs.[2019] The Chamber observes that on the exhibit the face of Haradin Bala is hardly distinct, which is a possible explanation for the failure to identify the photograph of Haradin Bala, but as the evidence is not clear whether the exhibit tendered in court is what was shown to Vojko Bakrač, or merely a perhaps poor subsequent reproduction, the Chamber cannot reach a positive conclusion about this non-identification. Throughout his entire testimony Vojko Bakrač spoke of Shala, which is the name he knew in the camp. In his evidence he did not purport to identify this Shala in the courtroom. It is necessary, therefore, to also consider the Defence suggestion that there was another KLA member in Llapushnik/Lapusnik, perhaps at the relevant time, who also used the name or pseudonym Shala. If so, references by witnesses to Shala need not be to Haradin Bala. This is considered in more detail a little later in this decision.

605. Vojko Bakrač's son, Ivan, who also experienced detention in Llapushnik/Lapusnik at the same time as his father, testified that Shala was an older man of medium height, with a moustache.[2020] Shala seems to have made a good impression on Ivan Bakrač. He describes Shala as a good-natured man, who brought them food and other supplies.[2021] According to his testimony, Shala was the one who unlocked the door.[2022] Ivan Bakrač testified that he never saw Shala beat anyone and his behaviour towards the witness and his father was generally respectful.[2023] He also mentioned the time when he played chess with Shala.[2024] Unlike his father, Ivan Bakrač had no difficulties identifying Shala on a photo spread. He identified a photo of Haradin Bala as the person he knew as Shala. He stated that during an interview with the OTP investigator, in January 2003, he recognised Shala on the line-up "immediately".[2025] In cross-examination Ivan Bakrač affirmed that he had not mentioned during that interview that he played chess with Shala.[2026] The Chamber does not attach significance to this omission, however, since it could be readily explained by the short length of the interview and because a chess game was hardly a central issue to events at

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2017 Vojko Bakrač, T 1347.
2018 Vojko Bakrač, T 1332; 1377.
2019 Agreed fact, Vojko Bakrač, T 1371; Exhibit DB1 (photo spread A2).
2020 Ivan Bakrač, T 1439-1441.
2021 Ivan Bakrač, T 1439-1441.
2022 Ivan Bakrač, T 1457.
2023 Ivan Bakrač, T 1457.
2024 Ivan Bakrač, T 14560.
2025 Ivan Bakrač, T 1464-1466. A copy of the photo spread is in evidence (Exhibit P83; T 1466). There are eight black-and-white quite clear photos. Haradin Bala is no. 8. In the Chamber's view photograph no. 8 is a good likeness of Haradin Bala.
2026 Ivan Bakrač, T 1554-1555.

Llapushnik/Lapusnik.[2027] Ivan Bakrač did describe Shala in his evidence as being of "strong" build. He also said this at the prior interview. In his evidence the witness added that Shala was "on the stocky side", a description consistent at least with his present appearance.[2028] Strong build does not closely correspond with the current appearance of Haradin Bala. The descriptions given by other witnesses of Shala's build in Llapushnik/Lapusnik are somewhat varied ranging from "rather thin" to "fatter than" the person describing him.[2029] The question of Haradin Bala's build at the relevant time is, therefore, unclear but it appears to have impressed witnesses differently. As in the case of his father's testimony, Ivan Bakrač was not asked, in the course of his evidence, if he could identify Haradin Bala in the courtroom the person he knew as Shala. He did, of course, unequivocally identify a photograph of Haradin Bala on the photo spread as Shala.

606. Another detainee, L04, testified that he saw Shala in the prison camp several times. In his testimony Shala was about 45 years old, about 170 or 175 centimetres tall, with black hair, a moustache and black teeth.[2030] L04 stated that after the war he found out that Shala's real name was Haradin Bala.[2031] There is no supporting evidence from the source of that information about Shala's name so that the Chamber does not place reliance on this. In the evidence of L04, Haradin Bala was a guard in the prison, who was always there during the 28 days of the witness' detention in Llapushnik/Lapusnik. Haradin Bala brought food and cigarettes to L04.[2032] The Defence for Haradin Bala observes that the witness made no reference to Shala or Haradin Bala while he was interrogated about events in the prison camp by Serbian authorities in October 1998, despite having named other KLA soldiers he came into contact with at Llapushnik/Lapusnik.[2033] The absence of mention of Shala in the statement given by L04 to the Serbian authorities is not surprising when regard is had to the general scarcity of KLA names in the text. The people involved in the KLA are referred to as "KLA members" throughout the whole statement, apart from two men, whose pseudonyms are mentioned. The only names that appear in the statement are those of detainees.[2034] In the Chamber's assessment, the lack of reference to Shala or Haradin Bala in the statement has little bearing on the assessment of the credibility of L04's evidence relating to that Accused.

607. The witness accepted in cross-examination that his description of Haradin Bala provided in court differed from the one given in the witness' initial statement to the Prosecution, in that he then

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2027 The Prosecution objected to the Defence line of cross-examination relating to such omissions, pointing out that the prior statement was probably 11 pages long, T 1553.
2028 Ivan Bakrač, T 1557.
2029 L12, T 1811-1812; L06, T 1001-1002.
2030 L04, T 1179.
2031 L04, T 1180-1881; 1238-1241.
2032 L04, T 1177-1179.
2033 Defence Final Brief, paras 680-681; 687; Exhibit P203.
2034 Exhibit P203.

said that Haradin Bala measured 180-185 centimetres.[2035] Further, L04 failed to recognise anyone on a photo spread of six photographs containing a photo of Haradin Bala during questioning by investigators from CCIU in 2002.[2036] The photo spread is not in evidence so the Chamber cannot determine whether the photograph of Haradin Bala was of good quality and whether it was a good likeness. However, the witness identified the Accused Haradin Bala in the courtroom as the person he knew as Shala in the prison camp.[2037] In addition, he made it clear that the person to whom he referred as Shala throughout his testimony is Haradin Bala and specifically rejected the Defence's suggestion that he mistook someone else for Haradin Bala.[2038] L04 testified that while in the camp he saw Shala every day,[2039] which, given the duration of the witness' detention, allowed considerable opportunity for original observation which could strengthen the reliability of his subsequent identification, but leaves unexplained his non-identification of a photograph in 2002. The Trial Chamber is very well conscious of the possibility of mistake with courtroom identification.[2040] In this case the possibility of mistake could be further heightened because L04 had seen Haradin Bala on television before he testified.[2041] The witness appears to have seen Haradin Bala on television in connection with the present proceedings, *i.e.* after he gave his initial interview. In view of L04's failure to recognise the photograph of Haradin Bala during the initial interview, the in-court identification remains the only identification of him by this witness.

608. L07, who was also detained in the Llapushnik/Lapusnik prison camp, testified that he saw Shala in the camp in 1998. The witness testified that Shala's hair and moustache at that time were the same as at the time of L07's testimony in court.[2042] It was the evidence of L07 that one day Shala was wearing a red shirt and black trousers, and had an automatic rifle in his hand.[2043] L07 stated that Shala was a prison guard and took care of the detainees.[2044] The witness testified that Haradin Bala behaved quite well with the detainees.[2045] During his testimony L07 referred occasionally to Haradin Bala as "Commander Shale" or "Commander Shala".[2046] However, he made it clear that he referred to Haradin Bala.[2047]

2035 L04, T 1241-1243.
2036 Agreed fact; T 1370.
2037 L04, T 1180-1181.
2038 L04, T 1241-1243.
2039 L04, T 1177.
2040 *See supra,* para 18.
2041 L04, T 1241.
2042 L07, T 809.
2043 L07, T 809.
2044 L07, T 808-810.
2045 L07, T 832.
2046 L07, T 795-796; 810.
2047 L07, T 811.

609. L07 stated that he learned the real name of Shala from Haradin Bala himself in 1999, when they met at a petrol station.[2048] It was put to L07 in cross-examination that he did not mention this encounter with Haradin Bala during his interviews with UNMIK or the Tribunal investigators in 2002 and 2003 respectively. The witness explained that he was not specifically asked about it.[2049] The statement of L07 given at the UNMIK interview is less than two pages long. It contains only one reference to Haradin Bala.[2050] It is thus understandable that there is no mention of the circumstances in which L07 came to know the real name of Shala. The interview given to UNMIK in 2003 was, however, much more detailed than the earlier one. The issue of discovering the name of Shala was raised in its course. L07 described his first encounter with Shala and stated that he "subsequently" came to know his real name.[2051] The circumstances of that subsequent occasion were not mentioned. The lack of specific reference to the meeting at the petrol station was explained by L07 on the basis that the investigators did not ask him.[2052] The Chamber would observe that this is somewhat surprising omission by the investigators given the relevance of the issue of the identification of Shala. It accepts, however, that the issue was left on the basis that L07 subsequently came to know Shala's real name. While it would not have been surprising had L07 told the investigators how he came to learn Shala's real name, the Chamber does not attach significance to his failure to do so in either of the interviews before he came to give evidence. L07 directly refuted a further reaching suggestion made by the Defence for Haradin Bala, a suggestion not supported or followed up in evidence, that the meeting at the petrol station never took place.[2053] Even though L07 did not deal with the subsequent meeting with Shala at a petrol station in either of his previous interviews, given the circumstances of each interview, the Chamber would make it clear that it does not find that L07 did not remember the meeting with Haradin Bala at the petrol station when he gave either of the earlier interviews, or that this meeting was a "recent invention" of L07. The Chamber also observes that the evidence does not suggest that L07 had any difficulty recognising Shala at the petrol station.

610. In cross-examination L07 stated that he saw Haradin Bala on television when the trial began.[2054] There is thus a possibility that the identification of Haradin Bala by L07 in court might be mistaken, not only because of the effects of the courtroom setting in which Haradin Bala was an accused, but also by virtue of the television image seen by L07. This witness was detained in the

[2048] L07, T 810.
[2049] L07, T 895.
[2050] Exhibit P70.
[2051] Exhibit P71, para 15.
[2052] L07, T 895.
[2053] L07, T 899.
[2054] L07, T 899.

Llapushnik/Lapusnik prison camp for three days.[2055] Hence his opportunities for observation of Shala were more limited that some other witnesses. The evidence does not indicate that L07 was ever asked to identify Shala by a photo spread identification. In the Chamber's finding L07 was honest and quite certain in his identification of Haradin Bala as Shala, but for the reasons canvassed, the Chamber must be cautious about the reliability of the identification.

611. L10 was detained for approximately one and a half month in the Llapushnik/Lapusnik prison camp.[2056] In his testimony Shala appeared to be between 40 and 50 years old, and about 180 to 200 centimetres tall. The witness stated that Shala had a moustache and that his hair was slightly grey. Shala's teeth were a bit blackened and some teeth were missing at the front. L10 testified that Shala wore joggers, sometimes trousers, and that he always had an automatic gun.[2057] Shala brought food and sometimes water to the detainees.[2058] He had the keys.[2059] Throughout his testimony L10, while referring to the person he believed was Haradin Bala, used the nickname Shala. L10 stated that he learned the real name of Shala from two individuals.[2060] Those were witnesses in this trial, L12 and L96. The reliability of their knowledge that Shala's real name was Haradin Bala can be assessed in light of the Chamber's conclusions in respect of their testimony. As will be shown, neither of them is flawless.[2061] Thus the reliability of the source of L10's evidence that Haradin Bala is the real name of Shala is less than persuasive. L10 also identified Haradin Bala as Shala in the courtroom.[2062] Although he did not watch any part of these proceedings on television, he did see the Accused on television at the time of their arrest.[2063] As with L07, there is the possibility of a mistaken identification both because the identification was of an accused in a courtroom setting and because the television image may have influenced his identification. Also, as with L07, the evidence does not suggest that L10 was asked to attempt a photo spread identification. While L10's description of Shala was not very precise, especially in respect of height, it is reasonable in a number of respects. The Chamber is satisfied that he was honest and quite sure in his identification but, for the reasons indicated, the Chamber treats the identification with caution. While in some respects the probative value of the identification evidence given by this witness can be loosely compared with that of L04, there is the countervailing factor of the length of the witness' detention and frequency of his sightings of Haradin Bala. Even

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2055 *See supra,* para 279.
2056 *See supra*, para 279.
2057 L10, T 2947.
2058 L10, T 2920-2922.
2059 L10, T 2998.
2060 L10, T 2947-2948.
2061 *See infra*, paras 612 and 616.
2062 L10, T 2949.
2063 L10, T 2949; 3030-3031.

so, the Chamber has reservations about the reliability of the identification of the Accused Bala by L10.

612. L96 was detained in the Llapushnik/Lapusnik prison camp for approximately a week in July 1998.[2064] In his testimony Shala is described as a 45-year old, dark skinned man with black hair and a black moustache.[2065] Shala was between 175 and 180 centimetres tall with a face that was "a bit haggard".[2066] It was the evidence of L96 that Shala wore a black uniform, a black shirt and sometimes a black beret. A KLA emblem was on either his shirt or beret.[2067] According to the testimony of L96, Shala always carried a Kalashnikov without a butt.[2068] L96 stated that Shala, together with Murrizi, brought food to the detainees and escorted them to the toilets located outside in the yard.[2069] L96 purported to identify the real name of Shala as Haradin Bala. The basis offered for this purported identification is not of any force. L96 testified that during the march to the Berishe/Berisa Mountains, specifically at a cherry tree, another of the detainees told a personal relation of L96 that he knew Shala and that Shala came from the Komaran/Komorane area.[2070] L96 further testified that, after the events at Llapushnik/Lapusnik, L96 and his family attempted to find out the identity of Shala.[2071] L96 stated that he ruled out the first person whom his uncle thought to be the Shala seen by L96 in the prison camp, because the physical description of that person was different.[2072] L96's uncle later "found out" that the real name of the Shala from the prison camp was Haradin Bala.[2073] The source of this information is not identified. L96 testified that in August 2000 he met Xheladin Ademaj, who had the name Haradin Bala written in his notebook.[2074] It is suggested that L96's testimony on that fact was contradicted by a statement allegedly given by Xheladin Ademaj.[2075] However, neither has the statement been tendered into evidence, nor can its content be deduced from the testimony of L96. Whatever may be the position, the Chamber cannot attach any weight to L96's evidence that the name of Shala is Haradin Bala.

613. In February 2002, during an interview with UNMIK investigators, L96 was shown six photographs. He immediately recognised one of them to be "Shale".[2076] This was a photograph of Haradin Bala. The Defence for Haradin Bala argued that no reliance should be placed on that

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2064 *See supra,* para 279.
2065 L96, T 2305; 2480.
2066 L96, T 2305.
2067 L96, T 2305.
2068 L96, T 2305.
2069 L96, T 2302; 2303; 2339-2340.
2070 L96, T 2478; 2500; 2503.
2071 L96, T 2476; 2478-2479.
2072 L96, T 2395; 2478-2479; 2501-2502.
2073 L96, T 2396.
2074 L96, T 2399; 2477.
2075 Defence Final Brief, para 795; L96, T 2471-2472; 2477.
2076 L96, T 2366-2367; 2369; Exhibit P102. There are six relatively clear black-and-white photos. Bala is no. 5.

identification because the investigators did not follow what they submit to be the correct procedure. In particular, it appears L96 was asked if he wanted extra time, during which he could leave the room.[2077] However, L96 had readily identified "Shale" before being offered extra time and the possibility of briefly leaving the room.[2078] Therefore, whatever may have been an appropriate procedure, the value of this identification is not affected by the suggested shortcomings. In addition, it must be noted that, it is the evidence of L96 that he saw Shala in the Llapushnik/Lapusnik camp every day, sometimes several times a day.[2079] In the course of his testimony the witness also identified Haradin Bala in the courtroom.[2080] The witness stated, however, that he watched a television broadcast of the proceedings of this trial before he came to testify.[2081] Hence, for reasons discussed in connection with other witnesses the Chamber is conscious of the possibility of a mistaken identification both because it was of an accused in a courtroom setting and because of the viewing of the television broadcast of the trial. The Chamber has also taken into account the views expressed elsewhere in this decision, arising from other issues, concerning the credibility of L96. Having weighed all of these matters, the Chamber nevertheless accepts that L96 recognised a photograph of Haradin Bala as that of the person he knew in Llapushnik/Lapusnik and described in his evidence as Shala. Even so, because of its reservations, for reasons discussed elsewhere,[2082] about the general honesty and reliability of L96, and because of the issues discussed in this paragraph, giving rise to the possibility of mistake, the Chamber is not prepared to accept and rely on this identification in the absence of other evidence of identification which satisfies the Chamber independently of L96.

614. L06, who was detained at the Llapushnik/Lapusnik prison camp for about a month and a half,[2083] testified that he saw Shala every day.[2084] L06 testified that Shala was around 50 years old, had a dark complexion and his teeth were a bit rotten. L06 stated that Shala was a little taller and fatter than him.[2085] Haradin Bala is in fact half a centimetre taller than L06.[2086] Therefore, contrary to a suggestion of the Defence for Haradin Bala,[2087] the limited description of Shala given by the witness is generally in keeping with that of Haradin Bala. L06 stated that Shala was a guard and he would, together with Murrizi, come into the room where the witness was held and bring food and water. Every three or four days in the evening Shala would open the door and allow the prisoners

[2077] Defence Final Brief, para 781.
[2078] L96, T 2367.
[2079] L96, T 2304-2305; 2338.
[2080] L96, T 2574.
[2081] L96, T 2471-2472.
[2082] *See supra*, para 26.
[2083] *See supra*, para 279.
[2084] L06, T 1001.
[2085] L06, T 1001-1002.
[2086] Agreed fact, T 5187.
[2087] Defence Final Brief, para 703.

to walk a bit.[2088] L06 testified that while in the prison camp Shala called him "Uncle".[2089] However, there is nothing in L06's testimony to suggest that there were any family connections between them or that he had known Haradin Bala before the war. It is to be noted that there is evidence that some soldiers addressed Fatmir Limaj in the same way.[2090] L06 testified that after the war he heard from people in his village that Shala was Haradin Bala.[2091] In cross-examination he stated that those people realised his identity when Shala was shown on television.[2092] The witness also identified Haradin Bala in the courtroom as the person he knew as Shala at Llapushnik/Lapusnik.[2093] Of course, as discussed above in connection with other witnesses, the Chamber must be cautious because of the possibility of a mistaken identification as this was in a courtroom where Haradin Bala was an accused. Further, L06 had also seen Haradin Bala on television. The context of the television broadcast is not disclosed in the evidence. There is a possibility of mistake in identification by virtue of the television viewing. The Chamber does accept the effect of the evidence of L06 that he had seen Shala in the camp a great deal and that Shala became very familiar to him.[2094] The Chamber also accepts his evidence that while marching to the Berishe/Berisa Mountains on 25 or 26 July 1998 he had a very clear view of Shala.[2095] The evidence does not indicate that L06 was asked to attempt to identify Shala in a photo spread identification.

615. The Defence for Haradin Bala also questions the honesty or reliability of L06's identification because he made no mention of Shala in a statement given to the Serbian authorities after his release in 1998. He named other KLA soldiers with whom he came into contact at Llapushnik/Lapusnik.[2096] The statement indeed does not contain reference to Shala. Two KLA nicknames are mentioned. At the end of the statement, there are the names of the four individuals who, as L06 stated, had originally kidnapped him.[2097] L06 testified that he did not reveal to the Serbian authorities the identity of those who held him in detention; he could not because they were wearing masks.[2098] The evidence relating to that interview is far from clear. Nevertheless, the Chamber notes that KLA names and pseudonyms are referred to in the statement to the Serbian authorities only in connection with the release of the witness from the camp and his kidnapping. Where events that occurred within the camp are discussed, the expression used in the statement is

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2088 L06, T 997-998.
2089 L06, T 1003.
2090 *See supra,* paras 591; 595.
2091 L06, T 1003-1004.
2092 L06, T 1094-1095.
2093 L06, T 1006-1007.
2094 L06, T 1106-1107.
2095 L06, T 1107.
2096 Defence Final Brief, para 712.
2097 Exhibit P204.
2098 L06, T 1032-1033.

"KLA members" without identifying them.[2099] The Chamber, therefore, attaches little weight to the absence of an express mention of the name Shala. Even so, while the identification of Haradin Bala by L06 was apparently honest and certain, for the reasons indicated it will be approached with caution.

616. The Chamber has heard the evidence of another detainee, L12, who was held in the cowshed for about one month.[2100] L12 said that he saw Shala every night and also during the day.[2101] In L12's testimony Shala was probably 56 years old, had a dark complexion and a moustache. Shala was of medium height and rather thin. L12 testified that Shala wore black clothes.[2102] In cross-examination L12 accepted that the first time he gave a description of Shala to the Prosecution was only several days before giving evidence. On that occasion he said that he had not taken a good look at Shala. He then described Shala as a tall man, taller than him, and well-built.[2103] This differs from his description given in court. It was the evidence of L12 that Shala had the keys to the cowshed and would let people into the cowshed to beat L12. Shala, together with Murrizi, also brought food for the detainees.[2104] It is of significance that, in June 2002, at a meeting with persons from CCIU, L12 was shown a photo spread containing a photograph of Haradin Bala. He did not recognise anyone in the photo spread.[2105] As the photo spread is not in evidence, it is not possible for the Chamber to make an assessment of whether or not his failure to recognise Haradin Bala could be due to the quality of the photo or to a poor likeness in the photo. The onus of proof is on the Prosecution, of course, in this as in all matters. In the courtroom L12 did identify Haradin Bala as the man he knew as Shala in Llapushnik/Lapusnik.[2106] This witness had also seen a person he believed to be Shala on television before he came to testify.[2107] Once again the possibility of a mistaken identification because of the influence of the courtroom setting must be weighed with care. Also the possibility of mistake because of the viewing of the television image must be considered, even though the witness specifically stated that he had identified in the courtroom the man he knew at the camp as Shala and this was not because he watched television.[2108] Having regard to these matters and, in particular, to the failure of L12 to identify Shala on the photo spread and the variations in his description of Shala, the Chamber is left with clear reservations about the reliability of his in-court identification of Haradin Bala as the person he knew in the camp as Shala.

2099 Exhibit P204.
2100 *See supra*, para 279.
2101 L12, T 1801.
2102 L12, T 1811-1812.
2103 L12, T 1839-1840.
2104 L12, T 1802.
2105 L12, T 1779-1780.
2106 L12, T 1812-1813.
2107 L12, T 1812-1813; 1842.
2108 L12, T 1847-1848.

617. L64, who was a KLA member, testified that he visited the Llapushnik/Lapusnik prison camp for the first time in early June 1998.[2109] He stated that his first encounter with Haradin Bala took place in the beginning of June in that part of Llapushnik/Lapusnik where the KLA kitchen was located.[2110] According to L64's testimony Haradin Bala stayed in Llapushnik/Lapusnik until the end of July, although the witness did not see him in the last days of July.[2111] L64 described Haradin Bala as a man of over forty years old, about 180 centimetres tall with a moustache; his teeth were not white, they were a little damaged and very split.[2112] In June 2003, during an interview with an investigator for the Prosecution, L64 described Haradin Bala as having an injured leg. L64 stated that he might have confused Haradin Bala with another person called Shala, whose real name is Ruzhdi Karpuzi and who had an injury to his right leg.[2113] In the course of the interview L64 said that the two Shalas could be confused, not only because of the pseudonym, but also because they bore a resemblance to one another.[2114] However, in court L64 testified that those two men known as Shala did not look alike. He explained that his previous statement to the investigator differed from his in-court testimony because, at the time of his previous statement, he thought that Haradin Bala might be released and there was no need for the witness to say what he knew about him.[2115] L64 said that by giving such a statement he tried to help Haradin Bala.[2116]

618. L64 stated that Haradin Bala was a "kind of a guard" and it was his duty to stay at the gate of the house called a prison.[2117] The witness testified that on one or several occasions he saw Shala carrying food from the kitchen and bringing it inside.[2118] It was L64's evidence that Shala was a calm and well behaved soldier. The witness said that he was on good terms with Shala.[2119] L64 testified that he knew the real name of Shala and also that his father was Selman Haradinaj.[2120] During an interview with an investigator on 17 June 2003 the witness correctly identified Haradin Bala on a photo spread.[2121] Nevertheless, there are reasons for approaching the identification and the evidence of L64 with caution. In addition to the inconsistencies about the leg and the general appearance between the prior statement of the witness and his in-court testimony, during an interview conducted on 4 July 2003 L64 stated that he "did not have contact with Shala".[2122] This

[2109] L64, T 4456.
[2110] L64, T 4445-4446.
[2111] L64, T 4446.
[2112] L64, T 4447.
[2113] L64, T 4786-4791; 4449.
[2114] L64, T 4793-4794.
[2115] L64, T 4452.
[2116] L64, T 4904-4905.
[2117] L64, T 4446-4447.
[2118] L64, T 4447.
[2119] L64, T 4447-4449.
[2120] L64, T 4445.
[2121] L64, T 4454; Exhibit P172. There are eight quite clear black-and-white photos. Haradin Bala is no. 8.
[2122] L64, T 4771.

was manifestly contradicted by parts of L64's evidence. It appears to have been made purposefully. Thus, it appears that L64 has been prepared to give accounts which are not truthful in material respects concerning Haradin Bala. There are also significant considerations of a general nature, discussed elsewhere in this decision, as to the credibility of this witness.[2123] In the result, the Chamber is not persuaded that, in the absence of independent confirmation, it can accept the testimony of this witness relating to the identification of Haradin Bala.

619. Ruzhdi Karpuzi was involved in the KLA movement. He testified that he saw Haradin Bala in Llapushnik/Lapusnik, regularly, but this was at the place from which the witness and other soldiers were observing a Serbian checkpoint in Komaran/Komorane, between 8 and 18 May 1998. Ruzhdi Karpuzi's testimony was that he did not see Haradin Bala after that.[2124] The witness stated that in May 1998 Haradin Bala's pseudonym was Shala.[2125] The evidence of Ruzhdi Karpuzi identifying Haradin Bala is, however, only of a limited relevance because it relates only to an early period and does not connect Haradin Bala directly with the Llapushnik/Lapusnik prison camp.

620. Zeqir Gashi, a medical doctor, testified that he saw Haradin Bala in Llapushnik/Lapusnik in June and July 1998. He stated that Haradin Bala came to his clinic once or twice for a check-up.[2126] Dr Zeqir Gashi testified that he also saw Haradin Bala once or twice in the kitchen of the house of Gzim Gashi.[2127] The kitchen was located across a narrow unpaved roadway from the compound in which, in the Chamber's finding, the prison camp was set up.[2128] The witness said he had known Haradin Bala before the war for about 10 to 15 years.[2129] Dr Zeqir Gashi testified that Haradin Bala's pseudonym was Shala and he believed that he was an ordinary soldier. He described Haradin Bala as a man of medium height, between the average and maximum height, with a moustache.[2130] It will be noted elsewhere in this decision how Dr Zeqir Gashi's description of the medical condition of Haradin Bala at that time tallies with that of some Defence witnesses. The witness did not suggest he had seen Haradin Bala in the Llapushnik/Lapusnik prison camp itself, so that his identification of Haradin Bala in the village of Llapushnik/Lapusnik is of a limited relevance for the purposes of the present analysis, although as will appear, it is of significance when evaluating an alibi advanced by the Defence for Haradin Bala.

2123 *See supra,* para 28.
2124 Ruzhdi Karpuzi, T 3081-3082; 3084.
2125 Ruzhdi Karpuzi, T 3139. However, the witness earlier stated he did not remember whether Haradin Bala had a pseudonym, T 3082-3084.
2126 Dr Zeqir Gashi, T 5621; 5654-5655.
2127 Dr Zeqir Gashi, T 5622; 5611-5613.
2128 *See supra,* para 6.
2129 Dr Zeqir Gashi, T 5619-5621.
2130 Dr Zeqir Gashi, T 5622-5623; 5663.

621. The totality of the evidence of the former prisoners discloses striking consistency on a few points. All eight of them testified that Shala brought food to the detainees. All of them, either directly or by describing his duties, referred to Shala's position as a guard in the camp. The witnesses provided similar estimates of Shala's age, testifying that Shala was over 40, or 50 years old. This is of greater than usual relevance, because, as the evidence discloses, few KLA members were of a similar age, most being younger.[2131] All the former prisoners stated that Shala had a moustache and three of them mentioned his teeth.[2132] The descriptions given by the former prisoners have in most respects a general correspondence with the physical appearance of Haradin Bala, although they do vary in detail. Despite these variations the Chamber is persuaded and finds that in their testimony, these witnesses, who were all in the Llapushnik/Lapusnik prison camp for periods during the relevant time, gave evidence about the same person, a person known to them in the camp as Shala. Shala is shown to have been the pseudonym used by the Accused Haradin Bala at Llapushnik/Lapusnik in May to July 1998.

622. Furthermore, all eight of them used the pseudonym Shala while referring to the guard from the Llapushnik/Lapusnik prison camp. The evidence is that there were only two persons using the pseudonym Shala in Llapushnik/Lapusnik in the relevant period.[2133] There is, however, also evidence relating to other persons whose surnames were Shala. According to that evidence, some of them were at some earlier point in Llapushnik/Lapusnik. In the evidence of Jakup Krasniqi, at some time Ferat Shala was in the Pellumbi unit and was based to the north of the main road from Peje/Pec to Prishtina/Pristina.[2134] The Llapushnik/Lapusnik prison camp, in the Chamber's finding was to the south of that main road.[2135] According to the evidence, on 9 May 1998 Haxhi Shala went to Llapushnik/Lapusnik when he found out about the fighting with the Serbian forces. When he arrived, he met, among others, Shaban Shala, Nexhmi Shala and Ramiz Shala.[2136] The evidence, however, shows that Haxhi Shala did not stay in Llapushnik/Lapusnik on that day and in the evening went to Klecke /Klecka.[2137] The evidence does not indicate that Haxhi Shala, or any other of the three individuals with the surname Shala, whom Haxhi Shala met in Llapushnik/Lapusnik on 9 May 1998, remained there or returned to that place at any later time. In the Chamber's finding, none of these five persons could have been the person referred to as Shala in the testimony of the witnesses who were held in Llapushnik/Lapusnik in the period that followed and ended on 25 or 26 July 1998. It is uncontested that Haradin Bala used the pseudonym Shala and was present there,

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2131 Exhibit P245, statement and tab 9.
2132 L04, L10, L06.
2133 L64, T 4451; Exhibit P32.
2134 Jakup Krasniqi, T 3404.
2135 *See supra*, para 282.
2136 Exhibit P34, pp 8-9.
2137 Exhibit P34, p 9.

at least for some of the period relevant to the Indictment.[2138] The other KLA member using the pseudonym Shala has been identified as Ruzhdi Karpuzi.[2139] He is thus the only person for whom Haradin Bala could have been mistaken by the witnesses. However, he bears no resemblance to Haradin Bala. He is 8 years younger than Haradin Bala,[2140] 15 centimetres taller[2141] and the evidence does not indicate that he wore a moustache in 1998.[2142] In particular, Ruzhdi Karpuzi walked with a limp because of an injury to his leg.[2143] Given these characteristics of Ruzhdi Karpuzi, the Chamber is satisfied that the victim witnesses whose evidence has just been considered were not referring to Ruzhdi Karpuzi in their evidence concerning the KLA soldier they knew in the Llapushnik/Lapusnik camp as Shala. One possible caveat to this view should be noted in that L64, a KLA soldier who is not a former prisoner, described Shala as having an injured leg. As mentioned earlier, however, this witness acknowledged in his evidence that to try and help Haradin Bala he was, at the time he said this, deliberately trying to create confusion about the two Shalas.

623. The Chamber has put to one side for the present the evidence of two further witnesses discussed above, L96 and L64, in each case because, without some independent confirmation of what they have said, the Chamber considers that it cannot have sufficient confidence in the honesty and reliability of each of these two witnesses. In respect of two other witnesses, Ruzhdi Karpuzi and Dr Zeqir Gashi, while these witnesses identify Haradin Bala as having been at Llapushnik/Lapusnik, in May 1998 in the case of Ruzhdi Karpuzi and in June and July 1998 in the case of Dr Zeqir Gashi, their evidence is of a more limited relevance for present purposes, because neither of them spoke of any connection between Haradin Bala and the prison camp. Nevertheless, each of them confirms the Accused's presence in Llapushnik/Lapusnik, although at different times, and, in this respect, has some consistency with the other evidence being considered at this stage. There remain, however, seven other witnesses, six of whom have identified Haradin Bala, either or both when shown photo-boards in earlier years or in court, and who recall him being known as Shala in the prison camp, and the seventh witness, Vojko Bakrač, who recalls Shala in the prison camp but who did not identify him when shown a photo spread which included a photograph of Haradin Bala in 2002.

624. In the view of the Chamber, one of these witnesses, in particular, stands out because of the Chamber's assessment of the witness and of the care, honesty, competence and, in this and most matters, the reliability he displayed when giving evidence and because of the opportunities he had

[2138] Defence Final Brief, paras 832-834; 837.
[2139] L64, T 4449; Ruzhdi Karpuzi, T 3061-3062; Exhibit P131.
[2140] Ruzhdi Karpuzi, T 3053; Exhibit P08.
[2141] Agreed facts, T 5187-5188.
[2142] L64, T 4794; Exhibit P134.
[2143] Ruzhdi Karpuzi, T 3201-3203; L64, T 4451; 4905; Elmi Sopi, T 6762-6763.

in 1998 to closely observe the guard in the prison camp whom he then knew as Shala. This witness is Ivan Bakrač. The Chamber finds that he immediately and unhesitatingly recognised a photograph of the person he knew in the camp as Shala, which was a photograph of the Accused Haradin Bala, when shown a photograph of 8 different but similar persons in January 2003 by an OTP Investigator. The circumstances of the interview with the investigator do not give rise, in the assessment of the Chamber, and in particular having weighed the expert evidence which was led on the potential difficulties with photo-board identification, to any reason of substance which detracts from the reliability of this unhesitating and confident photo-board identification. Earlier in these reasons the Chamber has noted the oral description of Shala given by Ivan Bakrač. It is not a closely detailed description but, subject to the Chamber's expressed views about his impression of the build of Shala, his description is in general accord with that of Haradin Bala. The nature of the description does not leave the Chamber with any concern that it may reveal a lack of detailed recollection such as would detract from the reliability of the photo spread identification. The Chamber has taken into account that Ivan Bakrač generally saw Shala in the house in the prison camp, rather than in one of the outhouse locations where others were detained, so that he had much better opportunities for observation of Shala, including when he played chess with him.

625. L07 was, in the view of the Chamber, a witness who was honest and quite certain that the Accused Haradin Bala was the person he knew as Commander Shala, or Shale, in the Llapusnik/Lapusnik camp in 1998. He had there seen Shala or Shale over a somewhat limited period of time, as discussed earlier. The Chamber accepts that he did meet the Accused Haradin Bala at a petrol station in 1999, *i.e.* relatively shortly after the relevant events, readily recognised him as Shala and there was given his correct name, Haradin Bala, by the Accused himself. For the reasons discussed earlier, the Chamber does not consider that the absence of specific reference to the petrol station meeting in two subsequent statements is explained by recent invention or error by L07. It is accepted he merely responded to questions put to him by the respective investigators. While his oral description of Haradin Bala is brief, it is consistent with the Accused's appearance. The Chamber would not, however, be able to be entirely confident of the identification of the Accused on the evidence of L07 alone because L07 had also seen TV coverage of the commencement of these proceedings and because of the possibility of mistake because the identification was of an accused person in a court-room setting, as discussed earlier.

626. Both L10 and L06 were held prisoner in Llapushnik/Lapusnik camp for about two months. Neither had been asked by investigators to look at a photo spread, but in court each of them identified the Accused Haradin Bala, as a guard of the prisoners over that period, and who was then known as Shala. The oral descriptions given by each of them differed in some details, but each were generally consistent with the appearance of Haradin Bala, although in respect of height one

suggested a height range of about 180 to 200 centimetres tall, which, while appropriate at the lower end is not at the upper end of the given range, reveals a lack of reliable original observation of this descriptor or lack of clear recollection of it. Not only did each of these witnesses have an opportunity to see Shala over a significant period of time, but L06 also had a good opportunity to observe him on the journey on foot into the Berishe/Berisa Mountains on 25 or 26 July 1998. Both of these witnesses appeared to the Chamber to be honest and confident in their identification in court of the Accused Haradin Bala as the Shala they knew at the prison camp, but in each case this identification was made in court and each of these witnesses had seen television coverage at the time of Haradin Bala's arrest or in connection with these proceedings. There is also a question of family tension, discussed earlier. For these reasons, and as discussed earlier, the Chamber would not be satisfied on the evidence of either of these witnesses alone, of the identification of the Accused.

627. Two other witnesses, L04 and L12 also identified Haradin Bala in court as a guard at the Llapushnik/Lapusnik prison camp where they had been held as prisoners each for approximately one month in the period relevant to the Indictment. L12 indicated he had not taken a good look at Shala when pressed about variations in oral description of Shala. L04 also gave descriptions of Shala which differed at least with respect to height. Both L04 and L12 had seen television coverage in connection with these proceedings in which Haradin Bala appeared. Further, both L04 and L12 had failed to identify a photograph of Haradin Bala when shown photo spreads which included his photograph. In each case, this occurred in 2002 when shown a photo spread by a UNMIK investigator. As discussed earlier neither photo spread is in evidence so that the Chamber cannot reach any conclusion as to the quality of the photographs of Haradin Bala which were used, or the degree of likeness to the Accused. In the circumstances, the Chamber must proceed on the assumption, which favours the Accused, that there was a sufficient likeness and that the photographs were of adequate quality to have enabled identification. Hence, their failure to recognise the photograph of Haradin Bala may well indicate that in their view in 2002, none of the persons depicted was the man they knew as Shala. Their failure may also have been dictated by other factors such as lack of certainty and a fear of mistakenly identifying an innocent person, or societal pressures.[2144] The Chamber is not in a position to determine the actual reasons for the negative identifications because the evidence is too scarce.[2145] Having regard to these

[2144] Anargyros Kereakes, involved in the identification procedures concerning Fatmir Limaj and Isak Musliu, stated that he informed the witnesses that he wanted them to be 100% sure that the person they picked was the suspect; T 4998-4999.

[2145] The Defence for Haradin Bala suggests that there may have been more negative identifications than admitted into evidence; Defence Final Brief, paras 896; 898. However, in view of the testimony of the investigators who were in charge of the identifications, this allegation appears to be devoid of foundation; Closing Arguments, T 7276-7277; Anargyros Kereakes, T 4949; Exhibit 258, paras 15 and 17; Exhibit 259, para 17.

considerations and, as discussed earlier, because of a question of a family tension, the Chamber must approach the 2005 identifications by each of L04 and L12 with a clear recognition that each could be mistaken. It does so even though it accepts that in each case the identifications were made honestly and that the witnesses were confident that the Accused Haradin Bala was the guard each of them knew as Shala in the prison camp.

628. Vojko Bakrač, the father of Ivan Bakrač, described the person and his activities as a guard and a KLA soldier he knew as Shala while he was detained at Llapushnik/Lapusnik. Like his son, he mainly saw Shala in the house. He spoke with Shala on occasions. He gave a general description which was consistent with the Accused Haradin Bala. However, when shown a photograph by UNMIK investigators in January 2002, he did not recognise anyone of the eight photographs even though one of them was of Haradin Bala. The Chamber has observed earlier that in the exhibit of his photo spread the face of Haradin Bala is hardly distinct, but in the absence of evidence whether the exhibit is a good copy of what was shown to the witness, it cannot be determined whether that could explain the failure of Vojko Bakrač to identify Haradin Bala. Nevertheless, he did not do so, and he was not asked at any other time to do so. As discussed earlier, however, the Chamber is persuaded and finds that no person other than Haradin Bala was a guard at the prison camp in Llapushnik/Lapusnik at the time relevant to the Indictment and used the name or pseudonym of Shala.

629. As mentioned above in connection with L10, L06, L04 and L12, there is also a question of family connections, which, it is submitted by the Defence for Haradin Bala, may affect the credibility of the evidence of these witnesses. As discussed earlier, the Chamber is not persuaded that the evidence of these four witnesses has been affected by the dispute between their family and the family with which, in the submission of the Defence for Haradin Bala, Haradin Bala had some distant connection. Nor has the Chamber been persuaded that any discussion about the events in the prison camp between these four witnesses, who belong to one extended family, could be of significance to the reliability of their testimony,[2146] or have any adverse bearing on the assessment of the credibility of the respective identifications of the Accused Haradin Bala as Shala by these four witnesses.

630. On a more general level the Chamber would observe that all of the eight *victim* witnesses discussed above gave accounts of the role and activities of the guard they each knew in Llapushnik/Lapusnik as Shala, in terms that differed in some respects as is to be expected as each person describes his own experiences and observations, drawing on his present recollection some

[2146] *See supra,* paras 32 and 35.

seven years after the events, but which discloses in general effect a similar pattern of activities and responsibilities. The Chamber is also conscious that the clothing worn by Shala varied in the descriptions of these eight witnesses, but in the view of the Chamber this is not surprising as Shala was obviously seen at different times by different persons.

631. In weighing the evidence of these eight witnesses[2147] the Chamber is fully conscious of the potential for each of the seven of them who identified Haradin Bala to have been mistaken in their respective identification, especially because of the particular issues discussed above in respect of each witness. While, in each case, the possibility of a mistaken identification must be very carefully weighed by the Chamber, it does not necessarily follow that because, for one reason or another, an identification by a witness may be mistaken, that the identification has no probative value and must be dismissed from consideration. In each case the Chamber accepts the honesty of the seven identifying witnesses, particularly Ivan Bakrač, and also of the eighth, Vojko Bakrač. In the present circumstances a factor relevant to the assessment of the probability of an honest but mistaken identification by each one of the seven witnesses is that six other persons, acting honestly, have, at different times and in different circumstances, also identified Haradin Bala as the KLA guard they each knew as Shala in the prison camp at times during the relevant period. While no one of the seven separate identifications, when considered separately, would satisfy the Chamber that Shala is Haradin Bala, because of the various possibilities for honest mistake identified earlier, in the particular circumstances now being considered, the combination of these particular seven separate identifications does, in the Chamber's finding, negate the possibilities of mistake and persuade the Chamber that the Accused Haradin Bala was indeed the KLA guard known as Shala in the prison camp as alleged.

632. Further, the Chamber notes that the evidence of the eighth former prisoner, Vojko Bakrač, is consistent with this finding. In addition, as set out earlier, because of general credibility concerns, the Chamber has not been able to accept the evidence of either L96 or L64, in the absence of other independent confirmatory evidence. L96 was a prisoner in the relevant period. L64 was a KLA soldier. Not only is the evidence of each of L96 and L64 not inconsistent with the guard in the prison camp being Haradin Bala, but the identification of Haradin Bala which each of them made is independently confirmed by the identifications made by the other seven former prisoners. In this respect, at least, the Chamber is therefore persuaded that it should accept the honesty and reliability of the separate identifications of Haradin Bala made by each of L96 and L64.

[2147] L04, L06, L07, L10, L12, L96, Vojko and Ivan Bakrač.

633. Before reaching its ultimately finding on this issue of identification, however, the Chamber must, in particular, weigh two further issues, an alibi advanced by the Defence for Haradin Bala and the health of Haradin Bala at the relevant time.

(b) Haradin Bala's alibi

634. The Defence for Haradin Bala submits that Haradin Bala could not have committed the crimes charged in the Indictment because he was only present in Llapushnik/Lapusnik in May 1998. It is suggested that approximately on 8 May 1998 Haradin Bala went with his family to Nekoc/Nekovce, from where he went to Llapushnik/Lapusnik to join the KLA. In the Defence's submission, Haradin Bala stayed in Llapushnik/Lapusnik for about two or three weeks and worked for the KLA in logistics and in the kitchen at Gzim Gashi's compound. The Defence for Haradin Bala contends that in June and July 1998 Haradin Bala moved from Llapushnik/Lapusnik and worked for the KLA in logistics in Luzhnice/Luznica and stayed in the house of Avdullah Puka.[2148]

635. Haradin Bala elected not to give sworn evidence. That is his legal right and no finding adverse to him may be made because of this. A consequence of his election is, however, that in so far as his defence case rests on an alibi, and also on his health, there is no sworn evidence from the Accused to support his alibi, or the contention about his health at the time. In this particular case the absence of sworn evidence from the Accused, which has been tested in cross-examination, to found or support these two positive defences on which he relies, has the effect 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 health. Instead, in advancing these two positive defences, the Defence for Haradin Bala must rely on an unsworn opening statement and other evidence, which is not consistent, complete or, in the Chamber's ultimate assessment, convincing.

636. Events preceding Haradin Bala's arrival in Llapushnik/Lapusnik were described in the testimony of a Defence witness, Kadri Dugolli. He stated that on or around 8 May 1998 Haradin Bala brought his family to stay with the witness' family, in Nekoc/Nekovce.[2149] The witness testified that some of Haradin Bala's family members came on a tractor, others in a horse-drawn cart or on foot.[2150] On the following day, in the evidence of Kadri Dugolli, Haradin Bala went to Llapushnik/Lapusnik.[2151] If this evidence is correct, it indicates that the place from which Haradin Bala set off for Llapushnik/Lapusnik on 9 May 1998 was Nekoc/Nekovce. However, in an unsworn opening statement, Haradin Bala stated:

[2148] Defence Final Brief, paras 831-840; 845.
[2149] Kadri Dugolli, T 7010; 7015.
[2150] Kadri Dugolli, T 7016.
[2151] Kadri Dugolli, T 7010; 7014.

> "I live in Korretice e Eperme; it's a valley on (*sic*) which on the 9th of May … I saw flames coming from Lapusnik. … It seemed as if it was coming from my own courtyard. … I decided to join these young men."[2152]

What Haradin Bala said indicates that on 9 May 1998 Haradin Bala went to Llapushnik/Lapusnik from his home village, Korretice e Eperme/Gornja Koretica, and not from Nekoc/Nekovce, as asserted by the Defence for Haradin Bala and as indicated by Kadri Dugolli, the only defence witness on this matter.[2153] The Defence Final Brief does not address this inconsistency. There is other evidence relevant to the date of Haradin Bala's arrival in Llapushnik/Lapusnik. Elmi Sopi stated that Haradin Bala came to Llapushnik/Lapusnik some time after 9 May 1998.[2154] Although it is unsourced and unconfirmed hearsay, the Chamber also notes that Shefki Bala testified that he was told that Haradin Bala arrived in Llapushnik/Lapusnik after the battle of 9 May 1998.[2155] Elmi Sopi put the date as sometime after 9 May 1998. This does not support the Defence case that he arrived on 9 May 1998.

637. In the evidence of Elmi Sopi, Haradin Bala stayed at Llapushnik/Lapusnik for some time in May 1998 and left after the fighting of 29 May 1998.[2156] Although his evidence is not precise, the effect of the evidence of Elmi Sopi, in the Chamber's assessment, is that the total time spent by Haradin Bala in Llapushnik/Lapusnik is approximately three weeks. However, in his unsworn opening statement Haradin Bala stated that he stayed in Llapushnik/Lapusnik for only around two weeks, which gives rise to a further inconsistency between the evidence called by the Defence for Haradin Bala and his unsworn opening statement to the Chamber.[2157] In any event, in the submission of the Defence for Haradin Bala, Haradin Bala left Llapushnik/Lapusnik at the end of May 1998.[2158] The evidence of Elmi Sopi is that a KLA soldier, Kumanova, encouraged Haradin Bala to go with him to Luzhnice/Luznica.[2159] Haradin Bala said in his unsworn opening statement that he did go with Kumanova to that place.[2160]

638. Elmi Sopi testified that he lived in Llapushnik/Lapusnik and was a member of the KLA in the relevant period.[2161] From May to July 1998 Elmi Sopi says he went everyday to the kitchen of the compound of Gzim Gashi.[2162] As established, this compound was across a narrow roadway

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2152 Unsworn statement of Haradin Bala, T 6912.
2153 Defence Final Brief, para 831.
2154 Elmi Sopi, T 6746.
2155 Shefki Bala, T 6922, 6926.
2156 Elmi Sopi, T 6747.
2157 Unsworn statement of Haradin Bala, T 6913.
2158 Defence Final Brief, para 835.
2159 Elmi Sopi, T 6764.
2160 Unsworn statement of Haradin Bala, T 6913-6914.
2161 Elmi Sopi, T 6758.
2162 Elmi Sopi, T 6729-6732.

from the prison camp.[2163] It is the effect of his evidence that he did not see Haradin Bala in the Gzim Gashi compound after the end of May 1998. In his testimony, most KLA soldiers had their meals in the kitchen there.[2164] If this evidence is correct, the probabilities would suggest it was highly unlikely for Elmi Sopi not to meet Haradin Bala in the kitchen, at least occasionally, if Haradin Bala had remained in Llapushnik/Lapusnik in June and July. It is noted by the Chamber that Elmi Sopi also denied in his evidence any knowledge of the prison camp in Llapushnik/Lapusnik,[2165] which, in the Chamber's finding, functioned directly across the narrow unpaved roadway from Gzim Gashi's compound for much of June 1998 and until 26 July 1998. It is Elmi Sopi's evidence that he never had occasion to go to the compound which served as the prison camp.[2166] Even so, it is somewhat surprising that a KLA member, who visited the compound across the roadway everyday for some two and a half months had no knowledge whatever of the existence of the prison camp.

639. The Defence for Haradin Bala's assertion that during his stay at Llapushnik/Lapusnik Haradin Bala worked for the KLA in logistics as well as in the kitchen at Gzim Gashi's compound has not been supported by any evidence.[2167] The Defence case is that Haradin Bala then left Llapushnik/Lapusnik and worked for the KLA logistics in Luzhnice/Luznica. The Defence for Haradin Bala relies on the testimony of three former KLA members, Elmi Sopi, Skender Bylykbashi and Avdullah Puka. Elmi Sopi stated that he met Haradin Bala in mid or late August 1998 in Novoselle/Novo Selo. It is his evidence that Haradin Bala told him that Bala was in Luzhnice/Luznica.[2168] This, of course, is well after the KLA were forced to leave Llapushnik/Lapusnik on 25 or 26 July 1998. In the testimony of Avdullah Puka, Haradin Bala stayed at his house in Luzhnice/Luznica from the end of June to the end of August 1998.[2169] Avdullah Puka stated that Haradin Bala told him that he was responsible for logistical issues in Luzhnice/Luznica.[2170] Skender Bylykbashi testified that he met Haradin Bala in either the middle of June or July 1998 in Bajice/Banjica.[2171] The witness stated that Haradin Bala told him that he was working in Luzhnice/Luznica, serving in the storage there.[2172] At its highest, even if the evidence were to be accepted as honest and reliable, all three witnesses only heard that Haradin Bala was located in Luzhnice/Luznica. They had no personal knowledge. Importantly, it is the evidence of each of the three witnesses that they each only heard this from Haradin Bala himself.

2163 *See supra,* para 6.
2164 Elmi Sopi, T 6733.
2165 Elmi Sopi, T 6739.
2166 Elmi Sopi, T 6768-6769.
2167 Defence Final Brief, para 834.
2168 Elmi Sopi, T 6747-6748.
2169 Avdullah Puka, T 7085-7088.
2170 Avdullah Puka, T 7090.
2171 Skender Bylykbashi, T 6969.

Avdullah Puka testified that he did not see Haradin Bala in Luzhnice/Luznica.[2173] Skender Bylykbashi stated that he was never in Luzhnice/Luznica in June and July 1998.[2174] It is not the evidence of Elmi Sopi that he ever saw Haradin Bala in Luzhnice/Luznica. No other evidence has been adduced by the Defence for Haradin Bala in this connection. Ruzhdi Karpuzi, however, a witness for the Prosecution, testified that after, what he said was, around 18 May 1998 he did not see Haradin Bala in Llapushnik/Lapusnik. It was his evidence that he had heard that Haradin Bala was in Luzhnice/Luznica. The source of this information was not disclosed.[2175]

640. It was the testimony of Avdullah Puka that Kumanova brought Haradin Bala to Avdullah Puka's house in Javor/Javor in late June 1998.[2176] He said that Haradin Bala stayed in the *oda* (guestroom) of that house until the end of August 1998.[2177] Avdullah Puka did acknowledge that Haradin Bala might have been away for two to three days during his stay in Avdullah Puka's *oda*.[2178] In the evidence of Avdullah Puka, six or seven other soldiers stayed in his *oda* in the same period.[2179] The *oda* had its separate entrance and thus the guests did not have to pass through Avdullah Puka's house.[2180] The witness stated that in that period he was busy with his own tasks and did not pay close attention to what the soldiers were doing.[2181] When tested in cross-examination, it became clear that Avdullah Puka was not certain who stayed in his *oda* and in which period.[2182] Furthermore, it emerged in the course of Avdullah Puka's evidence that some of the soldiers he said occupied his *oda* in the summer of 1998, returned in the autumn of 1998.[2183] However, he did not identify, with three exceptions, the soldiers who did stay in the summer, and he could not say which soldiers were there in autumn.[2184] He was unable to recall whether one soldier, Bezim Zhurda, stayed in Avdullah Puka's house in the autumn 1998, as he did in the summer. It was apparent to the Chamber that he had no clear recollection of who stayed in his *oda* in either summer or autumn. Despite this, Avdullah Puka most firmly refuted the suggestion that Haradin Bala might have returned in the autumn.[2185] The Chamber could not accept that this firm refutation was based on an honest or clear recollection of Haradin Bala being there in the summer as opposed to the autumn. It found his evidence in this respect quite unconvincing. Further, and significantly,

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2172 Skender Bylykbashi, T 6971.
2173 Avdullah Puka, T 7090.
2174 Skender Bylykbashi, T 6996.
2175 Ruzhdi Karpuzi, T 3081-3082.
2176 Avdullah Puka, T 7085-7087.
2177 Avdullah Puka, T 7088-7089; 7099.
2178 Avdullah Puka, T 7101-7102.
2179 Avdullah Puka, T 7088; 7093-7095.
2180 Avdullah Puka, T 7088-7089.
2181 Avdullah Puka, T 7101.
2182 Avdullah Puka, T 7094.
2183 Avdullah Puka, T 7095-7097.
2184 Avdullah Puka, T 7093-7097.
2185 Avdullah Puka, T 7095-7097.

in the Chamber's assessment, Avdullah Puka did not maintain any close or consistent attention to which soldiers stayed in his *oda*, or to their comings and goings, or whether they were absent overnight or for any period. Avdullah Puka's statements in evidence that Haradin Bala stayed there from late June to the end of August, and that in that time he did not leave the *oda* for more than three days, appeared to the Chamber to be made because of a firm commitment to the KLA cause and not to be based in any actual and honest recollection of those two matters.

641. Skender Bylykbashi recounted his meetings with Haradin Bala in Bajice/Banjica between the middle of June or July and 26 July 1998 or later. In his testimony, on one of those occasions Haradin Bala came to Bajice/Banjica with flour for his brother-in-law's family.[2186] When they met, they had brief conversations not exceeding a few minutes.[2187] Even though the testimony of Skender Bylykbashi is relied on by the Defence for Haradin Bala for the purposes of the alibi, this witness' account of meetings with Haradin Bala does not contradict or undermine the evidence that in the relevant time Haradin Bala was present in the Llapushnik/Lapusnik prison camp and committed the acts charged in the Indictment. Bajice/Banjica is located only approximately three to four km from Nekoc/Nekovce.[2188] In the testimony of Kadri Dugolli, Haradin Bala came by car with food supplies for his family from Llapushnik/Lapusnik to Nekoc/Nekovce in May 1998.[2189] He could equally have made visits to his family in Bajice/Banjica from Llapushnik/Lapusnik in June or July 1998. The evidence is clear that at least at times Haradin Bala had the use of a car in the period relevant to the Indictment.[2190]

642. The Defence for Haradin Bala also submits that some evidence suggests the practical impossibility of Haradin Bala's continuous, or at least near daily, presence in Llapushnik/Lapusnik. It is submitted that in the period of June and July 1998 Haradin Bala visited the makeshift clinic of Dr Fitim Selimi in Shale/Sedlare so frequently that he could not have been seen as a prison guard in Llapushnik/Lapusnik on a daily or near daily basis.[2191] Dr Fitim Selimi testified that he was in Shale/Sedlare in the period from mid June to 25 or 26 July 1998.[2192] In his testimony, Haradin Bala came to the clinic in Shale/Sedlare ten or more times.[2193] Shale/Sedlare is about seven to ten km from Llapushnik/Lapusnik,[2194] and is by a road which leads to Llapushnik/Lapusnik via Bajice/Banjica and Nekoc/Nekovce.[2195] A car can be driven on that road.[2196] Haradin Bala had the

[2186] Skender Bylykbashi, T 6969-6971.
[2187] Skender Bylykbashi, T 6972.
[2188] Kadri Dugolli, T 7020.
[2189] Kadri Dugolli, T 7020-7021.
[2190] Skender Bylykbashi, T 6996.
[2191] Defence Final Brief, para 844.
[2192] Dr Fitim Selimi, T 6943.
[2193] Dr Fitim Selimi, T 6946-6947.
[2194] Dr Zeqir Gashi, T 5664.
[2195] Exhibit P1, map 6.

use of a car on at least some occasions.[2197] It follows that Haradin Bala could readily be in both the prison camp and the clinic at Shale/Sedlare on the same day.

643. A lot of attention has been attached by the Parties to the testimony of Dr Zeqir Gashi and, in particular, to the date when he opened his clinic in Llapushnik/Lapusnik. Dr Zeqir Gashi testified that, after his return from Arlat/Orlate to Llapushnik/Lapusnik, he opened a makeshift clinic in the house of Ferat Sopi.[2198] He stated in court that it took place sometime in the beginning of June 1998.[2199] Therefore, in light of Dr Zeqir Gashi's account of Haradin Bala's visits to the clinic, this could contradict the evidence that Haradin Bala left Llapushnik/Lapusnik at the end of May 1998. However, in an interview with a Prosecution investigator Dr Zeqir Gashi provided a different indication of when the clinic was opened.[2200] The investigator stated that, to his best recollection, Dr Zeqir Gashi said that he operated the clinic starting in May or June.[2201] The investigator stated, however, that the precise date was not then of particular concern to him and he focused on other matters.[2202] While the Defence for Haradin Bala sought also to diminish the force of Dr Zeqir Gashi's evidence concerning the opening date by submitting it was influenced by leading questions,[2203] the Chamber observed that the witness appeared certain that the clinic opened in June 1998. Indeed, he specifically stated that he had made a mistake during the interview.[2204] Further, Dr Zeqir Gashi's evidence of other events appeared chronologically sound, which provided a further indication of its reliability. It was the Chamber's assessment that Dr Zeqir Gashi was of independent mind and gave no indication of being prepared to agree with any proposition in evidence that was contrary to his own understanding. The Chamber is not able, therefore, to accept the Defence submission that no weight should be attached to his evidence about dates because of the way he was questioned. Further, other evidence dealt with this issue.

644. Ferat Sopi testified that he began working with Dr Zeqir Gashi in his clinic some time in the period which he estimated as from 20 to 25 May 1998.[2205] That is earlier than indicated by Dr Zeqir Gashi. Ferat Sopi commented on the testimony of Dr Zeqir Gashi, saying that it was partially correct.[2206] However, it was not clarified which parts of Dr Zeqir Gashi's testimony he considered incorrect or what was his view on the difference between them about the time issue.

2196 Exhibit P197. A car drive from Magure/Magura to Llapushnik/Lapusnik is described, including Bajice/Bajince, Nekoc/Nekovce and Kizhareke/Kisna Reka.
2197 Kadri Dugolli, T 7020-7021; Elmi Sopi, T 6764-6765; Avdullah Puka, T 7090-7091.
2198 Dr Zeqir Gashi, T 5604.
2199 Dr Zeqir Gashi, T 5603-5604; 5642-5645; 5654-5655.
2200 Closing Arguments, T 7466-7467.
2201 Exhibit DB7, para 10.
2202 Exhibit DB7, para 11.
2203 Closing Arguments, T 7467-7468.
2204 Dr Zeqir Gashi, T 5644-5645.
2205 Ferat Sopi, T 7051-7052.
2206 Ferat Sopi, T 7079.

The Chamber observes that none of the witnesses offered a precise date. Ferat Sopi made it clear that his time range was an estimate. He was only certain that the clinic was opened in the month of May.[2207] That may well mean, of course, the very last days of May.

645. Dr Zeqir Gashi did not provide a specific date, indicating merely that the clinic started at the beginning of June 1998. In determining this, Dr Zeqir Gashi appeared influenced by his other movements. He testified that he returned to Llapushnik/Lapusnik from Arlat/Orlate after 28 or 29 May 1998.[2208] No significant events were referred to in his testimony in the period between his return and the opening of the clinic. No critical significance, for the credit or reliability of Dr Zeqir Gashi attaches, therefore, to a day or two's difference between the last days of May or the first days of June. In the Chamber's assessment, of considerable relevance to this issue is an exhibit which is a chronological list of injections given in the clinic. This begins on 31 May 1998. The injections are given numbers starting with "1". It thus appears that the list is not a continuation of another list. The last injection, according to the document, was given on 25 July 1998.[2209] This confirms the testimony of both Ferat Sopi and Dr Zeqir Gashi that the clinic operated until 26 July 1998.[2210] Dr Zeqir Gashi was satisfied that the list was accurate and consistent with the kind of records that were kept in Llapushnik/Lapusnik.[2211] In light of the other evidence, this list persuades the Chamber, and it finds, that the clinic of Dr Zeqir Gashi opened in Llapushnik/Lapusnik on 31 May 1998. Accordingly, Haradin Bala's visits to the clinic must have taken place after that date. The Chamber makes this finding despite the testimony of Elmi Sopi, which in the Chamber's view is not seriously different, and of Ruzhdi Karpuzi and Avdullah Puka, and also despite what was said by Haradin Bala in his unsworn opening statement.

646. There is also other evidence that Haradin Bala was in Llapushnik/Lapusnik after the end of May 1998. Dr Zeqir Gashi testified that he met Haradin Bala not only in the clinic, but also in the kitchen of Gzim Gashi's house.[2212] The Defence for Haradin Bala submits that Haradin Bala worked in that kitchen.[2213] However, it is the evidence of Elmi Sopi that this kitchen for KLA soldiers was set up in that place only after the use of another common kitchen elsewhere in the village became too dangerous because of Serbian shelling. This happened on 29 May 1998.[2214] If this evidence is accepted, it follows that Dr Zeqir Gashi's sightings of Haradin Bala in the kitchen of Gzim Gashi's compound, too, would not have commenced until after 29 May 1998.

2207 Ferat Sopi, T 7052.
2208 Dr Zeqir Gashi, T 5603-5604.
2209 Exhibit P217.
2210 Ferat Sopi, T 7052; Dr Zeqir Gashi, T 5605.
2211 Dr Zeqir Gashi, T 5630-5631; 5652-5653.
2212 Dr Zeqir Gashi, T 5621-5622.
2213 Defence Final Brief, para 834.
2214 Elmi Sopi, T 6729-6730.

647. As observed above, 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. The only testimony that substantially contradicts that evidence was given by Elmi Sopi and Avdullah Puka, and to a lesser degree of force that of Ruzhdi Karpuzi. As noted above, the Chamber has reservations about the honesty and reliability of the testimony of Avdullah Puka. While the evidence of Elmi Sopi was apparently more persuasive, for the reasons just given, the Chamber has found it was erroneous on this issue. So was that of Ruzhdi Karpuzi. The necessary effect of the body of evidence of the victims in the prison camp, which the Chamber has analysed earlier, is that Haradin Bala was also in Llapushnik/Lapusnik in June and July 1998. It is also the evidence of a KLA member, L64, and is consistent with the evidence of Dr Zeqir Gashi. Having weighed carefully the force and effect of this evidence, the Chamber is further confirmed in its finding that the testimony relevant to this issue of Elmi Sopi and Ruzhdi Karpuzi is erroneous. The Chamber finds that Haradin Bala did not leave Llapushnik/Lapusnik in or just after the end of May 1998. He was present there also in June and July 1998, although it is not shown that he was there continuously in the period.

648. Finally, the Defence for Haradin Bala argues that Haradin Bala was in a poor medical condition and therefore physically unable to commit the crimes charged in the Indictment. In particular, it is contended that his physical condition would make it highly unlikely that he could have undertaken the physical exertion involved in the alleged beating of prisoners and the alleged walk to the Berishe/Berisa Mountains on or about 26 July 1998, especially for the walk because it was in summer conditions.[2215] Witnesses for the Defence for Haradin Bala testified that Haradin Bala was already of poor health before 1998.[2216] Kadri Dugolli stated that Haradin Bala could not stand the sun and took an umbrella with him for protection.[2217] Dr Fitim Selimi testified that when Haradin Bala came to his clinic in Shale/Sedlare, Bala was generally weak and complained about pain in his chest, which, in the Doctor's view, was related to *angina pectoris*. Haradin Bala was taking medications.[2218] Dr Fitim Selimi recommended Haradin Bala to engage only in light physical exercise to avoid overexertion.[2219] Dr Zeqir Gashi testified that Haradin Bala came to his clinic once or twice for a check-up. He complained of high blood pressure and arrhythmic heartbeat.[2220] In the testimony of Dr Zeqir Gashi, Haradin Bala showed him the medication he was taking, which was a beta blocker. Dr Zeqir Gashi stated that this medication regulates the work of

[2215] Defence Final Brief, para 845.
[2216] Ali Thaqi, T 7024-7026; Kadri Dugolli, T 7007-7009.
[2217] Kadri Dugolli, T 7012.
[2218] Dr Fitim Selimi, T 6949-6950.
[2219] Dr Fitim Selimi, T 6951.
[2220] Dr Zeqir Gashi, T 5621-5622.

the heart in case of arrhythmia.[2221] Further, there is also a countervailing consideration. Even though Haradin Bala experienced a blood pressure problem and an arrhythmic heartbeat since before 1998, nevertheless, he joined the KLA and served in it as a soldier before, during, and for well after the events alleged in the Indictment. While for much of the time he was engaged in lighter duties,[2222] during his KLA service he also participated in actual military action.[2223] This indicates 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 physical demands of KLA service because of his physical condition. In the Chamber's finding the evidence on the matter does not demonstrate that Haradin Bala would not have been physically capable of engaging in the acts alleged in the Indictment. On the contrary, in the Chamber's finding, he was capable of the acts alleged, but by doing so he would have been acting unwisely because it involved some risk of a more serious incident involving his heart. This risk may have diminished the preparedness of Haradin Bala to engage in the most strenuous of those acts. This will be taken into account in the examination of the evidence relating to the commission of those acts by Haradin Bala.

649. The evidence relevant to whether it has been established that the Accused Haradin Bala was a KLA guard in the prison camp at Llapushni/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. In the Chamber's finding he is the guard known as Shala referred to in that context in the evidence of the eight victims discussed earlier in this Judgement, and other victims and witnesses. In the finding of the Chamber he is also the KLA guard known as Shala who, with another known as Murrizi, escorted prisoners from the prison camp into the nearby Berishe/Berisa Mountains on 25 or 26 July 1998 as Serbian forces advanced on Llapushnik/Lapusnik. The evidence concerning Shala's presence and activities in the Berishe/Berisa Mountains is considered elsewhere. With Murrizi, and perhaps a third KLA soldier, Haradin Bala was one of the armed KLA escorts who had charge of the last remaining group of prisoners in the Berishe/Berisa Mountains on 25 or 26 July 1998 after some prisoners had been set free by Haradin Bala and Murrizi, that being the time when most of this last remaining group of prisoners were killed.

[2221] Dr Zeqir Gashi, T 5641.
[2222] Skender Bylykbashi, T 6975.
[2223] Elmi Sopi T 6746-6747.

650. The Chamber would note specifically, even though it is necessarily the import of what has been said, that the Chamber is not left with a reasonable doubt affecting any of these findings despite the possibilities for mistaken identifications by victims and others, or by the alibi advanced by the Defence for Haradin Bala, or by the health of Haradin Bala at the relevant time.

(c) Haradin Bala's role

(i) Participation in the commission of specific crimes

651. The Prosecution submits that Haradin Bala participated in a joint criminal enterprise involving the commission of the crimes alleged by the Indictment. In particular, the Prosecution alleges that he participated in the enforcement of the detention of Serbian civilians and perceived Albanian collaborators at the Llapushnik/Lapusnik prison camp, in their interrogation, brutal and inhumane treatment, physical and psychological assault, torture and beatings, as well as murder. The Prosecution fsurther alleges that Haradin Bala planned, instigated, ordered and personally participated in the murder of ten Albanian civilians in the Berishe/Berisa Mountains. The Prosecution further alleges that Haradin Bala participated in the concealment of the murder of prison camp inmates through the burial of bodies and participated in efforts to keep the existence of the prison camp secret.[2224]

a. Torture, cruel treatment and murder in or around the Llapushnik/Lapusnik prison camp (Counts 4, 6 and 8)

652. It has been established that the deplorable conditions of detention at least in parts of the Llapushnik/Lapusnik prison camp amounted to cruel treatment. The Chamber has held that food and water were not provided regularly or adequately, and that sanitary and sleeping facilities were grossly inadequate.[2225] The conditions of detention were to a great extent dependent on acts or omissions of Haradin Bala. The former prisoners concordantly testified that the person they knew as Shala, and who the Chamber has found was Haradin Bala, was a guard in the prison camp. He had the keys. It was Haradin Bala, who, on occasions, opened the doors and who brought food to the inmates.[2226] Haradin Bala had direct contact with the detainees and saw constantly, at first hand, the conditions in each part of the prison camp. Haradin Bala would, from time to time, open the doors of the storage room and, the Chamber infers, the cowshed, to let some fresh air in or allow inmates to walk outside.[2227] However, as has been established, this irregular intervention did little

[2224] Indictment, para 12.
[2225] *See supra* paras 285-289.
[2226] *See supra,* paras 286-287; 621.
[2227] *See supra,* paras 286-287.

to improve the conditions. It was a case of too little, too rarely. Occasionally, and irregularly, he would supervise the emptying of the bucket in each of the storage room and cowshed which served as a toilet for all detainees.[2228] In the beginning there was not even a bucket. However, this was not done frequently enough and the buckets overflowed. In the cowshed, at least, chained detainees and those tied to each other were left with no option but to soil themselves in their clothing. Haradin Bala did nothing to enable medical care for the many who were in need of it, even though he knew that a clinic was nearby.[2229] Haradin Bala personally participated thus, through his omissions, in the maintenance and enforcement of the conditions of detention to which the prisoners were subjected, a material element of the crime of cruel treatment. As those conditions were maintained over many weeks, during which Haradin Bala frequently entered the rooms where prisoners were kept and at times provided assistance to them, his failure to do so on numerous other occasions leaves the Chamber persuaded that he had an intent to maintain those conditions of detention. Accordingly, in the Chamber's finding, it has been established that Haradin Bala committed, together with other persons, the crime of cruel treatment.

653. The Chamber has found, in respect of some of the acts of mistreatment and killing charged in the Indictment, that the elements of the crimes of cruel treatment, torture and murder, as violations of the laws or customs of war under Article 3 of the Statute, have been established. In some of these cases there is no evidence of Haradin Bala's direct involvement in the commission of the crime. The evidence demonstrates, however, that Haradin Bala took action which was to some extent related to the commission of others of those crimes.

654. The first incident relates to the mistreatment of L06 which the Chamber has found to constitute cruel treatment and torture.[2230] In the testimony of L10, L06 was taken out of the room by Shala, who in the finding of the Chamber was the Accused Haradin Bala, and, when L06 was brought back, he said he had been beaten. L06 himself stated that Haradin Bala only untied his chains on the day preceding the night when he was beaten and that he was taken out of the room and back by other persons.[2231] The accounts given by L06 and L10 differ as far as the role played by Haradin Bala is concerned. Because of L06's direct involvement in the incident, the Chamber is not prepared to prefer L10's account as more reliable in this particular respect. The Chamber proceeds, therefore, on the basis that the only action of Haradin Bala that might relate to the beating of L06 was untying L06's chains a few hours before the mistreatment. However, the link between his action and the actual mistreatment is far from clear. Even though the name of Shala was

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2228 *See supra,* para 286.

2229 As established above, Haradin Bala himself visited the clinic of Dr Zeqir Gashi, located in Llapushnik/Lapusnik. *See supra,* para 648.

2230 *See supra,* paras 305-306.

mentioned by L06 in the context of the particular incident of beating, it has not been established whether the untying of L06's chains was in any way related to the subsequent beating. For these reasons, the Prosecution has not established that Haradin Bala participated in any way in the actual beating of L06.

655. L10 testified to being mistreated by Shala, who was identified as Haradin Bala. As found earlier in this decision, Haradin Bala pointed a gun at L10's head and threatened him.[2232] The incident has been found to constitute the offence of cruel treatment. The direct participation of Haradin Bala in the commission of this crime has been established. He can only have acted with the intent of inflicting mental suffering upon L10. Accordingly, the Chamber finds Haradin Bala responsible for having perpetrated the crime of cruel treatment in this instance.

656. A further incident involving Haradin Bala relates to the mistreatment of L04 which the Chamber has found constituted cruel treatment.[2233] L04 stated that Shala was told by Tamuli to untie L04. As established earlier, L04 was then blindfolded, taken out of the room and beaten by individuals L04 believed to be Tamuli and Qerqiz.[2234] Shala had an automatic weapon and was guarding the door. He, however, did not personally join in the beating of L04.[2235] The Chamber accepts the evidence of L04 on the circumstances of his mistreatment. It finds that Haradin Bala did not inflict physical suffering on L04. He did, however, provide practical assistance to the direct perpetrators of the offence of cruel treatment. He better ensured there was no prospect of L04 escaping from the beating, or of the beating being seen or disrupted by third persons. In the Chamber's finding, Haradin Bala's involvement had thus a "substantial effect on the commission"[2236] of the crime of cruel treatment. In the circumstances, Haradin Bala could not have been ignorant of the intentions of the direct perpetrators. He certainly knew that a crime was being committed. Nonetheless, he remained and so he facilitated its commission. He is therefore responsible for aiding the crime of cruel treatment in respect of L04.[2237]

657. As indicated earlier in this decision, Shala, identified in the evidence as Haradin Bala, participated directly in another incident regarding L04 and L10. Haradin Bala forced L04 and L10, as well as another individual, to bury the bodies of three persons including Agim Ademi. There are some differences between the detail of the accounts of that event given by L10 and L04. They are nonetheless consistent with respect to the essential features of what occurred, especially the conduct

2231 *See supra,* para 304.
2232 *See supra,* para 299.
2233 *See supra,* paras 311; 313.
2234 *See supra,* para 311.
2235 L04, T 1175-1176.
2236 *See supra,* para 517.
2237 *See Čelebići* Trial Judgement, para 842.

of Haradin Bala, to whom both witnesses referred as Shala. Shala blindfolded them and took them in a car to the place where they were required to dig a grave. L04 and L10 and another individual received a pickaxe and shovels, with which they carried out the task given to them by Shala. They buried three bodies in the hole.[2238] Shala warned them that if they said anything about it, they would be shot.[2239] As discussed earlier, this incident caused psychological suffering of L04 and L10, which, in the Chamber's finding, in the circumstances amounted to cruel treatment. The physical perpetration of the crime by Haradin Bala has been established. Haradin Bala must have been aware of the substantial likelihood that psychological suffering would be inflicted as a result of forcing L04 and L10 to bury the bodies of fellow detainees, especially given the apparent injuries to and condition of the bodies. Haradin Bala is accordingly responsible for having directly perpetrated that crime.

658. Two incidents of mistreatment of L12 have been established. The first one occurred upon his arrival at the prison camp. In the Chamber's finding, Haradin Bala, referred to in L12's evidence as Shala, chained L12 to the wall and beat him with a stick until L12 lost consciousness. As has been established, even though the evidence does not reveal that Haradin Bala was unable to engage in strenuous activities, such as a prolonged beating of a person, it is of relevance that his ability to do so was adversely affected.[2240] The evidence concerning the role Haradin Bala played in this incident is, however, consistent and persuasive. The evidence of L12 as the victim of the incident is consistent with that of L04, who witnessed the incident, and confirmed the length and effect of the beating. Haradin Bala thus physically perpetrated the offence of cruel treatment in this case, despite his state of health. The circumstances of the incident and, in particular, the severity and duration of the beating, leave the Chamber satisfied that Haradin Bala acted with the intent to inflict physical suffering on L12. Haradin Bala is therefore, in the finding of the Chamber, responsible for having committed the offence of cruel treatment in connection with this incident. In the other case of mistreatment of L12 established earlier in this decision, L12 was beaten in a barn. Haradin Bala blindfolded L12 and brought him to a barn, where the beating took place.[2241] L12 testified that Shala was present during the incident.[2242] The Chamber accepts L12's evidence, however, that Haradin Bala's involvement in the incident was limited to bringing L12 to the perpetrators and being present while the beating was taking place. The Chamber finds that by bringing L12 to the barn and being present throughout the beating by others, Haradin Bala did contribute to the commission of the crime substantially enough to regard his participation as aiding

[2238] *See supra,* paras 299; 312 and 399-401.
[2239] L10, T 2946.
[2240] *See supra,* para 648.
[2241] *See supra,* para 316.

the offence committed by the direct perpetrators. In the circumstances, Haradin Bala must have become aware, at least at the time of the beating, that the assailants were committing a crime and of their state of mind. Accordingly, he possessed the *mens rea* required for aiding and abetting. As established earlier, this incident constitutes the elements of both cruel treatment and torture. However, as will be discussed shortly, the Chamber can enter a conviction only in respect of the charge of torture (Count 4).

659. Reference to Haradin Bala has been made in the evidence concerning the mistreatment of Emin Emini. L10 testified that Shala, together with two other men, took Emin Emini out of the storage room for the purpose of beating him. However, for reasons discussed earlier, despite this evidence, it is not possible to determine the identity of the individuals who took Emin Emini out of the storage room.[2243] Nor does the evidence suggest that Haradin Bala himself beat Emini.

660. As has been indicated, the evidence concerning the mistreatment and death of Fehmi Xhema is affected by a number of discrepancies. In particular, it is not established whether Haradin Bala was among those who took Fehmi Xhema out of the storage room and brought him back after the beating. As discussed earlier, the Chamber assessed that both L06 and L10, who gave differing accounts of mistreatment of Fehmi Xhema, were honest witnesses.[2244] In the absence of other evidence on the matter, there are no grounds for giving preference to either of these accounts. The Chamber therefore finds, in favour of the Accused Haradin Bala, that he did not participate in the mistreatment of Fehmi Xhema, either directly or by providing assistance.

661. The accounts given by L06 and L10 identify the involvement of Haradin Bala in the removal of, what they believed, was the dead body of Fehmi Xhema. Both L06 and L10 stated that Shala and two other soldiers came to the storage room to take away the body of Fehmi Xhema.[2245] The accounts differ, however, as to the time of that event. L06 testified that Fehmi Xhema, whom he believed to be dead at that time, remained in the room for three days before he was taken away.[2246] L10 stated that the body was removed on the day following day after the critical beating.[2247] The Chamber is persuaded, despite these differences, that one of the three soldiers who removed the near dead Fehmi Xhema from the storage room was Haradin Bala. As indicated earlier, Fehmi Xhema was subsequently shot.[2248] The evidence, however, does not make it possible

[2242] L12 stated that Shala should know what the individuals who beat L12 were talking about because he was there; L12, T 1808.
[2243] *See supra,* para 412.
[2244] *See supra,* paras 327-331.
[2245] L06, T 1013; L10, T 2942.
[2246] L06, T 1013
[2247] L10, T 2942.
[2248] *See supra,* para 336.

to establish the identity of those who shot Fehmi Xhema. It has not been established that those were the same people who removed Fehmi Xhema from the storage room for the last time. Moreover, the time of the death of Fehmi Xhema cannot be determined. It is therefore unclear whether the purpose of removing Fehmi Xhema from the storage room by the three soldiers, including Haradin Bala, was his immediate execution. In view of the absence of evidence on these issues, the Chamber is not persuaded that Haradin Bala participated in the shooting of Fehmi Xhema. Nor has it been established that he provided assistance to the murderers.

662. As discussed earlier, Haradin Bala ordered three detainees, including L04 and L10, to bury three bodies, including the body of Agim Ademi. There is no evidence, however, indicating that he directly participated in the killing of any one of the three. It could be inferred from the established circumstances of the incident that Haradin Bala was aware that Agim Ademi he had been shot. It is the evidence that a gunshot injury was visible. As a prison guard, he must also have known that Agim Ademi had been detained in the prison camp. There is nothing to suggest, however, that Haradin Bala had agreed to provide assistance at the time of the planning, preparation or execution of the crime,[2249] or in respect of the other two detainees. Even though the probability of such a prior agreement is clear, it could also be reasonably inferred from the evidence that Haradin Bala learned about the killings afterwards and was only ordered to remove the bodies from the prison camp. In the Chamber's finding, the evidence does not establish that Haradin Bala aided the commission of murder of Agim Ademi, or of the other two detainees.

663. As indicated earlier, the Prosecution suggested that the bodies L04 and L10 were forced to bury, together with the body of Agim Ademi, were those of Jefta Petković and Žvonko Marinković.[2250] The Chamber has found earlier that the evidence does not support the contention that the body of Jefta Petković, whose murder was established, was one of those L04 and L10 buried on the order of Haradin Bala. Accordingly, no link has been established between the murder of Jefta Petković and the Accused Haradin Bala.

b. Murder in the Berishe/Berisa Mountains (Count 10)

664. The Chamber has held that Haradin Bala and Murrizi, and possibly a third KLA soldier, were directly involved in shooting at the remaining small group of prisoners, who were among those they had forced to march into the Berishe/Berisa Mountains on 25 or 26 July 1998 and who remained after the first group was released.[2251] It has been established that nine of those prisoners

[2249] *See Blagojević* Trial Judgement, para 731.
[2250] *See supra,* para 390.
[2251] *See supra*, para 454.

were executed that day in a location in the Berishe/Berisa Mountains. 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,[2252] 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.

(ii) Participation in a joint criminal enterprise

665. It has been found in the preceding sections that the individuals detained in the Llapushnik/Lapusnik prison camp were kept in deplorable conditions and some of them were subjected to mistreatment. The Prosecution submits that the crimes enumerated in the Indictment were within the objective of a joint criminal enterprise, which came into existence before May 1998 and continued until at least August 1998. The Prosecution alleges that the purpose of that criminal enterprise was to target Serbian civilians and perceived Albanian collaborators for intimidation, imprisonment, violence and murder.[2253]

666. There is no direct evidence, however, to establish either the existence or the scope of the alleged criminal enterprise. At the most, there is a possibility of inferring from the existence of the prison camp that there was a design or plan by someone or some group, probably in the KLA, to detain a number of individuals. To the extent that they are revealed by the evidence, the reasons for the detention of those persons who were detained vary from case to case, but in the vast majority of cases are unclear or remain unknown. The fact that the prison camp functioned for at least six weeks[2254] and over thirty people were detained there,[2255] could suggest that its operation relied on the co-operation of a certain number of persons. The Indictment only identifies the three Accused as participating in the joint criminal enterprise but goes on to include in general language other KLA soldiers and guards at the Llapushnik/Lapusnik prison camp and other KLA soldiers participating in the arrest of Serbian civilians and perceived Albanian collaborators.[2256] The evidence shows that there were a number of people involved in the commission of the criminal acts established in this decision. There were at least two guards, Haradin Bala and the person known as Murrizi.[2257] The person whom some witnesses believed to be Qerqiz, participated in beatings and interrogations.[2258] L96 referred to five or six KLA soldiers who beat Shaban Hoti,[2259] and a soldier

[2252] *See supra*, paras 461; 466; 471; 476; 482; 487; 492; 501 and 506.
[2253] Indictment, paras 7-8.
[2254] *See supra,* para 282.
[2255] *See supra,* paras 243-279; 319-446.
[2256] Indictment, para 9.
[2257] *See supra,* para 276.
[2258] *See supra,* para 311.

whom L96 believed to be called Avdullah, who escorted L96 to the toilet.[2260] L06 mentioned Ramadan Behluli and Ali Gashi as his assailants.[2261] Witnesses also testified to the presence of masked soldiers in the camp. Given the nature of the available evidence, for reasons that are given elsewhere in this Judgement, the Chamber is not in a position to determine the identity of those involved in the operation of the prison camp, apart from the Accused Haradin Bala. There is absolutely no evidence to establish how, or on whose decision, the prison camp came to be established, or how or on whose orders Haradin Bala took up duties at the camp. While 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.[2262]

667. With regard to the different crimes committed against different detainees in the camp, it cannot be ruled out on the available evidence that some of the perpetrators of the crimes established in, or in connection with, the prison camp did so merely as visitors who came to the camp on an *ad hoc* basis and while there, for personal reasons, such as revenge, mistreated or killed old enemies. It is true that such "opportunistic visitors" could also have become participants in the alleged joint criminal enterprise by contributing to the overall effect of the prison camp. However, in order to prove their participation it would be necessary to establish that their contribution to the pursuance of the common purpose of the alleged joint criminal enterprise was substantial.[2263] In the present case that 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. In consequence, it cannot be determined with sufficient certainty that the commission of these crimes was envisaged within the alleged joint criminal enterprise.[2264]

668. Further, 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. As discussed earlier, there were, for example, instances of abductions in which personal revenge of individual KLA members was the motivating factor.[2265] It cannot be ruled out,

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[2259] L96, T 2312-2314.
[2260] *See supra,* para 424; L96, T 2309.
[2261] *See supra,* para 304.
[2262] *See Brdanin* Trial Judgement, para 346; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment, 11 May 2000, paras 16-17.
[2263] *See Kvočka* Appeals Judgement, paras 97 and 599.
[2264] In its rulings concerning joint criminal enterprise the Appeals Chamber referred to crimes committed "by one or more [participants in the common design]" and "other members of the group", thereby making it clear that only crimes committed by one or more participants in such an enterprise may give rise to liability of other participants; s*ee*, for example, *Tadić* Appeals Judgement, para 220; *Kvočka* Appeals Judgement, para 99.
[2265] *See supra,* para 216; Susanne Ringgaard Pedeersen, T 3532.

therefore, that in some cases the perpetrators of the crimes committed in, or in connection with, the prison camp may have been driven by such motives.[2266] This heightens to some extent the probability that persons involved in the operation of the camp, or "opportunistic visitors" to the prison camp, committed crimes for personal purposes such as retribution. It thus cannot be established with sufficient certainty that these crimes were in fact committed in pursuance of any KLA policy or plan of targeting Serbian civilians and perceived Albanian collaborators.

669. In 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. The Prosecution case is too deficient in factual information to enable the Chamber to be satisfied beyond reasonable doubt of the existence of a joint criminal enterprise, in which Haradin Bala became a participant. That being so, there is no point in further consideration of Haradin Bala's role in the camp and whether this could demonstrate that he joined in some alleged joint criminal enterprise. It has not been established by the Prosecution that a joint criminal enterprise existed as alleged.

(d) Conclusions

670. Haradin Bala has been identified as a guard in the prison camp, known as Shala. He performed this role throughout the period of the existence of the prison camp and participated in the commission of a number of crimes. Haradin Bala directly perpetrated the crime of cruel treatment by his role in the maintenance and enforcement of the deplorable conditions of detention in parts of the prison camp. Further, the Chamber has found that by threats with gun to the head of L10, by forcing L04 and L10 to bury the mutilated bodies of three fellow detainees, and by beating L12, Haradin Bala also perpetrated the crime of cruel treatment. Further, Haradin Bala has also been found to have aided the crime of torture committed by others against L12, and another incident of cruel treatment committed by others against L04. Haradin Bala is also directly responsible for the murder of nine detainees in the Berishe/Berisa Mountains nearby the prison camp.

[2266] The Chamber points out that its finding that the family dispute referred to by the Defence for Haradin Bala has no bearing on the events in the prison camp related specifically and solely to that dispute; *see supra,* para 31. There may have been other disputes, involving persons other than the Accused Haradin Bala.

3. Responsibility of Isak Musliu

(a) Was Isak Musliu identified at the Llapushnik/Lapusnik prison camp?

671. The Prosecution alleges in the Indictment that, from May to 26 July 1998, Isak Musliu, aka Qerqiz, was commander (and at times prison guard) of the Llapushnik/Lapusnik prison camp, and personally participated in the enforcement of the detention of prisoners, their interrogation, their murder, and the brutal and inhumane treatment inflicted upon them.[2267]

672. In the course of the trial, a number of Prosecution witnesses have purported to identify Isak Musliu in the Llapushnik/Lapusnik prison camp at the time covered by the Indictment. Two of the witnesses, *i.e.* L04 and L10, purported to identify a man they saw wearing a mask as Isak Musliu. Another witness, L12, did not even see Isak Musliu but only heard about him while being beaten. None of these three witnesses were capable of identifying Isak Musliu when shown photo spreads which included Isak Musliu's photograph. Only one witness, L96, gave evidence of seeing Isak Musliu without a mask in the Llapushnik/Lapusnik prison camp at the time of the events. L96 testified that he saw Isak Musliu twice: when he arrived at the Llapushnik/Lapusnik prison camp and a couple of days later when he was allegedly beaten by Isak Musliu himself. On both occasions, Isak Musliu was not wearing a mask. The Defence for Isak Musliu argues that these witnesses were mistaken in their identification of Isak Musliu at the Llapushnik/Lapusnik prison camp and submits that Isak Musliu never knew of, and did not participate in, the establishment or running of such a prison.[2268] Isak Musliu did not give evidence in his defence. Of course this is his right and no adverse inference has been drawn from his decision.

673. L04 was, in the Chamber's finding, detained in the cowshed in the Llapushnik/Lapusnik prison camp from around 28 June to 25 or 26 July 1998.[2269] It is L04's evidence that in the course of his detention he and other prisoners detained there were beaten by a man called Qerqiz.[2270] Every day, with the exception of the last three days of L04's detention, *i.e.* approximately 24-26 July 1998,[2271] Qerqiz would take the prisoners, including L04, out of the cowshed and beat them.[2272] The prisoners would return badly injured, on some cases they would not return.[2273] In one instance, L04 testified that Tamuli and Shala came to the cowshed, blindfolded him and took

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2267 Indictment, paras 2 and 11.
2268 Defence Final Brief, paras 993-994;1036-1043.
2269 *See supra,* para 279.
2270 L04, T 1172-1175.
2271 L04 testified that Qerqiz beat the prisoners ever day/night of his stay there except for the last week. T 1173-1174. During cross-examination, the witness rectified his statement and said that Qerqiz did not beat the prisoners the last three days that he was held in detention. T 1271-1272.
2272 L04, T 1139-1140; 1172-1175.
2273 L04, T 1173-1177, 1187.

him to a room where Qerqiz was waiting. He gave evidence that Qerqiz threw him on the floor, kicked him and twisted his arm.[2274] L04 testified that up until today he has pain to his right leg and arm due to Qerqiz's beating.[2275]

674. L04 testified that he learned that Qerqiz, was Isak Musliu through a fellow detainee at the Llapushnik/Lapusnik prison camp, who came from Isak Musliu's home town, Recak/Racak.[2276] Significantly, L04 never testified to having seen Isak Muliu's face on any occasion.[2277] On the contrary, L04 stated that throughout his detention in the Llapushnik/Lapusnik prison camp, the man that he learnt to be Isak Musliu always wore a mask.[2278] The only identifying features of Qerqiz, provided by L04's in-court testimony, was that he was a medium build man of approximately 170 centimetres tall and that he (regularly) wore a black uniform.[2279]

675. The Chamber notes that there is no confirmation of L04's identification of Isak Musliu from the detainee from which L04 says he learned that the perpetrator was Isak Musliu. That detainee, although specifically identified by L04, was not called to testify. There is, therefore, neither confirmation of L04's hearsay evidence that this detainee named Isak Musliu, nor, if that did occur, is there any evidence of the basis for the detainee's identification of Isak Musliu. Additionally, L04 gave evidence that on all occasions the man he identifies as Qerqiz was wearing a mask. Not surprisingly L04 did not identify Isak Musliu in the photo spread shown to him by an UNMIK investigator Anargyros Kereakes on 16 January 2002. He said of the photograph of Isak Musliu he was shown that he "looks familiar as being at Llapushnik, but [I'm] not sure."[2280] Throughout his testimony, L04 was unable to provide a description of his facial features because Qerqiz always wore a mask and only gave a limited physical description of the man he thought was Qerqiz. In this regard he says: "he is medium build. His dimensions are somewhere around 1 metre, 70 centimetres. This is how I would describe him".[2281] No further description is provided, with the exception of his uniform. L04 gave evidence that throughout his detention in Llapushnik/Lapusnik, Qerqiz wore a black uniform. There is evidence that the uniform typically used by the military police of the KLA was black.[2282] The evidence does not, however, enable a finding, that Isak Musliu held a position in the military police at the time of L04's detention at the Llapushnik/Lapusnik prison camp, from 28 June until 25 or 26 July 1998. Indeed, the evidence is not clear when the KLA military police was formed in the area concerned. In addition there is

[2274] L04, T 1175-1176.
[2275] L04, T 1206-1207.
[2276] L04, T 1173; 124341251; 1267-1268.
[2277] L04, T 1174.
[2278] L04, T 1173-1174.
[2279] L04, T 1174; 1246-1247.
[2280] L04, T 1165.
[2281] L04, T 1174.

testimony that, in May 1998, many KLA soldiers wore dark coloured shirts and trousers as there were not sufficient KLA uniforms.[2283] The evidence of L04, therefore, provides no reliable basis for a finding that Qerqiz was Isak Musliu or that Isak Musliu served in the Llapushnik/Lapusnik prison camp.

676. The Chamber is conscious that L04 did not mention Qerqiz or Isak Musliu in two of the three interviews he gave to investigative authorities regarding his detention in the Llapushnik/Lapusnik prison camp. In the interviews he gave to CCIU investigators, dated 16 January and 13 March 2002, L04 did not refer to Isak Musliu's or Qerqiz's presence when describing the events in the Llapushnik/Lapusnik prison camp. L04 did mention Isak Musliu in a further interview with investigators on 20 March 2002.[2284] No record of these interviews was tendered in evidence, but L04 was cross-examined on some of the content of the interviews in court. When asked why he did not mention Qerqiz's involvement in the Llapushnik/Lapusnik prison camp during the first two interviews, L04 stated that he did not mention him as he was not questioned about such matters.[2285] In the absence of any adequate evidence as to the length and detail of these two statements and the emphasis of their subject matter, the Chamber is not able to form a view as to the reasonableness of the explanation given.

677. L10 was, in the Chamber's finding, detained in the Llapushnik/Lapusnik prison camp from mid June to 25 or 26 July 1998.[2286] It is his evidence that in the course of his detention in the Llapushnik/Lapusnik prison camp a man named Qerqiz would come to the storage room where he and other prisoners were detained to mistreat the prisoners.[2287] Elsewhere in this decision, the Chamber has considered in some detail evidence of L10 concerning the treatment of L06 and Fehmi Xhema, and also the evidence of L06 about the same incidents. The Chamber will not repeat the details of this evidence here.[2288] On both occasions described (*i.e.* beating of L06 and removal of Fehmi Tafa from the storage room), witness L10 testified that Qerqiz was masked.[2289] Additionally, when recounting the removal of Fehmi Tafa from the storage room, L10 testified that it was at night and that he and the other prisoners in the storage room were sleeping when the two masked men entered the room. He testified that he could see the two men only because of the flashlights that they were carrying.[2290] The Chamber notes that L10 testified that Qerqiz was not only masked on the two occasions described above but he was always masked and he never saw his

[2282] Sylcman Selimi, T 2195-2196; Shukri Buja, T 4145-4147; Ramadan Behluli, T 2793-2794.
[2283] Fatmir Limaj, T 6091-6093.
[2284] L04, T 1261-1262.
[2285] L04, T 1261.
[2286] *See supra,* para 279.
[2287] L10, T 2922-2927.
[2288] *See supra,* paras 326-338.
[2289] L10, T 2937-2939, T 3048.

face in the course of his detention. Although he does give a physical description of the man he thought was Qerqiz, *i.e* stocky, not very tall, wearing a camouflage uniform (not black as described by L04) and carrying an automatic gun, during cross-examination he acknowledged that he could not distinguish Qerqiz from the other soldiers at the camp because of the mask he wore.[2291] It is L10's evidence that the only reason that he identified the masked perpetrator as Qerqiz is because another soldier, he says Shala, addressed him as Qerqiz.[2292] Later in his evidence, L10 explains that he later learned that Qerqiz was Isak Musliu.[2293] He did not, however, explain how and from whom he learned Qerqiz's real or full name. More remotely L10 says Emin Emini also once told him "this guy is from Racak".[2294] L10, therefore, provides no evidence on which the Chamber can reliably conclude that the man at Llapushnik/Lapusnik prison camp whom L10 says he then knew as Qerqiz is in fact Isak Musliu.

678. L12 was also, in the Chamber's finding, detained in the Llapushnik/Lapusnik prison camp in the summer of 1998.[2295] Unlike 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.[2296] During an interview with UNMIK he was unable to identify Isak Musliu in a photo spread shown to him. The photo spread contained a photograph of Isak Musliu.[2297] When questioned in court whether he knew Qerqiz, L12 stated "Yes, I've heard the name but I don't know who […] the person was".[2298] The evidence of L12 therefore provides no basis upon which the Chamber could find that Isak Musliu was in the Llapushnik/Lapusnik prison camp at the time of the events covered by the Indictment.

679. L96 is the only witness who testified to having seen Isak Musliu in the Llapushnik/Lapusnik prison camp without a mask. The Chamber has already found that L96 had been detained in the storage room in the Llapushnik/Lapusnik prison camp for about a week in July 1998.[2299] In the course of his evidence, L96 said he had twice seen Isak Musliu in the Llapushnik/Lapusnik prison camp.

2290 L10, T 2939.
2291 L10, T 2950 "Q. Okay. And just based on physical attributes, if you couldn't see his face how could you distinguish Qerqiz from the other soldiers or people that you saw? A. I probably would not be able to tell because he was wearing a mask and a long time [h]as elapsed."
2292 L10, T 2950-2951; 3048.
2293 L10 T 2951.
2294 L10, T 3048.
2295 *See supra,* para 279.
2296 L12, T 1808-1811.
2297 L12, T 1779-1780.
2298 L12, T 1811.
2299 *See supra*, paras 279; 307.

680. He said the first occasion was around 17 or 18 July 1998, when L96 first arrived at the Llapushnik/Lapusnik prison camp.[2300] It is his evidence that Isak Musliu entered the storage room and ordered all the prisoners to stand up and give their names. L96 offered the comment that he thought it was strange that Isak Musliu would ask the witness' name as they knew each other very well.[2301] L96 said that when he said his name, Isak Musliu turned to him and said "where on earth [have] you been [?]".[2302] L96 recounts that, on that occasion, Isak Musliu had a black moustache and had grown a beard which was not very long (a month old), he was wearing a black shirt and a uniform with a PU (military police) insignia on it. He also had a walkie-talkie and a revolver.[2303]

681. The second occasion, in which L96 encountered Isak Musliu in the Llapushnik/Lapunik prison camp, occurred two days after his arrival at the prison camp.[2304] L96 testified that Isak Musliu together with Murrizi and another soldier carrying a Kalashnikov rifle came to the room where L96 was detained to beat him.[2305] L96 described that during the beating, Isak Musliu, with a karate move, made the witness fall to the ground and then began kicking him "without any control on himself". He describes loosing consciousness because of the beating.[2306]

682. L96 testified that he saw Isak Musliu without a mask on both of these occasions.[2307] He recognized the man described in the incidents as Isak Musliu as he personally knew him.[2308] L96 also stated that he knew Isak Musliu's pseudonym before he was taken to the Llapushnik/Lapusnik prison camp for the same reason.[2309] It was the evidence of L96 that he had known Isak Musliu since he was 12 as they lived in nearby villages.[2310] He explained that it would have been impossible not to know him because of the vicinity of their villages.[2311] However, there was no other description of their association or even of any direct meeting. The absence of any such evidence does not provide the Chamber with any reassurance about L96's assertion of a childhood acquaintance. The Chamber also notes 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. Several witnesses whom the Chamber is satisfied were detained in the storage room at the relevant time said nothing as to the presence of a person named Isak Musliu or known as Qerqiz in

[2300] L96, T 2306-2308; 2573.
[2301] L96, T 2308.
[2302] L96, T 2307-2308.
[2303] L96, T 2306.
[2304] L96, T 2322; 2329-2330, 2573.
[2305] L96, T 2329-2330; 2516.
[2306] L96, T 2330.
[2307] L96, T 2573.
[2308] L96, T 2247-2249.
[2309] L96, T 2566.
[2310] L96, T 2248-2249.
[2311] L96, T 2248-2249.

the Llapushnik/Lapusnik prison camp. L96's evidence in this regard therefore remains unsupported.

683. The evidence of L96 about the two encounters with Isak Musliu while he was detained in the Llapushnik/Lapusnik prison camp (*i.e.* from 17 to 25 or 26 July 1998) may well be inconsistent with evidence that Isak Musliu was, perhaps from 19 July to 24 July, in Rahovec/Orahovac assisting in the KLA operations there. In this respect, the Chamber notes that while on 1 March 2005, the Defence for Isak Musliu filed an alibi notice, pursuant to Rule 67(A))i)(a) of the Rules, raising this absence,[2312] the Defence for Isak Musliu chose not to call any witnesses at the trial. There is, nevertheless, evidence from former KLA members called as witnesses for the Prosecution which suggest that Isak Musliu was not in Llapushnik/Lapusnik for at least part of L96's detention. Ruzhdi Karpuzi, a soldier in the Çeliku 3 unit, testified that four or five days before the fall of the Llapushnik/Lapusnik gorge, which was on 25 and 26 July 1998, Qerqiz together with other soldiers of the Çeliku 3 unit, left Llapushnik/Lapusnik to assist other KLA units in the fighting in Rahovec/Orahovac.[2313] Elmi Sopi testified to seeing Isak Musliu at the Rahovec/Orahovac crossroads either on 18 or 19 July 1998.[2314] Elmi Sopi and other KLA soldiers from the Pellumbi unit had gone to Rahovec/Orahovac to assist the civilian population because of a Serbian attack.[2315] Leaving aside issues relating to his reliability, L64 testified that on 18 or 19 July 1998, Qerqiz and other soldiers, including L64, went to Rahovec/Orahovac to help the civilian population because of the Serbian attack.[2316] L64 also testified that after their return from Rahovec/Orahovac, Qerqiz and Tamuli travelled back there every day to look for two soldiers who had gone missing. It is L64's evidence that in this period Qerqiz was not in Llapushnik/Lapusnik regularly.[2317] While the Chamber is not able to accept from this evidence that it is established that Isak Musliu, aka Qerqiz, was not at Llapushnik/Lapusnik at the times that L96 says he saw Isak Musliu in the prison camp, and saw him twice without a mask, nevertheless, this body of evidence cannot be dismissed as wrong. The Chamber is left, therefore, with a reservation about the honesty or the reliability of this aspect of the evidence of L96.

684. The Chamber is conscious that L96 did not refer to Isak Musliu's presence, by that name or by the pseudonym Qerqiz, in Llapushnik/Lapusnik when interviewed by Serbian authorities, or later by CCIU investigators, in August 1998.[2318] Perhaps more significantly, L96 did not describe being beaten by Isak Musliu. When cross-examined about these omissions, L96 stated that although he

[2312] Alibi Notice of Isak Musliu Submitted Pursuant To Rule 67(A)(i)(a), 1 March 2005.
[2313] Ruzhdi Karpuzi, T 3242.
[2314] Elmi Sopi, T 6754.
[2315] Elmi Sopi, T 6753-6754.
[2316] L64, T 4533-4537.
[2317] L64, T 4540; 4549.

had given a "detailed and careful" account of events, the interviews focused on the killings that took place during his detention and not on the beatings.[2319] The Chamber also notes that, during the interview with the Serbian authorities, L96 does mention Mulsi Musliu's participation in a killing at the Llapushnik/Lapusnik prison camp.[2320] It is the case, however, that this man bearing the same surname as Isak Musliu was in reference to a killing. It did not, however, lead to any reference to Isak Musliu and his participation in different events that occurred in the Llapushnik/Lapusnik prison camp while L96 was detained there.[2321] In the Chamber's impression the content and circumstances of these two interviews does lend some support for the submission of the Prosecution that these interviews were preliminary, short, and incomplete, with an apparent focus on killings that had occurred.[2322]

685. L96 had however identified Isak Muliu on a photo spread and identified him in the court room. In February 2002, in the course of an interview with UNMIK investigators, L96 was shown a photo spread of KLA members.[2323] The photos included one photograph of Isak Musliu. L96 testified that it was not difficult to identify Isak Musliu in the photo.[2324] L96, however, stressed that, in the photograph, Isak Musliu appeared clean shaven whereas in the Llapushnik/Lapusnik prison camp he had a beard and a moustache.[2325] Apart from the suggestion made by L96 himself that he knew Isak Musliu before the events, there is also evidence that, before identifying the photograph of Isak Musliu in February 2002, L96 had previously been shown a photograph of Isak Musliu during an interview in August 2001 with the UNMIK investigator, Anagyros Kereakes.[2326] As discussed elsewhere in this decision, the August 2001 viewing of a photograph may have increased the chances of a mistaken identification in 2002. Further because of the 2001 and 2002 viewings of a photograph, and because it was made of an accused in a courtroom setting, there is need for considerable care and caution by the Chamber in assessing the reliability of the identification. This gives rise to the issue whether the February 2002 identification was influenced by the photograph he had seen in August 2001. The dock identification of Isak Musliu by L96[2327] may be affected by the same consideration. Further, as discussed elsewhere in this Judgement,[2328] in-court identifications must be approached with considerable caution given the suggestiveness of the environment in which they are conducted.

2318 L96, T 2393.
2319 L96, T 2393; 2549-2550
2320 L96, T 2550.
2321 Defence Final Brief, paras 264-270.
2322 Closing Arguments, T 7271.
2323 L96, T 2366-2367; Exhibit P103.
2324 L96, 2369-2370; Exhibit P103.
2325 L96, 2369-2370; Exhibit P103.
2326 L96, T 2557.
2327 L96, T 2573.
2328 *See supra,* para 18.

686. L64 testified that he went to the Llapushnik/Lapusnik prison camp on several occasions at the time relevant to this case.[2329] It is his evidence that Isak Musliu, aka Qerqiz, was entitled to enter the prison camp. Although he recalls seeing him enter two or three times, he never saw him in the prison camp.[2330] L64 indicated however that on one occasion, at the end of June 1998, Qerqiz entered the prison camp wearing a mask and took it off when he came out.[2331] There is no other evidence which confirms or denies this aspect of L64's evidence.

687. Thus, it is the case that the only witness who purports to have identified Isak Musliu inside the Llapushnik/Lapusnik prison camp is L96. In addition to the particular concerns, which have just been discussed, about the evidence of L96 and L64, on a much general basis as discussed in some detail elsewhere in this decision,[2332] the Chamber 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. For these reasons, the Chamber is unable to be satisfied to the required degree that it can accept the evidence of either or both L96 and L64 that Isak Musliu was in the prison camp in Llapushnik/Lapusnik in the respective circumstances they have described.

688. By virtue of the above, the Chamber finds that all allegations that Isak Musliu personally participated in the operation of the Llapushnik/Lapusnik prison camp fall away. It has not been established that Isak Musliu planned, instigated, ordered, committed or otherwise aided and abetted any of the crimes charged in the Indictment.

(b) Did Isak Musliu hold a position of command and control over the KLA soldiers in the Llapushnik/Lapusnik prison camp?

689. It is alleged in the Indictment that in the capacity of a commander of the KLA in the Llapushnik/Lapusnik area, and the Llapushnik/Lapusnik prison camp,[2333] Isak Musliu exercised both *de jure* and *de facto* command and control over KLA soldiers conducting the Llapushnik/Lapusnik prison camp, and had the authority to discipline and punish his subordinates.[2334] The Defence for Isak Musliu submits that although there is no dispute at trial that Isak Musliu was the commander of Çeliku 3 unit, there is dispute as to whether he was the overall commander in Llapushnik/Lapusnik and a commander at the Llapushnik/Lapusnik prison camp. The Defence for Isak Musliu submits that Isak Musliu, as commander of the Çeliku 3 unit, had command over the five fighting positions of Çeliku 3, but not over other units operating in or

[2329] L64, T 4444.
[2330] L64, T 4464-4465.
[2331] L64, T 4464-4465.
[2332] *See supra,* paras 26 and 28.
[2333] Indictment, para 2.
[2334] Indictment, paras 14-17, 21, 25-26, 28-32.

around the village of Llapushnik/Lapusnik.[2335] In particular, in the Defence submission, he had no knowledge of, or involvement in, the Llapushnik/Lapusnik prison camp, nor did he have command over the KLA soldiers alleged to have performed functions therein.[2336]

(i) Çeliku 3 unit

690. L64 is the only witness to have testified about the establishment of the Çeliku 3 unit. Other witnesses confirmed its existence, however, and its location in the Llapushnik/Lapusnik village at the relevant time. It is L64's evidence that Çeliku 3 unit was created after Serbian forces attacked Llapushnik/Lapusnik on 9 May 1998.[2337] L64, a former Çeliku 3 soldier, testified that on 9 May 1998, when the Serbian forces attacked Llapushnik/Lapusnik, all KLA units in the area, including the units from Klecke/Klecka and Likofc/Likovac, went to Llapushnik/Lapusnik to try to protect the civilian population. He said that after the fighting on 9 May 1998, the KLA soldiers that had participated in the fighting met to discuss the setting up of a unit in Llapushnik/Lapusnik to protect the civilian population from further Serbian attacks. During the meeting Fehmi Ladrovci announced that the unit in Llapushnik/Lapusnik would be called Çeliku.[2338] L64's evidence is that a couple of days later, the Accused Fatmir Limaj told the soldiers that the unit would take the name of Çeliku 3.[2339]

691. There is some confirmation of this evidence in that several witnesses located the Çeliku 3 unit in Llapushnik/Lapusnik at times following 9 May 1998, specifically in the area that lies to the south of the Peje/Pec-Prishtina/Pristina main road.[2340] It is also L64's evidence that subsequent to the establishment of the Çeliku 3 unit, five Çeliku 3 fighting positions were formed in the area that lies south of the Peje/Pec-Prishtina/Pristina road. With the exception of position 1, the exact location of the other four fighting positions of Çeliku 3 is somewhat inconsistently described in L64's evidence. Position 1, otherwise known as Guri or Big Guri (meaning "Stone") was approximately 400 metres to the south of the Peje/Pec-Prishtina/Pristina road.[2341] There is a large natural stone formation at the position. L64 testified that, just after the formation of Çeliku 3, several soldiers including himself, moved from position 1 to position 2 in order to observe the movement of Serbian forces in Komoran/Komorane.[2342] This suggests that position 2 is closer to the Peje/Pec-Prishtina/Pristina road than position 1, and therefore to the north-east of fighting

[2335] Closing Arguments, T 7526.
[2336] Closing Arguments, T 7526.
[2337] L64, T 4355-4356.
[2338] L64, T 4353-4355.
[2339] L64, T 4353-4356, 4369.
[2340] The area concerned lies on the southern side of the road, L64, T 4350.
[2341] L64, T 4375-4380.
[2342] L64, T 4350-4352.

position 1. Differently, later in his evidence, L64 testified that the Çeliku 3 fighting positions, starting from position 1 (*i.e.* "Guri"), developed to the south, in the direction of the Berishe/Berisa Mountains.[2343] Further, during his testimony, L64 was asked to identify in an aerial map of the Llapushnik/Lapusnik area the five fighting positions of the Çeliku 3 unit. The positions identified are not to the south-west of position 1, but instead are located to the south-east of position 1. The positions marked are in the general vicinity of the location of the Llapushnik/Lapusnik prison camp,[2344] though not in the particular location or its immediate surroundings.

692. The Accused Fatmir Limaj also gave evidence about the location of the Çeliku 3 fighting positions. He confirmed that Çeliku 3 was located in the area of Llapushnik/Lapusnik that lies to the south of the Peje/Pec-Prishtina/Pristina road.[2345] He indicated on an aerial map of the Llapushnik/Lapusnik area[2346] the fighting positions held by the Çeliku 3 unit until the fall of Llapushnik/Lapusnik.[2347] The fighting positions of Çeliku 3 indicated on the map are located in the general vicinity of the location of the Llapushnik/Lapusnik prison camp. The Llapushnik/Lapusnik prison camp is, however, not marked as being under the command the Çeliku 3 unit.[2348] Ruzhdi Karpuzi, a former Çeliku 3 soldier, also indicated on an aerial map of the Llapushnik/Lapusnik area the location of three fighting positions of Çeliku 3.[2349] A comparison of the markings made on the aerial maps[2350] indicates that the Çeliku 3 fighting positions were located to the south of the Peje/Pec-Prishtina/Pristina road, in the general vicinity of the location of the Llapushnik/Lapusnik prison camp, but not in the particular location of the prison camp or in its immediate surroundings.

693. It is L64's evidence that, in the summer of 1998, the Çeliku 3 headquarters moved to three different locations in the village of Llapushnik/Lapusnik.[2351] L64 testified that the first location of the headquarters (from the formation of the unit until 29 May 1998) was near fighting position 1,[2352] and therefore, as said earlier, approximately 400 metres south of the Peje/Pec-Prishtina/Pristina road. It is his evidence that, due to the intensive shelling on 29 May 1998, the Çeliku 3 headquarters had to move to the house of "Vojvoda"[2353] for some days, before moving to another compound of houses further away from the prison camp, later identified as Elmi Sopi's

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2343 L64, T 4375-4380.
2344 Exhibit P170. L64, T 4378-4381.
2345 Fatmir Limaj, T 6306-6308. In his interview Shukri Buja explains that Guri 3 was located on the northern side of the asphalt road that divides Llapushnik/Lapusnik, whereas Çeliku 3 was on the other side, Exhibit P160. In his in-court testimony, Shukri Buja testified that he did not know the location of the units, T 3810-3811; 3791-3794.
2346 Exhibit DL8.
2347 Fatmir Limaj, T 6306-6308; Exhibit DL8.
2348 Exhibit DL8.
2349 Ruzhdi Karpuzi, T 3209-3212; Exhibit P130.
2350 Exhibits P130; P170 and DL8.
2351 L64, T 4378-4383.
2352 Indicated as HQ 1 in Exhibit P170; L64, T 4383.
2353 Indicated as HQ 2 in Exhibit P170; L64, T 4383.

compound.[2354] It is L64's evidence that Isak Musliu, aka Qerqiz, commander of Çeliku 3, and his closest soldiers would stay at the headquarters of Çeliku 3.[2355]

694. Ruzhdi Karpuzi's testimony differs from that of L64. Ruzhdi Karpuzi, another Çeliku 3 soldier, said that some of the Çeliku 3 soldiers, including himself, were initially stationed close to fighting position 1, but then moved to Gzim Gashi's compound until the Llapushnik/Lapusnik gorge fell. He explains that the Çeliku 3 soldiers stayed in that compound for a month, and that the number of soldiers staying in the compound varied constantly: "sometimes there were three soldiers, sometimes five, sometimes seven, another time two".[2356] Ruzhdi Karpuzi explains that the reason why there were few soldiers stationed there was to avoid KLA casualties from a potential attack by Serbian forces.[2357] Ruzhdi Karpuzi testified that the Çeliku 3 soldiers slept and ate there and also kept the records of the soldiers there. These records contained details of the soldiers, their names, their origin, and whether the soldiers had been wounded or killed.[2358] It is his evidence, 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/Lapusnik prison camp compound.[2359]

695. Elmi Sopi also gave evidence in this regard. It is his evidence that KLA soldiers in the period covered by the Indictment periodically ate in the kitchen located in Gzim Gashi's compound. This compound is directly across a narrow unpaved roadway from the prison camp. On Elmi Sopi's evidence, after 29 May 1998 a kitchen was set up in Gzim Gashi's house. It is his evidence that almost all soldiers had their daily meals in this house.[2360] Elmi Sopi explains that the Çeliku 3 soldiers previously ate at Fadil Gashi's house, closer to the Peje/Pec-Prishtina/Pristina road, but that due to the intensive shelling on 29 May, the kitchen was moved to Gzim Gashi's compound.[2361] Elmi Sopi does not specify which KLA soldiers ate at Gzim Gashi's kitchen. It is clear from this evidence that the Çeliku 3 soldiers that previously ate at Fadil Gashi's house, ate at Gzim Gashi's compound after 29 May 1998. It is not clear, however, whether all Çeliku 3 soldiers ate there or whether soldiers belonging to other KLA units in Llapushnik/Lapusnik also ate there.

696. As for the numerical extent of the Çeliku 3 unit in the summer of 1998, there is little evidence in this respect. Ramiz Qeriqi testified that the commander of the Çeliku 3 unit, Isak Musliu, "could have been a platoon commander in charge of 20 soldiers, not more", but later in his

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2354 L64, T 4380. 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, Exhibit P170.
2355 L64, T 4383, 4391-4392.
2356 Ruzhdi Karpuzi, T 3087-3088.
2357 Ruzhdi Karpuzi, T 3092.
2358 Ruzhdi Karpuzi, T 3091; 3244-3245.
2359 Ruzhdi Karpuzi, T 3248-3249. Exhibit P128.
2360 Elmi Sopi, T 6733; Exhibit DL15.
2361 Elmi Sopi, T 6729; Exhibit DL15.

evidence he states that he might not be accurate in this respect.[2362] L64 also testified in this respect. It is his evidence that when the Çeliku 3 unit was formed there were only 20 soldiers in the unit. However, L64 gave evidence that after the 29 May 1998 battle, the soldiers of the Çeliku 3 unit increased in number to approximately 60 soldiers.[2363]

(ii) Were there other units operating in Llapushnik/Lapusnik?

697. Several witnesses gave evidence that other units, such as the Lumi and Pellumbi units, operated in Llapushnik/Lapusnik in the period covered by the Indictment. The Prosecution submits that these units operated in the area that lies to the north of the Peje/Pec-Prishtina/Pristina road and not in the area to the south of the road where the Llapushnik/Lapusnik prison camp was located and the Çeliku 3 soldiers operated.[2364]

698. Ruzhdi Karpuzi, a former soldier in the Çeliku 3 unit, gave evidence that there were several units in the village of Llapushnik/Lapusnik, namely the Guri, Pellumbi, Lumi and Çeliku 3 units.[2365] He testified that the Pellumbi, Guri and Lumi units were stationed to the north of the Peje/Pec-Prishtina/Pristina main road.[2366] While it is also his evidence that one Pellumbi unit was also stationed to the south of the road, this was at Kizhareke/Kisna Reka,[2367] not at Llapushnik/Lapusnik.

699. Elmi Sopi testified that the Pellumbi unit was positioned along the Peje/Pec-Prishtina/Pristina main road, but in the area that lies to the north of the road.[2368] Elmi Sopi stated that Guri 3, although positioned closer to the road, was also in the area that lies north of the main road.[2369]

700. Sylejman Selimi, the commander of the Drenica operational zone[2370] at times material to the Indictment, testified that the Guri, Pellumbi and Alpha units were stationed on the northern side of the Peje/Pec-Prishtina/Pristina main road.[2371] Sylejman Selimi gave evidence that unlike in other areas, from May to July 1998 the units on the northern side of the Peje/Pec-Prishtina/Pristina road

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2362 Ramiz Qeriqi, T 3595.
2363 L64, T 4375.
2364 Closing Arguments, T 7269.
2365 Ruzhdi Karpuzi, T 3078.
2366 Ruzhdi Karpuzi, T 3079-3081; Exhibit P127.
2367 Ruzhdi Karpuzi, T 3079-3081; Exhibit P127.
2368 Elmi Sopi, T 6734-6735. Exhibit DL15.
2369 Elmi Sopi, T 6735. Exhibit DL15.
2370 *See supra,* para 55.
2371 Sylejman Selimi, T 2090-2094.

were already organized in brigades. He understood these to be the Guri, Pellumbi and Alpha units which were, on his evidence, part of the 113th Brigade commanded by Muje Krasniqi.[2372]

701. L64 also identified other KLA units in the village of Llapushnik/Lapusnik, but positioned on the northern side of the Peje/Pec-Prishtina/Pristina main road, namely the Pellumbi and Guri 3 units. During his testimony, L64 stated that these units were stationed there to patrol the road.[2373] L64 stated that the Çeliku 3 unit was the only unit stationed to the south of the Peje/Pec-Prishtina/Pristina road.[2374] He recalls, however, that in July 1998, a Pellumbi unit moved to the south side close to fighting position 5 of the Çeliku 3 unit.[2375]

702. Despite obvious variation in the evidence outlined above, in the Chamber's finding the Çeliku 3 unit was not the only KLA unit operating in the vicinity of the village of Llapushnik/Lapusnik at the time relevant to the Indictment. The Lumi, Pellumbi, Guri and Alpha units, were also present in Llapushnik/Lapusnik in the summer of 1998. The evidence reveals, however, that with the exception of a Pellumbi unit located a distance to the south of the position of the 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 to the north of the Peje/Pec-Prishtina/Pristina main road.

(iii) Was Isak Musliu commander of Çeliku 3 or overall commander of the Llapushnik/Lapusnik area?

703. The Chamber has heard evidence from both Prosecution and Defence witnesses as to Isak Musliu's leadership position of the Çeliku 3 unit located in Llapushnik/Lapusnik. The Chamber has also heard evidence that Isak Musliu might not have been the only leader of the Çeliku 3 unit. Several witnesses testified that, in fact, Ymer Alushani, aka Voglushi, played a central role in the command of the Çeliku 3 unit. In this respect, the Prosecution submits that Ymer Alushani, aka Voglushi, was Isak Musliu's deputy commander.[2376]

704. L64 testified that a couple of days after the formation of the Çeliku 3 unit on 9 May 1998, the Accused Fatmir Limaj told the soldiers that Isak Musliu, aka Qerqiz, would be their leader.[2377] It is noted that the witness does not refer to Isak Musliu as the "commander of Çeliku 3", but as the "person responsible for the Llapushnik/Lapusnik position".[2378] It is L64's evidence that the

[2372] Sylejman Selimi, T 2088-2090.
[2373] L64, T 4384-4385.
[2374] L64, T 4385.
[2375] L64, T 4385-4386; Exhibit P170.
[2376] Prosecution Final Brief, para 122; Closing Arguments, T 7270.
[2377] L64, T 4357-4358.
[2378] L64, T 4357.

decision to appoint Isak Musliu led to difficulties with respect to the position of Ymer Alushani, aka Voglushi, within the newly formed unit. Ymer Alushani, aka Voglushi, was previously the commander of the Zjarri unit, a unit that was incorporated into the Çeliku 3 unit at the time of its formation.[2379] L64 explained that several KLA soldiers complained about Isak Musliu, aka Qerqiz's, appointment as they had joined the unit specifically because they thought that Ymer Alushani, aka Voglushi, would be their commander. L64 stated that Ymer Alushani, aka Voglushi, never personally expressed his dissatisfaction with regard to Qerqiz's appointment; rather, he respected Qerqiz as "the person responsible for the position" and was always with him.[2380]

705. The hierarchical relationship between Isak Musliu, aka Qerqiz, and Ymer Alushani, aka Voglushi, within the Çeliku 3 unit is at times unclear in L64's evidence. For example L64 said that although Isak Musliu was the leader of the Çeliku 3 unit, he and Ymer Alushani shared responsibilities. L64 gave evidence that the soldiers in charge of the five Çeliku 3 fighting positions would report to either Qerqiz or Voglushi on the situation on the ground and the movement of the enemy forces.[2381] It his evidence that the soldiers were supposed to notify Qerqiz if something important occurred during the shifts, but that on occasions, the soldiers notified Ymer Alushani on these matters as well.[2382] The same occurred with regard to the recruitment of Çeliku 3 soldiers. In this respect, L64 testified that Isak Musliu decided whether KLA recruits would be admitted, but that others would go directly to Ymer Alushani to be recruited.[2383] In his diary or notebook[2384] under the entry dated 29 May 1998, L64 wrote that Qerqiz ordered him to fire at a member of the Serbian infantry that was approaching their position.[2385] Later in the same entry dated 29 May 1998, L64 notes that both Qerqiz and Voglushi ordered him to withdraw from his position.[2386] At the same time, it is L64's evidence that soldiers of Çeliku 3 unit had to ask Isak Musliu for travel permits to visit their families.[2387] Later in his evidence, L64 testified that Qerqiz was the person in charge of the fighting and that Qerqiz, not Voglushi, kept the only small radio which the Çeliku 3 unit possessed.[2388] Leaving aside the general credibility of this specific witness, the above evidence leaves it unclear whether Isak Musliu was *the* commander of Çeliku 3.

706. Ruzhdi Karpuzi, a former Çeliku 3 soldier, gave evidence that Ymer Alushani, aka Voglushi, and Isak Musliu, aka Qerqiz, were both commanders of the Çeliku 3 unit until Voglushi's

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2379 L64, T 4357-4361; 4335.
2380 L64, T 4357-4361.
2381 L64, T 4391.
2382 L64, T 4388; 4391.
2383 L64, T 4376-4378.
2384 Exhibit P169, p 9.
2385 L64, T 4371-4372; Exhibit P169, p 10.
2386 Exhibit P169, p 10.
2387 L64, T 4389-4390.
2388 L64, T 4371-4372; Exhibit P169.

death on 26 July 1998. It is his evidence that Isak Musliu became a commander of Çeliku 3 several weeks after 18 May 1998.[2389] On his evidence, Isak Musliu was elected by the KLA soldiers to become the leader of one of the units operating in Llapushnik/Lapusnik.[2390] Ruzhdi Karpuzi's evidence differed from L64's evidence in that he testified that Ymer Alushani, aka Voglushi, proposed Isak Musliu's promotion to the other soldiers and Isak Musliu subsequently became one of the commanders of Çeliku 3.[2391] It is his evidence that a man called Zogi, aka Mjeshtri, was also in charge of Çeliku 3, and more specifically of fighting position 1.[2392] Hence, on the evidence of Ruzhdi Karpuzi, there were several leaders of the Çeliku 3 unit, Isak Musliu, aka Qerqiz, Ymer Alushani, aka Voglushi and the man called Zogi, aka Mjeshtri.

707. Shukri Buja testified that he was not sure whether Isak Musliu, aka Qerqiz, or Ymer Alushani, aka Voglushi, was in charge of a unit in Llapushnik/Lapusnik.[2393] He later added that he did not even know whether the unit he was referring to was the Çeliku 3 unit.[2394] However, he testified that when he had business to do, he addressed Ymer Alushani, aka Voglushi, "one of the unit commanders there".[2395] It also became clear that his evidence about these matters differed from what he had said in an earlier interview in April 2003 when he said he had the impression that Ymer Alushani, aka Voglushi, had more authority then Isak Musliu.[2396]

708. Fatmir Limaj also referred to Isak Musliu's leadership position in an unsworn statement he made before the Chamber. He said that Isak Musliu became the commander of Çeliku 3 in mid May 1998.[2397] Nevertheless he said nothing as to who appointed Isak Musliu as commander of the Çeliku 3 unit.[2398] Specifically, he said nothing regarding L64's suggestion that it was Fatmir Limaj himself who appointed Isak Musliu commander of the unit.[2399] In an interview with UNMIK investigators dated 24 March 2001, Isak Musliu stated that, in the summer of 1998, he was merely a "team leader in the Llapushnik/Lapusnik area". In the interview, Isak Musliu described his responsibilities within the KLA as follows:

> The same month [May 1998] I started to serve as a UÇK soldier in Drenica valley. I served as a soldier for about 6 weeks and then became team leader in Lapushnik area. In my team I had in the beginning 11 soldiers and at the most 15-16 members.

2389 Ruzhdi Karpuzi, T 3075.
2390 Ruzhdi Karpuzi, T 3241.
2391 Ruzhdi Karpuzi, T 3075-3076; 3240-3241.
2392 Ruzhdi Karpuzi, T 3243.
2393 Shukri Buja, T 3976-3979
2394 Shukri Buja, T 3978.
2395 Shukri Buja, T 3978.
2396 Exhibit P160, p 70.
2397 Fatmir Limaj, T 6306-6308.
2398 Fatmir Limaj, T 5849-6582.
2399 Fatmir Limaj, T 5849-6582.

> In August 1998 [I] became deputy commander of UÇK brig. 121 in [the Nerodime] fighting area. [The Nerodime] fighting area include[s] the municipalities of Lipjan, Shtime, Ferizaj and Kachanik.[2400]

709. Sylejman Selimi testified that in the period from May to July 1998, there wasn't any single commander in charge of all the Çeliku units.[2401] It is his evidence that the structuring of KLA zones in the summer of 1998 differed from zone to zone. Unlike the units in the Drenica operational zone, the units located to the south of the Peje/Pec-Prishtina/Pristina main road, namely the Çeliku units, were not organised into brigades and had "no formations":

> there were some units, Çeliku-some units named Çeliku, which at that time started becoming organised just like the units in my area. But at that time they were still working independent of each other.[2402]

710. Bislim Zyrapi, witness for the Defence, gave evidence that during a visit to Llapushnik/Lapusnik in June 1998, Ymer Alushani, aka Voglushi, introduced himself to him as the commander of the Llapushnik/Lapusnik unit.[2403]

711. Zeqir Gashi, who acted as a physician in the makeshift clinic in Llapushnik/Lapusnik, gives a different account. Zeqir Gashi gave evidence that at the end of May 1998 he consulted with Ymer Alushani, aka Voglushi, regarding the possibility of opening a clinic in the village of Llapushnik/Lapusnik to provide medical service to the civilian population. On his evidence, Ymer Alushani, aka Voglushi, introduced him to "one of the leaders of the KLA there by the pseudonym of Qerqizi".[2404] It is his evidence that he was being introduced to Qerqiz because "as far as I remember or understood, Qerqiz was the leader of the unit that was in Llapushnik/Lapusnik."[2405] Later in his evidence, Zeqir Gashi explained that the unit he was referring to was the Çeliku unit.[2406] When questioned whether Qerqiz was the leader of all the soldiers in Llapushnik/Lapusnik, or only some of the soldiers in Llapushnik/Lapusnik, Zeqir Gashi stated that to "his understanding", he was the leader of the entire unit in Llapushnik/Lapusnik.[2407] He explained in fact that Qerqiz was the man they would go to when they needed medical supplies for the makeshift clinic.[2408] On his evidence, Qerqiz also interviewed soldiers that wanted to join the KLA.[2409]

2400 Exhibit P32.
2401 Sylejman Selimi, T 2155-2156.
2402 Sylejman Selimi, T 2090-2091, 2100.
2403 Bislim Zyrapi, T 6826; 6834-6835.
2404 Dr Zeqir Gashi, T 5604.
2405 Dr Zeqir Gashi, T 5604.
2406 Dr Zeqir Gashi, T 5604-5605.
2407 Dr Zeqir Gashi, T 5614-5615.
2408 Dr Zeqir Gashi, T 5613-5614.
2409 Dr Zeqir Gashi, T 5615.

(iv) Findings

712. In the view of the Chamber, the evidence does establish that the Accused Isak Musliu, aka Qerqiz, had a leadership position within the Çeliku 3 unit in late May, June and July 1998. In this respect it is not established that he had exclusive command or leadership of the Çeliku 3 unit as his authority may have been shared to some degree with Ymer Alushani, aka Voglushi. Nevertheless, in the Chamber's finding, Isak Musliu was in a position in this period to exercise effective command and control over the KLA forces that comprised the Çeliku 3 unit or fighting positions in the village of Llapushnik/Lapusnik.

713. In the view of the Chamber, however, the evidence is inconclusive and does not establish that Isak Musliu was in overall command, or in a leadership position, in respect of all KLA forces in the Llapushnik/Lapusnik village, or in that area. Indeed, 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, although soldiers from these units visited, ate and slept in the village on the south side of the road from time to time.

714. While the Çeliku 3 units were positioned in the general vicinity of the prison camp in the village of Llapushnik/Lapusnik in the period relevant to the Indictment, there 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. The relative proximity of the Çeliku 3 fighting positions to the prison camp does not, of itself, provide a sufficient basis for inferring a connection between the Çeliku 3 unit and the prison camp, nor does the very close proximity of Gzim Gashi's compound to the prison camp. While the evidence does establish that the Çeliku 3 unit had its headquarters in Gzim Gashi's compound, at least for part of the time relevant to the Indictment, the evidence does indicate that this headquarters came to be located there as a matter of expediency in the face of Serbian shelling of the earlier headquarters. Further, the evidence indicates that soldiers from other KLA units also ate at this compound, at least from time to time.

715. In the absence of any satisfactory direct evidence, and having regard to the above considerations, 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 in the village of Llapushnik/Lapusnik. It is not established that at the relevant time Isak Musliu had effective command or control of the KLA forces operating the prison camp. It follows that it is not established, pursuant to Article 7(3) of the Statute, that he had the material ability to prevent the detention of prisoners in the camp, their interrogation, their murder or the brutal and inhumane treatment inflicted upon them, or to put an end to such conduct, or to punish those responsible for it.

716. Earlier in this decision the Chamber has also examined in detail the limited body of evidence from witnesses who purport to have identified Isak Musliu in the Llapushnik/Lapusnik prison camp exercising some kind of authority over its operation. For the reasons given earlier, the Chamber is unable to conclude that the Accused Isak Musliu has been reliably identified as the person described in this evidence.[2410] It follows that the Prosecution has failed to establish any case against the Accused Isak Musliu in respect of any of the offences with which he is charged in the Indictment.

[2410] *See supra*, paras 671-688.

VII. CUMULATIVE CONVICTIONS

717. The question of cumulative convictions arises when more than one charge stems out of what is essentially the same criminal conduct. The Appeals Chamber has held that it is only permissible to enter cumulative convictions under different statutory provisions to punish the same criminal conduct if "each statutory provision involved has a materially distinct element not contained in the other".[2411] Where, in relation to two offences, this test is not met, the Chamber should enter a conviction on the more specific provision.[2412]

718. For reasons detailed earlier, the Chamber has found that the elements of the offences of torture (Count 4), cruel treatment (Count 6) and murder (Count 10) have been established.

719. In the present case, the issue of cumulation arises in relation to the offences of torture (Count 4) and cruel treatment (Count 6). The statutory basis and the elements of each of these two offences of torture and cruel treatment have been analysed earlier in this decision.[2413] Both offences require that the victim must have suffered serious bodily harm or mental harm, this harm must be as a result of an act or omission of the accused or his subordinate and the perpetrator's act must have been intentional. The offence of torture has an additional element in that the act or omission must have been carried out with a specific purpose such as to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[2414] The offence of cruel treatment, however, does not require proof of an element not required for the offence of torture. Accordingly, where the offences of torture and cruel treatment arise out of the same criminal conduct of the Accused, the Chamber will enter a conviction only in respect of the charge of torture (Count 4). The Chamber has done so with respect to one incident of mistreatment which, in the Chamber's finding, amounted both to cruel treatment and torture. The charge of cruel treatment remains, therefore, in respect of those incidents of mistreatment where the Chamber has found that only the offence of cruel treatment (Count 6) has been established.

720. In the instant case, the issue of cumulation does not arise in relation to the offences of torture (Count 4) and of murder (Count 10) as these offences are not based upon the same criminal conduct. The same can be said for the offences of cruel treatment (Count 6) and of murder (Count 10).

2411 *Čelebići* Appeals Judgement, para 412.
2412 *Čelebići* Appeals Judgement, para 413.
2413 *See supra*, paras 231-240.
2414 *Kunarac* Appeals Judgement, paras 142, 144 confirming *Kunarac* Trial Judgement, para 497. *See* also *Brdanin* Trial Judgement, para 481, *Krnojelac* Trial Judgement, para 181.

721. For the reasons given earlier in this decision, and having regard to the law as to the cumulative convictions, the Chamber will enter convictions against the Accused Haradin Bala in respect of Count 4, torture, Count 6, cruel treatment, and Count 10, murder.

VIII. SENTENCING

722. The Prosecution has submitted that the Accused Haradin Bala, if convicted on all counts, should receive a sentence of imprisonment of 18 years.[2415] He has not been convicted of all counts.

723. Sentencing is governed by Article 24 of the Statute and Rule 101 of the Rules. A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.[2416] Article 24 (2) of the Statute provides that a Chamber "should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".[2417] Rule 101 (B) requires that aggravating and mitigating circumstances as well as the general practice regarding prison sentences in the courts of the former Yugoslavia be taken into account,[2418] although the Chamber is not bound by the latter.[2419] The primary objectives of sentencing have been identified by the Appeals Chamber as retribution and deterrence.[2420] The former aims at imposing a just and appropriate punishment for a particular offence,[2421] while the latter seeks to ensure that the penalty imposed will dissuade the Accused and others from committing similar offences.[2422]

A. The gravity of the offence

724. The gravity of the offence is a factor of paramount importance in the determination of sentence.[2423] A sentence must reflect the inherent gravity of the totality of the criminal conduct of

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2415 Closing Arguments, T 7349.

2416 Rule 101 of the Rules provides: "(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life. (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

2417 Article 24 of the Statute provides "1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

2418 Rule 101 of the Rules.

2419 *Krstić* Appeals Judgement, para 260; *Blaškić* Appeals Judgement, para 682, referring to the *Kunarac* Trial Judgement, para 829.

2420 *Čelebići* Appeals Judgement, para 806; *Aleksovski* Appeals Judgement, para 185. Other, less dominant objectives, include the promotion of legal awareness, public reprobation and rehabilitation. *See Blaškić* Appeals Judgement, para 678; *Čelebići* Appeals Judgement, para 806. Nevertheless, it is the "individual guilt of an accused limits the range of the sentence." *See Stakić* Trial Judgement, para 899; *Nikolić,* Sentencing Judgement, para 132.

2421 *Todorović* Sentencing Judgement, para 29; *Nikolić* Sentencing Judgement, para 140.

2422 *Todorović* Sentencing Judgement, para 30.

2423 *Aleksovski* Appeals Judgement, para 182; *Čelebići* Appeals Judgement, para 731; *Blaškić* Appeals Judgement, para 683.

the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.[2424]

725. In the present case, the Prosecution submits that the gravity of the crimes is characterised by the fact that the Accused operated a prison camp where prisoners were subjected to inhumane conditions, mistreatment, beatings, torture, and murder over a nearly two-month period, and that the only reason why the prison camp was shut down was that the Serbian forces took-over the area where the prison camp was located at the end of July 1998.[2425] The findings of the Chamber affecting some of these matters have, however, taken away the basis for that submission in some respects.

726. It is to be emphasized that the Accused Haradin Bala was not in a position of command in respect of the camp. The Prosecution has not been able to establish who was in command. The role of Haradin Bala was that of a guard. While he performed this role throughout the period of the camp's existence, and was active in the day to day running of the prison, the evidence indicates that other KLA members were involved, in particular, in many of the episodes of more violent mistreatment of detainees. The evidence does not establish, or even suggest, that Haradin Bala exercised any authority over these other KLA members or that he actively instigated their mistreatment of detainees. Rather, his role was often as a mere attendant, apparently acting at the bidding of others. There were, however, episodes, identified in this Judgement, in which he actively participated in the physical mistreatment of individual detainees, whether as the perpetrator or an aider. These episodes involved cruel treatment by direct physical violence, and in one incident he aided the torture of a detainee. The detainees were, of course, defenceless, as they were captive and at his mercy, but the evidence does not disclose that he was motivated by or and gained any particular perverse pleasure from, the abuse of detainees or that his conduct was notably sadistic. It is clear from the evidence, nevertheless, that there was culture of violence in the prison camp, of which Haradin Bala was well aware. Indeed his conduct helped to create and re-inforce that culture. It was his day to day running of the prison that led to the deplorable and inhumane conditions of detention, particularly in the storage room and cowshed, that have been described earlier in this Judgement.

727. The remaining detainees were escorted from the prison on the last day by Haradin Bala and another. It is possible there was a third KLA guard. Having been led into the nearby Berishe/Berisa Mountains some of the detainees were released and allowed to leave. Of those that remained, it has been established that nine were executed by Haradin Bala, and the other guard or

[2424] *Furundžija* Appeals Judgement, para 249; *Blaškić* Appeals Judgement, para 683.

guards, acting together. At least one detainee was not executed, but death befell the majority of those remaining detainees. This is the most grave aspect of the criminal conduct of Haradin Bala. It is the effect of the evidence, however, in the Chamber's finding, that Haradin Bala was acting under orders from a higher authority, whose identity is not established by the evidence, in marching the detainees to the mountains, releasing some, and executing nine. He did not murder the nine detainees on his own initiative.

B. Aggravating and mitigating circumstances

728. The Statute and the Rules do not attempt to exhaustively define aggravating and mitigating factors. The jurisprudence has identified additional factors which a Chamber may take into account.[2426] These are not exhaustive. The Chamber must weigh the circumstances of each particular case to identify aggravating and mitigating circumstances and assess the weight to be accorded thereto.[2427]

729. Aggravating circumstances must be directly related to the commission of the offence,[2428] and must be established beyond a reasonable doubt.[2429] The exercise of the Accused of his right to remain silent, and not to testify, cannot constitute an aggravating circumstance.[2430] Mitigating circumstances may be taken into account regardless of whether they are directly related to the alleged offence,[2431] and are to be determined on a balance of the probabilities.[2432]

730. In the present case, the Prosecution submits that the relevant aggravating circumstances include the discriminatory intent; length of time during which the crime continued; active and direct criminal participation; premeditation; violent and humiliating nature of the acts and the vulnerability of the victims; the status of the victims, their youthful age and number, and the effect of the crimes on them; civilian detainees; character of the accused (which includes lack of remorse); and the circumstances of the offences generally.[2433]

731. As mentioned earlier, the Chamber has found that the Accused Haradin Bala is criminally responsible for the commission of the crimes of cruel treatment, torture and murder of civilian detainees.[2434] The status of the detainees as civilians (or persons not taking active part in the

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2425 Closing Arguments, T 7344.
2426 *Blaškić* Appeals Judgement, paras 686 and 696.
2427 *Čelebići* Appeals Judgement, paras 777; 780; *Blaškić* Appeals Judgement, para 685.
2428 *Kunarac* Trial Judgement, para 850; *Stakić* Trial Judgement, para 911.
2429 *Čelebići* Appeals Judgement, para 763; *Blaškić* Appeals Judgement, paras 686.
2430 *Čelebići* Appeals Judgement, para 783; *Blaškić* Appeals Judgement, para 687.
2431 *Stakić* Trial Judgement, para 920.
2432 *Blaškić* Appeals Judgement, para 697.
2433 Closing Arguments, T 7345.
2434 *See supra*, paras 652-670.

hostilities) cannot be taken into consideration as an aggravating factor given that it is already an element of the offences of torture, cruel treatment and murder under Article 3 of the Statute. These crimes were committed by the Accused Haradin Bala within a period of less than 2 months. The recurrence of Haradin Bala's criminal behaviour should not be considered an aggravating factor in the present case as the number of crimes committed in the period of time concerned has been taken into account in evaluating the gravity of the offences. The same can be said with regard to the direct participation of the Accused to the crimes and other factors invoked (*i.e.* vulnerability of the victims as detainees, violent and humiliating nature of the acts, circumstances of the offences generally). The Chamber has not heard evidence that would allow it to make a finding against the Accused in respect of the other matters relied on by the Prosecution.

732. The Defence for Haradin Bala has emphasized that the Accused 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".[2435] In an unsworn statement Haradin Bala pointed out that he was the father of a family of seven children and that one of his children requires particular attention because she is paralysed.[2436] The evidence also confirms that Haradin Bala is in a poor medical condition.[2437] He has for many years experienced problems involving his heart function and blood pressure.[2438] The Chamber will take these matters into consideration by way of some mitigation of the sentence. It is also conscious that his prolonged detention will be of hardship for his family, in particular because his daughter requires particular assistance, and is satisfied that his anxiety about his family will make the period the Accused is to serve in custody more difficult for the Accused.

733. The Chamber has also heard evidence regarding Haradin Bala's good treatment to some detainees at the Llapushnik/Lapusnik prison camp.[2439] Although this evidence shows that he was capable of some benevolence this does not significantly detract from the seriousness of his conduct on the other occasions for which he is to be punished. The occasional assistance to some detainees will not be given much weight.

[2435] Closing Arguments, T 7479.
[2436] Unsworn statement of Haradin Bala, T 6905.
[2437] Ali Thaqi, T 7022-7026; Kadri Dugolli, T 7007-7012; Dr Fitim Selimi, T 6949-6951; Exhibit DB6.
[2438] Ali Thaqi, T 7022-7026; Kadri Dugolli, T 7007-7012; Dr Fitim Selimi, T 6949-6951; Exhibit DB6.
[2439] L07, T 832; L24, T 1330-1332.

C. The general practice in the courts of the former Yugoslavia and this Tribunal

734. In determining the appropriate sentence, the Chamber takes into account the general sentencing practice in the former Yugoslavia. It is, however, not bound by such practice[2440] and can, impose a sentence in excess of that which would be applicable under the relevant law in the former Yugoslavia.[2441] By Article 142 of the SFRY Criminal Code, which was in force at the time of the offences, a number of criminal acts including "killings, torture and inhuman treatment", "immense suffering or violation of body integrity and health" of the civilian population were punishable by a sentence of imprisonment for not less than five years or by the death penalty. Articles 38(1) and 38(2) of the SFRY Code are also of relevance insofar as they provide for a sentence of 15 years imprisonment subject to the provision that if a criminal offence attracts the death penalty, the court may impose a longer sentence of 20 years imprisonment. By virtue of the above, the crimes of which the Accused Haradin Bala has been found guilty are punishable in the former Yugoslavia by sentences of between 5 and 20 years imprisonment.

735. Although this case turns on its own facts, in determining the sentence of Haradin Bala, the Chamber has also considered the sentencing practice in this Tribunal related to the commission of crimes in or around prison camps or detention centres. An overview of the judgements demonstrates that the circumstances of the cases vary considerably, affecting the length of sentences handed down. The cases involve convictions for a variety of offences, direct criminal liability under article 7(1) or superior liability under article 7(3) of the Statute, and in some cases both crimes against humanity and war crimes, but in others only one other of these. Significant factual variation also occurred in respect of matters such as the number of victims, the duration of existence of the prison camp, and the degree of cruelty displayed by the accused. The most serious offences in cases involving prison camps have led to sentences of considerable duration. In *Prosecutor v. Jelisić,* in which a sentence of 40 years was handed down, the Trial Chamber emphasized in imposing sentence "the repugnant, bestial and sadistic nature of […] Jelisić's behaviour."[2442] In *Prosecutor v. Delalić et al*, in imposing a sentence of 15 years on Landžo, a

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[2440] *Čelebići* Appeals Judgement, paras 813; 816; *Kunarac* Appeals Judgement, para 377; *Jelisić* Appeals Judgement, paras 116-117; *Blaškić* Appeals Judgement, para 681-682, referring to the *Kunarac* Trial Judgement, para 829: "Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia."

[2441] *Čelebići* Appeals Judgement, para 816-817; *Blaškić* Appeals Judgement, para 681.

[2442] *Jelisić* Trial Judgement, para 130.

guard in the Čelebići prison camp, the Trial Chamber had particular regard to the sadistic tendencies exhibited and the premeditated nature of his criminal acts.[2443]

736. The Chamber has considered, in particular, two cases which exhibit factual and legal allegations with some similarity to the instant case. In the *Prosecutor v. Tadić,* the Accused was sentenced to 20 years of imprisonment for committing and aiding and abetting the crimes of 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.[2444] In *Prosecutor v. Delalić et al*, Landžo was sentenced to 15 years for committing crimes of wilful killing, wilfully causing great suffering or serious injury to body or health and torture under Article 2.[2445] The acts committed in the latter case were particularly heinous and depraved in nature. The Chamber has also noted the circumstances of, and the sentence of 7 years imprisonment imposed in, the *Prosecutor v. Aleksovski.*[2446] It is significant, however, that there was no conviction for murder in that case.

D. Credit for time served in custody

737. Pursuant to Rule 101(C) of the Rules, the Accused is entitled to credit for the time spent in detention pending and during his trial. The Chamber notes that Haradin Bala has been in custody in relation to this Indictment since 17 February 2003.

[2443] *Čelebići* Trial Judgement, paras 1272-1284
[2444] *Tadić* Sentencing Appeals Judgement.
[2445] *Čelebići* Trial Judgement; *Čelebići* Sentencing Appeals Judgement.
[2446] *Aleksovski* Appeals Judgement.

IX. DISPOSITION

738. For the foregoing reasons, having considered all of the evidence and the submissions of the parties, the Chamber decides as follows:

739. The Chamber finds that the jurisdictional requirements for the applicability of Article 5 of the Statute have not been established. Accordingly, the offences of crimes against humanity brought under Article 5 of the Statute, namely Count 1 (imprisonment), Count 3 (torture), Count 5 (inhumane acts), Count 7 (murder) and Count 9 (murder), are dismissed.

740. The Chamber finds the Accused Fatmir Limaj **NOT GUILTY** on all counts in the Indictment. Pursuant to Rule 99(A) of the Rules, the Chamber orders that Fatmir Limaj be immediately released from the United Nations Detention Unit.

741. The Chamber finds the Accused Haradin Bala **GUILTY**, pursuant to Article 7(1) of the Statute, of the following counts:

Count 4: Torture, a violation of the laws or customs of war, under Article 3 of the Statute, for having aided the torture of L12;

Count 6: Cruel treatment, a violation of the laws or customs of war, under Article 3 of the Statute, for having personally mistreated detainees L04, L10 and L12, and aided another episode of mistreatment of L04, and for his personal role in the maintenance and enforcement of inhumane conditions of detention in the Llapushnik/Lapusnik prison camp;

Count 10: Murder, a violation of the laws or customs of war, under Article 3 of the Statute, for having personally participated in the murder of the following nine detainees in the Berishe/Berisa Mountains: Emin Emini, Ibush Hamza, Hyzri Harjizi, Shaban Hoti, Hasan Hoxha, Safet Hysenaj, Bashkim Rashiti, Lutfi Xhemshiti and Shyqyri Zymeri.

but finds the Accused Haradin Bala **NOT GUILTY** on all other counts in the Indictment.

742. The Chamber hereby sentences Haradin Bala to a single sentence of 13 years imprisonment. Haradin Bala has been in custody since 17 February 2003. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention so far. Pursuant to Rule 103(C) of the Rules, Haradin Bala shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

743. The Chamber finds the Accused Isak Musliu **NOT GUILTY** on all counts in the Indictment. Pursuant to Rule 99(A) of the Rules, the Chamber orders that Isak Musliu be immediately released from the United Nations Detention Unit.

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

Dated this thirtieth day of November 2005
At The Hague
The Netherlands

Judge Kevin Parker
Presiding

Judge Krister Thelin

Judge Christine Van Den Wyngaert

[Seal of the Tribunal]

X. ANNEX I: GLOSSARY OF TERMS

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977
Akayesu Trial Judgement	*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998
Aleksovski Appeals Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000
Aleksovski Trial Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999
APC	Armoured personal carrier
BCS	Bosnian Croatian Serbian language
Blagojević Trial Judgement	*Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case No. IT-02-60-T, Judgement, 17 January 2005
Blaškić Appeals Judgement	*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004
Blaškić Trial Judgement	*Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000
Brđanin Trial Judgement	*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004
CCIU	UNMIK Police Central Criminal Investigation Unit
Čelebići Appeals Judgement	*Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-A, Judgement, 20 February 2001
Čelebići Sentencing Appeals Judgement	*Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003
Čelebići Trial Judgement	*Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-T, Judgement, 16 November 1998
Closing Arguments	Transcript of hearing in the present case relating to the closing arguments of Prosecution and the Defence. All transcript pages referred to in this Judgement are taken from the uncorrected version of the transcript. Minor

	differences may therefore exist between the pagination therein and that of the final transcript released to the public
Common Article 3	Article 3 of Geneva Conventions I to IV
Defence	Counsel for the Accused Fatmir Limaj, Haradin Bala and Isak Musliu
Defence for Fatmir Limaj	Counsel for the Accused Fatmir Limaj
Defence for Haradin Bala	Counsel for the Accused Haradin Bala
Defence for Isak Mulsiu	Counsel for the Accused Isak Musliu
Defence Final Brief	*Prosecutor v.Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Defence Joint Final Brief Pursuant to Rule 86(B) (Confidential), 21 July 2005; Corrigendum to Sections 7, 8, and 12 of Defence Joint Final Brief, 25 July 2005 and Corrigendum to Sections 3, 4, 5 and 9 of Defence Joint Final Brief, 1 August 2005
Defence Skeleton Argument on the Jurisdictional issue of Armed Conflict	*Prosecutor v.Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Defence Skeleton Argument on the Jurisdictional Issue of Armed Conflict, 30 August 2005
FARK	Forcat Armatosur e Republikes e Kosoves/Armed Force of the Republic of Kosovo
Furundžija Appeals Judgement	*Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-A, Judgement, 21 July 2000
Furundžija Trial Judgement	*Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Judgement, 10 December 1998
FRY	Federal Republic of Yugoslavia
Galić Trial Judgement	*Prosecutor v. Stanislav Galić*, Case No. IT-98-29, Judgement, 5 December 2003
Geneva Convention I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949

Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
HRW	Human Rights Watch
ICC	International Criminal Court
ICMP	International Commission on Missing Persons
ICRC	International Committee of the Red Cross
ICRC Commentary on the Additional Protocols	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987
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 6 November 2003)
JCE	Joint criminal enterprise
Jelisić Appeals Judgement	*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001
Jelisić Trial Judgement	*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1999
JSO	Special Operations Unit of Ministry of Interior of Republic of Serbia
Kordić Appeals Judgement	*Prosecutor v. Dario Kordić & Mario Čerkez,* Case No. IT-95-14/2-A, Judgement, 17 December 2004
Kordić Trial Judgement	*Prosecutor v. Dario Kordić & Mario Čerkez,* Case No. IT-95-14/2-T, Judgement, 26 February 2001
Krnojelac Appeals Judgement	*Prosecutor v. Milorad Krnojelac* Case No. IT-97-25-A, Judgement, 17 September 2003

Krnojelac Trial Judgement	*Prosecutor v. Milorad Krnojelac* Case No. IT-97-25-T, Judgement, 15 March 2002
Krstić Appeals Judgement	*Prosecutor v. Radislav Krstić,* Case No. IT-98-33-A, Judgement, 19 April 2004
Krstić Trial Judgement	*Prosecutor v. Radislav Krstić,* Case No. IT-98-33-T, Judgement, 2 August 2001
Kunarac Appeals Judgement	*Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23&23/1-A, Judgement, 12 June 2002
Kunarac Trial Judgement	*Prosecutor v. Dragoljub Kunarac et al.,* Case No. IT-96-23/1-T, Judgement, 22 February 2001
Kupreškić Appeals Judgement	*Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001
Kupreškić Trial Judgement	*Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000
KLA	Kosovo Liberation Army/"UÇK", "Oslobodilacka vojska Kosova
Kvočka Appeals Judgement	*Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30/1-A, Judgement, 28 February 2005
Kvočka Trial Judgement	*Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30-T, Judgement, 2 November 2001
LDK	Democratic League of Kosovo
LPK	Popular Movement for Kosovo
LPRK	Popular Movement for the Republic of Kosovo
Milošević Rule 98*bis* Decision	*Prosecutor v Slobodan Milošević,* Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004
MUP	Ministry of the Interior
Naletilić Trial Judgement	*Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. 98-34-T, Judgement, 31 March 2003
Nikolić Sentencing Judgement	*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003
Oda	Guest room
OTP	Office of the Prosecutor

PJP	Special Police Unit of the Ministry of Interior of the Republic of Serbia
Pre-Trial Brief of Fatmir Limaj	*Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-PT, Pre-Trial Brief of Fatmir Limaj, 1 June 2004
Pre-Trial Brief of Haradin Bala	*Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-PT, Pre-Trial Brief of Haradin Bala Pursuant to Rule 65ter (F) of the Rules of Procedure and Evidence, 1 June 2004
Pre-Trial Brief of Isak Musliu	*Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-PT, Pre-Trial Brief of Isak Musliu, 1 June 2004.
Prison camp	Llapushnik/Lapusnik Farm Compound referred to in Prosecution Exhibit P6 (pp 1-18)
Prosecution	The Office of the Prosecutor
Prosecution Final Brief	*Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Prosecution's Final Brief (Confidential), 20 July 2005
Prosecution Pre-Trial Brief	*Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Prosecutor's Notice of Filing of Pre-Trial Brief and Other Documents Pursuant to Rule 65 *ter*, 27 February 2004 and Corrigendum to Prosecution's Pre-Trial Brief, Updated Witness List and Revised Set of Rule 65ter Summaries, 30 September 2004
PU	Policia Ushtarake/ KLA military police
OSCE	Organisation for Security and Cooperation in Europe
Rules	Rules of Procedure and Evidence of the Tribunal
SAJ	Special Anti-terrorist Unit of the Ministry of Interior of the Republic of Serbia
Statute	Statute of the International Criminal Tribunal for the former Yugoslavia established by Security Council Resolution 827
Stakić Trial Judgement	*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003
Strugar Trial Judgement	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005
T	Transcript of hearing in the present case. All transcript pages referred to in this Judgement are taken from the

	uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Tadić Appeals Judgement	*Prosecutor v. Duško Tadić aka "Dule",* Case No. IT-94-1-A, Judgement, 15 July 1999
Tadić Jurisdiction Decision	*Prosecutor v. Duško Tadić aka "Dule",* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadić Sentencing Appeals Judgement	*Prosecutor v. Duško Tadić aka "Dule",* Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000
Tadić Trial Judgement	*Prosecutor v. Duško Tadić aka "Dule"*, Case No. IT-94-1-T, Judgement, 7 May 1997
TO	Territorial Defence
Todorović Sentencing Judgement	Prosecutor v. Stevan Todorović, Case No. IT-95-9/1-T, Sentencing Judgement, 31 July 2001
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
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIK MPU	United Nations Interim Administration Mission in Kosovo, Missing Persons Unit
UNICEF	United Nations Childrens' Fund
Vasiljević Appeals Judgement	*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004
Vasiljević Trial Judgement	*Prosecutor v. Mitar Vasiljević,* Case No. IT-98-32-T, Judgement, 29 November 2002
VJ	Vojska Jugoslavije/ Army of Yugoslavia

XI. ANNEXES II AND III: MAPS

Annex II: Map of the area and the surrounding municipalities

Annex III: Topographical map of the area

XII. ANNEX IV: PROCEDURAL HISTORY

A. Pre-trial proceedings

1. Indictment and initial appearance

744. The Accused Fatmir Limaj, Haradin Bala, and Isak Musliu were originally indicted with a fourth Accused Agim Murtezi. The Indictment, confirmed by Judge Amin El Mahdi on 27 January 2003, was confidentially filed on 15 January 2003 and alleged nine counts of violations of the laws or customs of war and crimes against humanity pursuant to Articles 3 and 5 of the Statute. The acts and omissions forming the basis of the indictment were alleged to have occurred between May 1998 and July 1998.

745. Three of the four Accused, *viz* Haradin Bala, Isak Musliu and Agim Murtezi were arrested by the SFOR on 17 February 2003 and transferred to the UNDU. On 18 February 2003, Judge Amin El Mahdi vacated the Order for non-disclosure.[2447] Fatmir Limaj was arrested on 18 February 2003 and transferred to the UNDU from Kosovo on 3 March 2003. At the initial appearance of Haradin Bala, Isak Musliu and Agim Murtezi, on 20 February 2003, all three entered a plea of not guilty to all charges held against them. At the initial appearance of Fatmir Limaj, which took place on 5 March 2003, he also entered a plea of not guilty to all charges against him.

746. By Order of the President of the Tribunal the case was assigned to Trial Chamber I on 30 May 2003. On 20 February 2003, Judge Liu Daqun was assigned pre-trial judge[2448], however, on 23 May 2003, following the adoption of resolution 1481(2003) by the United Nations Security Council allowing *ad litem* judges to act as Pre-Trial Judges, Judge Joaquín Martín Canivell was assigned Pre-Trial judge.[2449]

2. History of the Indictment

747. On 21 February 2003, the Murtezi Defence raised the possibility of a mistake in identity of the Accused. On 21, 24 and 25 February 2003, the Prosecution interviewed the Accused Agim Murtezi in accordance with Rules 42 and 43 of the Rules. At the request of the Prosecution, the indictment was withdrawn by Trial Chamber I, without prejudice, on 28 February 2003.[2450]

[2447] Decision to Vacate the Order for Non-Disclosure entered 27 January 2003, 18 February 2003.
[2448] Order Designating a Pre-Trial Juage, 20 February 2003.
[2449] Order Designating a New Pre-Trial Judge, 23 May 2005.
[2450] Order to Withdraw the Indictment Against Agim Murtezi and Order for His Immediate Release, 28 February 2003.

748. On 7 March 2003, pursuant to Rules 50 and 73 and in compliance with the Order of Trial Chamber I the Prosecution filed the "Prosecutor's Motion to Amend the Indictment" dismissing all charges against Agim Murtezi and removing one victim included in Annex III of the original indictment. On 25 March 2003, Trial Chamber I granted the Prosecution Motion.[2451]

749. On 6 November 2003 the Prosecution filed a new "Motion to amend the Amended Indictment". Trial Chamber I granted the Motion on 12 February 2004 finding that no prejudice could be shown to the Accused.[2452] The amended indictment included the addition of allegations of joint criminal liability under Article 7(1) of the Statute against all three accused, the addition of one count of inhumane acts, as a crime against humanity, under Article 5 of the Statute based on factual allegations contained in the original indictment, the addition of one incident of murder under existing counts in the original indictment and the addition of allegations of superior responsibility under Article 7(3) of the Statute against the Accused Isak Musliu.

750. On 20 February 2004, the Defence for Isak Musliu applied before the Chamber for certification to appeal the decision to grant leave to amend the Amended Indictment. On 25 February 2004, Trial Chamber I denied the application.[2453]

751. Following the amendment, the Accused Fatmir Limaj, Haradin Bala and Isak Musliu were required to plead once more on 27 February 2004. All three Accused pleaded not guilty to all charges added by the amendment to the indictment.

752. The Defence for Haradin Bala announced its intention to offer a partial defence of alibi.[2454]

3. Applications for provisional release

753. On 24 June 2003, the Defence for Fatmir Limaj filed an "Application for Provisional Release of Fatmir Limaj". On 12 September 2003, Trial Chamber I rejected the Accused's application on the grounds that it could not be satisfied that the Accused would have surrendered voluntarily if given the opportunity, as well as on the basis of the seriousness of the charges against the Accused and the lack of guarantees from the legitimate authority and administration of Kosovo, UNMIK.[2455] On 22 September 2003, the Defence for Fatmir Limaj filed an application for leave to

[2451] Decision to Grant Leave to Amend the Indictment, 25 March 2003.
[2452] Decision on Prosecution's Motion to Amend the Amended Indictment, 12 February 2004.
[2453] Decision on Musliu's Application for Certification to Appeal "Decision on Prosecution's Motion to Amend the Amended indictment", 25 February 2004.
[2454] Pre-Trial Brief of Haradin Bala pursuant to Rule 65*ter*(F) of the Rules of Procedure and Evidence, 27 May 2004, paras 2-5.
[2455] Decision on the Provisional Release of Fatmir Limaj, 12 September 2003.

appeal the decision of Trial Chamber I on provisional release of Fatmir Limaj. The application was denied by the Appeals Chamber on 31 October 2003.[2456]

754. On 7 July 2003, the Defence for Haradin Bala filed a similar application for provisional release. On 16 September 2003, Trial Chamber I rejected the application on the grounds that it was not satisfied that, if released, the Accused would appear for trial.[2457] The Defence for Haradin Bala applied for leave to appeal, which was subsequently denied by Trial Chamber I on 31 October 2003.[2458]

755. On 6 August 2003, the Defence for Isak Musliu also filed an application for provisional release. On 17 September 2003, Trial Chamber I rejected the application on the same grounds as it refused the applications on behalf of Fatmir Limaj and Haradin Bala. The Defence for Isak Musliu also applied for leave to appeal the decision and this was denied on 31 October 2003.[2459]

4. Issues relating to the protection of victims and witnesses

756. On 19 June 2003, the Prosecution filed its first "Prosecution's Motion for Protective Measures Regarding Disclosure" whereby it requested protective measures for six sensitive witnesses. The Defence for Fatmir Limaj and Isak Musliu opposed the delayed disclosure of the evidence of the six sensitive witnesses. Trial Chamber I rejected the Defence's arguments and granted the Prosecution's request for protective measures on 30 September 2003.[2460]

757. On 21 October 2003, the Prosecution filed a second confidential and partially *ex-parte* motion for protective measures regarding disclosure of eight other sensitive witnesses. Trial Chamber I granted the Prosecution's second motion on 18 December 2003.[2461]

5. Health of the Accused Haradin Bala

758. On 1 July 2003, pursuant to Rule 74*bis*, the Defence for Haradin Bala requested that an independent cardiologist examine Haradin Bala to determine whether he was fit to stand trial. On 24 July 2003, the Pre-Trial Judge ordered the Registrar to appoint a cardiologist to conduct a medical examination of the Accused.[2462] On 9 September 2003 the cardiologist filed his report and concluded that Haradin Bala was fit to stand trial.

[2456] Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003.
[2457] Decision on Provisional Release of Haradin Bala, 16 September 2003.
[2458] Decision on Haradin Bala's Request for Provisional Release, 31 October 2003.
[2459] Decision on Provisional Release of Isak Musliu, 31 October 2003.
[2460] Decision on the Prosecutor's Motion for Protective Measures Regarding Disclosure, 30 September 2003.
[2461] Decision on the Prosecutor's Motion for Protective Measures Regarding Disclosure, 18 December 2003.
[2462] Order for a Medical Examination of the Accused, confidentially filed on 25 July 2003.

759. As a result of further medical problems, the Defence for Haradin Bala filed a second confidential "Motion of Haradin Bala for Medical Examination" to have the Accused examined again by an approved cardiologist on 9 June 2004. Trial Chamber I granted the request on 28 June 2004.[2463] On 28 July 2004, the new cardiologist filed his medical report, in which he concluded that Haradin Bala's medical condition was satisfactory. In August 2004, Trial Chamber I requested the Registry to organise other examinations of the Accused until a consistent diagnosis was obtained. A further examination of the Accused Haradin Bala revealed no respiratory deficiency.

6. Commencement of Trial

760. On 27 February 2004, the Prosecution filed its Pre-Trial Brief. On 28 April 2004 the Defence for Isak Musliu filed an "Application for Extension of Time to File Defence Pre-Trial Brief". The Defence for the two other Accused joined the request. Trial Chamber I enlarged the time-limit by two weeks on the ground that the decision was made before the Pre-Trial Briefs were due.[2464] A further extension was granted on 24 May 2004.[2465] All three Accused filed their Pre-Trial Briefs on 1 June 2004.

761. On 11 October 2004, by order of the Acting President of the Tribunal, the case was assigned to Trial Chamber II consisting of Judge Kevin Parker (presiding), Judge Krister Thelin and Judge Christine Van Den Wyngaert. [2466]

762. The pre-trial conference took place on Monday, 15 November 2004. During the pre-trial conference, the Chamber orally denied a request from the Defence for the postponement of trial.[2467] The trial against Fatmir Limaj, Haradin Bala and Isak Musliu commenced on Monday, 15 November 2004.[2468]

B. Trial Proceedings

1. Overview

763. The Prosecution case opened on 15 November 2004 and ended on 13 April 2005. The Defence for Fatmir Limaj opened its case on 17 May 2005 and completed it on 3 June 2005. The Defence for Haradin Bala opened its case on 7 June 2005 and completed it on 9 June 2005. The

[2463] Order for a Medical Examination of the Accused Bala (confidential), 28 June 2004.
[2464] Decision on Defence's Applications for Extension of Time to file Pre-Trial Briefs and Order for Filing of Expert Reports and Notice under Rule 94*bis*, 7 May 2004.
[2465] Decision on Defence's Applications for Extension of Time to File Pre-Trial Briefs, 24 May 2004.
[2466] Order Assigning Judges to a Case Before a Trial Chamber, 11 October 2004.
[2467] Oral Decision of the Chamber, 15 November 2004.
[2468] Scheduling Order for the Pre-Trial Conference and the Commencement of the Trial Against Fatmir Limaj, Haradin Bala and Isak Musliu, 12 October 2004.

Defence for Isak Musliu did not call any live witnesses, apart from the joint Defence expert witness. The Prosecution called 30 witnesses. The Prosecution entered 260 exhibits into evidence. The Defence for Fatmir Limaj called eight defence witnesses and the Defence for Haradin Bala called seven defence witnesses. One expert witness was called as a joint Defence witness. In total, the Defence entered 44 exhibits. The Prosecution tendered 31 *92bis* statements. At the request of the Defence for Fatmir Limaj three 92*bis* statements were tendered, one *92bis* statement was tendered at the request of the Defence for Haradin Bala and twelve at the request of the Defence for Isak Musliu. The closing arguments were heard between 29 August and 1 September 2005.

2. Matters relating to witnesses

764. Several motions were filed by the Prosecution for the protection of victims and witnesses and for the protection of other confidential material under Rule 75 of the Rules. The Chamber granted the Prosecution's request for protective measures with respect to thirteen prosecution witnesses.

765. On 11 April 2005 the Prosecution filed a Motion seeking protective measures for certain witnesses whose statements were admitted under Rule *92bis*. The request was granted by the Chamber on 14 April 2005.[2469]

766. The Defence counsel for all three Accused in this case requested an order, pursuant to Rule 74, that the Prosecution cease "proofing" witnesses with immediate effect, or an order that a representative of the Defence be permitted to attend the Prosecution's proofing sessions, or that the Defence be provided with a video or tape-recording of proofing sessions. The Chamber denied the Motion and found that proofing was a necessary and established procedure. The Chamber found that nothing had been submitted by the Defence that persuaded the Chamber that proper standards of proofing were not being observed.[2470]

767. By various decisions, the Chamber issued subpoenas with respect to 14 witnesses.[2471]

768. In the course of the presentation of its case, the Prosecution requested that four Prosecution witnesses, all former KLA members, be declared hostile. The Chamber made a number of oral rulings in respect of hostile witnesses. The Chamber denied the request with respect to Sylejman

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[2469] Decision on Prosecution's Motion for Protective Measures Regarding Rule 92*bis* witnesses, 14 April 2005.
[2470] Decision on the Defence Motion on Prosecution Practice of "Proofing Witnesses", 10 December 2004.
[2471] Decision on the Prosecution Motion for Issuance of Subpoenas, 2 November 2004, Decision on the Prosecution's Second Motion for Issuance of Subpoenas, 15 November 2004, Decision on the Prosecution's Third Motion for Issuance of Subpoenas, 15 December 2004, Decision on the Prosecution's Fourth Motion for Issuance of Subpoenas, 14 January 2005, Decision on the Prosecution's Fifth Motion for Issuance of Subpoenas, 20 January 2005, Decision on the Prosecution's Sixth Motion for Issuance of Subpoenas, 28 January 2005.

Selimi on the grounds that, although the Chamber conceded that there was some discrepancy between the witness' *viva voce* evidence and his prior statement, the matters identified by the Prosecution appeared to have no material distinction and any change in position did not appear to the Chamber to be motivated by a hostility to the Prosecution.[2472] The Chamber, however, granted three subsequent requests from the Prosecution with respect to Ramadam Behluli[2473], Ruzhdi Karpuzi[2474] and Shukri Buja[2475] on the grounds that there were material differences between their oral evidence and prior statements and, on consideration of the witnesses explanations for these differences together with their general demeanour, the Chamber was persuaded that they were not prepared to tell the truth. The Prosecution was allowed to cross-examine all three witnesses.

3. Evidentiary issues

769. On 17 November 2004, the Chamber granted a Motion filed by the Defence for Haradin Bala seeking to exclude a statement made by Accused Haradin Bala in an interview with an investigator with the OTP on 17 February 2003.[2476]

770. On 1 February 2005 the Prosecution filed a Motion, pursuant to Rule 67(A)(i)(a), requesting the Chamber to order the Defence for Haradin Bala and Isak Musliu to provide details of any alibi defence within seven days. On 16 February 2005 the Chamber ordered the Defence to notify the Prosecution, by 28 February 2005, of any alibi they wish to raise as a defence and, in such case, to specify the place or places the Accused claims to have been, the names and addresses of any witnesses and any other evidence relied upon.[2477] The Defence for Haradin Bala filed its alibi notice on 28 February 2005.[2478] The Defence for Isak Musliu filed its alibi notice on 1 March 2005.[2479]

771. The Prosecution filed a Motion seeking the admission, as substantive evidence, of video-recordings (with transcripts) of the interviews given to representatives of the OTP by two witnesses who were called to testify for the Prosecution and gave oral evidence inconsistent in some significant respects with what they had previously said in the course of the interviews. The video-recordings and the transcripts had been admitted into evidence already for the purpose of assessing the credibility of the witnesses. The effect was that the oral evidence given by each witness during

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[2472] Oral Decision of the Chamber, 18 January 2005.
[2473] Oral Decision of the Chamber, 1 February 2005.
[2474] Oral Decision of the Chamber, 8 February 2005.
[2475] Oral Decision of the Chamber, 9 March 2005.
[2476] Decision on Defence Motion to Exclude Statements Made by Haradin Bala in Interview of 17 February 2003, 17 November 2004.
[2477] Decision on notice of alibi pursuant to Rules 54 and 67(A) of the Rules of Procedure and Evidence, 16 February 2005.
[2478] Alibi Notice of Haradin Bala Submitted pursuant to Rule 67(A)(i)(a), 28 February 2005.

examination-in-chief was significantly less favourable to the Prosecution than the earlier interview with the OTP. Each of the two witnesses had been declared hostile and, in the particular circumstances, the Chamber granted the Motion to admit the prior inconsistent statements as substantive evidence.

772. On 24 May 2005 the Defence filed a Joint Motion requesting that the Chamber (a) find that the Prosecution has violated its disclosure obligations pursuant to Rules 66 and 68, (b) order the immediate disclosure of any remaining exculpatory material that has not been yet revealed, and (c) provide an appropriate remedy under Rule 68*bis*. On 1 June 2005 the Joint Defence moved another motion orally seeking relief for the late disclosure by the Prosecution of a further document. On 7 June 2005, the Chamber dismissed the Motion and found that it has not been shown that there had been any substantial or systematic failure by the Prosecution in respect of disclosure. The Chamber held that where late disclosure had occurred, steps had been taken to ensure that no material prejudice was caused to the Defence.[2480]

773. The Prosecution put forth a Motion to admit four rebuttal statements pursuant to Rules 85 and 92*bis*. On 7 July 2005 the Chamber partly granted the Prosecution request, in that, it allowed the first three statements as rebuttal evidence but denied admission of the fourth statement as it related to an issue which could have been anticipated by the Prosecution.[2481]

774. On 12 July 2005 the Defence filed a joint Motion to admit a rejoinder statement pursuant to Rule 92*bis.* The request was denied by the Chamber on 18 July 2005, on the basis that the evidence did not have the requisite probative value.[2482]

4. Provisional release

775. The Defence for Fatmir Limaj filed a Motion on 5 September 2005 for the Provisional Release of the Accused, pending judgement or for such shorter period as the Chamber saw fit.[2483] The application was denied by the Chamber on 26 October 2005 on the grounds that the UNMIK guarantee was conditional and limited in nature, that at that stage in the proceedings the potential risk of flight could well be at its uppermost and that there was an absence of appropriate security and financial arrangements for the movement of the Accused to and from Kosovo.[2484]

[2479] Alibi Notice of Isak Musliu Submitted pursuant to Rule 67(A)(i)(a), 1 March 2005.
[2480] Decision on Joint Defence Motion on Prosecutions's Late and Incomplete Disclosure, 7 June 2005.
[2481] Decision on the Prosecution's Motion to Admit Rebuttal Statements via Rule 92*bis,* 7 July 2005.
[2482] Decision on Joint Defence Motion to Admit Rejoinder Statement via Rule 92*bis,* 18 July 2005.
[2483] Defence Renewed Motion for Provisional Release of Fatmir Limaj, 5 September 2005.
[2484] Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, 26 October 2005.