DISTRICT COURT OF PRISTINA
P. Nr. 526/05
Date: 2 October 2009

IN THE NAME OF THE PEOPLE

The District Court of Pristina, in the trial panel composed of:

1) EULEX Judge, Mr. Francesco Florit, as presiding Judge,
2) EULEX Judge, Mr. Tron Gundersen, as panel member
3) Local Judge, Mr. Rahman Retkoceri, as panel member,

assisted by the court clerk undersigned, in the criminal case against:

Latif GASHI, aka Commander "Lata", Kosovo Albanian by ethnicity, father's name Riza, mother's name Raba, born on 12 September 1961 in Doberdol, municipality of Podujevo, Law graduated from the law faculty in Pristina and currently working as legal advisor to the Ministry for the Environment, with no previous conviction and no pending criminal proceedings; currently in detention;

Nazif MEHMETI, aka "Dini", Kosovo Albanian by ethnicity, father's name Haradin, mother's name Shabe, born on 20 September 1961 in Shajkofc, municipality of Podujevo, married with three children, Law graduated from the law faculty in Pristina and currently employed as Chief Executive of Credit Control at the PTK, with no previous conviction and no pending criminal proceedings, [redacted]

Rrustem MUSTAFA, aka "Remi", Kosovo Albanian by ethnicity, father's name Musli, mother's name Nefise, born on 27 February 1971 in Perpellac, Law graduated from the law faculty in Pristina, member of the Parliament of Kosovo, with no previous conviction and no pending criminal proceedings, currently residing in Pristina, [redacted]; not in detention;

After having held the main trial, in the presence of the Public Prosecutor, of the accused and their defense counsels;

after the panel deliberation held on the 1st October 2009, based on the Article 349 and 351 of the Law on Criminal Proceedings of the Socialist Federal Republic of Yugoslavia;

pronounces the following

ENACTING CLAUSE:

the accused **Latif Gashi** is found guilty of the criminal offence of war crimes against civilians, as described in count 5, count 8 and count 14, of the amended indictment of the 30th of June 2003 and described below;

the accused **Nazif Mehmeti** and **Rrustem Mustafa** are found guilty of the criminal offence of war crimes against civilians as described in count 5 and count 8, of the amended indictment of the 30th of June 2003 and described below;

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Count 5 from October of 1998 until late April of 1999, Latif GASHI, Nazif MEHMETI and Rrustem MUSTAFA pursuant to a joint criminal enterprise, ordered and participated in the establishment and perpetuation of the inhumane treatment of Kosovo Albanian civilians detained in the detention center located at Llapashtica, by housing those civilian detainees in inhumane conditions, depriving them of adequate sanitation, food and water, and needed medical treatment. The inhumane treatment of the civilian detainees caused immense suffering or was a violation of the bodily integrity and health of those detainees and constituted an application of measures of intimidation and terror. Thus incurring in personal and superior responsibility for the war crimes contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Count 8 Latif GASHI, Nazif MEHMETI and Rrustem MUSTAFA from October 1998 until late April of 1999, pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians detained in the detention center located at Llapashtica, in an attempt to force those detainees to confess to acts of disloyalty to the KLA. Thus incurring in personal and superior responsibility for the war crime of inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture contrary to Article 142 of the CCY as read with Articles 22, 24,26 and 30 of the CCY.

Count 14 from 2 August 1998 until late September 1998 Latif GASHI ordered and participated in the beating and torture of [redacted], a Serbian forest ranger who was detained in detention centers located at Bare, Bajgora in an attempt to force him to confess to acts against the KLA or to provide intelligence information, thus incurring in personal responsibility for the war crime of inhumane treatment, immense suffering and violation of bodily integrity or health, application of measures of intimidation and terror and torture contrary to Article 142 of the CCY as read with Articles 22, 24,26 and 30 of the CCY.

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The trial panel,

noting that the prosecutor on the 30th of September 2009 withdrew the charge against Latif Gashi and Rrustem Mustafa as per count 9 of the amended indictment,

after reading article 349 n.3 of the Law on Criminal Proceedings of the Socialist Federal Republic of Yugoslavia,

REJECTS

the charge of count 9.

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In relation to the accused Naim Kadriu, the Panel takes note officially of his death and consequently, pursuant to article 143 LCP

DISMISSES

the criminal proceedings against the said accused.

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For the above mentioned reasons the Panel, pursuant to Article 42 and 48 Paragraph (1) and (2) Subparagraph 1, of the LCP issues the following:

SENTENCE

1. **Latif Gashi shall serve a term of imprisonment of 6 years;**
2. **Nazif Mehmeti shall serve a term of imprisonment of 3 years;**
3. **Rrustem Mustafa shall serve a term of imprisonment of 4 years;**

The time spent in detention on remand by the accused must be counted as part of the prison sentence pursuant to Article 50 CCSFRY and article 351 Paragraph (1) Subparagraph 6) of the LCP.

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The accused shall reimburse the costs of the criminal proceedings pursuant to Article 98 Paragraph 1 and 2 of the LCP, with the exception of the costs of interpretation and translation. A separate ruling on the amount of the costs shall be rendered by the Court when such data is obtained, pursuant to article 96 of the LCP.

Pursuant to Article 353 paragraph 1 and 7 of the LCP, custody of the accused Latif Gashi is ordered with a separate decision and shall last until the verdict becomes final or the sentence is served.

PROPERTY CLAIM

Pursuant to Article 351 paragraph 1 n.7) of the LCP, the accused Latif Gashi shall compensate the injured party [redacted] for the damages caused, which the Court determines in the sum of 5.000 Euro.

REASONING

Procedural History

On 19 November 2002, the indictment against the three accused and against Mr. Naim Kadriu was filed in Court.

The indictment was subsequently amended on 4 February and 30 June 2003. Pursuant to the amended indictment, the accused had to stand trial for 14 different counts, charging them for the criminal offence of War Crimes against Civilians, in violation to article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereafter CCSFRY) - applicable law in the proceedings pursuant to Regulation 1999/24 issued by the United Nation Mission in Kosovo (hereafter UNMIK) as amended by UNMIK Regulation 2000/59.

The first instance trial was held before the District Court of Pristina which, with its decision of 16th July 2003, dismissed counts 4, 6, 7, 10 and 13, as well as the charges of counts 1 and 11 against Latif Gashi; the charges of inhumane treatments, beatings and torture of civilians allegedly committed at the detention centers in Majac and Potok of counts 5 and 8 against the accused were also rejected as well as the charge of count 12 against Nazif Mehmeti and the charges of count 14 against Nazif Mehmeti and Rrustem Mustafa.

With the said decision, the accused were found guilty for the criminal offence of War Crimes against Civilians in relation to the remaining charges; as a consequence, detention terms of 10 years for Latif Gashi, 13 years for Nazif Mehmeti and 17 years for Rrustem Mustafa are imposed.

The defence counsels of the three accused appealed the conviction, challenging all the counts for which their clients had been found guilty; the Prosecutor filed an appeal only in relation to the term of the sentence imposed by the trial panel on Latif Gashi.

The Supreme Court, with its decision dated 21 July 2005, further reduced the extension of the indictment 'cancelling in their entirety' counts: 1, 2, 3 and 12 (all related to the charge of unlawful detention and arrest), and acquitting the accused for count 11 because the factual allegation had not been proven 'beyond reasonable doubt'. The remaining counts were sent back pursuant to article 381 of the LCP to the first instance court for re-trial; contextually, the Supreme Court of Kosovo released the accused from custody and

ordered restrictive measures which were finally lifted by the Presiding Judge with two successive rulings dated 28 April 2009 and 15 July 2009.
On 14 April 2009, the EULEX Prosecutor Robert Dean filed an amended indictment against the three accused in which the single count of War Crimes against Civilians was divided in three sub-counts encompassing counts 4, 5, 6, 7, 8, 9, 11, 13 and 14 of the original indictment. The defence counsels objected to the indictment, submitting that the amended indictment included charges which were not part of the *thema decidendi* anymore.

The re-trial commenced on 7 July 2009 before the trial panel in the composition outlined above. At the presence of the accused and their counsels, and without any of the duly summoned injured parties appearing, the Presiding Judge confirmed that the trial panel had been constituted in accordance with the law. The jurisdiction of the EULEX Judges in this case is based on the provisions of Article 3 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo. No objections have been raised by the parties as to the composition of the panel. Before the indictment was read out, the defence counsels reiterated the objections to the amended indictment and, after hearing the arguments of the parties, the panel adjourned the trial to the following day for the decision.

On 8 July 2009,
the Trial Panel read the decision rejecting the amended indictment and, pursuant to article 390 LCP, used the original indictment and its successive amendments in the part sent back by the Supreme Court as base for the re-trial; no objection was raised by the parties and the Prosecutor read the indictment to the accused who all pleaded not guilty to all the charges.
On the same day the Court initiated the evidentiary proceedings with the examination of the first of the accused, Mr. Latif Gashi.

On 9 July 2009,
the evidentiary proceedings continued with the examination of the other two accused, Nazif Mehmeti and Rrusten Mustafa.

On 10 July 2009,
witnesses [redacted] and [redacted] appeared and gave evidence before the trial panel.

On 15 July 2009,
witness [redacted] confirmed the statement given to the investigative Judge on 17 July 2002 and his declaration was read in the records; witness also answered some additional questions;
Witness [redacted] confirmed the statement given on 26 July 2002 to the investigative Judge which was read in the records;
Witness [redacted] confirmed the statement given to the investigative Judge on 25 September 2002 which was read in the records; the witness also answered one additional question;

Witness [redacted] confirmed the previous statement given to the investigative Judge on 3 May 2002 and the statement given before the trial panel on 23 May 2003 was read in the records; the witness also answered some additional questions.
Witness [redacted] confirmed his previous declaration given to the investigative Judge on 27 August 2002 and the record of his testimony at the main trial on 22 and 23 May 2003; the witness also answered some additional questions; a document proposed by the defence counsel indicating the structure of the KLA was shown to the witness and tendered as evidence.

On 9 September 2009,
Witness [redacted] confirmed the previous statement given before the investigative Judge on 3 September 2002 and the statement given before the trial panel on 16 June 2003; he also answered some additional questions;
Witness [redacted] confirmed the previous statement given before the investigative Judge on 21 August 2002 and the statement given before the trial panel on 12 June 2003; he also answered additional questions.
Witness [redacted] confirmed his previous statements given at the main trial and before the investigative Judge; he also answered some additional questions.

10 September 2009,
Witness [redacted] confirmed the previous statement given before the trial panel on 20 May 03; Witness also answered some additional questions;
Witness [redacted] confirmed the previous statement given before the trial panel on 17 June 2003, Witness also answered some additional questions;
[redacted], confirmed statement given before the investigative judge on 11 July 2002, Witness also answered some additional questions.

11 September 2009,
Witness [redacted] confirmed the previous statement given before the trial panel on 15 May 2003, Witness also answered some additional questions.

15 September 2009,
Witness [redacted] confirmed the previous statement given before the trial panel on 17 June 2003 while denied the statement given on 29 October 2009 before the investigating Judge, Witness also answered some additional questions;
Witness [redacted] confirmed the previous statement given before the trial panel on 9 March 2003 and the statement given before the investigative Judge on 23 and 26 March 2002, Witness also answered some additional questions;
Witness [redacted] confirmed the previous statement given before the trial panel on 31 March – 1 April 2003, Witness also answered some additional questions.

On 18 September 2009,
the Court entered into the record as evidence the following:

- Statements of witness "Q" given to the Investigative Judge on 1 and 11 February 2002;

- Statements of witness [redacted] given to the investigative Judge on 18 July 2002;
- Statements of witness "4" given to the investigative Judge on 18 October 2002 and the record of its testimony given at the main trial on 20 and 21 March 2003;
- Statement of witness [redacted] (originally witness H) given to the Investigative Judge on 6 February 2002 and the record of its testimony given at the main trial on 5 May 2003.

Additionally, in the course of the same hearing the Public Prosecutor submitted to the attention of the trial panel evidence already offered during the first trial which is included in the case file, as previously tendered:

- Exhibit n. 4, "the brown book";
- Exhibit 33, OSCE report titled " as seen as told" ;
- Exhibit 26 and 27, [redacted] medical records;
- The record of the Site Inspection conducted during the first main trial on 27 June 2003 and attached photos, in particular photos n. 7, 8, and 9.

On 30 September 2009,
the Court heard the final speeches from the Pubic prosecutor, the defence counsels and the Accused.

On 02 October 2009,
the panel announced the judgment and, pursuant to article 353 paragraphs 1) and 7) ordered the arrest of the accused Latif Gashi.

Legal findings

After over six years from the filing of the original indictment, after twelve hearings and the examination of numerous witnesses, the trial of the three accused has come to the end.

The case, as known, comes for the second time before a Court of first instance, since the Supreme Court of Kosovo, with its decision of 21st July 2005, has "remanded for retrial" the case to the District Court of Pristina, which had already tried Mr.Latif Gashi, Mr. Nazif Mehemeti and Mr.Rrustem Mustafa (together with Mr.Naim Kadriu) in the course of the year 2003.

The trial has unfolded quietly. The tensions that were palpably present in the course of the proceeding in 2003 (as in the course of the investigation in 2002) and that could be read in many passages of interrogations of the investigating judge and of the minutes of the main trial, have disappeared.

A number of factors have contributed to the change of atmosphere in the court room.

The passage of time, in first place, is a natural milder and softener of passions and tensions: like in an ageing man, passions soothe and calm down, leaving space to

rationality and more balanced assessment of life, so in this trial, the mere temporal distance from the date of the facts and from the previous trial, had reduced the conflict in the Court room.

The change of the panel is another factor. During the course of the trial, in numerous occasions, the three accused as well as their lawyers have represented the investigation as an initiative inspired or at least heavily influenced by the Serb secret services, based on false allegations and testimonies. In addition, it has been said that the activity of the UNMIK investigators and prosecutors, and later of the investigating judge was a sort of fabrication aimed to discredit fighters of the war against the Serb occupier. It has been underlined that the practice of making recourse to Serb interpreters to translate the declarations of the witnesses (in the vast majority of Albanian ethnicity) was prejudicial and hampered the possibility to rely on genuine and credible witness' statements. In the opinion of the defence Counsels, the same court of first instance, presided by UNMIK judge Clayton, would have been victim, of this climate of pre-conviction and pre-judgment, rendering a judgment based on false and erroneous bases.
Whatever the nature of these allegations, it was evident to everybody and from the onset of the trial, that all the above was not applicable to the new trial panel, composed by a Kosovo judge and EULEX judges, in relation to whom any such allegation would have been simply hilarious and unprofessional. This has benefited the climate of the trial and has paved the way for the orderly development of the proceedings.

A further factor must eventually be counted, as a fundamental contribution for a fair trial. The behaviour of the accused in the course of the trial, in the Court room and outside, has been impeccable. It is known that the three accused have played a role in the course of the conflict in Kosovo, with different level of responsibility, corresponding to their personal attitudes and to their experience of life. It is known that their commitment to the community has further developed, after the end of the war, bringing them to new responsibilities and to positions of relevance. It must be recognized, as a point of great honour, that before and during the trial they put themselves at the disposal of the Court without reluctance, for the only purpose of serving justice and having justice served on them.

Of course, this has been perceived and has greatly contributed to a trial free from bias, from either part.

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The Supreme Court of Kosovo, with its decision of 21st July 2005, has "remanded for retrial" the case to the District Court of Pristina.

The words used by the highest judicial instance of the Country must be read carefully and correctly interpreted, in order to understand their bearings on the current trial.

At page 2 of the document, point one of the enacting clause establishes that the decision of first instance is "ANNULLED AND CANCELLED IN ITS ENTIRETY and the case is remanded for retrial".

In the last page of the same decision, it is stated that "the Kosovo Supreme Court has no choice but to remand the entire case for retrial, based on Article 385, Paragraph 1, of the LCP."

What do the used expressions exactly mean? And how do they match with the provisions of the LCP?

The parties have understood and interpreted the decision in conflicting ways.

On one side, the prosecutor filed on 14th April 2009 an amended indictment in which he reformulated, in three sub-counts (A, B, C) the charges of the original indictment related to: (i) the inhumane conditions of detention in which the victims were allegedly kept (count A), (ii) the beating and torture to which the detainees were allegedly subject (count B) and (iii) the killing of five detainees (count C). In doing so, the prosecutor mentioned in the indictment also events allegedly happened in Majac and Potok, even if the accused had been acquitted from the relative charges by the decision of the District Court of Pristina dated 16th July 2003.

On the other side, the defence counsels argued (in their written response dated 21st April 2009 and orally, in the course of the hearing 7th July 2009) that the retrial should not deal with some substantial parts of the original charge.

Indeed, they chorally observed, the court of first instance, in the decision dated 16 July 2003, acquitted the three accused from parts of counts 5 and 8 of the amended indictment dated 30th June 2003, i.e. from the allegations relating to the inhumane treatment, beating and torture allegedly happened at Majac and Potoc; since the prosecutor had not appealed against that part of the decision, those allegations may not be discussed anymore. The decision had become *res judicata*, the lawyers say.

Furthermore, the defence counsels add, also counts 1, 2, 3 and 12 of the amended indictment should not be discussed anymore in the retrial, since the Supreme Court had expressly 'CANCELLED IN THEIR ENTIRETY' (bold letters in the original of the decision of the Supreme Court) these counts. Therefore, Mr. Syla concluded, these counts "are not based in the law and in accordance with Article 365, Paragraph 1, and Article 363, Paragraph 2, of the Law on Criminal Procedure, they are annulled. According to the findings of the Supreme Court, in relation to these counts of the indictment, it results that there have been violations of the criminal law to the detriment of the accused Latif Gashi because he has been tried for offences that don't actually constitute criminal offences. For these reasons we as Defence Counsels of Latif Gashi think that he cannot be tried again on these Counts. So the (*new, amended*) indictment (*of 14th April 2009*) cannot stand, bearing in mind Article 319, Article 3 and Article 378 of the LCP" (Mr.Mexhid Syla, hearing of 7th July 2009).

The analysis of the arguments of the defence counsels introduce the following part of the decision where the Court understands that different juridical principles have application in the case.

When referring to parts of counts 5 and 8 of the amended indictment of 16th July 2003 (allegations relating to inhuman treatment at Majac and Potok; allegation relating to beatings and torture at Majac and Potok), the lawyers of Mr.Gashi, Mehmeti and Mustafa underline that the repetition of the trial is prevented by the fact that the prosecutor had not appealed against that part of the decision of the District Court of Pristina which had acquitted their respective clients form the accusation of wrongdoings in Majac and Potok. They say that the renounce of the appeal by the prosecutor has rendered that part of the decision of first instance *res judicata*, i.e. something that, not being exposed to possible revision or appeal, is now intangible.

The conclusion of the lawyers is correct and the Court confirmed it in its decision dated 8th July 2009, which was read in the course of the hearing held on 8th July 2009.
It is the principle *tantum devolutum quantum appellatum* which finds application here, rather than the prohibition of *reformatio in pejus*, as instead suggested by the lawyers in their motion of 21 April 2009 (pg. 4): the first principle implies that the appeal judge may only decide on the part of the decision (of first instance) which is contested by either party (the remaining part becoming *res judicata*) while the prohibition of *reformatio in pejus* (art.378 LCP) is a limitation of the judicial power when an appeal is, in fact, filed by the accused ('if an appeal has been filed only on behalf of the accused...').

When it comes to counts 1, 2, 3 and 12, the argument exposed by the lawyers is quite different. The principle *tantum devolutum quantum appellatum*, the prohibition of *reformatio in pejus* or the same definition of *res judicata* can not be recalled without further specification.

The application of the principle *tantum devolutum quantum appellatum* would be incongruent: the decision of the District Court of Pristina was indeed appealed by the lawyers and has been subject matter of the decision of the Supreme Court of Kosovo. So, it is still part of the trial and of the indictment on which the trial has to reach a final decision.

The prohibition of *reformatio in pejus*, on the other hand, is clearly out of context here: the retrial is not an appellate procedure if also it is the consequence of the favourable decision of the Supreme Court on the appeals of the defendants. The application of article 378 LCP, imposed by article 390.4 LCP, in case of retrial, means that the judge of the retrial, at the end of the procedure, if he or she finds the accused guilty, can not sentence the accused to an imprisonment heavier than that previously received or that he or she can not decide *ultra vires* (for example re-examining counts that had not been appealed against).

Eventually, the principle of *res judicata*, can be applied only after an interpretation of the decision of the Supreme Court.

When the Supreme Court addresses the issue of Count 1, 2, 3 and 12, it finds that the court of first instance had completely and correctly understood the facts described by the prosecutor as the base of the Counts but had erred in the application of the law to those facts. In the decision it is explicitly stated that 'the charges in Count 1 found proven in the trial verdict *are not grounded in the law*' (pg.12). The same words are used in relation to Count 2, Count 3 and Count 12.

For obvious reasons, if also the Supreme Court has not spent many pages on the point, limiting itself to the passage reported above, it must be assumed that the Supreme Court has approved the interpretation of the relevant facts done by the court of first instance because otherwise the Supreme Court would have not proceeded to the legal qualification of those facts.

The conclusion to which the Supreme Court has come must be taken as final and not subject to retrial. Despite the fact that the same Supreme Court has 'remanded the entire case for retrial' (pg.20 of the decision of the Supreme Court), the real intention of the Supreme Court emerges from the clear manner in which it expresses the concept that the charges of Count 1, 2, 3 and 12 are '**CANCELLED IN THEIR ENTIRETY**' (capital, bold letters used in the original), to make clear that the episodes described in the counts should not be further subject to judicial examination.

This solution may give rise to objections. One can observe that the Supreme Court should have applied article 387 LCP, which states that 'the Court of second instance shall modify the verdict (*acquitting the accused form Count 1, 2, 3 and 12, in this case*) if it finds that the decisive facts have been correctly established in the verdict in the first instance and that in view of the state of the fact as established a different verdict must be rendered when the law is properly applied...'. It can be added that the Supreme Court should have distinguished better in the enacting clause between the counts where the charges where cancelled in their entirety (1, 2, 3, 12) and those where this did not happen.

By sending the entire case to retrial and omitting to specify which counts should have been retried and on which the decision was an acquittal, the Supreme Court may have committed an inaccuracy (the case should have not have been sent back for retrial *in its entirety*). However, if not explicitly stated in the enacting clause, it is hardly disputable that the words used by the Supreme Court in relation to counts 1, 2, 3, 12 (*charges cancelled in their entirety*) amount to an acquittal. Likewise, it is hardly disputable, in the light of the unequivocal words used by the Supreme Court, that at the end of the retrial, this panel could not establish the facts described in counts 1, 2, 3, and 12 in a manner different from the assessment of the Supreme Court and could not interpret the law in a diverging manner.

In this line, the decision of the Supreme Court in relation to the facts charged in Counts 1, 2, 3, 12 is a *res judicata* and for this reason the facts there described can not be subject to further judicial examination. It would be incongruous, against any rationale, and source of confusion and legal uncertainty if this panel should try again facts that the Supreme

Court of Kosovo has explicitly qualified as lawful. Contradiction and discredit in the administration of justice would follow, should this panel decide in contrast with the findings of the Supreme Court.

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The conclusion that this panel has reached towards the requests of the defence counsels in relation to Counts 1, 2, 3 and 12 must be brought to its logical consequences.

The principle of non contradiction imposes to this court to interpret and read all the different parts of the decision of the Supreme Court in the same manner.

Specifically, in relation to Count 8, this panel observes that the Supreme Court has found the decision of the trial panel of 16th July 2003 correct and has consequently found ungrounded the appeals of the lawyers of the accused on the point .

The solution adopted by the Supreme Court is clear and free from equivoques. The words used by the supreme judicial instance of the Country in relation to the charge of beatings and torture administered by the accused, in their respective capacity, in Llapashtica, do not leave space to interpretation.
The Supreme Court (pg.15 of the decision) firstly recalled the charges (of the survived part) of count 8, then reviewed the reconstruction of the facts done by the trial panel, analyzing the arguments of the appeals of the accused towards the decision on this count (related, as can be read in the appeals and as recalled in the decision, to the testimony of anonymous witnesses). Eventually, the Supreme Court concluded that the issues raised in the appeals 'are without merit' and that 'the rights of the defendants as enshrined in Article 6(3) (d) of the European Convention on Human Rights were not violated and the trial court properly based its findings on the testimony of these witnesses'.

Despite finding the appeals without merit, the Supreme Court has remanded "the entire case for retrial". The solution was adopted by the Supreme court for the reasons expressed in the last page of the decision: 'the trial verdict treated the various counts in the...indictment ... as one singular war crime as to each defendant. ... Having treated them as one singular war crime and having imposed sentences accordingly, the Kosovo Supreme Court *has no choice but* (Italic added) to remand the entire case for retrial, based on Article 385, Paragraph 1, of the LCP". In other words, the Supreme Court identified an insurmountable obstacle to her taking a final decision on Count 8, in the circumstance that the lower trial panel had qualified the various criminal facts described in the indictment as a unique crime, requiring therefore a unitary decision.

The solution adopted by the Supreme Court may be discussed in law but can not be contested by this panel. The Supreme Court confirmed the correctness of the decision of the trial panel on the facts described in Count 8.

Furthermore, it must be said that not only has the Supreme Court confirmed the facts described in count 8 in Llapashtica, but it has also given the legal qualification of these facts.

Indeed, it can not escape us that in the paragraph titled **Ex officio review of applicable international law** (bold and underlined in the original, pg.5), the Supreme Court had abundantly explained, from page 5 to page 11, the legal setting of the decision, illustrating the international and domestic law applicable to the case.

This state of things is binding for this panel, which can not derogate from the factual and legal qualification given by the Supreme Court on point 8.

As it happens in relation to Counts 1, 2, 3 and 12, also this part of the decision of the Supreme Court must be taken as *res judicata* by this lower Court, who is therefore not in the position to contradict the decision of the superior court on its assessment of the facts and interpretation of the law in relation to Count 8.

In essence, for Count 8, the duty of this panel is limited to the sentencing, that the Supreme Court found to be precluded to itself, based on the interpretation given to Article 385 LCP in the last page of its decision. The unification operated by the trial panel of all facts in a single war crime has been seen by the Supreme Court as a limit to the application of article 367 LCP and to the pronouncement of a decision determining the appropriate sentencing for the facts described in the surviving part of Count 8 (beatings and torture of Llapashtica). By using the expression 'the Kosovo Supreme Court has *no choice* but to remand the entire case for retrial', the Court showed that no other solution was available and that it was therefore 'compelled' to do so.

And now, a last point on count 8, in order to prevent equivoques.

It may not have come as a surprise for the parties that the opinion of this trial panel in relation to count 8 was the one exposed above and that therefore there was no need at all to examine witnesses in the course of the retrial, having the facts as well as the law been established by Supreme Court. On the contrary, it was an orientation that had been made explicit to the parties in order to justify the circumstance that no witness had been admitted on the facts described in count 8 (in relation to Llapashtica). It was made explicit to the parties in the course of the hearing of 9th July 2009, as recognized by the Prosecutor in his final speech. And it had been made explicit to the parties also in the course of the meeting held on the 24th July, held exactly for the purpose of determining to determine, in light of the parties' submissions, the list of the witnesses to be summoned at the trial.

The lists of witnesses and the reasons given in those occasions did not raise any concern by the Defence Counsels at that time or in the course of the trial. It come therefore as unexpected and nor credible the argument of the defence Counsel Mr.Syla, in the course of his closing speech, who asked the acquittal of his client from count 8 ...because no witness was heard by the Court on the facts described in the count.

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The arguments used in the previous paragraph in relation to count 8 may be equally used in relation to Count 11 as well.

The Count, as known, deals with the alleged killings of five detainees by the accused.

While the District Court panel had found the accused Gashi, Mehmeti and Mustafa guilty of the charge, the second instance panel had a drastically different approach in the evaluation of the evidence.
In essence, the Supreme Court found that no direct evidence was available to the first panel on some crucial aspects of the events described in Count 11: '...there is no evidence in the trial record that any witness heard, or had personal knowledge of, an order given by Rrustem Mustafa to Nazif Mehmeti to have the five victims...killed'; '...there is no evidence in the trial record that any witness heard or had personal knowledge of any order given by Nazif Mehmeti ...to kill the five victims'; '...there is no evidence in the trial record that any witness observed the killing of any of the five... detainees'.
Even more, the Supreme Court observed that the trial panel, in its decision, did not examine specifically the said aspects. The Supreme Court indeed says that in relation to the assumed orders to kill and the actual killing 'There is no finding in the trial verdict...'. The Court then concludes that 'The finding in the trial verdict that the charges under Count 11 had been proven was based solely on circumstantial evidence.

On the basis of this conclusion (only circumstantial evidence for Count 11) the Court further explains that having taken the decision on circumstantial and not direct evidence, the trial panel should have ruled out other possible conclusions. In other words, when only indirect evidence is available, it is not enough to draw positive logical conclusions on the responsibility of the accused from the available clues, but a further mental process is required from the Court, which consists in a rule of exclusion of other possible, alternative conclusions that from the clues could have been drawn. Only when this higher standard is satisfied, it may be stated that the threshold of guilt beyond reasonable doubt is met.
This lower Court shares the argument of the Supreme Court and believes that also this part of the decision must be taken as final. A judgment in second instance which establishes that no guilt beyond reasonable doubt may be reached corresponds to a final acquittal on the case. The prohibition of double jeopardy or *ne bis in idem*, enshrined in article 34 of the Constitution of Kosovo as in a number of legal instruments at the international level (Covenant on Civil and Political Rights, ECHR, ...), must find practical application in the case. If the Supreme Court has not found the basic elements to affirm the responsibility of the accused for Count 11, there is no reason for which the accused themselves should be exposed again to the ordeal that a trial is, especially if so severe and, for some aspects, infamous charges are involved.

In the end, if the Court of superior instance states that 'There is no proof beyond reasonable doubt that Rrustem Mustafa ordered Nazif Mehmeti to ensure the killings of

the five victims. There is not proof beyond reasonable doubt that Nazif Mehmeti ordered some unknown and unidentified person or persons to carry out the killings of the five victims', this means that the decision must be taken as final; on the other hand, it is hardly believable that a renewed mental process (what is in essence the logical process of drawing conclusions from simple clues of indirect or circumstantial evidence) made by this panel today could fill the vacuum identified by the Supreme Court in the decision of the first trial panel.

For these reasons, it was decided as in the ruling of 8th July 2009.

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The trial panel has illustrated, in the pages that precede, the reasons way Count 8 is treated as already adjudicated by the Supreme Court. It has been explained that the same principle invoked by the lawyers in relation to Count 1, 2, 3, and 12 finds application in relation to Count 8 as well as count 11, so that the principle of non contradiction imposes to the Court to treat identical situations in the same way.

From this, it follows that the facts described in Count 8 (and 11) must be treated as adjudicated facts, on which further judicial investigation in the course of the trial is not necessary and shall be avoided.

To those who may be left perplexed by the interpretation of this Court, suffice it to say that no other logical solution was admissible and that the interpretation of this Court is the most logical one.

Which other options were available?

A retrial on all counts?

This was the solution proposed by the Prosecutor when he filed the new indictment, encompassing also facts that had been already quashed by the Court of first instance in 2003.

By doing so, the Prosecutor applied literally the principle affirmed by the Supreme Court.

The decision of the Supreme Court, at page 2, at the bottom, in the enacting clause, point 1, expressly states 'the Verdict ...of the Pristina District Court' is ANNULLED AND CANCELLED IN ITS ENTIRETY (capital letters used in the original) and the case is remanded for retrial'; in the last page it concludes 'the Kosovo Supreme Court has no choice but to remand the entire case for retrial'.

From this viewpoint, the Prosecutor has rightly taken the original indictment, in its entirety, only changing the words: if the decision of first instance is quashed, everything must restart anew, and the procedure shall return to the last valid act before the decision was cancelled.

But this solution could not be in keeping with the history of the trial. In fact, the circumstance that the acquittal granted by the Court of first instance were not appealed by the Prosecutor made it not controvertible anymore, so that the expression (used by the Supreme Court) 'the case is remanded for retrial' had to be interpreted and limited to the case in the part which was presented to the Supreme Court and not in its 'original' entirety. 'The case', in other words, to which in the mentioned passage the Supreme Court refers, is the case before itself and not the case, as originally determined by the indictment of 30th June 2003.

Pursuant to the same logic, the interpretation of the decision of the Supreme Court imposes us to exclude from the subject matter of the trial those part of the indictment which were 'cancelled in their entirety' by the Supreme Court, even if 'the case is remanded for trial'. Would it make sense to hear witnesses and to listen to arguments of the parties in relation to counts 1, 2, 3 and 12, when it is clear and established that the Supreme Court has found that the facts there described were not amounting to anything unlawful? Since this trial panel is bound by the interpretation given by the Supreme Court to the facts and to the law, it could not give, at the end of the evidentiary proceedings, a different description of the facts nor give them a different legal qualification. So, what's the point of wasting judicial resources if the solution of the case is not in the hand of this trial panel?

Lastly, also on count 8, since the Court has established that the facts were correctly assessed and that the law was correctly applied, why should this trial panel hear witnesses again?

It may not be concealed that, by doing so, this trial panel introduces a quantum of discretion in the interpretation of the decision of the Supreme Court (because it treats count 8 and 11 in the same manner in which counts 1, 2, 3 and 12 are dealt with), despite the fact that the Supreme Court has established to 'remand the entire case for retrial' (page 20). But this is the price that must be paid for the sake of the coherence of the system.

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On the premise of what said until now, the legal scenario in which the facts described in the charge must be placed becomes clear.

Also in relation to this aspect, the trail panel is bound by the decision of the Supreme Court; as known, the applicability of the Geneva Conventions in Kosovo during the conflict is not under dispute and it was clearly confirmed by the Supreme Court which remarks that: the four Geneva Conventions were ratified by the People's Republic of Yugoslavia on 21 April 1950; while the additional protocols I and II were adopted on 8 June 1977, and entered into force on 7 December 1878 therefore were all in force in Kosovo as of March 22, 1989, which includes the period of the armed conflict.

The non-international character of the conflict, which is finally confirmed by the Supreme Court, commands the application of Article 3 common to the Geneva Conventions, which sets the minimum guarantees in cases of *armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,*[1] and the Additional Protocol II, *which develops and supplements Article 3.*[2] The Supreme Court confirmed that Article 3 common to the Geneva Conventions and Additional Protocol II are properly applied to the case.

The Supreme Court also confirmed several factual and legal findings, as determined by the first instance panel, which this re-trial panel shall not re-asses; in particular, the Supreme confirmed:

a. The existence of the armed conflict in Kosovo in the relevant time;
b. The existence of a nexus between the armed conflict and the crime alleged;
c. The victim's status as protected person according to the Geneva conventions;
d. That the factual allegations of the surviving counts violate both: domestic law and applicable rules of international law effective at the -duality test-. time of war, armed conflict or occupation.

This panel acknowledges that the general elements of article 142 CC-SFRY are met and that is bound in the legal qualification of the offence, to the paired rule of international law identified by the Supreme Court.

Additionally, this Panel notes that the above mentioned elements were never challenged during the proceedings by either party.

Eventually, also the point of the applicable forms of liability was considered by the trial panel when it assessed the responsibility of the accused for the committed criminal offences; the conclusion reached were not overturned by the Supreme Court. In relation to Count 8, then, the different roles of the accused in the events are established and fixed in the terms highlighted in the previous decisions.

As it will be said in short, their participation to a joint criminal enterprise does not criminalize the whole KLA nor characterizes the KLA as a criminal organization - as submitted by the counsels of the accused during their closing arguments.- but simply identifies the specific modality of co-perpetration of the crimes.

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Before starting the examination of each count, it is appropriate to spend some words to put the event in context.

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[1] Common Article 3 to the Geneva Conventions, comma I
[2] Additional Protocol II to the Geneva Conventions, Article 1

In the course of the trial, in a number of occasions, the defence counsels and the accused themselves have recriminated and have expressed their concern for what they felt as the most serious and damaging consequence of the trial and of the decision of first and second instance.

In a word, they chorally complained that it was execrable and tragic, and a clear indicator of an injustice being done, that those who were members of the liberation army, and not Serbs, were brought before a Court of law.

The argument was voiced repeatedly, in a frank manner, with no attempt to create a sophisticated elaboration of the thought.

It was pointed to the attention of the Court that the most immediate evidence of the lack of credibility of the charges was the fact that Albanians, instead of Serbs, were answering for the accuse of war crimes, despite the fact that Serbs were the oppressors and that only through a liberation war the Albanians were able to free themselves form the yoke of Belgrade.

The panel understood that this was felt genuinely as the most devastating and insulting circumstance of all, for the accused.

It is easy to understand way.

Beyond the simple description of the facts as beatings, restrictions of liberties and torture, the charge is for the violation of the Geneva conventions, which brings the qualification of war crime. Now, for people who fought for the independence and who are generally regarded as heroes for what they did and for what they achieved, to be branded as war criminals, to be put on the same level of people tried in Nuremberg or in Den Hague by international tribunals, was clearly unacceptable.

With the simplification that sometimes a rhetoric argument requires, it was said that Serbs should be regarded as war criminals, not Albanian and that "how comes that those who fought to give freedom to a population were now put on the same level of those who oppressed?" It was added that History can not be written by a Court, with the corollary that in case of unfavourable decision against the accused, the credibility of the Court, not of the accused, would have been put in peril.

The Court's answer to this argument will not be too long.

The trial panel does not feel it necessary to enter in a long dissertation, identifying and describing at length the circumstances in which the history of this Country unfolded, through decades of progressively degenerating relations between the two main communities of the Albanians and of the Serbs.

A decade after the facts happened and the conflict ended, it is high time to see at things in a colder manner. While it is undisputable that mistakes and excesses may have been committed also on the part of the Albanians, the premise is that things must be kept in proportion.

And if we put things in the right perspective, it can hardly be contested that the proportion between the Albanian victims of the hostilities and of the oppression that preceded the conflict, and the Serb casualties, is in enormous detriment of the first group. It can hardly be contested that the final showdown was preceded by a decade of iron-fist policy and systematic discrimination against the Albanians at any level of public administration and of the society.

The plain truth, in relation to the conflict and to the warfare that preceded the 24th March 1999, is that the most various sources tell us that the ratio between Albanian and Serb victims (deaths and disappearances included in this count) is of about six or seven to one. But the considerations that precede do not exclude that this trial has its own justification and its own legitimacy.

This trial has never purported to be the final word on the events that unfolded for years in Kosovo. Judges do not have this function, nor have the instruments to achieve this.

What this trial tries to achieve is a fair assessment of the facts which are offered to the consideration of the panel, nothing less or more.

Of course, the Court is aware of the History of this Country and of the events of the last decades. It may be said that they (History and events of the last decades) are the scenario in which the facts described in the indictment took place. They are known and they are considered by the Court.

If also they constitute a precondition for the legal qualification of the charges (without conflict in the Country, no war crime) they do not have a direct impact on the legal qualification of the facts described in each individual count. Or at least they may not be used as a general defence by the accused. The argument "we were at war, and the war was not caused by us" does not goes so far as to invoke "*omnia licet in bello*" which can not be evidently put forward as a justification. Nor the circumstance that the Serb authority were leading a campaign of annihilation and of ethnic cleansing of the Albanian population in Kosovo (and specifically, in the Llapi area) may constitute a general *excusatio* for a behaviour that in normal circumstances would be illegal. The immorality and illegality of the oppression and of the aggression does not authorize the victim (be it the population in general or the single individual) to behave in a similar way because there can not be elision between two illegalities. The circumstance that someone acts illegally does not permit to me to act illegally as well, also in the case in which I direct (my illegal behaviour) against him. Two wrongs do not make one right.

Also if it is taken as an invocation, for some profile, of a state of necessity or even of self-defence, i.e. a condition that deprives the contested behaviour of its unlawfulness, the argument is not convincing.

In order for the self-defence (*vim vi repellere licet*) or the state of necessity (*necessitas legem non habet*) to be operational, the condition of immanent peril, and the proportionality between the assault to physical integrity and the defence must be present.

Now, in all the behaviours described in the indictment those precondition for self defence/state of necessity do not occur.

It can not escape that the only surviving counts do not refer anymore to the detention in itself (which was not considered unlawful by the Supreme Court: counts 1, 2, 3 and 12) but to the modalities of that detention[3].

So, if the modalities of detention and not the detention in itself, is at stake, where is the possibility that the indicted torture (counts 8, 9 and 14) or the sufferance described in count 5 were caused by an imminent or immanent risk or danger? If it is arguable, and justifiable that the detention was necessary to prevent collaborators from revealing to the Serb authorities the exact location of the UCK forces (behaviour that, as said by the SC was licit), there could be no such justification for torture or deprivation of adequate conditions for those held in detention.

Much less it could be said that the justification for acts of the like of those described in the indictment can be found in a sort of suspension of legality, a sort of *etat d'exception* imposed by the conditions in which the belligerents where confronting themselves.

First of all, as we will see, at least until the critical date of the 24th March 1999, the situation in the field had not degraded at the point to impose a state of emergency, as it is testified for example by the circumstance that most of the detainees were simply summoned to appear before the KLA police in order to clarify their situation and report about their activities and their relation with the Serbs.

Secondly, a *iustitium* (as known in the Roman tradition, i.e. a suspension of the republican legality, in the course of which *iustitia* was not operating and that was therefore implemented only in extraordinary circumstances) may be admitted with procedural formalities and for a limited period of time and may not be invoked as a scapegoat for any illegality. Not surely for torture or for killings of detainees without trials. The same accused (and some witness: [redacted], 15.7.09, pg.8; [redacted], 9.09.09, pg.19; [redacted], 10.9.09, pg.9) have repeatedly remarked their keen attention

[3] The term detention is used in the course of this decision, for three reasons: i) it has been used in the course of the investigation, in the indictment and in the course of the trail; to change it now would create only confusion; ii) 'ndalimi', in Albanian may have, indeed, a more neutral connotation but it may as well be used in a technical way to indicate the detention behind bars, like in the expression 'qendre ndalimi'; iii) in English, only a longer sentence, not of practical use, may be an adequate substitute: for example 'deprivation of liberty'.

for the respect of the standards outlined in international conventions on human rights and for the Geneva Conventions; they recalled that specific written orders were promulgated for this and that UCK soldiers received training on these issues. If this is so, how can the state of emergency be prospected?

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It is now time to turn to the individual charges, namely count 5, count 8, count 9 and count 14.

The first charge to be considered is what remains of count 5, i.e. the charge of participation in the establishment and perpetuation of the inhumane treatment of Kosovo Albanian civilians detained in the detention center located in Llapashtica, by housing those civilians detainees in inhumane conditions, depriving them of adequate sanitation, food and water and needed medical treatment, casing in this way immense suffering and violation of bodily integrity ad health to the detainees.

The Supreme Court, in its analysis of Count 5 (page 14 of the decision) comes to the conclusion that the trial panel had committed a violation of the provision of article 366 para 1 LCP because the facts had been incompletely established.
The Supreme Court, noted that the trial panel had established some facts ('the trial verdict refers to the detention center set up in Llapashtica, describing it as a small stable approximately three meters by four meters, with only one window and without heat or water. Its floor was damp and the detainees had only sponge mattresses for sleeping'), but further observes that it was incumbent upon the trial panel to compare the conditions of health and security of the civilian detainees with those of the civilian population at large. Only by doing this comparison the standard set out by Article 3 common to the Geneva Conventions and related provision of Protocol II, article 5 (1) (a) is satisfied. Omitting the said comparison, the trial panel incompletely established the facts.
The conclusion reached by the Supreme Court puts this panel in the condition to limit substantially the exam of the facts of count 5. What is required by this panel is to complete the evaluation requested by the Supreme Court, by doing the comparison omitted by the previous trial panel. In order to compare the conditions between the civilian detainees and the population at large, it was necessary to gather information on the conditions in which the Albanian population lived in the course of the months between autumn 1998 and spring 1999.

It must be understood that this Court does not have now the possibility to have a direct knowledge of the conditions in which the detainees were kept in Llapashtica: ten years later, it is simply unrealistic to hope that the premises are kept untouched and that they may give a genuine idea of the situation in which people deprived of liberty lived in the detention center. A visit to the crime scene has been ruled out by the panel to avoid false impressions. It is true that the previous panel had paid a visit when four years had already elapsed from the time of the events and so may have formed its own judgment on an already modified condition. But this argument, in case, weighs in favour of the decision *not* to visit the detention center again, and to use the knowledge and the description of the

facts and the pictures produced by the previous trial panel in the course of its visit (which is in the file and has been exhibited in Court in the course of a session of this trial). If in four years the state of facts has changed, what can have been the state of facts after 10 years?

In conclusion, there is no other option than making recourse to the findings of the first trial panel, already reflected in the decision of first and second instance and further transcribed above. The Supreme Court has relied on them, has not contested them and has taken them as a genuine and correct assessment of the conditions of the building in which the victims were detained. The description of the building and of the room that was used as detention cell, as identified in the course of the ocular inspection of 27th June 2003, has not been contested by the same Defence Counsels and can therefore be taken as a valid base for the judgment by this panel.

The words used by the trial panel at page 46 of the decision dated 16th July 2003 express, beyond doubt, the impression made on the panel by the premises in which the detainees were kept, at least at night. It is worth to recall the expression used in the passage: "Even in the middle of a summer's day once the entrance door was closed the interior was pitch black... The room was damp and its dimensions estimated at 3 by 4 meters. In the opinion of the trial panel, the International Prosecutor was right when he said *'That room tangibly denies the words spoken in defence of it'*".

The panel has heard in the course of the re-trial a number of witnesses who spoke about the conditions of their detention in Llapashtica and other who described the conditions in which the Albanian population lived in the course of the months the preceded the conflict and in the course of it. All the witnesses had already been heard during the trial and most (no all) had given their testimony before the investigating judge. They all confirmed their previous declaration, which were therefore read into the minutes, with some exception.

In general the statements given in Court did not bring any element of specificity or of originality to the picture which had already emerged from the previous declarations. As obvious, the witnesses appeared, at the distance of ten years from the facts and of six years after their previous passage before the Court, sick and tired by the procedure and willing, in general, to close in the swifter and less problematic way this procedural errand, in order to put definitively behind their shoulder the difficult memories of an age that most of them wanted to forget. The consequence was a pattern of testimony lacking freshness and vivacity, with monosyllabic, *routine* answers; lacklustre depositions which lasted much less that those given in the course of the previous trial or before the Investigating Judge.

Some patterns emerged from the beginning. The witnesses who had been victims generally confirmed the sufficiency of the food, the regularity of its delivery; they said they had access to water and that in some case were also treated when sick. Nobody complained for the sleeping conditions even if they referred that it was cold. They confirmed that they were allowed an unrestricted freedom of movement in the courtyard of the house where the detention cell and the military police headquarters were located.

The witnesses who had been guarding the detention center or had been UCK members testified that the detainees were treated well, in conditions which were not inferior to those of the soldiers and of the military police officers of the UCK. They said they were eating the same food and they had the same access to running water. They said that the same doctor was visiting UCK members as well as detainees. Even when not asked, this category of witnesses added that the population at large was in worse conditions than the detainees, forced to flee the supervening Serb forces, without food and shelter, without the minimum condition for a dignified life.

Now, it must be clear that the terms for the comparison requested by the Supreme Court must be carefully identified. On one side we have the condition of the detainees in Llapashtica. On the other side the reference to "the same extent as the local civilian population" can not be limited to that section of the population that had to abandon their home and their belonging to seek protection form the attacks of the Serb forces. It is known and it is acknowledged that vast portions of the Albanian population endured immense suffering when, expelled from their home under the threats of the weapons or the fear of indiscriminate attacks, found themselves in long queues of desperate people seeking refuge in Albania or in Macedonia or went into the hiding, literally exposed to the elements of the rigid Balkan winter. It is known and it is acknowledged that in those circumstances these people did not have enough water, food, heating and were exposed to the risk of random aggressions of the Serb troop. These were extreme conditions, much, much worse than those endured by the detainees in Llapashtica, no doubt.

But, as correctly pointed out by the Prosecutor in the course of his final speech, this was not the rule during all the winter of 1998 and 1999 and cannot be taken in any case as the parameter for the comparison.

The convincing argument of the Prosecutor (page 6) is that the standard of the comparison requested by the provision of Protocol II 5 (1) (a) of the Geneva Convention can not be found in the conditions imposed on the victim of forced transfer or evacuation. Subject to inhuman treatment, they are turned into objects of a criminal action which degrade and humiliate the life of the victims and that therefore may not be taken to set the standard of minimum life decency for the detainees of Llapashtica. It would be a sad defeat of international legality if such a mechanism of reciprocal degradation was permitted to the forces in conflict.

To this, it must be added that in the last months of 1998, if also episodes of forced evacuation from the villages did happen, they had not yet taken the size and the characteristic that only in the following spring become more common. This is not to minimize the suffering of the Albanian population, forced *en masse* from their homes when the internationalization of the conflict provoked the bitter reaction of the withdrawing Serb forces on the inert population, but written accounts (which are part of the file as 'background documents', binder 10) and specific testimonies ([redacted]; [redacted]) confirm that the end of winter 1999 is the time when the internal and international displacement of population reached the proportion of a biblical

event. From the words of [redacted] (Chief of staff and commander of a brigade, giving testimony on 15th July 2009, pg.17) it is clear that an episode of mass evacuation of the area of Podujevo took place at the beginning of April 1999 ("*On the 10 April the Serbian forces undertook a massive attack and thanks to our concentration we managed to force them to withdraw and not let them get close to the civilians.*") and that few days earlier as well an attack on the local population had occurred ("*I would like to add that during the end of March, 23 or 24 during the attack the population was relying on the supplies of KLA*"). [redacted] testimony (9.9.09, pg.4) follows the same line: "*In Llapashtica, for how long was the HQ established?* [redacted]*: I don't know exactly, but I can say that the HQ was in Llapashtica until the start of the NATO bombing, approximately*". [redacted], 9.9.09, pg.15: "*Pristina was something specific, the inhabitants of Prisina were displaced just before NATO started bombing*"... "*Public Prosecutor: The average living conditions of the general area of the Llapi Zone is what I am trying to find out. What were the largest towns of the Llapi Zone apart from Pristina and Podujevo?* [redacted]*: Obiliq and Fush Kosova. Public Prosecutor: Did people live in those towns during the war?* [redacted]*: Of course in Pristina there were people and other cities as well. Personally I did not come to this part. I can not say in relation to the town I never saw, I can only say what I saw I can tell you about.*".

Another notion emerged from the testimonies of some witnesses: during the months of operation of the detention center in Llapashtica, some of the suspected-collaborators-to-become-detainees were simply summoned to the detention camp, not arrested or abducted or caught in action. They were civilians ordered to report in person to the headquarters in Llapashtica. This modality of convocation testifies that, at least up to the end of the winter, social confusion was not reigning unfettered and that living conditions, if surely degraded, were not as drastic as depicted in the final speeches by the Defence Counsels.

What emerges when facts are put in a correct temporal perspective is that the establishment of the detention centre of Llapashtica preceded the wide displacement of large portions of the population that took place from end winter/beginning of spring 1999. Consequently, the conditions suffered by the detainees and those of the displaced people may not be compared and shall not be the terms of an equation.

We have scarce information on the situation of the civilian population, but the little we know is enough to conclude that the conditions in which the population lived in the Llapi zone were not as poor as those of the detainees in Llapashtica.

To start, there was a sufficient freedom of movement.
People could think to move around with a degree of liberty even during the evening hours. Witness 7, [redacted], detained in Llapashtica for one month, starting end Nov. 1998, hearing 15.9.09, page 36: "*At what time the witness was in village of Bariljeva and the reason why he went there?* [redacted]*: We went there just because we wanted to, for leisure. Presiding Judge: What time?* [redacted]*: Evening, 6-7 p.m.*".

If also not in abundance, heating and electricity and water were accessible, at least in Podujevo, through the winter of 1998/1999 ([redacted], 10.9.09, pg.23).

Public places could be open for business. [redacted], who was owner and run his own bar/restaurant, in the course of the hearing 10.9.09 pg.3 : "*He* (Rrustem Mustafa) *just asked me whether they* (Serb police officers) *had used to come and whether they would ask about the army. I told him no, I told him this was business premises, all were invited to come for food.*

These are the only circumstances which are available about living conditions of the population in the same area (Llapi zone) in the winter 1998/1999.
It is not much. But it is sufficient to draw the conclusion that the condition of the detainees was surely worse and that even if it may be established that the detainees had sufficient access to food and to water (to drink and occasionally to wash), it is however clear that the room in which they were kept at night, or during the day, was something below any acceptable standard. Dark, dump and cold, it was so unbearable that detainees used to stay out in the courtyard all day long even in the winter days! On this, the testimonies agree, both on the side of the victims ([redacted]) as on the side of the guards ([redacted]).

To this, a further consideration must be added to better characterize the modalities of the detention. Reference is made here to Count 8 which, confirmed by the Supreme Court, established in an incontrovertible manner that in Llpashtica there was torture and there were beatings. This is a judicial truth that may not be ignored nor contested by this panel. Even if not all the detainees were subjected to violence in the course of their detention, it is purely abstract that they did not know what other fellow inmates were experiencing. This must have contributed, amongst the detainees, to a climate of oppression and fear to be subjected to violence, as alleged in Count 5 a condition that, in itself, lowered the standard of life below decency.

Taking all circumstances in consideration, the panel concludes that the conditions of detention in Llapastica were considerably lower than the living condition of the population in Podujevo and surrounding area.

The responsibility of the accused is therefore affirmed, for the respective role the accused played at the time. The responsible of the military police, who had direct responsibility over the detention center and the surrounding premises, Nazif Mehmeti should have reported to his superior (Rrustem Mustafa) that the premises were overcrowded and lacking basic conditions to keep people restricted. Latif Gashi, a man of action tasked with the duty to gather information, had direct and unrestricted access to the cell and visited and interrogated and beaten the detainees, directly reporting to his superior, Rrustem Mustafa. This last, tolerated all this. He knew the situation but thought that it was acceptable that people suspected of being collaborators of the Serbs or a trouble for the population suffered the treatment that was imposed on them.
The expression "joint criminal enterprise" does not implies, of course, a criminal organisation like mafia or Chinese triads, which is created to mandate crimes and finds in

its own organization source of power through oppression and threat. The expression "joint criminal enterprise" rather indicates in the given circumstances a shared knowledge and will, or acceptance, of the situation; a psychological state that mutually foster and corroborates amongst those who share it and beyond them, in the community of the soldiers, tolerance toward illegality and lack of discipline and responsibility.

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On Count 8 there is little to say. The responsibility of the three accused has been asserted and confirmed through the previous stage of the trial and this panel take notice of it.

The only duty of this panel with regard to Count 8 is the determination of the amount of the penalty, which will be dealt with at a later stage of the decision.

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The third count to be considered is count 9.

The Prosecutor has withdrawn the charge at the beginning of his closing statement.

The trial Panel may only take notice of this and reject the count, after reading article 349 n.3 of the Law on Criminal Proceedings of the Socialist Federal Republic of Yugoslavia.

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The last count to be considered is number 14, describing the maltreatment, the physical abuse and the torture of [redacted] by Latif Gashi during two months in the summer of 1998 while the Serbian forest ranger was detained in the detention centers located at Bare and Bajgora.

When analyzing this count, the Supreme Court, in its decision dated 21st July 2005 mainly concentrates (second half of pg.19) on a specific episode happened to [redacted] during his detention, which had been object of a scrupulous analysis by the trial panel at first instance. The Supreme Court, on this aspect, relate the conclusions of the trial panel and quotes 7 lines from the first instance decision, at the end of which it is said that no conclusion adverse to the defendant Gashi may be based "on this part of the evidence of [redacted]c".
The Supreme Court then establishes that in the decision of the trial panel there was no finding "that Latif Gashi committed or ordered the beating and torturing of [redacted] in Bajgora" and that "the findings in the enacting clause of the trial court verdict that the charge in Count 14 was proven is inconsistent with and contrary to the reasoning of the verdict".

The conclusions of the Supreme Court shall be accepted by this lower Court, even if it must be noted that the trial panel in the first instance had dedicated page 43 and 44 of its

decision to the findings related to the responsibility of Latif Gashi for the beating of [redacted] and to its legal qualification (as war crime).

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This last Count (14) is the most contested, amongst those that survived the first and the second stage of the trial; in the course of the hearing, the deposition of the witness has attracted much animosity from the lawyers.

One may think, what is the reason to be specifically worried by count 14, which proven or not proven, would not change substantially the weigh of the responsibility already ascertained on the part of the accused Latif Gashi? Once the responsibility of the three accused is established in relation to count 8, where the charge refers to beatings and torture administered to a number of detainees, as a sort of routine, which difference can really make one more victim?

The reason of the animosity would be that [redacted] represents, in the eyes of accused (also those not involved in the count anymore) and of their defence counsels the evidence of the fabrication of the accuses and of the trial. Being a Serb, he would have been used by the secret services of Serbia to discredit and pollute the image of some of the most valorous participants to the war of liberation of the Albanian community of Kosovo. Through prefabricated documents and bought testimonies, the secret services of the previous ruler would have managed to influence the investigation, the prosecution and, in a manner, also the trial until now.

The argument is not realistic and not based on statements which may be proven. It is just an allegation that has never gone beyond the stage of the enunciation. It is interesting that it has been put forward caustically and with determination only for one of the many witnesses of the trial. And the others? All those beaten and tortured in Llapashtica, as established in count 8, who have been considered reliable by the first and the second instance Courts? If count 14 were absorbed in count 8 (identical conducts are criminalized in the two counts) what would be the weight of such argument? When there are several witnesses denouncing torture, what's the reason to say that only one is biased or a proxy of the secret service of Serbia?

What just said brings us to a further consideration. Count 14 is an autonomous charge. However, the conducts (beating and torture) are identical to those described in Count 8, only locations, timeframe and number of victims change. Only practical reasons in the formulation of the indictment, it is understood by the panel, have brought the prosecutor to write a further count (the 14th). But it is a unique history of brutalities the one described in the indictment; a history started at the beginning of August 1998 and lasted until the end of the following spring.

Once it is proven that torture and beatings were inflicted on the detainees in Llapashtica, why should the panel renounce to think that they took place also elsewhere, i.e. in Bare/Bajgora? If there was a pattern of behaviour inclined to violence on the detainees,

then there is no reason to think that it was characteristic and limited to Llapashtica and not experimented already before in Bare and Bajgora.

[redacted] has given a testimony that appeared to be genuine and truthful. It is true that he incurred in some contradictions and in minor confusions and it is true that he was not able to identify Latif Gashi in Court[4]. But this does not impinge on his credibility.
On the opposite, it makes even more remote the possibility of a false testimony and of the fabrication of his testimony by the secret service of Serbia. If the witness had been coached by the secret service, Latif Gashi would have been surely identified in Court.

[redacted] during his testimony did not appear as a man used by others or someone who was serving or pleasing someone else. The idea that such a simple man can be used by what is described as a qualified secret service is naïve. The way in which he spoke and the way in which he presented himself (including the recourse, during the testimony, to notes written by him on worn out pieces of paper –see minutes hearing 15.9.09, pg.17) is far from the image of the cunning executor that the defence counsel tried to paint.

In the opinion of the panel, his testimony was reliable and sufficiently clear, given that 10 years have passed. His speech was concentrated around some points on which his memory was still vivid (the moment of the arrest, the modalities of the interrogation, the obsessive requests of information about [redacted], the move from Bare to Bajgora, the circumstances of the identification of Latif Gashi in the course of the interrogation in front of the investigating judge). His declaration substantially matched the statements given in 2002 before the investigating judge and in 2003 before the trial panel, in a degree which makes it very difficult to think that the witness could remember at the distance of many years what he had referred before, if those circumstances had been invented and repeated by heart and not directly experienced.
During the cross examination, led by Mr.Syla and Mr Tmava, and with some final questions being asked also by Mr.Balaj, the witness did not show any substantial uncertainty or weakness and was able to answer pertinently and promptly.

Eventually, on the issue of the identification of the accused, there are the circumstances underlined with remarkable efficacy by the Prosecutor in his final speech. Mr. Dean has drawn the attention of the Court on the corroboration that may be found in the file to the personal and professional details of the accused referred by [redacted]. The village of origin, the profession, his background as teacher or headmaster, the emigration to Germany, are all details that find confirmation in a way or another in the file (as shown by the Prosecutor, in declarations of the same Latif Gashi and of a witness-witness 4).

In the end, the Court has no doubt as to the responsibility of Latif Gashi in the repeated beatings, amounting to torture to extort self-accusatory declaration from [redacted]

[4] It must be noted, if also it is not reported in the minutes of the trial, that at the moment of the request of identification and in the course of it, Latif Gashi crossed his arms on his chest and brought his hand and the second finger to his face, to cover his mole. This was intentional, it is understood by the panel, if also dissimulated as a posture of reflection and concentration.

[redacted]. Latif Gashi not only was present and was leading the interrogation. He was present at any relevant stage of the ordeal through which the victim [redacted] had to go through from the days following the arrest up to the last moment of his release. He also played the role for which he had the title, responsible of for the intelligence. He performed his job zealously and with personal commitment, at least until he was progressively engaged in military operations. Significantly his presence, in the deposition of [redacted], is associated to the beatings: (hearing 15.9.09, pg 17) *"Presiding Judge: In Bajgora, how long did you stay?* [redacted]*.: I think we stayed in Bajgora until the 15th or the 17th September.*
Presiding J.: Were you beaten again in Bajgora? M. S.: No, they didn't.
....
Pg. 18: "*Presiding Judge: Latif Gashi was constantly present in Bajgora and in Bare? Or was he coming episodically?* [redacted]*: In Bare he was present all the time, whereas in Bajgora he visited only a few times.*"

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The judicial experience teaches that the longer the proceedings last, the greater is the tendency to have a lenient inclination toward the accused. It's only natural. After 11 years from the facts, the voice of the witnesses weakens, the documents appear more and more pieces of papers good for book of history rather than for pieces of evidence and in general, the possibility to find confirmation to the charges in statements and documents fades. In part, it has happened also in this trial, so that the original indictment has been progressively reduced to a limited number of counts by the judicial activity and the prosecutor was forced to drop one of the last charges. However, it would be wrong to draw the impression that what happened in the detention center of Llapashtica and in the other places where alleged collaborators of the Serb were restricted was just some slaps on the wrist and a bit of maltreatment.

There was more, much more. There was a system that allowed not only torture but also disposal of people who, for different reasons, in the opinion of their guardians, should have not returned to their homes.
The fact that count 11 has fallen only means that it was not proven that the accused were liable for the killing. It does not mean that individuals like [redacted] were not killed or that they died of natural death.

In this environment, where the torture and the killing of suspected collaborators was admitted (possibly, to eliminate witnesses of brutalities) to believe that a system of interrogation was strictly banned because not useful and to respect the Geneva conventions (which, eventually, do not prohibit interrogations) is simply illogical and untenable. It is not a mark of great sophistication in the defence of the accused that they refuted with pertinacity the possibility that interrogations of detainees did actually take place. The obstinacy shown by the accused on the point (and by the witnesses, all KLA members of various levels, who repeated this version as a mantra) does not weigh in

favour of the credibility of the accused in general and discredit their ability to state their case truthfully.

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Before passing to the sentencing, a last procedural issue has to be solved.

In principle, the position of the late Naim Kadriu is still formally unsolved.
Since it is known that Mr.Kadriu passed away, the panel on its own motion had acquired a copy of the death certificate of Naim Kadriu form the Municipality of Podujevo.

After this formality has been completed, and what was known only informally has found a confirmation, the panel takes note officially of his death and consequently, pursuant to article 143 LCP dismisses the criminal proceedings against the said accused.

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SENTENCING

This part of the decision will be short, considering that this panel substantially approves the consideration expressed on the point by the trial panel in its decision of 16th July 2003.

It is the opinion of this court that the way in which the accused have been depicted in that judicial document reflect a right comprehension of the psychological relations amongst themselves, of their motivations and personal values in the course of the conflict. Depurated of the considerations related to the counts which did not survive the different stages of the trial, the assessment done there is still a valid base for our sentencing policy.

Starting from Nazif Mehmeti, it is clear that even if he bears the responsibility of the ill treatment in Llapashtica, for his duty as head of the military police in the area, it may be repeated here that "his responsibility was diminished ... as ... he did not instigate the regime but actively supported its operation. In mitigation, it was clear that ... he was...affected by the gravity of the events in which he had taken part".

To this it must be added that he appeared, in the course of the hearings and after the examination of the minutes of the entire trial, as a minor actor of the events, a subdued executor of the design of others, at the point to deserve the paternalistic remark of Rrustam Mustafa who, in the course of the initial examination described the character of Mehmeti as 'a very polite one' (9.07.09, pg.24).

For Latif Gashi, the conviction that he was at the center of a system that permitted interrogation, beating and torture of detainees from the early days in Bare to the end of the closure of the camp in Llapashtica is confirmed by this panel. He is a man of action, given a job (head of intelligence) that allowed him to express himself with brutality and

cynicism. His proven direct involvement in the beatings and his personal liability for three counts justifies the heavier sentencing imposed on him.

For Rrustem Mustafa, the panel concludes that his responsibility derives from his position of authority and his tolerance of the events allowed, if not directly ordered, by his position of head of the hierarchy of the KLA in the zone of LLapi. Loyally, he never tried to put on the subordinates the blame for any of the events ascertained.

Having established the responsibilities in the stated terms, the panel consider that even if all the episodes are part of a unique charge of war crime, it is nonetheless appropriate to determine the individual responsibility in relation to each single episode, for a better measuring of the terms to be served and in order to avoid the risk that further developments of the trial, at a later stage, are faced again by the problem caused by the single penalty option.

Taking as most severe behaviour the conduct described in Count 8 (considering the repeated beatings and torture as more severe than the detention in inhumane condition) Rrustem Mustafa is given 4 years of detention, Nazif Mehmeti 3 years and Latif Gashi 5 years. In relation to Count 5, 2 years are added to Rrustam Mustafa, 1 year and six months are added to Nazif Mehmeti and 2 years to Latif Gashi. Eventually, in relation to Count 14, Latif Gashi is given a further term of 2 years, to be added to the previous ones, inflicted to the accused. The resulting totals (6, 4.5 and 9 years respectively) are subject to the application of a diminishing circumstance that applies to all of the accused.

The diminishing circumstance consists of the extraordinarily long time of the trial.
From 21 July 2005 until the beginning of the re-trial (7.07.09) the binders rested somewhere without any action being taken. The accused, freed by the Supreme Court of Kosovo but subjected to measures limiting their freedom of movement, had to wait four years to see their responsibility assessed and to have the possibility to state their case.
This is an extremely long period of time, during which, as it is evidenced by the minutes of pre-trial meetings and internal memorandums which are in binder 16, only inconclusive if not elusive initiative were taken to restart the trial by UNMIK International Judicial Support Division.

The reduction of the sanction is therefore granted in the maximum of the spectrum, bringing the terms of imprisonment to the amounts established in the enacting clause.

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PROPERTY CLAIM

The sufferance endured by the [redacted] for the ill treatment inflicted on him by Latif Gashi is a damage that must be restored, since the victim of the crime has expressly requested it when he was heard in the course of the trial. At the distance of many years and in the absence of a specific evaluation by an expert witness, an equitable assessment is still possible. The panel agrees that the liquidation of 5.000,00 Euro may represent a substantial compensation for the repeated beating and the maltreatment to which [redacted] was subject.

COSTS OF THE PROCEEDINGS

The accused shall reimburse the costs of the criminal proceedings pursuant to Article 98 Paragraph 1 and 2 of the LCP, with the exception of the costs of interpretation and translation. A separate ruling on the amount of the costs shall be rendered by the Court when such data is obtained, pursuant to article 96 of the LCP.

The Presiding Judge
Francesco Florit

The Court Clerk
Francesco Caruso