

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-04-84-A

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Date Filed: 17 July 2008

THE PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC REDACTED

NOTICE OF FILING OF PUBLIC REDACTED VERSION OF PROSECUTION
APPEAL BRIEF

The Office of the Prosecutor:

Mr. Peter Kremer, QC

Counsel for Ramush Haradinaj:

Mr. Ben Emmerson, QC
Mr. Rodney Dixon
Ms. Susan L. Park

Counsel for Idriz Balaj:

Mr. Gregor Guy-Smith
Ms. Colleen Rohan

Counsel for Lahi Brahimaj:

Mr. Richard Harvey
Mr. Paul Troop

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The Prosecution hereby files its public redacted version of the Prosecution Appeal Brief, filed confidentially on 16 July 2008.

Word Count: 19.



Peter Kremer QC
Senior Appeals Counsel

Dated this 17th day of July 2008
At The Hague, The Netherlands

**UNITED
NATIONS**

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

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I. OVERVIEW

1. Under Ground 1, the Prosecution brings a limited appeal from the acquittals of the three accused in respect of the crimes committed at KLA headquarters and prison in Jablanica/Jabllanicë.¹ Ground 1 raises a fundamental issue about the scope of the Prosecution's right to a fair trial. In this case, the Prosecution was denied a fair trial when the Chamber, notwithstanding the prevailing circumstances of intimidation and fear of witnesses, failed to take reasonable steps to secure the testimony of crucial witnesses. While the trial was expeditious, in the final analysis, it was unfair.

2. Grounds 2 and 3 relate to Idriz Balaj only. Ground 2 raises important questions about when the *actus reus* and *mens rea* for aiding and abetting are fulfilled. The Chamber's errors led to Balaj's acquittal for the murders of three members of the same family. Ground 3 challenges the Chamber's reasonable doubt conclusions as to Balaj's rape of a woman and his cruel treatment of her husband, again leading to his erroneous acquittal.

¹ Counts 24, 26, 28, 30, 32 and 34.

II. GROUND 1: BREACH OF PROSECUTION'S FAIR TRIAL RIGHT UNDER ARTICLE 20(1) OF THE STATUTE

A. Overview

3. An atmosphere of intimidation and fear was a prominent feature of the trial of Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj. “[M]any witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe.”² Two crucial witnesses, Shefqet Kabashi and [REDACTED]³ were reluctant to testify because of intimidation and fear. Both possessed direct evidence relating to the guilt of the three accused.⁴ The Chamber considered both to be important witnesses to the Prosecution case having witnessed crimes charged in the indictment.

4. These special circumstances notwithstanding, the Chamber refused to consider all reasonable steps to secure the testimony of these two witnesses before the end of the trial.⁵ Instead of briefly adjourning the trial to secure the evidence of these two witnesses, the Chamber ordered the Prosecution’s case closed. Rather than focusing on ensuring a fair trial, it fixated on conducting an expeditious one.⁶ This expeditious trial became unfair when, under prevailing circumstances of intimidation and fear, reasonable steps were not taken to secure the testimony of crucial witnesses. Without this testimony, acquittals resulted.⁷

B. Prosecution’s Right to a Fair Trial

5. By refusing the Prosecution’s persistent requests to take all reasonable measures and by not exercising its own powers to obtain the crucial evidence of these two witnesses, the Chamber rewarded witness intimidation and violated the

² Judgement, para.6.

³ The redactions in the public version of this Appeal Brief relate to information that reveals the identity of this witness or that might lead to revealing his identity.

⁴ See below, paras.13, 16.

⁵ During the trial, the Chamber had taken reasonable steps – launching contempt proceedings and issuing arrest warrants compelling the attendance - for other reluctant witnesses. For Avni Krasniqi see Order to Prosecution to Investigate for Contempt; Order for Detention on Remand. For Sadri Selca see Order in Relation to Witness 18; Warrant of Arrest and Order for Surrender of Sadri Selca.

⁶ [REDACTED].

⁷ Judgement, para.28.

fundamental principles of a fair trial. Specifically, the Chamber violated the Prosecution's right to a fair trial under Article 20(1) of the Statute by denying the Prosecution the right to lead crucial evidence from Shefqet Kabashi, a former KLA member, about the crimes he witnessed the three accused commit and [REDACTED] about the crimes they committed [REDACTED]. The direct incriminatory evidence these two witnesses against the three accused was relevant to their Joint Criminal Enterprise (JCE) responsibility for crimes committed at KLA headquarters and prison in Jablanica/Jabllanicë,⁸ as well as to their individual responsibility.⁹

6. The Prosecution's right to a fair trial guaranteed under Article 20(1) of the Statute is anchored in the Prosecution's duty to represent the interests of the victims and the international community at trial.¹⁰ The right to a fair trial obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.¹¹ The central element of the Prosecution's right to fair trial is its right to tender evidence and to question witnesses comprehensively. The Prosecution's imperative to prove guilt beyond reasonable doubt mandates securing this right. The Appeals Chamber has held that:

The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses.¹²

7. The Prosecution's right to fair trial is a fundamental one. The Office of the Prosecutor is the representative of the rights and interests of victims of the conflict in

⁸ Counts 24, 26, 28, 30, 32 and 34.

⁹ Counts 24 (Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj), 26 (Lahi Brahimaj) and 34 (Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj).

¹⁰ *Aleksovski* AD on Admissibility of Evidence, para.25; *Prlić* AD on Prosecution Appeal Concerning Reduction of Time for the Prosecution Case, para.14; *Martić* AD Regarding Evidence of Milan Babić, para.13.

¹¹ *Tadić* AJ, para.48. See also Cassese, p.384.

¹² *Orić* AD on Length of Defence Case, para.7. See also *Prlić* AD on Prosecution Appeal Concerning Reduction of Time for the Prosecution Case, para.14. The Appeals Chamber has also held that "[I]n a case with multiple accused, the issue of proportionality is affected not only by the burden of proof upon the Prosecution, but also by the circumstance that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual Accused." See *Prlić* Decision on Defendants Appeal, para.39.

the former Yugoslavia and the international community. These rights and interests demand the Tribunal's vigorous protection. Protection of the Prosecution's fair trial rights is an accepted fundamental principle of criminal proceedings in national jurisdictions where the Prosecution also represents the rights and interests of victims and society.¹³ The Chamber erred in law by denying the Prosecution a fair trial.

C. Intimidation and Evidence of Crucial Witnesses

8. Crucial witnesses Shefqet Kabashi and [REDACTED] were intimidated because they each possessed concrete and direct information as to the culpability of the three accused.

1. Intimidation and Crucial Evidence of Shefqet Kabashi

(a) Intimidation of Shefqet Kabashi

9. Shefqet Kabashi was an intimidated witness. He understood his civic duty to testify in trial as being:

[w]ithin the framework of a normal life. Since this normal life does not exist in the state where I live, where people get killed and to -- nowadays the reasons why they got killed are not known, when lives of people have changed, I don't know in what conditions I can give a statement here. I cannot accommodate myself to giving this statement here because of the things I went through.¹⁴

10. The Chamber accepted that Shefqet Kabashi was afraid, and then inquired why he consented to lift protective measures ordered to protect him.¹⁵ In response, Shefqet Kabashi described a process of witness intimidation that in his opinion rendered any protective measures meaningless:

I am disappointed, and not only disappointed, but certain

¹³ **Australia:** *Moss v. Brown* (1979) 1 NSWLR 114, 126; **Canada:** *R. v. Morin*, [1992] 1 S.C.R. 771, para.87; *R. v. Schertzer*, 2008 CarswellOnt (Ont. S.C.) 419, para.71; **India:** *Zahira Habibulla H. Sheikh and Anr v. State of Gujrat and Ors*, [2004] 5 SCC 353, para.36; **United Kingdom:** *R. v. Sang*, (1979) 69 Cr. App. R. 282, 290; *R. v. Martin*, [1998] 1 Cr. App. R 347, 353; *R. v. Cairns*, (2003) 1 Cr. App. R. 38, para.43; **United States:** *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

¹⁴ S. Kabashi, T.5438, 05-06-2007, (Open Session).

things that should not happen and should not be done in modern world have happened. You, yourself, may not have come across such things, but there were persons who were asked questions as witnesses and whose names don't even appear on witness lists because they have been killed. I don't want protective measures because such measures do not exist in reality; they only exist within the boundaries of this courtroom, not outside it.¹⁶

11. While Shefqet Kabashi appeared before the Chamber on 5 June 2007, he refused to answer questions on the substance of the case.¹⁷ The Chamber ordered Shefqet Kabashi orally not to leave the territory of the Netherlands “until matters have been resolved.”¹⁸ It did not place him in the custody of the Tribunal. It allowed him to leave the court room before issuing an Order in Lieu of Indictment for contempt and arrest warrant so he could be taken into the custody of the Tribunal. The Chamber subsequently issued an Order in Lieu of Indictment and a Summons to Appear on 7 June 2007.¹⁹ He failed to appear.²⁰ From that point forward, the Chamber dealt with the attendance of Shefqet Kabashi to the exclusion of the parties. It was not until 1 November 2007 that the Chamber granted²¹ Shefqet Kabashi another opportunity to testify.²² He appeared before the Chamber [REDACTED] and again refused to testify.²³ Thereafter, the Chamber refused all Prosecution requests for the Chamber to take steps to compel his testimony. He never testified on the substance of the case.

(b) Crucial Evidence of Shefqet Kabashi

12. Shefqet Kabashi, a former KLA member, had direct and incriminating evidence relevant to the JCE responsibility of Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj for the crimes committed in KLA headquarters and prison at

¹⁵ T.5439, 05-06-2007, (Open session).

¹⁶ S. Kabashi, T.5439-5440, 05-06-2007, (Open Session).

¹⁷ S. Kabashi, T.5415, 5418, 5412-5422, 5441-5448, 5459-5461, 05-06-2007, (Open Session).

¹⁸ T.5466, 05-06-2007, (Open Session).

¹⁹ Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, p.3

²⁰ [REDACTED]

²¹ T.10118-10120, 01-11-2007, (Open Session).

²² 25 October 2007 Application for Subpoena Ad Testificandum for Shefqet Kabashi; Prosecution's Application to Hear Shefqet Kabashi via Video Link.

²³ [REDACTED]

Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32 and 34 and to the individual responsibility of Lahi Brahimaj under Count 26.

13. Shefqet Kabashi had evidence of, inter alia, the following:²⁴

- He joined the KLA on 9 April 1998 at the Jablanica/Jabllanicë KLA headquarters at Lahi Brahimaj's house;²⁵
- He provided a sketch of the Jablanica/Jabllanicë KLA headquarters and prison;²⁶
- In early 1998, he and approximately 100 others collected arms and ammunition from Albania;²⁷
- He then trained as a KLA soldier;²⁸
- Ramush Haradinaj visiting the Jablanica/Jabllanicë KLA headquarters and prison regularly, accompanied by Idriz Balaj;²⁹
- He saw two persons of Roma ethnicity detained in Grabanica under suspicion of being Serb collaborators;³⁰
- He saw these two persons at the Jablanica/Jabllanicë KLA prison and heard Lahi Brahimaj say that they should be "sent to Drenica" (a known euphemism for execution);³¹
- Lahi Brahimaj, Idriz Balaj and others beat detainees at the Jablanica/Jabllanicë KLA prison;³²

²⁴ Shefqet Kabashi's statements, signed on 24 October 2004 and on 1 June 2007, are attached as Appendix A to Prosecution's Appeal Brief. *See* also 25 October 2007 Application for Subpoena Ad Testificandum for Shefqet Kabashi, para.10.

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ [REDACTED]

³² [REDACTED]

- In the Jablanica/Jabllanicë KLA prison he saw a Roma from village Budisalc (Klina) lying severely beaten and given cut marks with rifle bayonet's. He subsequently died in the prison.³³
- In June or July 1998 he saw Pal Krasniqi, Skinder Kuci at the Jablanica/Jabllanicë KLA prison. He saw that Pal Krasniqi was badly beaten.³⁴
- Pal Krasniqi told him that he admitted of being a Serb spy to end his torture at the Jablanica/Jabllanicë KLA prison.³⁵
- He saw Lahi Brahimaj and Idriz Balaj beat prisoners at the Jablanica/Jabllanicë KLA prison. Idriz Balaj was particularly cruel and notorious.³⁶
- The KLA kidnapped and killed other alleged collaborators.³⁷

2. Intimidation and Crucial Evidence of [REDACTED]

(a) Intimidation of [REDACTED]

14. [REDACTED]³⁸ [REDACTED]³⁹ [REDACTED]⁴⁰

15. [REDACTED] never testified.⁴¹

(b) Crucial Evidence of [REDACTED]

16. [REDACTED] had direct and incriminating evidence relating to the JCE responsibility of the three accused for crimes committed at Jablanica/Jabllanicë KLA headquarters under Counts 24, 26, 28, 30, 32 and 34 and for their individual

³³ [REDACTED]

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

responsibility for [REDACTED]⁴² and [REDACTED].⁴³ [REDACTED].⁴⁴
 [REDACTED] had evidence that include the following:⁴⁵

- [REDACTED]⁴⁶
- [REDACTED]⁴⁷
- [REDACTED]⁴⁸
- [REDACTED]⁴⁹
- [REDACTED]⁵⁰
- [REDACTED]⁵¹
- [REDACTED]⁵²
- [REDACTED]⁵³
- [REDACTED]⁵⁴
- [REDACTED]⁵⁵
- [REDACTED]⁵⁶
- [REDACTED]⁵⁷
- [REDACTED]⁵⁸
- [REDACTED]⁵⁹

42 [REDACTED]
 43 [REDACTED]
 44 [REDACTED]
 45 [REDACTED]
 46 [REDACTED]
 47 [REDACTED]
 48 [REDACTED]
 49 [REDACTED]
 50 [REDACTED]
 51 [REDACTED]
 52 [REDACTED]
 53 [REDACTED]
 54 [REDACTED]
 55 [REDACTED]
 56 [REDACTED]

D. Chamber Decisions Leading to an Unfair Trial

17. The Chamber's haste to end the trial resulted in precluding the evidence of crucial witnesses. It fixated on ending the Prosecution's case within the designated 125 hours to present the Prosecution's case. To that end, the Chamber rendered several decisions consistently rejecting the Prosecution's continued attempts to secure the evidence of Shefqet Kabashi and [REDACTED]. By doing so the Chamber abused its discretion. These decisions, individually or cumulatively, confirm its error in choosing an expeditious trial over a fair one.⁶⁰

18. The Prosecution had requested 230 hours to present its case.⁶¹ Before the trial started, the Chamber had set 125 hours for the Prosecution case.⁶² However, when the 125 hours was set, the Chamber and the Prosecution were unaware that witness intimidation and fear would become a prominent feature of the trial.⁶³ Yet, near the end of the trial when this feature was known, the 125 hours remained the Chamber's inflexible measure.⁶⁴

19. On 31 October 2007, the Chamber announced that it had "reviewed the time still available under the 125 hours, and the Chamber also reviewed what still remains of the list of witnesses" and that it expected "the Prosecution to close its case presentation on the 16th of November, because some videolink is still scheduled for early that same week."⁶⁵ The Chamber, after having discussed various deadlines stated: "We're all under time pressure. That would be true for both Prosecution, Defence, and the Chamber as well."⁶⁶

⁵⁷ [REDACTED]

⁵⁸ [REDACTED]

⁵⁹ [REDACTED]

⁶⁰ On 11 December 2007, after controlling the contempt proceedings against Shefqet Kabashi for seven months, the Chamber referred the matter to the Prosecution to investigate and prosecute. The Chamber directed the Prosecution to investigate Kabashi's conduct from 5 June 2007 to and including 20 November 2007. On 13 December 2007, the Prosecution filed an indictment against Shefqet Kabashi. *See* [REDACTED]. The Prosecution received the Registry file concerning Shefqet Kabashi on 12 December 2007. *See also* [REDACTED].

⁶¹ Prosecution Pre-Trial Brief, para.3.

⁶² T.350-351, 01-03-2007, (Open Session). The transcript erroneously refers to 175 hours, *See* T.684-685, 08-03-2007, (Open Session).

⁶³ Judgement, para.28.

⁶⁴ T.9984-9986, 31-10-2007, (Open Session).

⁶⁵ T.9984, 31-10-2007, (Open Session).

⁶⁶ T.9986, 31-10-2007, (Open Session)

20. As the Prosecution case neared the Chamber's 125-hour limit, the Chamber knew it had not yet heard from two crucial Prosecution witnesses. It also knew they had been intimidated and were afraid to testify. Rather than "make use of all of its powers under the Rules",⁶⁷ the Chamber over reacted to time pressure and closed the Prosecution's case. While an expeditious trial resulted, a fair trial did not.

21. A fair trial is not measured in hours. A fair trial must be measured by whether or not the Chamber allowed the parties to present their case. In the case of the Prosecution, this measurement is to be made on a case by case basis recognizing that the prosecution represents the interests of victims, justice and the international community.⁶⁸ In the prevailing circumstances of witness intimidation and fear in this case, the Chamber's denial of additional time to take reasonable steps in order to secure the crucial evidence of Shefqet Kabashi and [REDACTED] resulted in an unfair trial to the Prosecution.

22. The Chamber stated that it "made use of all its powers under the Rules to facilitate the reception of evidence without stepping beyond its role as an impartial finder of the facts."⁶⁹ It did not. Taking reasonable measures to find crucial facts was part of the Chamber's mandate. Its impartiality could not have been challenged if it had taken reasonable steps. The defence would not have been prejudiced if the Prosecution had been granted additional reasonable time to secure the crucial evidence. Instead, the Chamber abrogated its role as an impartial finder of the facts and gave undue weight to time pressure in taking decisions, which in turn prevented it from finding crucial facts. An unfair trial resulted.

23. The Chamber's unreasonable rush to judgement is evidenced in its 30 November 2007 Scheduling Order.⁷⁰ This Order considers that "the presentation of the Prosecution evidence in this case has concluded and that the Prosecution case is therefore closed." Notwithstanding the words of this Order, the Prosecution had neither finished presenting evidence nor closed its case as two crucial Prosecution witnesses had not yet testified on the substance of the case. This Order also notes that

⁶⁷ Judgement, para.29.

⁶⁸ See, for example, *Prlić* Second Modified Scheduling Order. Trial Chamber III extended time allocated to the Prosecution to present its case because, inter alia, "health and availability of the prosecution witnesses...the Prosecution will be unable to complete its case-in-chief on 13 December 2007."

⁶⁹ Judgement, para.28.

on 29 November 2007, a mere three days after the Chamber declared that the Prosecution's case closed,⁷¹ the defence made no 98 *bis* submissions and elected to call no evidence. The Chamber scheduled 14 January 2008 for filing final trial briefs and 21 to 23 January 2008 for closing arguments.

1. Decisions Relating to Shefqet Kabashi

24. [REDACTED]⁷² [REDACTED]⁷³ [REDACTED]⁷⁴ [REDACTED]⁷⁵
[REDACTED]⁷⁶ [REDACTED]⁷⁷ [REDACTED]⁷⁸ [REDACTED].

(a) Decision of [REDACTED]

25. [REDACTED]⁷⁹ [REDACTED]⁸⁰ [REDACTED]⁸¹

(b) Decision of [REDACTED]

26. [REDACTED]⁸² [REDACTED]⁸³ [REDACTED]⁸⁴ [REDACTED]⁸⁵

(c) Decision of [REDACTED]

27. [REDACTED]⁸⁶ [REDACTED]⁸⁷ [REDACTED]

28. [REDACTED]⁸⁸

29. [REDACTED]⁸⁹ [REDACTED]⁹⁰

70 Scheduling Order for Final Trial Brief and Closing Arguments.

71 [REDACTED]

72 [REDACTED]

73 [REDACTED]

74 [REDACTED]

75 [REDACTED]

76 [REDACTED]

77 [REDACTED]

78 [REDACTED]

79 [REDACTED]

80 [REDACTED]

81 [REDACTED]

82 [REDACTED]

83 [REDACTED]

84 [REDACTED]

85 [REDACTED]

86 [REDACTED]

87 [REDACTED]

88 [REDACTED]

89 [REDACTED]

90 [REDACTED]

30. [REDACTED]⁹¹ [REDACTED]

(d) Decision of [REDACTED]

31. [REDACTED]⁹² [REDACTED]⁹³ [REDACTED]

32. [REDACTED]⁹⁴ [REDACTED]⁹⁵

33. [REDACTED]⁹⁶ [REDACTED]⁹⁷ [REDACTED]

34. [REDACTED]⁹⁸ [REDACTED]⁹⁹

35. [REDACTED]¹⁰⁰ [REDACTED]¹⁰¹

36. [REDACTED]¹⁰² [REDACTED]¹⁰³ [REDACTED]¹⁰⁴ [REDACTED]

(e) Decisions Relating to [REDACTED]

37. [REDACTED]¹⁰⁵ [REDACTED]¹⁰⁶ [REDACTED]¹⁰⁷ [REDACTED]¹⁰⁸
[REDACTED]¹⁰⁹ [REDACTED]

38. [REDACTED]¹¹⁰ [REDACTED]¹¹¹

⁹¹ [REDACTED]

⁹² [REDACTED]

⁹³ [REDACTED]

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

⁹⁶ [REDACTED]

⁹⁷ [REDACTED]

⁹⁸ [REDACTED]

⁹⁹ *U.S. v. Marquado*, 149 F.3d 36, 39 (1st Cir. 1998). See also *Kastigar et al v. United States* 406 U.S. 441, 442 (1972); *United States v. Dien* 598 F.2d 743, 744 (1979).

¹⁰⁰ See Rule 89(D).

¹⁰¹ See *Čelebići* AJ, para.283; *Popović et al.*, Decision on Motion to Re-open the Prosecution Case, 9 May 2008, paras.23-25; *Hadžihazanović and Kubura* Decision on the Prosecution's Application to Re-Open its Case, paras.31-47.

¹⁰² Memorandum of Service of Subpoena, 29 October 2007; Order to Prosecution to Investigate for Contempt, para.3.

¹⁰³ Memorandum of Service filed by the Kosovo Police Service of UNMIK, 15 June 2007.

¹⁰⁴ For Avni Krasniqi see Order to Prosecution to Investigate for Contempt; Order for Detention on Remand. For Sadri Selca see Order in Relation to Witness 18; Warrant of Arrest and Order for Surrender of Sadri Selca.

¹⁰⁵ [REDACTED]

¹⁰⁶ [REDACTED]

¹⁰⁷ [REDACTED]

¹⁰⁸ [REDACTED]

¹⁰⁹ [REDACTED]

¹¹⁰ [REDACTED]

39. [REDACTED]¹¹² [REDACTED]
40. [REDACTED]¹¹³ [REDACTED]¹¹⁴ [REDACTED]¹¹⁵ [REDACTED]¹¹⁶
41. [REDACTED]¹¹⁷ [REDACTED]

E. Conclusion and Relief Sought

42. The Prosecution was denied a fair trial. Had it received the evidence of the two crucial witnesses, it would have presented incriminating case against the three accused resulting in their conviction for their participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/ Jabllanicë (counts 24, 26, 28, 30, 32, 34). The same evidence would have led to convicting the three accused for their criminal responsibility individually under count 24 and 34, and for the conviction of Lahi Brahimaj for his criminal responsibility under count 26.

¹¹¹ *Tadić* AJ, para.52.

¹¹² [REDACTED]

¹¹³ [REDACTED]

¹¹⁴ [REDACTED]

¹¹⁵ [REDACTED]

¹¹⁶ [REDACTED]

¹¹⁷ See *Prlić* Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić Questioning into Evidence, para.57 (“[...] as opposed to a jury’s verdict, professional judges have to write a reasoned decision, which is subject to appeal.”); *Prlić*. Decision on Petković’s Interlocutory Appeal Against the Trial Chamber’s Decision on Jurisdiction, para.11 (“A Trial Chamber must provide a reasoned opinion that, among other things, indicates its view on all of those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision.”); *Milutinović* AD Refusing Milutinović Leave to Appeal, para.22 (“A Chamber must, as part of the fair trial guarantee, render a reasoned opinion. This requirement obliges the Chamber, *inter alia*, to indicate its view about on all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.”).

43. The only remedy is to remit the matter to a trial chamber for a re-trial on the relevant counts only. A re-trial would permit a reasonable possibility for the crucial evidence of Shefqet Kabashi and [REDACTED] to be heard.

III. GROUND 2: ERRORS AS TO THE MURDER OF SISTER “S”, THE MOTHER OF WITNESS 4 AND SISTER “M”

A. Overview

44. Idriz Balaj, who used the name “Toger” in the Dukagjin area during the indictment period,¹¹⁸ aided and abetted the murders of sister “S”, the mother of Witness 4 and sister “M”. Balaj substantially contributed to their murders by taking them from their home and bringing and keeping them in the vicinity of their murderers, whom he knew to be dangerous. His acts were all part of the chain of events leading to their deaths. Balaj was aware of the probability that the three women would be murdered and that his acts would substantially contribute to their murders.

45. The Chamber erred in law in concluding on the basis of its factual findings that the *actus reus* of aiding and abetting was not fulfilled.¹¹⁹ Alternatively, the Chamber erred in fact in finding that it did not have a sufficient basis to assess the relevance and importance of Balaj’s acts.¹²⁰ The Chamber also erred in law applying an awareness of a certainty test, not the correct awareness of a probability test to assess Balaj’s *mens rea* for aiding and abetting the murders of the three women.¹²¹

B. Legal Error in not finding that Balaj’s acts substantially contributed to the deaths of the three women

46. The Chamber erred in law in concluding that the *actus reus* of aiding and abetting was not fulfilled on the basis of their own findings.¹²² Balaj¹²³ substantially contributed to the deaths of sister “S”, the mother of Witness 4 and sister “M”. He forcibly recruited sister “S” into the KLA.¹²⁴ He forcibly took the mother of Witness 4 and sister “M” from their home.¹²⁵ He brought and kept the women in the vicinity of

¹¹⁸ Judgement, para.242. For a description of the Dukagjin area, see Judgement, paras.63 and following.

¹¹⁹ Judgement, para.242.

¹²⁰ Judgement, para.242.

¹²¹ Judgement, para.242. The Prosecution abandons the alternative factual error set out in paragraph 14 of the Prosecution’s Notice of Appeal

¹²² Judgement, para.242.

¹²³ Judgement, para.242.

¹²⁴ Judgement, para.238.

¹²⁵ Judgement, paras.238, 242.

the perpetrators.¹²⁶ Balaj made the victims readily accessible for their murderers. His role was a link in the chain of events leading to their deaths.¹²⁷

47. Bringing and keeping the victims in the vicinity of their murderers amounts to aiding and abetting. The *actus reus* of aiding and abetting may occur before the principal crime has been perpetrated.¹²⁸ The *actus reus* of aiding and abetting may take place at a location removed from the location of the principal crime.¹²⁹ Involvement in the execution of *actus reus* of the crime is not required. By requiring proof of the Balaj's further role in the events leading to their deaths, the Chamber erred.

48. The correct test for the *actus reus* requires that "the support of the aider and abettor has a substantial effect upon the perpetration of the crime."¹³⁰ This test does not require "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime."¹³¹

49. The Appeals Chamber in *Vasiljević* held that it was sufficient to constitute the *actus reus* of aiding and abetting that Vasiljević "prevented the men from escaping on the way to the river bank and during the shooting".¹³² Likewise, Balaj's making the three women readily accessible for their murderers substantially facilitated their murders and constituted the *actus reus* of aiding and abetting.

50. Therefore, once the Chamber found that Balaj brought and kept the three women in the vicinity of the perpetrators,¹³³ the *actus reus* of aiding and abetting was satisfied. Balaj "placed them at a direct and serious risk" which materialized in their murders.¹³⁴ Only these findings were necessary to assess the relevance and importance of his acts. To require additional specific evidence about the course of events leading to their murders in the hands of the KLA¹³⁵ was not required.

¹²⁶ Judgement, para.242.

¹²⁷ Judgement, para.242.

¹²⁸ *Blaškić* AJ, para.48.

¹²⁹ *Blaškić* AJ, para.48.

¹³⁰ *Blaškić* AJ, para.48.

¹³¹ *Blaškić* AJ, para.48.

¹³² *Vasiljević* AJ, para.134.

¹³³ Judgement, para.242.

¹³⁴ See Partly dissenting opinion of Judge Höpfel on Count 14, para.3.

¹³⁵ See Judgement, para.242.

51. The Chamber made the following findings of Balaj's acts which established the *actus reus* of aiding and abetting beyond a reasonable doubt.¹³⁶

- From early April 1998, the family had been repeatedly visited by armed men, some wearing black KLA uniforms.¹³⁷ They asked the family members about ties to the late Serbian police officer Slobodan Prašević and about weapons.¹³⁸ They searched their home.¹³⁹
- Balaj first took away sister "S". Around mid-April 1998 Balaj and other KLA soldiers¹⁴⁰ came to the family home in the late evening and left with sister "S". Sister "S" was forcibly recruited into the KLA.¹⁴¹
- From that day forward, Balaj controlled sister "S" and kept her in the vicinity of the KLA soldiers. His control is evidenced when Balaj and two or three armed men wearing black uniforms with KLA insignia brought sister "S", who was also wearing a black uniform, for a visit to her home approximately four days after she was taken away.¹⁴²
- Approximately one or two weeks later, sister "S" was allowed to visit the family home again. During this visit, she told her family that she was now a KLA member and took orders from Toger, who had instructed her to be back at the base by a certain time.¹⁴³ Sister "S" also said that Toger had ordered her to kill somebody and that he would kill her if she did not comply.¹⁴⁴ After sister "S" had left the house, two or three soldiers arrived by car to check on the whereabouts of sister "S". Balaj, accompanied by another person, arrived by separate car and asked why sister "S" was late.¹⁴⁵
- Balaj also brought the mother of Witness 4 into the custody of the KLA.¹⁴⁶ Approximately three to four weeks after the second visit of sister "S", Balaj

¹³⁶ Judgement, paras.238, 239, 240, 242.

¹³⁷ Judgement, paras.237, 238.

¹³⁸ Judgement, para.237.

¹³⁹ Judgement, para.237.

¹⁴⁰ Judgement, para.238.

¹⁴¹ Judgement, para.238, 242.

¹⁴² Judgement, para.238.

¹⁴³ Judgement, para.238.

¹⁴⁴ Judgement, para.238.

¹⁴⁵ Judgement, para.238.

¹⁴⁶ Judgement, paras.238, 242.

and other KLA soldiers came to the family home between midnight and 1:00 a.m. and took the mother away.¹⁴⁷

- Both sister “S” and the mother of Witness 4 were murdered by KLA soldiers.¹⁴⁸ Their bodies were found together at the same location at the Radonjić/Radoniq canal.¹⁴⁹ Both had multiple gunshot injuries.¹⁵⁰
- Finally, Balaj took sister “M” into the custody of the KLA.¹⁵¹ Balaj and other KLA soldiers broke down the door of the family home at night. When Balaj and the KLA soldiers took away sister “M”, she was crying¹⁵² and had her hands tied behind her back. Balaj led her holding her the hand.¹⁵³ KLA soldiers murdered her.¹⁵⁴ Her body was discovered about four days later in the woods near Bardonić/Bardhaniq village.¹⁵⁵

C. Factual Error in not finding that Balaj’s acts substantially contributed to the deaths of the three women

52. In the alternative, the Chamber erred in fact in finding that it did not have a sufficient basis to assess the relevance and importance of Balaj’s acts.¹⁵⁶ The above findings that Balaj “brought and kept them in the vicinity of the perpetrators”¹⁵⁷ - and the evidence underlying them - allow no reasonable doubt¹⁵⁸ that he substantially contributed to the murder of the three women.

53. Balaj was the central figure in the abduction of the three members of the family. Witness 4¹⁵⁹ stated: “[...] on every occasion when they came, Toger was the number one.”¹⁶⁰ Balaj commanded the Black Eagles, a special unit of the KLA with a

¹⁴⁷ Judgement, para.238.

¹⁴⁸ Judgement, para.239.

¹⁴⁹ Judgement, para.239.

¹⁵⁰ Judgement, para.239.

¹⁵¹ Judgement, paras.240, 242.

¹⁵² Judgement, para.240.

¹⁵³ Judgement, para.240.

¹⁵⁴ Judgement, para.240.

¹⁵⁵ Judgement, para.240.

¹⁵⁶ Judgement, para.242.

¹⁵⁷ Judgement, para.242.

¹⁵⁸ See *Limaj* AJ, para.13.

¹⁵⁹ The Trial Chamber found him a reliable and credible. Judgement, para.237.

¹⁶⁰ Witness 4, T.1533-1534, 20-03-2007, (Open Session).

violent reputation.¹⁶¹ The Black Eagles wore uniforms distinct from the rest of the KLA.¹⁶² Balaj and his men wore black uniforms.¹⁶³ Other witnesses confirmed that Balaj held a position of authority within the KLA.¹⁶⁴ Following the withdrawal of the MUP from Rznić/Irznik on 21 April 1998, the Black Eagles had moved their headquarters to a location in or near the old school in Rznić/Irznik.¹⁶⁵ The village KLA had their headquarters in a different building.¹⁶⁶

54. Members of the Black Eagles and the KLA participated in taking the three women. The KLA soldiers who harassed the family introduced themselves as a special unit of the night.¹⁶⁷ Balaj and person(s) in black KLA uniforms¹⁶⁸ brought sister "S" for visits to her family. She, too, wore a black uniform.¹⁶⁹ Sister "S" told Witnesses 4 and 19 that she took orders from Toger.¹⁷⁰ She was held in the old school in Rznić/Irznik.¹⁷¹ After her second visit, Witness 4 walked with sister "S" on her way back to the base in Rznić/Irznik.¹⁷²

55. Balaj controlled sister "S" and made sure that she did not leave. Balaj was the person from whom sister "S" took orders.¹⁷³ He accompanied her during her first visit to the family home.¹⁷⁴ He came looking for her on the day of the second visit. He asked why she was late.¹⁷⁵ He had instructed her to return to the base before a certain time on the day of her second visit.¹⁷⁶ Balaj had told her that she was to kill somebody and threatened to kill her, if she did not comply.¹⁷⁷ Sister "S" was killed.¹⁷⁸

¹⁶¹ S. Cekaj, T.4438, 17-05-2007, (Open Session); P. Shala, T.9970,9973, 30-10-2007, (Open Session); B. Zyrapi, T.3218, 23-04-2007, (Open Session); R. Tetaj, T.3670,3676, 07-05-2007, (Open Session); Z. Stijović, T.9087, 09-10-2007, (Open Session); A. Krasniqi, T.10758-10759, 14-11-2007, (Open Session), P371, para.26 (Public).

¹⁶² P1213, para.19 (Public) But see, P. Shala, T.9974, 30-10-2007, (Open Session).

¹⁶³ Judgement, paras.237, 238, P1213, para.19 (Public); Witness 4, T.1464, 20-03-2007, (Open Session); Witness 19, T.1186, 15-03-2007, (Open Session).

¹⁶⁴ S. Cekaj, T.4394, 16-05-2007, (Open Session); P1213, para.14, (Public); Y. Haskaj, T.10339, 06-11-2007, (Open Session); P371, para.26, (Public); see Judgement, para.242.

¹⁶⁵ P1214 (Public); [REDACTED]; P320 (Public); [REDACTED]; P1156 (Public).

¹⁶⁶ P1214 (Public); P320 (Public) and S. Cekaj, T.4440-4441, 17-05-2007, (Open Session).

¹⁶⁷ Witness 19, T.1154-1155, 17-05-2007 (Open Session).

¹⁶⁸ Judgement, para.238.

¹⁶⁹ Judgement, para.238.

¹⁷⁰ Judgement, para.238.

¹⁷¹ Witness 4, T.1437-1439, 19-03-2007, (Open Session); see Judgement, para.227 and Partly dissenting opinion of Judge Höpfel on Count 14, para.5.

¹⁷² Witness 19, T.1176-1177, 15-03-2007, (Open Session); [REDACTED]; Judgement, para.224.

¹⁷³ Judgement, para.238.

¹⁷⁴ Judgement, para.238.

¹⁷⁵ Judgement, para.238.

¹⁷⁶ Judgement, para.238

¹⁷⁷ Judgement, para.238.

¹⁷⁸ Judgement, para.239.

56. The bodies of sister “S” and the mother of Witness 4 were found in the Lake Radonjić/Radoniq canal near Glodane/Gllogjan, close to the end of the man-made part of the canal.¹⁷⁹ The canal runs nearby the village of Rznić/Irzniq.¹⁸⁰ The body of sister “M” was found approximately four days after she had been taken away by Balaj, in the woods near Bardonić/Bardhaniq.¹⁸¹ She had been brutally treated. She had knife cuts on the arm and the throat and a bullet hole in her earlobe.¹⁸² The leather jacket, which she was wearing when taken away from the family house and which was lying about one or two metres from her naked upper body, was bullet ridden and full of knife cuts.¹⁸³

57. Balaj was in charge when he and his men took sister “S”, the mother of Witness 4 and sister “M” from their home.¹⁸⁴ Balaj’s forcible abductions of these women resulted in their being available to their murderers. His contribution made the women accessible to the KLA soldiers who murdered them. These findings and evidence provided the Chamber with a sufficient basis to assess the relevance and importance of Balaj’s acts. The Chamber erred in fact by not assessing the relevance and importance of Balaj’s acts without “specific evidence on the course of events after the mother and the two sisters ended up in KLA hands”.¹⁸⁵ Specific details about their murders were not required for the Chamber to make this assessment. On the basis of the findings and the evidence, the only reasonable conclusion is that Balaj’s acts substantially contributed to the deaths of the three women.

D. Legal error in not finding that Balaj was aware of the probability that his acts would substantially contribute to the three women being killed¹⁸⁶

58. Balaj was aware of the probability that the three women would be murdered. Balaj was also aware of the probability that his acts of bringing and keeping the three women in the vicinity of the KLA soldiers would substantially contribute to their murders. His awareness was proven beyond a reasonable doubt. He had personally threatened to kill sister “S” if she did not kill someone when he ordered. He was

¹⁷⁹ P1254, paras.321,332 (Public); Judgement, para.239.

¹⁸⁰ P10 (Public); P1254, para.85 (Public); P367, para.50 (Public),

¹⁸¹ Judgement, para.240.

¹⁸² Witness 4, T.1474, 20-03-2007 (Open Session), Judgement, para. 228.

¹⁸³ Witness 4, T.1467, 1473-1474, 20-03-2007 (Open Session), Judgement, para.228.

¹⁸⁴ Witness 4, T.1533-1534, 20-03-2007, (Open Session).

¹⁸⁵ Judgement, para.242.

present in the home when a KLA soldier threatened the mother of Witness 4 with death if she left the area. He was prominent in harassing the family. He forcibly took the women into a dangerous environment. He and his Black Eagles unit had a reputation for brutality. He was aware of crimes by KLA soldiers against local resident who were not supporting KLA policy.

1. The mens rea for aiding and abetting is awareness of a probability

59. The *mens rea* for aiding and abetting is knowledge in the sense of “awareness of a probability” that the crime will be committed and the acts or omissions of the accused will assist in the commission of the crime.¹⁸⁷ The awareness of a probability test has been confirmed by the ICTR Appeals Chamber in *Ndindabahizi*.¹⁸⁸

60. The *mens rea* for the modes of planning, instigating and ordering is awareness of a substantial likelihood.¹⁸⁹ In *Orić*, the Trial Chamber referred to the *mens rea* for instigating to determine the *mens rea* for aiding and abetting.¹⁹⁰ Aiding and abetting is not a more serious form of criminal participation than instigating or ordering.¹⁹¹ It is illogical to require a higher *mens rea* for aiding and abetting than for other modes of liability when consistency with the other modes of liability is achieved by a *mens rea* for aiding and abetting requiring knowledge in the sense of awareness of a probability. Awareness of a probability is also consistent with the *mens rea* requirement for aiding and abetting in national jurisdictions.¹⁹²

¹⁸⁶ The Prosecution abandons the alternative factual error set out in paragraph 14 of the Prosecution’s Notice of Appeal.

¹⁸⁷ *Blaškić* AJ paras.45, 50. See also *Furundžija* TJ para.246, *Blaškić* TJ para.287 (both referred to in footnote 94 of the *Blaškić* AJ), *Brdanin* TJ, para.272, and *Strugar* TJ, para.350.

¹⁸⁸ *Ndindabahizi* AJ para.122; see also *Blagojević & Jokić* AJ para.222.

¹⁸⁹ *Blaškić* AJ paras.42, 166 for ordering; *Kordić & Čerkez* AJ, paras.30-32, 112 for ordering, instigating and planning.

¹⁹⁰ *Orić* TJ, para.288.

¹⁹¹ See *D. Milošević* TJ, para.979.

¹⁹² **Germany:** BGHSt (Entscheidungen des Bundesgerichtshofs in Strafsachen) 7, pp. 369-370; BGHSt 40, pp.304 *et seq*; BGHSt 42, p.135; Tröndle/Fischer, Strafgesetzbuch (German Penal Code), Commentary, 51st ed., 2003, § 27, No. 8, § 15, No. 9, 10a with further reference; Cramer in Schönke/Schröder, Strafgesetzbuch, Kommentar (Commentary to the German Penal Code), 24th ed., 1991, § 15, No. 84, **The Netherlands:** Cleiren & Nijboer, Strafrecht, Tekst & Commentaar, (1997), p.274 with further references, **South Africa:** Snyman, Criminal Law, 3rd ed. (1995), pp.170, 260, **Spain:** Cerezo Mir, Curso de Derecho Penal Español III/2 (2002), pp. 233-234. **Switzerland:** Forster in Niggli/Wiprächtiger, Strafgesetzbuch I, Art. 1-110 StGB, Kommentar (2003), Art. 25 paras.3 (acts of assistance), 4 and 19 (crime). Jenny in Niggli/Wiprächtiger, Strafgesetzbuch I, Art. 1-110 StGB, Kommentar (2003), Art. 18 para.47. **United Kingdom:** *Carter v. Richardson* [1974] RTR (Road Traffic Reports), 314 (Queens Bench Division) referred to in Simester and Sullivan, Criminal Law - Theory and Practice (2nd ed. 2003), p. 214; *Maxwell v. Director of Public Prosecutions for Northern Ireland*, (1979) 68 Cr. App. R. 128; Law Commission Consultation Paper No.131, Assisting and Prosecution Appeal Brief

61. Although the *Blaškić* Appeal Judgement refers to “probability” only with regard to the awareness of the crime carried out by the principal perpetrator, awareness of the probability is the test for both elements of the *mens rea* for aiding and abetting: awareness regarding the occurrence of the crime and awareness regarding the assisting conduct.¹⁹³ Logically, the same *mens rea* standard must apply to each element.¹⁹⁴

62. In the part of the Judgement describing the law on aiding and abetting, the Chamber correctly quoted *Blaškić* Appeal Judgement that “it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.”¹⁹⁵ However, when applying the law to the facts, the Chamber applied an “awareness of a certainty” test, instead of the correct awareness of a probability test. It found that “there was no evidence that Idriz Balaj was aware at that time that these murders **were or would be** committed”.¹⁹⁶

2. Balaj was aware of the probability that his acts would assist the murder of the three women

63. Balaj was aware of the probability that the three women would be murdered. He was also aware of the probability that his acts of bringing and keeping the victims in the vicinity of, and thus making them available for, their murderers, would substantially contribute to their death. Had the Trial Chamber used the correct awareness of a probability standard, it would have concluded that Balaj had the required *mens rea* for aiding and abetting.

64. The evidence set out below supports that Balaj was aware of the vulnerable situation of the family, their connection with a Serbian policemen, the coercive manner of the KLA soldiers, including death threats, the violent reputation of the

Encouraging Crime (1993), para.2.58 referred to in Simester and Sullivan, *Criminal Law - Theory and Practice* (2nd ed. 2003), p.214; Smith and Hogan, *Criminal Law* (8th ed. 1996), p.141. *R. v. Reardon* (1999) CrimLR 392 (Court of Appeal (Criminal Division)).

¹⁹³ For this “double intent” see *Orić* TJ, para.288; *Blaškić* AJ, paras.49-50.

¹⁹⁴ For examples from national jurisdictions where *mens rea* for aiding and abetting consists of a two part test, the awareness of a probability standard applying to both, see: **Germany**: Lackner, *Strafgesetzbuch mit Erläuterungen* (22nd ed. 1997), § 27 No.7; Tröndle/Fischer, *Strafgesetzbuch* (German Penal Code), Commentary, (51st ed., 2003) § 27, No.8; **The Netherlands**: Cleiren & Nijboer, *Strafrecht, Tekst & Commentaar*, (1997), p.274; **Switzerland**: Forster in Niggli/Wiprächtiger, *Strafgesetzbuch I*, Art. 1-110 StGB, Kommentar (2003), Art. 25 paras.3 (acts of assistance), 4 & 19 (crime).

¹⁹⁵ Judgement, para.145.

KLA soldiers surrounding him and other KLA crimes against those not supporting KLA policy.

65. Murder was a considered option for Balaj and other KLA soldiers. Balaj himself had ordered sister “S” to kill somebody and threatened her that if she did not comply, he would kill her.¹⁹⁷ During one visit to the family home, in which Balaj was present, another KLA soldier told the mother of Witness 4 that she could not receive any permission to travel because her husband used to work with the Serbian police, and if she tried to travel anywhere, she would be killed.¹⁹⁸

66. Balaj was a person with authority in the KLA and involved in the harassment of the family.¹⁹⁹ KLA soldiers asked the family members about their connection to Serbian police officer.²⁰⁰ He was in charge of KLA soldiers that took away family members.²⁰¹ He must have been aware of the family’s connection with a Serbian police officer who was shot and killed in his car shortly before the harassing visits to the family started. Witness 4 and his mother were with the Serbian police officer car at the time of the attack.²⁰²

67. Balaj was aware of the vulnerability of the victims. He was in command of the KLA soldiers who targeted the family home at night.²⁰³ His targets were unarmed²⁰⁴ females, one of them a young girl,²⁰⁵ [REDACTED].²⁰⁶ Balaj created a coercive environment. He and his KLA soldiers were armed.²⁰⁷ [REDACTED]²⁰⁸ [REDACTED].²⁰⁹ When sister “S” was taken away, one of the KLA members carried a big gun.²¹⁰ Sister “M” was taken after the KLA soldiers had broken the door of the house and forced the family to line up against the wall.²¹¹ They tied the hands of a

¹⁹⁶ Judgement, para.242, emphasis added.

¹⁹⁷ Judgement, para.238.

¹⁹⁸ Witness 4, T.1452-1453, 19-03-2007 (Open Session); T.1516, 20-03-2007, (Open Session) see Judgement, para.228.

¹⁹⁹ Judgement, para.237.

²⁰⁰ Judgement, para.237.

²⁰¹ See above, para.53.

²⁰² Witness 4, see Judgement, para.227; Witness 19, see Judgement, para.223.

²⁰³ See above, para.53.

²⁰⁴ Witness 19, T.1151-1152, 14-03-2007, (Open Session).

²⁰⁵ Judgement, para.232.

²⁰⁶ [REDACTED].

²⁰⁷ Witness 19, T.1186, 15-03-2007, (Open Session).

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED].

²¹⁰ Witness 4, T.1430, 19-03-2007, (Open Session).

²¹¹ Witness 19, T.1202, 15-03-2007, (Open Session).

crying sister “M” behind her back.²¹² As Balaj had taken sister “S” and the mother of Witness 4 and neither had returned, the family members must have feared for their lives.

68. Balaj, as head of the KLA unit called the Black Eagles,²¹³ must have been aware of their reputation for violence. KLA commander Rrustem Tetaj testified that Balaj and the Black Eagles were known for their brutality²¹⁴ and were widely suspected of being responsible for the kidnapping and killing of Albanians, Serbs and Roma in the area: “It was like a secret, a public secret, everything which happened in Dukagjin. If it was not proved, then everybody said that this was done by Toger... This is what we heard, and that was how it happened. Everything bad that happened, it was attributed to the Toger.”²¹⁵ Zoran Stijović testified that a significant number of documents identified Idriz Balaj and his close associates as the most responsible person for the murders, attacks and other incidents happening the area.²¹⁶ The DB had a constant inflow of information, including that persons were killed and thrown, dumped into the Lake Radonjić and the canal next to the lake.²¹⁷ KLA Military Police member, Avni Krasniqi testified that people were afraid of Balaj.²¹⁸

69. Balaj, through his position of authority in the KLA, must also have known that KLA soldiers were committing crimes including murder against those not supporting KLA policy. Examples proven during the trial included:

- Dragoslav Stojanović, Mijat Stojanović and Veselin Stijović (all of Serb ethnicity) were cruelly treated and tortured by KLA soldiers on 18 April 1998 first at the Stojanović family house and then at the house of Smajl Haradinaj in Glodane/Gllogjan (Dečani/Deçan municipality). (Count 4)
- Cruel treatment and torture of Staniša Radošević and Novak Stijović (both of Serb ethnicity) on 22 April 1998 at the entrance of Glodane/Gllogjan (Dečani/Deçan municipality). (Count 6)

²¹² Judgement, para.240.

²¹³ See above, para.53.

²¹⁴ R.Tetaj, T.3676-3677, 07-05-2007 (Open Session).

²¹⁵ R.Tetaj, T.3670, 07-05-2007 (Open Session).

²¹⁶ Z. Stijović, T.9087, 09-10-2007 (Open Session).

²¹⁷ Z. Stijović, T.9087, 09-10-2007 (Open Session).

²¹⁸ A.Krasniqi:T.10758-10759, 14-11-2007 (Open Session). See also P.Shala, T.9974-9975, 30-10-2007 (Open Session): Other units did not “meddle” with Toger’s unit.

- Zenun Gashi, a retired police man of Roma ethnicity, was abducted on or around 1 August 1998 taken to Glodane/Gllogjan (Dečani/Deçan municipality), cruelly treated and murdered in KLA custody. (Count 20)
- Nurije and Istref Krasniqi (two Albanians) were murdered in KLA custody after on 12 August 1998 they were taken away from their home and brought them to the KLA headquarters in Glodane/Gllogjan (Dečani/Deçan municipality). (Count 22)
- Sanije Balaj was murdered on 12 August 1998 south from Barane/Baran at a place called Lugu i Isufit (Dečani/Deçan municipality) by the KLA, in particular by Idriz Gashi, a KLA fighter or commander with the potential help of other KLA members. (Count 22)
- Witness 61, a Roma from Deçan/Dečani was raped, cruelly treated and tortured by the KLA in the summer of 1998 at KLA headquarters in Rznić/Irznik. (Counts 36 and 37)

70. The only reasonable conclusion from the evidence is that Balaj was aware of the probability that the three women would be killed and that his acts of bringing and keeping the victims in the vicinity of their murderers would substantially contribute to their death.

E. Relief Sought

71. On the basis of the foregoing, the Appeals Chamber should reverse the acquittal of Balaj for murder, enter a conviction under Count 14 for murder as a violation of the laws or customs of war under Article 3 of the Statute for having aided and abetted the murders of sister “S”, the mother of Witness 4 and sister “M”, and sentence Balaj accordingly.

IV. GROUND 3: ERROR REGARDING THE RAPE, TORTURE AND CRUEL TREATMENT OF WITNESS 61 AND THE CRUEL TREATMENT OF WITNESS 1 (COUNTS 36 AND 37)

A. Rape, Torture and Cruel Treatment of Witness 61 by Idriz Balaj a/k/a “Toger”

1. Overview

72. The Chamber found that Balaj was “Toger”.²¹⁹ Having found that Balaj was Toger, it was patently unreasonable for the Chamber to acquit Balaj given the clear and consistent evidence that the KLA soldier called Toger had taken into custody, detained, interrogated and raped Witness 61.

73. The Chamber erred by asking itself an unreasonable question: Whether Witness 61 was raped by Toger or another KLA soldier?²²⁰ The question was unreasonable because the evidence did not permit a finding that Witness 61 confused Toger with another KLA soldier or that another KLA soldier raped her. The Chamber based its doubt on a misreading of the evidence and at the same time failed to consider other crucial evidence supporting the only reasonable conclusion that Balaj raped Witness 61. Witness 61’s inability to identify Balaj does not raise any doubt about his identification given her clear and consistent evidence that she was raped by the KLA soldier called Toger.²²¹

74. Toger was one of five armed KLA soldiers who forcibly took Witness 61 and her husband from their home to his headquarters house²²² in Rznić/Irzniq.²²³ Toger gave orders to the other four soldiers and they all called him Toger.²²⁴ Toger spoke Albanian and Witness 61 could tell he was not from the area. Toger and another KLA soldier took Witness 61 to the house. Inside the house, Witness 61 was taken to a room with a table, some chairs, a TV and a bed. Toger was alone in the room with Witness 61. The lights were on. The other soldier remained at the door, then Toger

²¹⁹ Judgement, para.469

²²⁰ Judgement, para.469.

²²¹ See Judgement, para.466.

²²² See above, para.53 and below para.82.

²²³ Judgement, para.469.

²²⁴ See below, para.82.

ordered him to leave. Toger interrogated Witness 61 for half an hour, then he told her to undress and lie on the bed. Toger turned off the lights but left the television on. She saw Toger come to the bed and take his clothes off. Toger raped her several times.²²⁵ Toger instructed her not to tell her husband what happened and told her to leave after she got dressed. Witness 61 told her husband and her entire family that the KLA soldier called Toger had violated her. That morning, her husband and father-in-law went to the local KLA Headquarters and complained that the KLA soldier called Toger had raped Witness 61.

75. This evidence leaves no doubt that it was Balaj who raped Witness 61. It is not possible that she confused him with someone else. The Chamber's conclusion was one no reasonable trial chamber could have reached.

2. The evidence leaves no doubt that Balaj raped, tortured and cruelly treated Witness 61

76. The Chamber accepted Witness 1's identification of Balaj as the KLA soldier called Toger and found that Toger was one of the men that took Witness 1 and Witness 61 from their home.²²⁶ It also noted Witness 1's evidence that Toger and another KLA soldier took her to the house where his wife was raped.²²⁷ While Witness 1 could not see who brought Witness 61 into the room where she was raped,²²⁸ the identification of Balaj going to the house with Witness 61 and another soldier is not questioned. Yet, the Chamber found that the evidence leaves reasonable doubt as to whether it was Toger or another KLA soldier who raped Witness 61.²²⁹ The Chamber erred in coming to this conclusion.

77. To find reasonable doubt based on Witness 1's inability to see what transpired inside the house ignores the clear and consistent testimony of Witness 61. The Chamber's explanation for her possibly confusing Toger with another KLA soldier is based on Witness 61's evidence that it was too dark to see the soldiers who came to

²²⁵ Judgement, para.460; Witness 61, T.3993-3996, 11-05-2007, (Open Session).

²²⁶ Judgement, para.469.

²²⁷ Judgement, para.469.

²²⁸ Judgement, para.469.

²²⁹ Judgement, para.469.

her house.²³⁰ This finding misreads the evidence, ignores relevant parts of the evidence concerning Toger and applies the evidence out of context.

78. Darkness was not a factor preventing Witness 61 from seeing Toger at her home. Witness 61 described the events in her house as follows:

It was at 12.00 at night. Toger came with four other people. He came to the door. My father-in-law came up and opened the door for them. He opened the door. My father-in-law asked them, What do you want? They asked him, Where is your son? My father-in-law told them that he is sleeping. Then they took us. They waited for us until we dressed. Then they came inside the house again. They told the father – my father-in-law that, You should not expect that they will send us back.²³¹

79. Witness 61 saw Toger but did not recognise him as she did not know him.²³² However, her husband recognised him as someone he knew of as Toger.²³³ Witness 61 was able to clearly describe the weapons possessed by the KLA soldiers who came into her home.²³⁴ She could not describe the other three soldiers who remained outside or the insignia on their arms because she only saw them outside where it was dark.²³⁵

80. Further, Witness 61 not only saw Toger inside her home but also heard the other soldiers call this KLA soldier Toger:

Q. The – you said Toger and four others came to your house that night. How did the other four refer to this person you’ve called Toger?

A. They referred to him as Toger. I don’t know his name. I remember them calling him “the Toger.”

Q. Is that how you know him, that he was called Toger, or –

²³⁰ Judgement, para.469.

²³¹ T.3982, 11-05-2007, (Open Session).

²³² Witness 61, T.4005, 11-05-2007, (Open Session).

²³³ Witness 61, T.4005, 11-05-2007, (Open Session).

²³⁴ Witness 61, T.3987-3988, 11-05-2007, (Open Session).

²³⁵ Witness 61, T.4043, 11-05-2007, (Open Session); Witness 61, T.3988, 11-05-2007, (Open Session) (regarding the insignias).

A. Yes.²³⁶

This is crucial evidence showing that Witness 61 knew from the beginning which soldier was Toger. The Chamber fails to discuss this evidence entirely.

81. Another identifying feature of the KLA soldier called Toger was that he spoke Albanian to Witness 61 and she could tell he was not from the village.²³⁷ Balaj was originally from Iglareva/Gllarevë in Klina/Klinë municipality²³⁸ and he lived in Croatia until 1998 when the war started.²³⁹ [REDACTED].²⁴⁰

82. The Chamber further failed to analyse both the evidence of Balaj's command and of his notebook in support of the identification of Balaj as the KLA soldier who interrogated and raped Witness 61. Balaj was the commander of the headquarters at or near the school in Rzníč/Irzníq.²⁴¹ [REDACTED].²⁴² Toger ordered Witness 1 and 61 to accompany them.²⁴³ Witness 61 was taken inside the house into the room where Toger was staying.²⁴⁴ After interrogating Witness 61, Toger ordered the KLA soldier guarding the door to leave just before he raped her.²⁴⁵ During his interrogation, Toger ordered guards to bring in a wooden stick.²⁴⁶ Toger then raped Witness 61.²⁴⁷ During the interrogation, Toger took notes in a notebook.²⁴⁸ Balaj and KLA soldiers under his command would enter villages looking for people they wanted. He carried a notebook containing the names of collaborators.²⁴⁹

83. The same person interrogated and raped Witness 61. It was only Toger in the room and she could clearly see him.²⁵⁰ During the interrogation one soldier stayed at the door but Toger told him to leave.²⁵¹ At some point during the questioning Toger summoned guards and ordered them to bring him a wooden stick. They complied

²³⁶ Witness 61, T.4001, 11-05-2007, (Open Session).

²³⁷ Witness 61, T.4000, 11-05-2007, (Open Session).

²³⁸ Indictment, para.8.

²³⁹ Balaj Pre-Trial Brief, para.13.

²⁴⁰ [REDACTED].

²⁴¹ See above, para.53.

²⁴² [REDACTED].

²⁴³ [REDACTED].

²⁴⁴ Witness 61, T.3991, 11-05-2007, (Open Session).

²⁴⁵ Witness 61, T.3991, 11-05-2007, (Open Session).

²⁴⁶ Witness 61, T.3993, 11-05-2007, (Open Session).

²⁴⁷ Judgement, para.460; Witness 61, T.3993-3996, 11-05-2007, (Open Session)

²⁴⁸ Witness 61, T.3991-3992, 11-05-2007, (Open Session).

²⁴⁹ Prosecution Final Trial Brief, para.245; R. Tetaj, T.3671-3673, 21-05-2007, (Open Session)

²⁵⁰ Witness 61, T.3991, 11-05-2007, (Open Session).

²⁵¹ Witness 61, T.3991, 11-05-2007, (Open Session).

with his order and left.²⁵² For the duration of her ordeal, Witness 61 was in the room with the KLA soldier she knew as Toger. It was Toger who ordered her to get undressed and to go to the bed. It was Toger who turned the light off and raped her repeatedly.²⁵³ After the rape, Toger told Witness 61 to leave the room and her husband was brought in to be interrogated.²⁵⁴ Her husband was asked the same questions²⁵⁵ which indicates that Toger interrogated him.

84. On their way home, Witness 61 was crying and complained to her husband that Toger had done something to her while they were inside the house. When they arrived home, she complained to her husband and father-in-law about Toger and what had happened to her.²⁵⁶ Her husband recognised the KLA soldier called Toger as someone he had seen before in the village.²⁵⁷ At around 5 a.m., Witnesses 1 and 56 went to the village KLA commander to report the incident. Afterwards, three high-ranking commanders of the KLA including Shemsedin Cekaj came to the house.²⁵⁸ The commanders told Witness 61 that “Toger” had admitted the crime and that it would not happen again.²⁵⁹ Witnesses 61, 1 and 56’s evidence is consistent on this point. Shemsedin Cekaj’s failure to recall this occurrence is irrelevant.²⁶⁰ The Chamber was wrong not to consider the additional hearsay evidence of “Toger’s” hearsay admission in corroboration.²⁶¹

85. At least once after the incident Witness 61 saw the KLA soldier called Toger who raped her driving a black jeep.²⁶² Balaj drove a black jeep.²⁶³

86. Witness 61 did not know the KLA soldier called Toger before she had contact with him during these very traumatic events. The fact “that her memory of the appearance of the perpetrator was insufficient for the purpose of identification or

²⁵² Witness 61, T.3993, 11-05-2007, (Open Session).

²⁵³ Witness 61, T.3993-3996, 11-05-2007, (Open Session).

²⁵⁴ Witness 61, T.3996, 11-05-2007, (Open Session).

²⁵⁵ Witness 61, T.4025, 11-05-2007, (Open Session).

²⁵⁶ Witness 61, T.3996-3997, 11-05-2007, (Open Session).

²⁵⁷ Witness 61, T.4003, 4005, 11-05-2007, (Open Session).

²⁵⁸ Witness 61, T.3997, 11-05-2007, (Open Session); [REDACTED].

²⁵⁹ Witness 61, T.3998, 4050, 11-05-2007, (Open Session).

²⁶⁰ See Judgement, para.469.

²⁶¹ Judgement, para.469.

²⁶² Judgement, para.460; Witness 61, T.3999, 11-05-2007, (Open Session).

²⁶³ Prosecution Final Trial Brief, para.238: C. Krasniqi, P351, para.60 (Public); A. Krasniqi, T.10745-10746, 10749, 14-11-2007, (Open Session); Witness 19, T.1158-1159, 1164, 1167, 14-03-2007, (Open Session); A. Pappas, T.4090, 4100, 4128, 4147-4149, 14-05-2007, (Open Session); Witness 61, T.3999, 11-05-2005, (Open Session).

does not fit the likeness of Idriz Balaj”²⁶⁴ does not raise any doubt about his identification given her clear and consistent evidence that it was the KLA soldier she knew as Toger who raped her.²⁶⁵ Her evidence was that it was the KLA soldier called Toger who took her to the headquarters house, interrogated and raped her. She leaves no doubt that it could have been another KLA soldier. The Chamber found that the KLA soldier called Toger as Idriz Balaj.²⁶⁶

87. Witness 1 identified the KLA soldier called Toger as Balaj. He had seen him before, during and after the events. He identified him on a photo board.²⁶⁷ He had seen Toger and another soldier taking his wife to the house. She complained to him and his father at the first opportunity about what had happened. From their discussions with her at the time, they then complained about Toger’s rape of Witness 61 to the village KLA leaders. [REDACTED],²⁶⁸ which may explain why Witness 61 had difficulty identifying Toger on a photo board.

3. Conclusion

88. In its analysis of the evidence the Chamber ignored the totality of the evidence, which identified only the KLA soldier called Toger as the perpetrator of the crimes committed against Witness 61. The Chamber found that the KLA soldier called Toger was Balaj. Based on the clear and consistent evidence regarding the rape, torture and cruel treatment of Witness 61, no reasonable trial chamber could have concluded there was a doubt that Balaj was the perpetrator.

89. The Appeals Chamber should reverse Balaj’s acquittal, convict him for rape, torture and cruel treatment of Witness 61 and sentence him accordingly.

B. Cruel treatment of Witness 1 by Idriz Balaj aka “Toger” and others

90. Balaj and the other KLA soldiers cruelly treated Witness 1. The Chamber erred in law in finding otherwise.²⁶⁹ Without any reasoning, the Chamber simply concluded:

²⁶⁴ Judgement, para.469.
²⁶⁵ Judgement, para.469.
²⁶⁶ Judgement, para.469
²⁶⁷ Judgement, para.462, [REDACTED].
²⁶⁸ [REDACTED].
²⁶⁹ See Judgement, paras.459-469.

[I]t is also not established that KLA soldiers, by putting Witness 1 in a well or by any other acts, caused him serious mental or physical suffering or injury, or seriously attacked his human dignity. Consequently, the Trial Chamber is not convinced beyond a reasonable doubt that cruel treatment or torture was committed against Witness 1.²⁷⁰

91. Based on the evidence received and accepted by the Chamber, no reasonable trial chamber could have made this finding. The acts committed against Witness 1 fell squarely within the definition of cruel treatment under Article 3 of the Statute because they constituted a serious attack on his human dignity or caused him at least serious emotional suffering.

92. Witness 1, a Roma man, with his hands tied and with his wife, was forcibly taken by Balaj and four other armed KLA soldiers from his home at midnight to his headquarters in a house in or near the Rznić/Irznj school.²⁷¹ Balaj gave orders to the KLA soldiers.²⁷² Witness 1 was separated from his wife outside the house. He saw Toger and another KLA soldier take her into the house. He was thrown into a well with water up to his waist and a lid closed over him.²⁷³ He was left there for about two to three hours. While he was in the well, Toger interrogated the wife of Witness 1 about her husbands' alleged collaboration with the Serbs. Toger then raped her. Afterwards, Toger interrogated him.²⁷⁴ Witness 1 and his wife were then allowed to return to their home. Witness 61 was crying on the way home and told her husband that Toger had done something to her and later at home told him and his father about Toger and what had happened to her.²⁷⁵

93. Toger and the KLA soldiers were heavily armed with automatic pistols, rifles, grenades and knives.²⁷⁶ [REDACTED].²⁷⁷ He and his wife were scared because there were rumours about Toger and the KLA killing people.²⁷⁸

²⁷⁰ Judgement, para.467.

²⁷¹ Judgement, para.461.

²⁷² See above, para.82.

²⁷³ Judgement, para.461.

²⁷⁴ See above, para.83.

²⁷⁵ Judgement, para.461.

²⁷⁶ [REDACTED]; Witness 61, T.3988, 11-05-2007, (Open Session).

²⁷⁷ [REDACTED].


²⁷⁸ Witness 61, T.3987, 11-05-2007, (Open Session).

94. On the basis of the mental suffering inflicted on Witness 1, the legal requirement for cruel treatment under Article 3 of the Statute was met. Serious mental suffering alone may constitute cruel treatment.²⁷⁹ The mental suffering inflicted need to be lasting, so long as it is real and serious.²⁸⁰ The real and serious mental harm to the victim is self-evident when armed and dangerous men bind and forcibly take a victim and his wife at night, take her to a house under guard while he is shut in a well outside for hours.²⁸¹ These facts met the elements cruel treatment. The Chamber erred in law when, without any legal or factual analysis, it held that intentional mental suffering inflicted against Witness 1 did not amount to cruel treatment.

95. The Chamber found that Balaj was one of the KLA soldiers who took Witness 1 and his wife to the headquarters in Rznici/Irznici.²⁸² The evidence showed Balaj was in charge. Balaj's personal involvement in the cruel treatment of Witness 1 makes him guilty for committing.²⁸³

C. Relief Sought.

96. The Appeals Chamber should reverse Balaj's acquittal, convict him for cruel treatment of Witness 1 and sentence him accordingly.



Peter Kremer QC
Senior Appeals Counsel

Dated this 16th day of July 2008

At the Hague, The Netherlands

Word Count: 13,345

²⁷⁹ See *Limaj* TJ, para.657.

²⁸⁰ *Krnjelac* TJ, para.131; *Kunarac* TJ, para.501.


²⁸¹ See *Čelebići* AJ, para.424; *Blaškić* AJ para.595; *Kunarac* TJ, para.501.

²⁸² Judgement, para.469.

²⁸³ Judgement, paras.459-469.

Declaration Pursuant to Rule 111

The Prosecutor will exercise due diligence to comply with his continuing Rule 68 disclosure obligations during the appeal stage of this case. As at the date of this filing, the Prosecutor has disclosed, or is in the process of disclosing, to the accused all material under Rule 68(i) which has come into his actual knowledge and, in addition, has made available to them, under Rule 68(ii), collections of relevant material held by the Prosecutor.



Peter Kremer QC
Senior Appeals Counsel

Dated this 16th day of July 2008
At The Hague, The Netherlands

Prosecution's Glossary

Pleadings, Orders, Decisions etc from Prosecutor v. Haradinaj, Case No. IT-04-84-A

Abbreviation used in Prosecution Appeal	Full citation
Judgement	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, T.Ch., Judgement, 3 April 2008
Prosecution Appeal Brief.	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-A, Prosecution Appeal Brief, 16 July 2008 (<i>Confidential</i>)
Balaj Pre-Trial Brief	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, Pre-Trial Brief of Idriz Balaj, 12 February 2007
Prosecution Final Trial Brief	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, Prosecution's Final Trial Brief, 14 January 2008
Prosecution Pre-Trial Brief	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-PT, Prosecution Pre-Trial Brief with Confidential Annexes, 29 January 2007
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Order to Investigate for Contempt	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, T.Ch., Order to Prosecution to Investigate with a View to Preparation and Submission of an Indictment for Contempt, 31 October 2007
Scheduling Order for Final Trial Brief and Closing Arguments	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, T.Ch., Scheduling Order for Final Trial Brief and Closing Arguments, 30 November 2007
Order in Relation to Witness 18	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, T.Ch., Order Pursuant to Rule 77(C)(i) in Relation to Witness 18, 31 October 2007
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
25 October 2007 Application for Subpoena Ad Testificandum for Shefqet Kabashi	<i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T, Application Prosecution's 24 th Application for Subpoena Ad Testificandum, or Compelled Video Link Testimony, Or Rule 92 <i>Quater</i> Application, Or Recall of Investigator to Testify, 25 October 2007
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Contempt Cases relating to Prosecutor v. Haradinaj, Case No. IT-04-84-T,

Abbreviation used in Prosecution Appeal	Full citation
[REDACTED]	[REDACTED]
Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi	<i>Prosecutor v. Shefqet Kabashi</i> , Case No. IT-04-84-R77.1, T.Ch., Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Order for Detention on Remand	<i>Prosecutor v. Avni Krasniqi</i> , Case No.IT-04-84-R77.2, T.Ch., Order for Detention on Remand, 13 November 2007

Other ICTY authorities

Prosecution's Glossary
Case No. IT-04-84-A
16 July 2008
Confidential

Abbreviation used in Appeal	Full citation
<i>Aleksovski</i> AD on Admissibility of Evidence,	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1, App. Ch., Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999
<i>Krasniqi</i> (Contempt) TC Order	<i>Prosecutor v. Avni Krasniqi</i> , Case No. IT-04-84-R77.2, T.Ch., Order for Detention on Remand, 13 November 2007
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, T. Ch., Judgement, 3 March 2000
<i>Blagojević</i> AJ	<i>Prosecutor v. Vidoje Blagojević & Dragan Jokić</i> , Case No. IT-02-60-A, App.Ch., Judgement, 9 May 2007
<i>Brđanin</i> TJ	<i>Prosecutor v Radoslav Brđanin</i> , Case No. IT-99-36-T, T. Ch., Judgement, 1 September 2004
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>Furundžija</i> TJ	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, T.Ch., Judgement, 10 December 1998
<i>Hadžihazanović and Kubura</i> Decision on the Prosecution's Application to Re-Open its Case	<i>Prosecutor, v. Enver Hadžihazanović and Amir Kubura</i> , case No.01-47-T, T.Ch., Decision on the Prosecution's Application to Re-Open its Case, 1 June 2005
<i>Krnojelac</i> TJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-T, T.Ch., Judgement, 15 March 2002
<i>Kunarac</i> TJ	<i>Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković</i> , Case No. IT-96-23 & IT-96-23/1-T, T.Ch., Judgement, 22 February 2001
<i>Limaj</i> AJ	<i>Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu</i> , Case No. IT-03-66-A, App.Ch., Judgement, 27 September 2007
<i>Limaj</i> TJ	<i>Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu</i> , Case No. IT-03-66-T, T.Ch., Judgement, 30 November 2005
<i>Martić</i> AD Regarding Evidence of	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-AR73.2,

Milan Babić	App.Ch., Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006
Milosević TJ	<i>Prosecutor v. Dragomir Milošević</i> , Case No. IT-98-29/1-T, Judgement, 12 December 2007
Milutinović AD Refusing Milutinović Leave to Appeal	<i>Prosecutor v. Milutinović</i> , Case No. IT-99-37-AR65.3, App.Ch., Decision Refusing Milutinović Leave to Appeal, 3 July 2003
Orić TJ	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, T.Ch., Judgement, 30 June 2006
Orić AD on Length of Defence Case	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-AR73.2, App.Ch., Interlocutory Decision on Length of Defence Case, 20 July 2005
Prlić AD on Prosecution Appeal Concerning Reduction of Time for the Prosecution Case,	<i>Prosecutor v. Prlić</i> , Case No. IT-04-74-AR73.4, App.Ch., Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007
Prlić Second Modified Scheduling Order	<i>Prosecutor v. Prlić</i> , Case No. IT-04-74-T, T.Ch., Second Modified Scheduling Order, 22 November 2007
Prlić Decision on Defendants Appeal	<i>Prosecutor v. Prlić</i> , Case No. IT-04-74-AR73.7, App.Ch., Decision on Defendants Appeal Against "Décision Portant Attribution Du Temps à La Défense Pour La Présentation Des Moyens à Décharge", 1 July 2008
Prlić Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić Questioning into Evidence	<i>Prosecutor v. Prlić</i> , Case No. IT-04-74-AR73.6, App.Ch., Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić Questioning into Evidence, 23 November 2007
Prlić. Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction	<i>Prosecutor v. Prlić</i> , Case No. IT-04-74-AR72.1, App.Ch., Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005
Strugar TJ	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, T.Ch., Judgement, 31 January 2005
Tadić AJ	<i>Prosecutor v. Duško Tadić a/k/a "Dule"</i> , Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999
Vasiljević AJ	<i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-A, App.Ch.,

	Judgement, 25 February 2004
--	-----------------------------

ICTR authorities

Abbreviation used in Prosecution Appeal	Full citation
<i>Ndindabahizi AJ</i>	<i>Prosecutor v. Emmanuel Ndindabahizi</i> , Case No. ICTR-01-71-A, App.Ch., Judgement, 16 January 2007

General Sources

Abbreviation used in Prosecution Appeal	Full citation
Cassese	A. Cassese, <i>International Criminal Law</i> . 2 nd Edition (Oxford University Press, 2008)

Other Abbreviations

Abbreviation used in Prosecution Appeal	Full citation
Art.	Article
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
Chamber	Trial Chamber in <i>Prosecutor v. Haradinaj</i> , Case No. IT-04-84-T
Exh.	Exhibit
Exhs.	Exhibits

fn.	Footnote
fns.	Footnotes
KLA	Kosovo Liberation Army – <i>Ushtria Çlirimtare e Kosovës</i> (UÇK)
mn.	margin number
para.	paragraph
paras	paragraphs
p.	Page
pp.	pages
Rules	Rules of Procedure and Evidence
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
T.	Trial Transcript
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo

**UNITED
NATIONS**

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

Case No. IT-04-84-A

Date: 16 July 2008

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

THE PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

CONFIDENTIAL

APPENDICIES A AND B TO PROSECUTION APPEAL BRIEF

The Office of the Prosecutor:

Mr. Peter Kremer, QC

Counsel for Ramush Haradinaj:

Mr. Ben Emmerson, QC

Mr. Rodney Dixon

Ms. Susan L. Park

Counsel for Lahi Brahimaj:

Mr. Richard Harvey

Mr. Paul Troop

Counsel for Idriz Balaj:

Mr. Gregor Guy-Smith

Ms. Colleen Rohan

Appendix A

Shefqet Kabashi statements of [REDACTED] and 1 June 2007

IT-04-84-A

Appendix A

Prosecution Appeal Brief

Confidential

Statement of Shefqet KABASHI

U0162411

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
PROSECUTION
OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS
OF INTERNATIONAL LAW COMMITTED IN THE TERRITORY
OF THE FORMER YUGOSLAVIA SINCE 1991

WITNESS STATEMENT

WITNESS INFORMATION:

Last Name: KABASHI

First Name: Shefqet

Nickname /Alias: Shullc

Father's name: Tahir

Mother's name: Timë

Date of Birth: 01 July 1976

Gender: Male

Place of Birth: Zahaç, municipality of Peja/Pec

Ethnic Origin: Kosovar Albanian Religion: Muslim

Current Occupation: Works at Pizzeria Place

Former: Mechanic

Language(s) Spoken: Albanian, Serbian and English

Language(s) Written: Albanian and Serbian

Dates of Interview: 10, 12, 14 May 2007

Place of Interview: Video link and telephone conference

Interviewer: Antoinette Issa, Barney Kelly, Romana Schweiger

Interpreter: Maklan Misha

Language(s) Used in Interview: Albanian and English

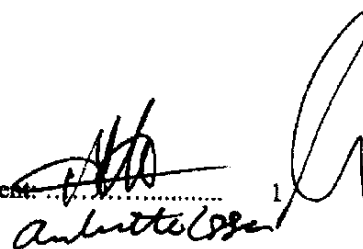
Names of all persons present during interview:

Shefqet KABASHI, Barney Kelly, Antoinette Issa, Romana
Schweiger, Maklan Misha

Signed / Initialled:



Others Present:



Statement of Shefqet KABASHI

U0162412

Witness Statement

1. I was born in the village of Zahaç, municipality of Peja on 1 July 1976. I have three brothers and four sisters.
2. Around 9 April 1998 or later, I went to Jablanica with my cousin Bashkim Kabashi in order to join the KLA. We were occupied by Serb forces. There was a call at that time for all Albanians to join the KLA movement. I had some relatives and friends in the region and they also confirmed to me that the recruitment into the army (KLA) was going on in Jablanica. I wanted to join the KLA in order help liberate Albanians from the Serb offensives.
3. I went to the KLA Headquarters (HQ) which was actually the house of Lahi Brahimaj. At that time I did not know Lahi Brahimaj nor the fact that this was his house. I learned this later because it was known among the soldiers that it was Lahi's house and because of the friendship we developed between our families. My sister and Lahi's brother's daughter were married to two brothers in the village of Llugaxhi. This relationship existed for sometime, but before that time, I did not know Lahi in person.
4. When I arrived at the KLA HQ, I talked to the soldiers standing outside the KLA HQ and told them that I was there to join the KLA. They were dressed in camouflage uniform with KLA insignia. They did not give me any immediate response. I then went to the house of my distant relative Ardian Ahmeti who was living in the same village of Jablanica and his house was located close to the KLA HQ. Ardian Ahmeti told me to first speak to Hajdar Dula.
5. Hajdar Dula came to my relative's house and we discussed the matter. Hajdar Dula was a soldier in the KLA. He was wearing a KLA uniform. I am not sure of his exact position. He told me that one group was about to leave for Albania to procure arms and ammunition. So I immediately joined that group to go to Albania. Hajdar Dula did not go to Albania with us. It was a big group, maybe more than a hundred, who went to Albania.

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Statement of Shefqet KABASHI

U0162413

6. We crossed the Kosovo border towards Albania the same evening and stayed in the "so-called" compound of Sali Berisha's family in Prifç village (Tropoja district, Albania). The next day, we inspected weapons and ammunition and started our return journey for Kosovo. My cousin Bashkim Kabashi was with me the whole time.
7. We brought heavy artillery including grenade launchers, machine guns and ammunition from Albania. When we returned, we dumped all of the weapons and ammunition at the gate of the KLA HQ in Jablanica. I then went to my relatives' house.
8. That same day, Hajdar Dula once again came to my relatives' house and we talked about the war. He asked me if I was still willing to go to the frontline in Cermjan. This village was very close to Jablanica. There are about two or three villages between Jablanica and Cermjan. I agreed to go. Hajdar gave me a uniform, his weapon, and his car. That same evening upon our return from Albania, I joined the battlefield in Cermjan.
9. We arrived in Cermjan as a group of four soldiers from Jablanica. Other soldiers joined us in Cerjman and we became a total of fifteen soldiers. While I was in Cermjan the only person I knew there was Bashim Kabashi. All other soldiers were new to me. The moment we arrived in Cermjan, the Serbs (who were members of the Yugoslav Army) started shelling at us and we tried to fight but the Serbs then brought in reinforcements and we had to withdraw the next day and return to Jablanica. I drove back to Jablanica in Hajdar Dula's car which I had earlier borrowed from him.
10. On our return to Jablanica, Bashkim and I spent 3-4 days in my relatives' house. Afterwards I returned to the KLA HQ and approached Lahi Brahimaj. I told him that I had been participating in combat at the frontlines but I had not received any identity card or a personal weapon and was not registered as a KLA soldier. Lahi Brahimaj initially told me that there were no weapons for me. But I insisted on the formalisation of my recruitment to the KLA, so Lahi Brahimaj took me inside and gave me a Russian model old sniper type rifle.

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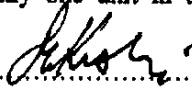
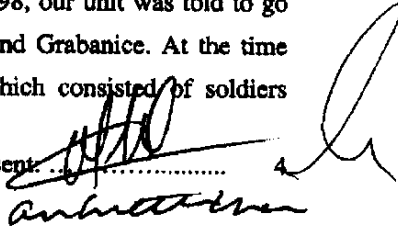


Statement of Shefqet KABASHI

U0162414

11. Lahi Brahimaj then took me to the KLA barracks and I was formally registered as a KLA soldier. The KLA barracks were located in a house situated about 500 metres away from Lahi Brahimaj's house towards Zabel village. This house belonged to Naser and Enver's family. I can't remember their last names. Everybody in the village knows it. These barracks were used by soldiers who trained there, slept there, ate there etc.
12. At the barracks, Lahi handed me over to Afrim whose last name I don't know, but was known by the pseudonym "Leopard" who became my first Commander. He asked me my name and pseudonym which was "Shulle" and I was formally registered as a soldier.
13. The KLA was initially reluctant to formally register me as a member because they always verified family backgrounds in order to ensure that only real Albanians who did not collaborate with the Serbs and spy on them would enter the KLA.
14. When I was getting my recruitment formalised in Jablanica KLA HQ, my cousin Bashkim left for home telling me that he would return soon. He came back to Jablanica after a few days along with another cousin Jaha Kabashi. My cousins, Bashkim and Jaha told me that when they reached Jablanica KLA HQ, they enquired about me and they were told that I was in Kepuz undergoing training. Both of them joined me in training in Kepuz for 2-3 days. Kepuz is a village located about 3 kilometres east of Jablanica.
15. Between 9 April and 19 May 1998, I moved between Jablanica and Kepuz. Training for KLA soldiers from Jablanica HQ was organised in Kepuz and the training was only being given by KLA soldiers. Agim Zeneli, one of the KLA soldiers was the person who was giving us the training. We received physical training including crawling and we were also trained to use different types of weapons.
16. When we returned to Jablanica around 19 May 1998, our unit was told to go and intervene in the battle going on in Bokshiq and Grabanice. At the time there was only one unit in the Jablanica HQ which consisted of soldiers

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Statement of Shefqet KABASHI

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staying in Jablanica and we were told to participate in this battle going on in Bokshiq and Grabanice. We used some grenade launchers to shell the positions of the Serbian forces. Our task was to prevent Serbian forces (VJ and MUP) from proceeding towards Dollove village. I participated in actions in both the places. On 20th and 21st of May 1998 I was in this same area, I have drawn a rough sketch of the positions on the ground. This is appended to my statement.

17. When it got dark we transported some old people walking on the main road from Grabanice to Bokshiq. We spent that night in Grabanice village.
18. After the attacks on Grabanice and Bokshiq, around 20 May 1998, the villagers of Grabanice evacuated to Glllogjan (Peja) and other villages nearby. I later heard from several people in the region that the villagers were addressed by Lahi Brahimaj and Alush Agushi who were both Commanders in the Jablanica KLA HQ and I heard that Lahi asked the remaining villagers why they didn't stay and defend the village. I only heard about this from villagers from Grabanice who used to live there as well as others but I do not have any direct knowledge of this.
19. Shaqir Krasniqi and Hazir Morina had contact with Lahi Brahimaj in the past and they were appointed KLA village leaders in Grabanice. I knew Hazir Morina before the war only by his pseudonym "Sadiki" and now I know his full name. Sadri Berisha was another village leader of Grabanice who was also a member of the KLA. Shaqir and Sadri were killed after the war, but Hazir is now the body guard of Alush Agushi in the Kosovo Protection Corps (TMK). I don't know much about these killings. I think they possibly be related to the incidents which occurred during the war.
20. I believe that Sadri Berisha was killed on orders of some commanders in the KLA because he did not cooperate much with them. He was not on good terms with some commanders in the KLA which is why I believe this. However I do not have any direct evidence to support this. Regarding the killing of Shaqir Krasniqi I heard rumours in Klina that he was killed as revenge for actions or killings in which he took part during the war.

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Statement of Shefqet KABASHI

U0162416

21. It was sometime after June or July 1998 that my unit was sent to Berisha by Alush Agushi as a special unit for intervention to help Fatmir Limaj "Celiku". I was part of this special intervention unit that was called "Mala's Unit" or "Unit 192". Mala was Alush Agushi's pseudonym. At this point, more formal units began to be created within the KLA in Jablanica. In the beginning there wasn't a formal structure of units but over time such units began to emerge. I cannot remember the exact date, but it took place when the Serbs attacked Llapushnik at the end of July 1998. Before the Serb offensive on Llapushnik and the fall of Llapushnik, Commander Celiku was the main commander for areas around Llapushnik, Malisheve and areas toward Rahovac and Suva Reka.
22. When we arrived in Berisha, Commander "Celiku" met us and he asked for me. He told me that Alush Agushi had gone back to Jablanica and that until he returned, I was responsible for Berisha. I was in Berisha with 30 soldiers. We visited different points in Berisha including villages of Trpeze, Novoselle and Divljaka. We had only one checkpoint in Berisha and that was above the school in Novoselle. There was no need for more checkpoints in Berisha because the area of Divjak and Klecke was controlled by the KLA. Occasionally we were shelled by the Serbs.
23. After 2 or 3 days in Berisha, "Qerqiz", whose name I later learned was Isak Musliu, approached me with another soldier and told me that "Celiku" had called me. I got into his car and went with him to "Celiku". Initially it was a formal conversation. Then he specifically told me not to interfere in local affairs and told me that I was called for a specific job and when I will be needed, I will be informed. When we had these arguments, I remember Shukri Buja was also present in that room and there were some other soldiers I did not know.
24. That night the Serbs attacked Klecke and we had to withdraw from the area. The next morning, we were called back to Jablanica HQ because reinforcements were needed. I learned that Jablanica had also been attacked by the Serbs. I met "Leopard" after we returned from Klecke and he told me that I

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Statement of Shefqet KABASHI

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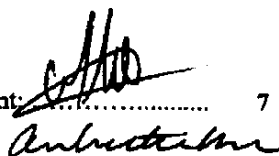
should go with him to Albania to get weapons. We left that same evening and went to Rugova by car and then continued on foot.

25. I returned two weeks later from Albania with weapons. I was there during the second offensive on Jablanica in late August and early September 1998. At that time, my cousin Jaha went with Ramush Haradinaj from Jablanica to Berlic where they were surrounded by the Serbian forces. Around that time the whole population of the Dukajini area moved to Albania and Montenegro.
26. Between April 1998 and July 1998 I saw several people who had been beaten and mistreated in Jablanica by the KLA. These people were detained at the KLA barracks which as I mentioned earlier was located 500 meters away from Lahi Brahimaj's house towards the village of Zhabel. I can describe the layout of the barracks in the following way. When you enter the gate there is a stable for keeping animals and then 10 to 20 meters on the left side is a house which contains four rooms where the soldiers, including myself would stay and use as sleeping quarters. It was a one storey house which was slightly elevated from the ground. There was a cellar in the house which contained water. I have never been inside the cellar but I could see that it was filled with water from the courtyard. You could also see the cellar from the left side of the entrance to the house going down but it was not a proper cellar. Whenever the soldiers used the toilet which was outside the house, we would pass by a window and we could see the cellar inside.
27. Lahi Brahimaj was the overall commander for the Jablanica HQ. Lahi's pseudonym was "Maxhup". This HQ was located in Lahi Brahimaj's house. I did not know Lahi Brahimaj before I joined the KLA. But since I joined I saw him all the time. Sometimes I'd see him several times a day, other days I may not see him at all. But I was active in the same area where he was the commander and I knew him.
28. Alush Agushi was also a Commander in the KLA. I knew Alush Agushi before I joined the KLA but I had never spoken to him. He had occasionally been to Klina to eat and drink.

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Others Present:



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Statement of Shefqet KABASHI

U0162418

29. Brahimaj and Agushi had a very good relationship. For some time, I was in Alush Agushi's unit as I described earlier. As far as I remember, Alush covered the area towards the Prishtina-Peja road and Klina. There were several other Commanders. It was not exactly the type of a strict vertical military hierarchy. There were some soldiers who would report directly to Lahi Brahimaj, others to Alush Agushi and some others to Ramush Haradinaj who was the Over-all-Commander-in-Chief of the Dukagjini zone. Nazmi Brahimaj came in the end of June 1998. I saw both Lahi and Nazmi together in the HQ. As a member of the KLA I knew that Nazmi was responsible only for the soldier's barracks whereas Lahi had much more responsibility. Specifically, Nazmi appointed guards and organised soldiers in the barracks and Lahi dealt with other matters pertaining to the organisation of staff, sending soldiers to Albania etc.

30. I also knew of another commander in the KLA named Idriz Balaj "Togeri." His soldiers were more disciplined and more curt than others. They also didn't communicate much with other soldiers outside their unit. They were not allowed to mix with other soldiers. "Togeri" spent a lot of his time in Glogjan with Ramush Haradinaj. I have also seen Haradinaj and "Togeri" visit the Jablanica HQ together several times. Initially we knew Togeri only by his nickname but I subsequently learned that his full name was Idriz Balaj and he was appointed by Ramush Haradinaj as head of a special unit called "Togeri's Unit". I knew this because soldiers talked about it in the KLA. I know that he was appointed by Haradinaj because nobody else could have appointed him. I learned "Togeri's" name after the war. His name became public on radio, TV etc.

31. Ramush Haradinaj was active in the KLA even before 1998. But sometime in the months of February-March 1998, he started becoming more active. I do not know the exact date when he became the Commander-in-Chief of the Dukagjini zone, but it may be some time in June-July 1998. I only know that Ramush had some agreement with Tahir Zemaj in June-July 1998. But the interference of the KLA General Staff sabotaged that arrangement. I did not

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Statement of Shefqet KABASHI

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know Haradinaj before I joined the KLA but I saw him several times after I joined the KLA.

32. Some other KLA members I saw in the Jablanica KLA HQ were Hajdar Dula, Xhelal Hajda, Fadil Nimani, Musa Gjakova, Driton Ahmeti. Sokol Dobruna and Muslim Dobruna who were recruiters in the KLA and not commanders.

33. I also saw some commanders from the KLA General Staff visiting Jablanica HQ. I remember having seen Rexhep Selimi on a few occasions. I knew him during the war. I met him the first time in Jablanica when we were going to Albania to get the arms. I also met him once on the road near Jablanica. There were some other commanders from the General Staff also visiting Jablanica, but I personally never met them.

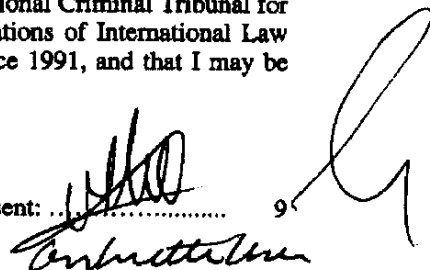
34. As I understood it, the General Staff was not well organised when I was in Jablanica. As far as I knew, it was mainly Rexhep Selimi, Syleman Selimi, Lahi Brahimaj, Fatmir Limaj and Azem Syla. Hashim Thaci and Jakup Krasniqi came in the picture later on.

35. In October 2004, Investigator Harjit Sandhu has shown me six photo boards. He showed me each photo board and asked me if I recognised anybody. I identified some persons in these photo boards and I signed my name under the person I recognised on the photo board and I explained how and when I met them.

WITNESS ACKNOWLEDGEMENT


I have read this statement in the Albanian language and it is true to the best of my knowledge and recollection. I have given this Statement voluntarily and am aware that it may be used in legal proceedings before the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991, and that I may be called to give evidence in public before the Tribunal.

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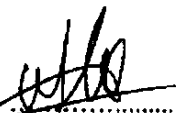
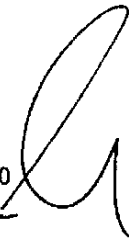



Statement of Shefqet KABASHI

U0162420

Signed: 

Dated: 01/06/07

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Statement of Shefqet KABASHI

U0162421

INTERPRETER CERTIFICATION

I, Maklan Mihsa, Interpreter, certify that:

1. I am duly qualified and approved by The Registry of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 to interpret from the Albanian language into the English language and from the English language into the Albanian language.
2. I have been informed by Shefqet KABASHI that he speaks and understands the Albanian language.
3. I have orally translated the above statement from the English language to the Albanian language in the presence of Shefqet KABASHI who appeared to have heard and understood my translation of this statement.
4. Shefqet KABASHI has acknowledged that the facts and matters set out in his statement, as translated by me, are true to the best of his knowledge and recollection and has accordingly signed his signature where indicated.

Dated: 

Signed: 01-06-2007

Signed / Initialled: Others Present:  11 *amburte / etc*

Appendix B

IT-04-84-A

Appendix B

Prosecution Appeal Brief

Confidential