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Mission d'Administration Intérimaire des Nations Unies au Kosovo

DISTRICT COURT OF PRISTINA
C. Nr. 425/2001
16 July 2003

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF PRISTINA, with the panel (hereinafter the Court) composed of International Judge, Timothy Clayson, Presiding Judge, Judge Leonard Assira and Judge Daniel Mabley as members of the panel assisted by Eileen Byrne as court recorder in the criminal case against the accused: LATIF GASHI, NAZIF MEHMETI, NAIM KADRIU AND RRUSTEM MUSTAFA (co-accused) charged with committing the criminal offence of War crime pursuant to Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCY), as read with Articles 22, 24, 26 and 30 of the CCY, as made applicable by UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59, and as set out in the new indictment filed on 19 November 2002 and as subsequently amended by the Public Prosecutor on 4 February 2003 and 30 June 2003, and subsequent to oral, public trial hearings held on 20, 21, 24, 25, 26, 27 February; 10, 11, 13, 14, 17, 18, 20, 21, 31 March; 1, 3, 7, 8, 9, 29, 30 April; 5, 6, 8, 12, 13, 15, 16, 19, 20, 22, 23, 26, 29 May; 9, 10, 12, 13, 16, 17, 19, 20, 23, 24, 25, 26, 30 June; 1, 2, 9, 11, 12, 14 July, save those hearings which were closed to the public due to the measures ordered for the protection of the witnesses pursuant to UNMIK Regulation No. 2001/20, as amended, in the presence of the Pristina Public Prosecutor's Office represented by the International Prosecutors, Gary McCuaig and Philip King Alcock, the Accused and their respective Defence Counsel, Mexhid Syla, Bajram Tmava and Nekibe Kelmendi, for Latif Gashi, Fazli Balaj for Nazif Mehmeti, Hamit Gashi and Tome Gashi for Naim Kadriu, and Aziz Rezha for Rrustem Mustafa, and representatives of the injured parties, Mirko Brboric and Svetlana Scepanovic, on 16 July 2003 following deliberation and voting of the Panel, ruled and publicly declared the following

VERDICT

Pursuant to Article 351 of the Law of Criminal Procedure ("LCP"), the following acts are found to have been proved in the case of each Accused:

IN RELATION TO LATIF GASHI, aka Commander 'Lata,' ethnicity Kosovar Albanian, father's name Riza, mother's name Raba, born on 12.09.61, place of birth Doberdol, municipality of Podujevo, married with three children, graduated from the Faculty of Law in Pristina, Director of the Intelligence Service of Kosovo and reserve officer of the TMK,

without previous convictions or pending criminal proceedings, living in Pristina city centre off Mother Theresa Avenue, grid coordinates EN 1328 2333 in detention since 28 January 2002;

During the period 30th October 1998 to late April 1999, in complicity with Rrustem Mustafa, and aided and abetted by Nazif Mehmeti and others, and pursuant to a joint criminal plan, he illegally detained Kosovo Albanian citizens suspected of collaboration with Serbs in a detention centre organised by and under the control of the KLA at Llapashtica, and also at Majac and Potok by causing them to be detained in inhumane conditions, depriving them of adequate sanitation and beating and torturing them thus causing them great suffering and violation of their health, and thereby depriving them of their right to a fair trial: the citizens so detained included witnesses 7, 4, Drita Bunjaku, Agim Musliu, Idriz Zvarqa, Alush Kastrati, Hetem Jashari, and witness "V", the purpose of the plan being to seek to force those detained to confess to disloyalty to the KLA and to punish those detained for that alleged disloyalty to the KLA. (Count 2, 5 and 8).

During the period 31st May 1999 until an unknown date in mid June 1999, at an unknown location in Koliq, in complicity with Naim Kadriu, he illegally detained, beat and tortured witnesses "Q" and "R" thus exposing them to great suffering and violation of bodily health and thereby depriving them of their right to a fair trial (Count 3 and 9).

During the period 1st August 1998 to 26th September 1998, at a detention centre organised by and under the control of the KLA at Bajgora, he beat and tortured Milovan Stankovic thereby exposing him to great suffering and violation of bodily health, and thus aided and abetted the unlawful detention of Milovan Stankovic. (Count 12 and 14).

In relation to Latif Gashi, the following acts were not established:

Count 1 - Allegation relating to illegal detention (Kosovo Albanian victims) at Bajgora;
Count 4 – Allegation relating to inhumane treatment (Albanian victims) at Bajgora;
Count 5 (part) – Allegations relating to inhumane treatment at Majac and Potok only;
Count 6 – Allegation relating to inhumane treatment at Koliq;
Count 7 – Allegation relating to beating and torture at Bajgora;
Count 8 (part) – Allegations relating to beating and torture at Majac and Potok only;
Count 10 – Allegation relating to killing of Victim 1, Osman Sinani;
Count 11 – Allegation relating to killing of Drita Bunjaku, Agim Musliu, Idriz Svarqa, Alush Kastrati, and Hetem Jashari;
Count 13 – Allegation relating to inhumane treatment (Stankovic) at Bajgora.

IN RELATION TO NAZIF MEHMETI, aka 'Dini,' ethnicity Kosovar Albanian, born on 20.09.61, father's name Hajredin, mother's name Shahe, married with three children, place of birth Shajkofc, municipality of Podujevo, graduated from the Faculty of Law in Pristina residing in the village of Shajkofc/ Pristina, SU 3/2, 2nd floor #9, Pristina, employed as KPS officer in Pristina, Station 3 without previous convictions or pending criminal proceedings and has been in detention since 28 January 2002;

During the period 30th October 1998 to late April 1999, he aided and abetted Rrustem Mustafa and Latif Gashi illegally to detain Kosovo Albanian citizens in a detention centre organised by and under the control of the KLA at Llapashtica, by supervising the detention centre and directing the guards under his control and ensuring that the detainees remained in detention whilst knowing that they were detained in inhumane conditions and deprived

of adequate sanitation and that unlawful measures of beating and torture were being applied to them, thus causing them great suffering and violation of their health and thereby depriving them of their right to a fair trial: the citizens so detained included witnesses 7, 4, Drita Bunjaku, Agim Musliu, Idriz Zvarqa, Alush Kastrati, Hetem Jashari, and witness "V". (Counts 2, 5 and 8).

On a date unknown during but prior to late April 1999, in complicity with Rrustem Mustafa and in compliance with his order that Drita Bunjaku, Agim Musliu, Idriz Svarqa, detained at that time at Majac, and Alush Kastrati and Hetem Jashari detained at that time at Potok, be killed, he conveyed the order from Rrustem Mustafa to kill these persons to unknown members of the KLA and further himself ordered those members of the KLA to carry out the killings which they then did. (Count 11).

In relation to Nazif Mehmeti, the following acts were not established:

Count 5 (part) – Allegations relating to inhumane treatment at Majac and Potok only;
Count 8 (part) – Allegations of torture at Majac and Potok only;
Count 12 – Unlawful detention at Bajgora (Stankovic);
Count 13 – Inhumane treatment at Bajgora (Stankovic);
Count 14 – Torture at Bajgora (Stankovic).

IN RELATION TO NAIM KADRIU, aka 'Lumi,' born on 05.03.73, place of birth Turqice, ethnicity Kosovar Albanian, father's name Halit, mother's name Mihane, married with two children, literate, living in the city of Podujevo at grid coordinates EN 1630 5062, employed by Kosovo Petrol, without previous convictions or pending criminal proceedings and has been in detention since 28 January 2002;

During the period 31st May 1999 until an unknown date in mid June 1999, at an unknown location in Koliq, in complicity with Latif Gashi, he illegally detained, beat and tortured witnesses "Q" and "R" thus exposing them to great suffering and violation of bodily health and thereby depriving them of their right to a fair trial (Counts 3 and 9).

In relation to Naim Kadriu, the following act was not established:

Count 6 – Inhumane treatment at Koliq.

IN RELATION TO RRUSTEM MUSTAFA, aka 'Remi', ethnicity Kosovar Albanian, born on 27.02.71, place of birth Perpellac, father's name Musli, mother's name Nefise, married, graduated from the Faculty of Law, Pristina, residing in the city of Podujevo, Fiteria Street, at grid coordinates EN 1601/5245 without previous convictions or pending criminal proceedings and has been in detention since 11 August 2002;

During the period 1st August 1998 to 26th September 1998, knowing that Kosovo Albanian citizens and Milovan Stankovic were being illegally detained at a detention centre organised by and under the control of the KLA at Bajgora in the Llap zone, and being in a position of responsible command as Commander of the Llap zone, he failed to prevent the further illegal detention of those persons and failed to take any steps to identify and punish the members of the KLA responsible for those offences. (Count 1 and 12).

During the period 30th October 1998 to late April 1999, in complicity with Latif Gashi, and aided and abetted by Nazif Mehmeti and others, and pursuant to a joint criminal plan, he

illegally detained Kosovo Albanian citizens suspected of collaboration with Serbs in a detention centre organised by and under the control of the KLA at Llapashtica, and also at Majac and Potok by causing them to be detained in inhumane conditions, depriving them of adequate sanitation and beating and torturing them thus causing them great suffering and violation of their health, and thereby depriving them of their right to a fair trial: the citizens so detained included witnesses 7, 4, Drita Bunjaku, Agim Musliu, Idriz Svarqa, Alush Kastrati, Hetem Jashari, and witness "V", the purpose of the plan being to seek to force those detained to confess to disloyalty to the KLA and to punish those detained for that alleged disloyalty to the KLA. (Counts 2, 5 and 8).

On an unidentified date between 31st May 1999 and mid June 1999, he ordered Naim Kadriu to torture witness "R" by directing Naim Kadriu to coerce witness "R" to agree to commit an act of murder in order to obtain his own release from illegal detention at a location at Koliq. (Counts 3 and 9).

On a date unknown during but prior to late April 1999, he ordered the murder of Drita Bunjaku, Agim Musliu, Idriz Svarqa, detained at that time at Majac, and Alush Kastrati and Hetem Jashari detained at that time at Potok, by ordering Nazif Mehmeti to travel to Majac and Potok for the purpose of ensuring that his order for these killings be carried out by members of the KLA and which killings were then carried out as ordered by him. (Count 11).

In relation to Rrustem Mustafa, the following acts were not established:

Count 4 – Allegation relating to inhumane treatment (Albanian victims) at Bajgora;
Count 5 (part) – Allegations relating to inhumane treatment at Majac and Potok only;
Count 6 – Allegation relating to inhumane treatment at Kolec;
Count 7 – Allegation relating to beating and torture at Bajgora;
Count 8 (part) – Allegations relating to beating and torture at Majac and Potok only;
Count 10 – Allegation relating to killing of Victim 1, Osman Sinani;Count 13 – Allegation relating to inhumane treatment (Stankovic) at Bajgora;
Count 14 – Allegation relating to torture (Stankovic) at Bajgora.

BECAUSE

In relation to each of the above named accused the acts found proved against each of them were found to have been committed in breach of international law effective at the time of the conduct and during the period from the beginning of August 1998 to the 10th June 1999, when an internal armed conflict existed in Kosovo between armed and security forces of the Republic of Serbia and of the Federal Republic of Yugoslavia and the Kosovo Liberation Army (UCK/KLA) as combatants in the conflict, both armed forces being under responsible command, and exercising control over parts of the territory of Kosovo that enabled them to carry out sustained and concerted military operations, and whilst an international armed conflict co-existed alongside the internal armed conflict during the period 24 March 1999 to 12 June 1999. Each of the offences had a nexus with the armed conflict, and the victims of the offences were all entitled to the protection of Common Article 3 of the 1949 Geneva Conventions as read with Articles 1 to 6 inclusive of Additional Protocol II of the 8th June 1977. Further, in accordance with the provisions of Articles 42, 43 and 147 of the 1949 Geneva Convention IV, the acts of illegal detention constitute grave breaches of international humanitarian law, as applicable in the context of

internal armed conflict in accordance with customary international law effective at the time of the conduct.

Further, in relation to the accused Rrustem Mustafa, and the finding of facts relating to Count 1 and 12 set out above (item 1), his liability for command responsibility is established in accordance with Articles 86 and 87 of the 1977 Geneva Protocol I Additional to the Geneva Convention of 12 August 1949, as applicable in the context of internal armed conflict in accordance with customary international law effective at the time of the conduct.

Thus, pursuant to Article 142 of the CCY, and Articles 22, 24, 26 and 30 of the CCY, in the case of each accused these acts are qualified as the offence of War crime.

Based on Articles 33, 38, and 41 paragraph 1 of the CCY, Articles 351 and 353 of the LCP, and UNMIK Regulation 1999/24, Section 1.4, the Court imposes the following

SENTENCES

LATIF GASHI, for the criminal acts of War crime as set out above, is sentenced to a term of 10 (TEN) years imprisonment.

NAZIF MEHMETI for the criminal acts of War crime as set out above, is sentenced to a term of 13 (THIRTEEN) years imprisonment.

NAIM KADRIU for the criminal acts of War crime as set out above, is sentenced to a term of 5 (FIVE) years imprisonment.

RRUSTEM MUSTAFA for the criminal acts of War crime as set out above, is sentenced to a term of 17 (SEVENTEEN) years imprisonment.

Pursuant to Article 50 of the CCY, in the case of the defendants Latif Gashi, Nazif Mehmeti and Naim Kadriu, the time spent in detention since the 28 January 2002 will be taken into account in relation to the period of imprisonment. Further, in the case of the defendant Rrustem Mustafa, the time spent in detention since the 11 August 2002 will be taken into account in relation to the period of imprisonment.

The injured parties are invited to launch a civil law suit as to their claim for civil compensation.

Pursuant to Article 95, paragraph 2, item 6 of the LCP, the lump sum part of the cost of the criminal proceedings shall be levied at 200 euros, the more specific costs to be calculated at a later stage pursuant to Article 96 of the LCP; the accused shall pay the costs of these criminal proceedings.

Pursuant to Article 353 paragraphs 1, 6 and 7 of the LCP and by separate decision, the detention of each defendant is extended until the verdict comes into effect.

THE PROCEEDINGS

The accused were heard on various dates between the 20th February 2003 and the 18th March 2003.

The following witnesses were heard during the main trial:

Witness "4", Witness "7", Suzanne Ringaarrd-Pedersen, Witness "5", Witness "D", Witness "E", Witness "G", Witness "F", Witness "C", Witness "S", Witness "H", Witness "P", Witness "W", Halil Sinani, Fatmir Mustafa, Gani Zuka, Bajram Isufi, Kamber Hoxha, Idriz Bajrami, Arif Mucolli, Nuredin Ibishi, Naip Gubetini, Jashar Ejupi, Jetullah Zhdrella, Ramadan Miftari, Milovan Stankovic, Mohammed Latifi, Vesel Jaha, Haredin Berisha, Kadri Kastrati, Tafil Avdiu, Fadil Sulevici, Skender Murati, Agim Dibrani, Idriz Shabani, Milazim Veliu, Witness "I", Rrustem Shalolli, Stephen Petty, Richard Griffen, Michael Kijowski, Albana Muhaxhari, Mario Scherer, Bajram Krasniqi, Ralf Gehling.

Pursuant to Article 333 paragraph 2, the Court decided, after the parties consented, that the statements of the following witnesses given at previous stages of the proceedings be considered read into the record:

Witness "K", Sabit Berisha, Afrim Maloku, Sabri Gashi, Islam Ahmeti, Kappllan Parduzi, Bajram Ahmeti, Fetije Potera, Safet Gashi, Dr. Marek Gasior, Tefik Gashi, Flamur Dylhasi, Flamur Blakaj, Witness "M", Rifat Ejupi, Witness "V", Witness "Q", Myrvette Konushevci, Witness "J".

The Court decided after agreement with the parties to conduct an ocular inspection pursuant to Article 330 (2) of the LCP. The ocular inspection took place on 27 June 2003. The purpose of the ocular inspection was to familiarise the Court with the location of various events; to locate the positions of perpetrators and witnesses during these various events, to visualise the movement of persons and to test the credibility of witnesses by confirming the physical locations of where they said they were and what they could have seen from that location. The ocular inspection was attended by the Presiding Judge and Judge Assira of the Court, the International Prosecutor, Mexhid Syla, Fazli Balaj and Hamit Gashi, and Aziz Rexha, Defence Counsel, a court recorder and interpreters. The witnesses called to attend the ocular inspection were Tafil Avdiaj and Bajram Isufi.

The procedure of presentation of evidence was closed on the 2nd July 2003.

THE INDICTMENT

By his indictment dated the 19th November 2002, as amended on the 4th February 2003 and finally amended in trial on the 30th June 2003, the International Public Prosecutor charged the four defendants with a number of acts arising from the period between the beginning of August 1998 and mid June 1999. The specific allegations were set out in a total of fourteen counts and were said to relate to the activities of the defendants regarding detainees at five "detention centres" located at Bajgora (August to September or October 1998), Llapashtica (November 1998 to late March 1999), Majac (March 1999 to mid April 1999), Potok (March 1999 to late April 1999) and Kolec[1] (May 1999 to mid June 1999).[2]The allegations included a number of acts of murder.

[1] Kolec is also spelt Koliq.
[2] Indictment para B9: all references are to the indictment as finally amended on 30th June 2003.

The defendants were alleged to be members of the Kosovo Liberation Army (KLA/UCK), a fact admitted by each of them during the trial, although in the case of three of the defendants, (Latif Gashi, Nazif Mehmeti, and Naim Kadriu), their precise roles, the duration of their involvement with the KLA and their relationships both de jure and de facto with each other and within the organisation were in dispute in the trial. Rrustem Mustafa admitted[3] that throughout the period of the indictment, and for a considerable period beforehand, he held the position of overall Commander of the Llap Zone in the North East of Kosovo, and was answerable only to the KLA general headquarters of which, as a zone commander, he was a member.

In broad terms, the indictment alleged that all four defendants took part during the period identified in a joint criminal enterprise in which Albanian civilians suspected of collaborating with the Serbs were unlawfully arrested, and unlawfully detained in the detention centres. The purpose of these activities was further described as "…to force those detained to confess to disloyalty to the KLA and to punish those detained for that alleged disloyalty to the KLA". The indictment also alleged that these purposes were applied to a Serb detainee in the months of August and September 1998[4]. It was alleged that as part of the regime that was applied to the detainees they were "…housed in inhumane conditions, denied adequate sanitation, food, water and medical treatment. They were subjected to routine beatings and tortures, forced to beat each other, forced to make false confessions and threatened with death".[5]

It is thus clear that in addition to the murder of the victims named therein, the indictment alleged that the defendants, at various times and places during the period August 1998 to mid June 1999 had established and maintained a system of illegal detention in the Llap zone the purpose and nature of which was wholly contrary to regular process implicit in legal detention. In particular, it was alleged that beating and torture with a view to forcing detainees to confess to acts of disloyalty to the KLA, to punish those detained for those alleged acts, and the imposition of conditions upon them that were inhumane, were an integral part of the regime. In simple terms, therefore, it was alleged that the defendants promoted a regime of detention that was arbitrary and oppressive and from which normal safeguards and proper trial processes were wholly absent.

The indictment further alleged that during the period when the events were said to have happened all the necessary conditions were in place for each proven act to be qualified as the offence of War Crime, thus at all times material to the indictment:

- A state of internal armed conflict existed in the territory of Kosovo between the KLA (Kosovo Liberation Army – UCK), and the armed and security forces of the Federal Republic of Yugoslavia, including the forces of the Yugoslav army (VJ), and of the Republic of Serbia, including the forces of the Ministry of the Interior and Serbian paramilitary groups, and an international armed conflict existed alongside the internal armed conflict during the period 24th March 1999 to 12th June 1999;
- Both opposing forces were under responsible command exercising control over part of the territory of Kosovo to enable them to carry out sustained and concerted military operations;
- All the victims were expressly protected members of the civilian population;

[3] See TM (trial minutes) 14.03.03, p5-7 specifically, and generally the entire transcript for information on the Llap zone command;*"I began as commander of the Llap operational zone from the very beginning from about September 1997"*(p7), RM.
[4] Indictment para 10.
[5] Indictment para 11.

- A nexus existed between the acts committed by the accused and the internal and international armed conflicts, the existence of the armed conflict played a substantial part in the ability of the accused to carry out the offences, and the actions of the accused were directly linked to the armed conflict;
- The acts of the accused were carried out on behalf of and were closely linked to the armed forces of the KLA rendering them parties to the conflict – the KLA declared itself a legal army on the 15th or 16th May 1998;
- That each of the acts concerned was accompanied by the necessary intent in the mind of the perpetrator.

The conduct alleged against the defendants was said to be contrary to Article 142 of the CCY, as read with Articles 22, 24, 26, and 30 of the same, namely committing, ordering, acting in complicity with others, aiding, participating in a joint criminal design, and committing by omission, for the purpose of committing war crime, and that the defendants were criminally liable both personally and by virtue of their command responsibility for illegal abduction, unlawful detention, beating, torture and, in some cases, murder of Kosovar Albanian citizens.

Further the conduct alleged was said to involve violation of the applicable international law, including Common Article 3 to the four Geneva Conventions of 1949, customary international law, as applicable in internal and international armed conflict, the Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, Additional Protocol I of 1977 to the Geneva Conventions of 1949, as applicable in international armed conflict, and Additional Protocol II of 1977 to the Geneva Conventions of 1949 as applicable in internal armed conflict.

Although the indictment specifically alleged conduct by reference to individual locations, the trial panel found that it was both fairer to the defendants and clearer to consider the indictment by reference to the nature of the allegations rather than simply by individual reference to the places where the offending was said to have occurred.

CONCLUSIONS AS TO THE APPLICABLE LAW.

The correct approach to interpretation of legal provisions.

Historically, Courts in the former Yugoslavia including Kosovo interpreted legal provisions in a literalist or formalist manner. In view of the fact that this approach is long established it would be wrong for this Court now to seek to take a different view. The issue of the correct approach to interpretation of UNMIK Regulations is, however, quite different. As far as this Court is aware, this issue has not been considered in any detail in any prior verdict of international or local judges in Kosovo. For the reasons explained herein, this trial panel has no doubt whatsoever that UNMIK Regulations must be interpreted purposively. Thus, wherever possible the Court in interpreting UNMIK Regulations, should seek to identify and give effect to their intent and purpose. No other approach is consistent with the very essence of UNMIK's existence namely to seek to re-establish a civil administration in Kosovo in accordance with human rights principles and international conventions, and pursuant to Security Council Resolution 1244 of the 10th June 1999.

UN Security Council Resolution 1244 sets out the purposes and principles of the UN Charter and 'the primary responsibility of the Security Council for the maintenance of

international peace and security.' The Security Council recalled the 'jurisdiction and the mandate' of the International Tribunal for the Former Yugoslavia and decided that the main responsibilities of the international civil presence would include the protection and promotion of human rights. It further demanded 'full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia'. This is further elaborated under UNMIK Regulation 1999/24, amending UNMIK Regulation 1999/1 and the Constitutional Framework, which outlines the obligations of public servants to abide by international precepts. In addition, this approach is well illustrated in and consistent with the jurisprudence of the ICTY and ICTR.[6]

Finally, support can be drawn from the substantive provisions of Sections 1 and 2 of UNMIK Regulation 1999/24. Section 1 establishes the applicable law in Kosovo as "the law in force in Kosovo on the 22nd March 1989". Section 2 specifically provides that the SRSG shall provide clarification of the implementation of that Regulation upon request from the courts. Such a provision can only be understood as relating to the clarification of the purpose and intent of the Regulation in order to assist the courts to give effect to that purpose and intent. This most important Regulation has indeed been the subject of clarification by the then SRSG, Mr. Bernard Kouchener, who, upon a request from an International Judge pursuant to Section 2, provided an extensive response. [7]

The proper approach to prior case law.

Whilst prior case law from whatever source is in no sense binding on this court it is the view of this trial panel that to ignore such materials is equally no part of the law: the trial panel may adopt the jurisprudence of others should the trial panel consider that the law as it applies to this case has elsewhere been accurately and helpfully expressed; this is obviously relevant in the field of international law. For the sake of brevity, it should thus be understood that where the trial panel refers to prior case law in the absence of any comment to the contrary, the panel adopts the text as a correct statement of the law. Whilst citation of prior case law was not the practice in the courts of the former Yugoslavia, the trial panel

[6] See for example, the approach of the Appeals Chamber in *P-v-Tadic* , Appeal on Jurisdiction Judgment, Case Number IT-94-1-A73.1, Appeal Chamber, 2nd October 1995, which reflected the ICJ Advisory Opinion on Competence of the General Assembly for the Admission of a State to the UN, ICJ Rep. 1950, and the case of *P v Celibici*, ICTY (Trial Chamber Judgment). The Appeal Chamber in *Tadic* held that a tribunal called upon to interpret and apply the provisions of a treaty must 'endeavour to give effect to these provisions in their natural and ordinary meaning in the context in which they occur.' In case of doubt and wherever the contrary is not apparent from the text of a treaty provision, the provisions must be interpreted in light of and in conformity with customary international law. In *Celebici*, the Trial Chamber of the ICTY resorted to 'a reasonable as well as purposive interpretation of the existing provisions of international customary law' to interpret the ICTY Statute and Rules of Procedure and Evidence. The Trial Chamber concluded that since the essence of interpretation is to discover the true purpose and intent of the Statute and Rules in question, the task of the judge interpreting a provision under whichever system is necessarily the same. The Trial Chamber resorted to literal and purposive rules of interpretation, so under the purposive rule, the court is required to look into the legislative history for the 'mischief' that the statute intends to remedy. Accordingly, the ICTY as an ad hoc tribunal, had to take into consideration the objects and purposes of the Statutes as well as the social and political considerations which gave rise to their creation.

[7] In his answer to Judge Agnieszka Klonowiecka-Milart, Mr. Kouchener referred inter alia to Section 1.4 and stated that the purpose of the second sentence of Section 1.4 ("the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between the 22nd March 1989 and the date of the present Regulation"), was as follows: "The intent of Section 1.4 was to reflect the principle set forth in Article 15(1) of the International Covenant of Civil and Political Rights (ICCPR), namely, that 'if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby'".

notes that in this case both prosecution and defence counsel made reference on a number of occasions to case law from other jurisdictions, especially the ECHR and the ICTY. Accordingly, this trial panel whilst in no sense bound by any prior decision of any Court considers it will often be helpful and informative to make reference to such decisions where they may assist in the correct understanding of legal provisions applicable in Kosovo; this is obviously particularly important in relation to issues of international law.

Relevant legal provisions.

The terms of Article 142[8] of the CCY provide that a person will commit an offence if he/she orders or commits one of the proscribed acts and such act or order is also a violation of the rules of international law effective at the time of the order or act. Thus, the order or conduct must contravene a dual test: both the applicable state and international law must condemn the event in order for criminal liability to apply.

In order to establish criminal responsibility under international law of any accused for the offence of War crime, the following matters must be proved:

- the existence of an armed conflict, either internal or international, and the participation of the accused in the armed conflict;
- a nexus between the alleged crime and the armed conflict;
- the civilian (protected) status of the victim;
- that the order or conduct concerned is in violation of international law effective at the time of the conduct;
- that the order or conduct concerned falls within those criminal acts identified as war crime within Article 142;
- the participation of the accused in the offence.

Not all the rules of international law applicable to international armed conflict apply in cases of internal armed conflicts. In internal armed, conflicts the essential features of the term "armed conflict" are (1) that protracted armed violence takes place between governmental authorities and organised armed groups or between such groups within a State, (2) that those groups under responsible command, exercise such control over a part of the territory of the State as to enable them to carry out sustained and concerted military operations and to implement Protocol II to the Geneva Conventions of August 1949, and (3) that hostilities take place at a level in excess of that which could be characterised as merely internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature[9].

[8] "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health, dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing into concentration camps and other illegal arrests and detention, deprivation of rights to a fair trial; forcible service in the armed services of enemy's army or its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on a large scale of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or twenty years of imprisonment"..

[9] See Protocol II to the Geneva Conventions of 12th August 1949, *P v Tadic*, Appeal on Jurisdiction Judgment, Case No. IT – 94-1-A73.1, Appeal Chamber, 2nd October 1995, para70, *P v Akeyesu*, Trial Judgment, Case No. ICTR – 96 – 4 – T, Trial Chamber 1, 2nd September 1998, paras 620 and 625, and see the ICRC Commentary to Protocol II.

That an armed conflict so defined existed in Kosovo for some period(s) during 1998 and 1999 is not in doubt and has not been disputed in any of the evidence or arguments heard by the panel, and the evidence of all defendants, certain parts of which are referred to below, supports this conclusion. Relevant materials in this regard include: the UN Security Council Resolution 1199 (1998) dated 23rd September 1998, in which the following statement is recorded:

"Noting further the communication by the Prosecutor of the International tribunal for the Former Yugoslavia to the Contact Group on July 7th 1998, expressing the view that the situation in Kosovo represents an armed conflict within the terms of the mandate of the tribunal.

Gravely concerned at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army which have resulted in numerous civilian casualties and according to the estimate of the Secretary General the displacement of over 230,000 persons from their homes."

Subsequent Security Council resolutions recognise the need to maintain international peace and security, which was threatened by the widespread acts of violence and displacement of persons in the region.

The defendant Latif Gashi in his evidence to the trial panel stressed that the KLA in the Llap zone, "publicly appeared in the Llap operative zone somewhere in the middle of May 1998" and was acknowledged as an army both nationally and internationally. He stated that from that time until the middle of September 1998 he had worked in organising help for the sector of health and logistics[10]. He stated that the first battle in the Llap zone took place on the 15th September (Kacandoll).

As referred to above, Rrustem Mustafa in his evidence stated that he had become the Commander of the Llap zone sometime in September 1997 and that the war in the Llap zone started later than in other areas of Kosovo[11]. He stated that detention centres had been operated by the KLA in the Llap zone from about the end of August 1998.

The claim of the defence that at least part of the counts mentioned in the indictment could not be considered as war crime since, it is said, no significant armed conflict occurred in the Llap zone before September 15, 1998, is misconceived. Humanitarian law is to be applied to the whole of the territory under the control of one of the parties, whether or not actual combat occurred at the time and place of the events in question. It is therefore sufficient if the crimes concerned were closely related to hostilities occurring in other parts of the territories controlled by either party to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed pursuant to the attempt of one party, here the KLA, to consolidate and enlarge the territories under its control, and followed by reprisal attacks of the other party in the conflict (FRY and Serbian security forces), even if these events take place in areas and at times outside the scope of the indictment. Furthermore, there is no doubt that the relevant offences were committed in furtherance or in order to take advantage of the situation created by the fighting already happening in other areas of Kosovo.[12]

[10] TM 20.02.03, p11.
[11] TM 14.03.03, ps 7,9.
[12] See Kunarac, Kovac and Vukovic IT-96-23 and IT-96-23/1 "Foca", Judgment, para 568.

The OSCE and other major reports referred to herein provide useful insight into major events and developments concerning the hostilities in Kosovo during 1998 and 1999. The OSCE report states[13] that *"By the beginning of 1998, the nature of the Kosovo situation had changed. A new element had entered the equation in the form of the Kosovo Liberation Army (UCK), and the Serbian authorities were responding with a huge increase in military force."* The same passage continues a little later, *"The Serbian authorities brought in special security forces in January 1998. They responded to clashes with the UCK by reprisal attacks on villages, using military helicopters and armoured personnel carriers, accompanied by brutal house-to-house raids and indiscriminate arrests. Two such attacks on villages in late February were followed by an assault on the village of Donki Prekaze/Prekazi I Poshtem (Srbica/Skenderaj municipality) in early March, where at least 54 people were killed including a local UCK leader, most of his family and other women, children and elderly men. The reprisals continued with further attacks on villages in the central Drenica region, causing many villagers to flee their homes. In this downward spiral of violence, many Kosovo Albanians, including erstwhile supporters of the LDK's non-violent stance, became UCK members or active sympathizers"*. The same passage also states that, *"Substantial additional Serbian military reinforcements were sent in to Kosovo in May 1998"*, and that a, *"strong final warning"*, from European governments in June was ignored as Serb forces were concentrated in the Drenica region and along the south-western border, using Artillery to force villagers out of their homes and then going in to loot and burn them.

The Report for the Prosecutor of the ICTY[14] provided a detailed account of the KLA as an organised armed group engaged in protracted armed violence. Whilst noting that this report was prepared for a prosecution agency, this court is impressed by its careful and moderate assessment of the growth of the KLA. The report states that, *"By the end of 1997, however, it (the KLA) was demonstrating its ability to launch coordinated operations over a fairly wide area, indicating the emergence of a high degree of organizational structure, …"*, and indicates that KLA numbers had swollen to several thousand towards the summer of 1998. Later, the report states, *"Before the Serbian/FRY offensive at the end of July 1998, the UCK controlled significant regions of Kosovo, from the Drenica area south to Malishevo"*. Whilst the report makes it clear that the KLA was not fully unified and that from time to time its fortunes fluctuated, it rightly emphasises that the level and duration of the violence described, *"far exceeded the isolated or sporadic attacks characteristic of a civil disturbance"*.[15]

In this context it is important to note that it is not necessary for the prosecution to prove neither that the KLA was a fully unified force nor that it had reached the same level of development across Kosovo.

It is a well-known fact that the NATO campaign against FRY and Serbian forces began on the 24th March 1999 and was formally suspended on the 10th June 1999[16]with FRY and Serbian forces withdrawing from Kosovo from the 12th June 1999. There is, however, no basis in the evidence to support the view that any sufficiently close relationship existed between NATO and the KLA as would be necessary for the entire conflict in Kosovo to be considered international. The better and sustainable view is that between 24 March and 10

[13] Kosovo "As Seen, As Told" Part 1 Executive Summary p4.
[14] Report on Serious Violations of International Humanitarian Law in Kosovo in 1998, February 1999, pages 15 – 19.
[15] See also the full assessment of this issue in the Case of Miroslav Vuckovic, Mitrovica District Court, C.C. No. 48/01 verdict dated 25th October 2002, p 38 - 43
[16] "As Seen, As Told" Part 1 Executive Summary p7.

June 1999 an international armed conflict between NATO and FRY and Serbian forces co-existed alongside the internal armed conflict between the FRY and Serbian forces and the KLA. The former conflict did not change the character of the latter, which remained internal. For the conflict between the FRY and the KLA to be considered as international, it would be necessary to establish a clear link between the KLA and NATO forces, sufficient to show that the KLA acted as an agent of the ten NATO countries involved in Operation Allied Force by being under the 'overall control of the latter'. The overall control test, in the words of the ICTY's Appeals Chamber in the Tadic case requires proof of, "control by a State over subordinate armed forces or militias or paramilitary units (…) of an overall character and must comprise more than the mere provision of financial assistance or military equipment or training".[17] There is no evidence to demonstrate such a relationship in the context of the conflict in Kosovo, and thus the court is satisfied that in the period between 24 March and 10 June 1999, the armed conflict between FRY and Serbian forces and the KLA remained internal in character. Hence, as far as the applicable international humanitarian law is concerned, each party in the conflict was bound to apply, as a minimum, the fundamental humanitarian provisions of international law embodied in the four Geneva Conventions, Common Article 3, the 1954 Cultural Property Convention (Article 19) and the 1977 Additional Protocol II, as well as customary international humanitarian law effective at the time of the conduct.

Conclusion: it is not necessary for the trial panel to ascertain a precise date by which the hostilities in Kosovo had achieved the status of an armed conflict save to say that the trial panel has no doubt whatsoever that for the period covered by the indictment, from the beginning of August 1998 until at the earliest the 10th June 1999 an internal armed conflict existed in Kosovo between the KLA (UCK) and armed forces of the Federal Republic of Serbia and the Federal Republic of Yugoslavia, including the Yugoslav Army (VJ), and forces of the Ministries of the Interior of the Federal Republic of Serbia and the Federal Republic of Yugoslavia.

Participation of the accused in the armed conflict.

Each of the accused confirmed that he had participated in the armed conflict. It was clearly established that the KLA had a hierarchical command with a body known as the *"zone command,"* comprising a number of commanders of various sectors[18].

In their evidence the defendants stated that they held the following positions in the Llap zone of the KLA.

Latif Gashi: was actively involved in the KLA prior to August 1998 and from about November 1998, was Commander of the Intelligence Service although, according to him, this service was never effectively operated. Mr. Gashi stated that he was fighting in various battles during 1998 and 1999, the first of which was at Kacandoll on the 14th or 15th September 1998. In the assessment of the trial panel he was well known and charismatic and the panel also found that during 1998 he featured in contemporary Serbian intelligence documents as one of the prominent figures in and leaders of the Llap zone command of the KLA[19]. He disputed that he had any role concerning detainees or the military police at

[17] ICTY, *Tadic*, Appeals Chamber, Jurisdiction, para. 76.
[18] See generally the evidence of both RM and LG to the Investigating Judge and also to the trial panel.
[19] See Court exhibit 2 (original item number 49), document dated 15th December 1998, p2: *"in Llapashtica where they (the KLA) have an improvised prison headed by the so-called security body (meaning person in a position of authority) called Latif Gashi, called Lata".*

Llapashtica however it was fully clear to the trial panel that he held a position that put him in effective control as Commander of the Military Police from October 1998 until May 1999.

Nazif Mehmeti: joined the KLA about a year after its formation. He described his position as deputy Commander of the Military Police. The trial panel found that his functions in the Military police Headquarters at Llapashtica during the period from early November 1998 until 24th March 1999 were to act as the immediate subordinate of Latif Gashi and as supervisor of the military police. He was in charge of the security of the detainees and was responsible for the guards of the detention facility[20].

Naim Kadriu: described himself as, *"Chief of the Sector of Public Information"*, in the KLA but that he had been a member of the KLA in the Llap zone for a period of twenty-four days only from 28th February to the 24th March. However, his diaries and notes[21] provide highly detailed accounts of the period between late February 1999[22]and 12th June 1999. The trial panel rejected as wholly incredible his explanation that these materials were a mixture of fact and fantasy based on accounts he had received from persons after the war and collected by him for the purposes of his personal interest of writing a history book.[23] By way of an example of this point, the evidential materials concerning the Sinani incident in early June 1999[24] clearly show that Naim Kadriu was an active member of the KLA at that time.

Rrustem Mustafa: was Commander of the Llap zone[25] throughout the period of the indictment and had the power to release and thus detain detainees[26]. He was in overall control of all KLA issues within the zone, and provided a description of the hierarchy.[27]

Conclusion: with the exception of Naim Kadriu who denied, but was nevertheless proved to have been an active member of the KLA at the time of the events with which he was charged, each of the accused accepted that he had been an active member of the KLA within the Llap zone during the period of the armed conflict. Accordingly, the trial panel holds that the participation of each of the accused as a participant in the armed conflict has been proved. This conclusion does not, of course, in any way affect the issue as to proof of specific criminal acts or individual participation therein.

Nexus.

[20] See his evidence TM 25.02.03, p7 and 26.02.03 ps 10, 11.
[21] See especially Court exhibits 9, 10, 11, and 12 (original item numbers 2, 9, "B" and "A")
[22] E.g. Court exhibit 9 (original item number 2), entry 28.02.02: *"Today is the last day of February. It is also my last day working fro the UCK in civilian clothes. Today I put on the UCK uniform"* etc followed by numerous accounts of events, information, personalities in the period late February until mid June including his account of the incident relating to Halil Sinani and witness "Q".
[23] See TM 11.03.03.
[24] See below.
[25] TM 14.03.03 p5
[26] See TM 17.03.03 p3, and Court exhibit 4 (original item 21) loose pages – decisions concerning amnesty and release of detainees in the period 31.12.98 to 05.04.99, but note that the trial panel considered that the "Amnesty document" dated 05.04.99 was not a genuine reflection of the order of RM, but a document signed by him in order to cover up for the true nature of his order namely that some detainees should be released and others killed. As far as the other documents are concerned, the trial panel had no reason to doubt their authenticity and thus accepted them as genuine.
[27] TM 14.03.03 p8.

All the acts alleged in the indictment are said to have, by their very nature, a nexus with the armed conflict, that is to say[28]a close connection or link with the armed conflict. At the heart of the allegations was the assertion that the persons detained were kept in detention because of their alleged collaboration with the Serbs or for other alleged criminal acts, that their treatment whilst in detention including the conditions in which they were held and the eventual murder of some detainees, all occurred in the context and as part of the KLA Llap zone effort to repel and defeat FRY and Serbian armed forces. The trial panel found a great deal of confirmation of the basic reason for detention from the evidence of the accused. Rrustem Mustafa stated that detention took place as a preventative measure,[29]and Latif Gashi made similar observations in his evidence[30]. The issue of detention will be dealt with in greater detail later in this verdict however it is fully established that all the events that the trial panel found proved were intimately linked to the aims and aspirations of the KLA in the Llap zone, namely, as already expressed, the defeat of the FRY and Serbian armed forces, and thus that a clear nexus existed between those acts and the armed conflict.

Conclusion: a very clear nexus has been demonstrated between the acts proved against the defendants and the armed conflict in Kosovo, as it existed during the period of the indictment.

Status of the victims.

In relation to internal armed conflict, Common Article 3 of the Geneva Conventions of 1949 and Article 4 of Additional Protocol II both refer to their protections being granted to persons who are taking no active part in the hostilities. As a result of its assessment of the witnesses, the evidence given by the defendants and the documentary materials in the case, the trial panel found that each of the victims in the case was not taking any active part in the hostilities. In truth, those who were placed into detention were frequently the victims of little more than gossip and rumour in respect of which there was no possibility of independent judicial review. There is very little evidence before the trial panel that any of the detainees were *"definitely suspected of or engaged in activities hostile to the Security of the State"*[31] such as might justify detention being imposed upon them. For these purposes, the trial panel holds that *"definitely suspected"* means that the detaining power must have a genuine suspicion based upon grounds which, in the circumstances of the case in question, could lead a reasonable person to that view, or, put another way, the suspicion must be one that a reasonable person, on the facts of the case, would not find so unjustified as necessarily to be rejected. A careful review of the reasons for detention of persons by the KLA in the Llap zone shows that mere association with Serbs was considered sufficient to lead to the conclusion that a person might be a collaborator and thus should be detained. Hence, and by way of illustration, merely doing business with Serbs, or having personal relationships with Serbs were cited as reasons for imposing detention: such matters are

[28] See ICTY *Kunarac* AC judgment, para 55 ("closely related to the armed conflict"); ICTY *Tadic* AC jurisdiction decision (1995), para 70 ("closely related to the hostilities"); ICTY *Kunarac* TC Judgment, pars 402 and 407 ("a close nexus"), ICTY *Delalic* TC judgment, 16 Nov 1998, para 193 ("an obvious link"), and id, para 197 ("a clear nexus").

[29] TM 14.03.03 p7 and 8 *"We could not tolerate the actions of Albanian individuals who were collaborating with the enemy forces against our army and the civilian population. Therefore I consider that we have by right detained this small number of Albanians who in cooperation with the enemy forces were endangering our army and the civilians we were protecting".*

[30] TM 24.02.02 *"Without having the possibility to work with them the decision was taken to be detained and to stop their collaboration or regarding the other person not to report the same offences."*

[31] Article 5 of Protocol II.

plainly insufficient and smack more of ethnic distrust and prejudice than legitimate concerns over security.

Conclusion: the evidence showed that the vast majority of persons detained by the KLA Llap zone were detained for reasons that cannot fairly be said to be sufficient to justify detention. Further, and no matter what the merits of imposing detention upon them, it follows that once detention was imposed upon them the victims were at all material times thereafter persons who were taking no active part in hostilities and who thus enjoyed the protection of the rights granted under Common Article 3 and Article 4 of Additional Protocol II.

Breach of Article 142 CCY.

Among the acts identified under Article 142 are "murder, torture, inhumane treatment…..forced taking to concentration camps and other illegal imprisonment, deprivation of the right to correct and impartial trial". Thus it is clear that the activities alleged in the indictment are capable of being acts contrary to the provisions of Article 142. As explained in relation to the individual acts set out below, the trial panel found that all the proven acts satisfied the requirements of Article 142.

Violation of international law.

The Socialist Federal Republic of Yugoslavia ratified the 1949 Geneva Conventions and Additional Protocol II in 1978.

Murder, torture and inhumane treatment are prohibited by Common Article 3 (1) of the Geneva Conventions and Article 4 of Protocol II, and are also prohibited acts under Article 142 of the CCY and other provisions of the Criminal Law of Kosovo.

Murder. In the circumstances of the present case, "murder", is alleged to have been committed by the deliberate intentional killing of the victims named in the indictment; the defendants named are alleged to be criminally liable by virtue of participation either directly or as an accessory.

Torture. The word, "torture", has been the subject of much debate.[32] In the view of this trial panel the difficulty may partly arise from the overlap between the concept of torture and that of inhumane treatment and the fact that the overlap involves issues of degree that cannot be the subject of exact definition. This should not inhibit any Court from reaching the conclusion that torture has or has not been established in any particular case, as the defendant will of course always receive the benefit of any doubt that may exist. This Court agrees with the definition of torture as explained in the decision in Prosecutor v Kunarac. This Court considers and defines torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, with the aim or purpose of obtaining a confession or information, or punishment or discrimination on any ground against the victim or a third party.

[32] See the extensive review of this in the *Celibici* case which considered inter alia the definitions offered in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments, the 1975 Declaration on the Protection of all Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishments, and the 1985 Inter-American Convention to Prevent and Punish Torture.

Inhumane treatment. In contrast to torture, inhumane treatment clearly involves some physical or mental abuse of a person or persons that for some reason(s) falls short of torture. Typically, the absence of a necessary aim or purpose, or the fact that the level of gravity of the maltreatment falls short of that which should plainly be characterised as torture, would support a finding of inhumane treatment rather than torture. Obviously, in circumstances of war not every aspect of human inconvenience imposed by one person on another will amount to inhumane treatment. For a conviction to be based on inhumane treatment it would be necessary to demonstrate that the conditions and/or treatment of the person(s) concerned were significantly worse than those generally prevailing in the affected territory. In relation to both torture and inhuman treatment it is appropriate to consider all the relevant circumstances as established by the evidence in order properly to assess the nature and gravity of the case. Lastly, before a conviction can be recorded it must be shown that the defendant acted with intent to inflict torture or inhuman treatment as the case may be.

Illegal detention. The view that customary international law can be identified solely by reference to ratified treaties is inadequate to provide for the legitimate expectations of persons who are victims of internal armed conflict; the jurisprudence of the ICTY, the views of eminent international jurists, and the approach of the ICRC all reflect this fact[33].

Further, it is well recognised that since the end of the Second World War the nature of armed conflict has undergone marked change so that armed conflicts essentially internal in character have become much more common and international armed conflicts correspondingly rare. It has to be accepted that internationally recognised legal obligations of parties to internal armed conflicts have from time to time been obstructed rather than advanced by the presence of treaties, which by there very nature are static in form unless and until amended; this remains true to the present day[34]. Given that the principal contracting parties cannot include any corpus of potential victims but are sovereign states it

[33] See for example James G. Stewart, "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalised armed conflict", IRRC, June 2003, Vol. 85, No. 850, p. 313 at p 313 and later p. 322, *"The then President of the ICTY, Antonio Cassesse, opined that 'there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international armed conflicts…'. Similarly minded and in contrast to the terms of the ICC Statute, at least one ICTY Appeals Chamber Judge, considered that 'a growing practice and opinio juris, both of States and International organizations, has established the principle of personal criminal liability for the acts figuring in the grave breach Articles (…) even when they are committed in the course of an internal armed conflict' (Separate Opinion of Judge Abi-Saab, Tadic Jurisdiction Appeal, 2nd October 1995). In fact, the ICRC has chosen to address what it calls 'the insufficiency with respect to content and coverage' of treaty law applicable in non-international armed conflicts by analysis of custom and not promulgation of further treaty-based law (See also J-M Henkaerts, "The conduct of hostilities: Target selection, proportionality and precautionary measures under international humanitarian law", in The Netherlands Red Cross, Protecting Civilians in 21st –Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice, 8th December 2000, p. 11). The position reflects the reality that national legislation, international legal instruments, and judicial reasoning all show that states are chipping away at the two-legged edifice of the laws of armed conflict"*. This Court adds that in its respectful opinion, the full text on this issue contained in the separate opinion of Judge Abi-Saab, referred to earlier in this footnote, provides a powerful basis for accepting the proposition quoted herein.

[34] The ICC Statute is a recent example of state-induced shunning of the critical human rights issues relating to liberty of the person in internal armed conflict. It is a mistake to regard any treaty based law such as the ICC Statute as necessarily reflecting the full extent of established international customary law, no matter how enthusiastically the signatories thereto might have been exhorted to achieve that purpose nor how keenly they assert that they did so. At p 54 of his book "International Criminal Law", Professor Cassesse points out that *"No authoritative and legally binding list of war crime exists in customary law. (An enumeration can only be found in the Statute of the ICC, under Article 8, which is not, however, intended to codify customary law.)"* Further, at p 62 Professor Cassesse states *"..in many respects the Statue marks a great advance in international criminal law, in others it proves instead faulty; in particular, it is marred by being too obsequious to State sovereignty"*.

is not surprising that, despite the efforts of the ICRC, treaty-based international legal obligations in internal armed conflict have failed to keep pace with reasonable human rights standards.

Keeping in mind that the creation of customary law by Courts is a contradiction in terms, nonetheless it must follow from the above that increasingly it will fall to Courts to declare whether or not a particular principle has or has not been established in customary international law, and this will most frequently arise in the context of internal armed conflicts. In these circumstances, Courts should not be hesitant to assert the existence of obligations under international law, despite the reluctance of states to incorporate and reflect them in treaties, if the denial of their existence is repugnant to all civilised people. This principle is already mirrored in the terms of Common Article 3(1) (d), which provides that prosecutions by a party to internal armed conflict of persons taking no active part in hostilities shall only take place before *" a regularly constituted court, affording all the judicial guarantees, which are recognised as indispensable by civilised peoples"*[35].

The effect of the Appeals Chamber decision in P v Tadic[36], was that serious infringements of customary international law are capable of amounting to war crime regardless of the nature of the conflict in which they occur. In order to qualify as such the act in question must: a) consist of a 'serious infringement' of an international rule, that is to say 'must constitute a breach of a rule protecting important values, and the breach must involve 'grave consequences for the victim'; b) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; c) 'the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule'. Although the Appeals Chamber rejected the breadth of the approach adopted by the Trial Chamber in ruling on the limitations of Article 2 of the Tribunal's statutory jurisdiction, it acknowledged that both significant state and judicial authority was beginning to support the alternate view that the grave breaches provisions applied in both internal and international armed conflict.

The Appeals Chamber stated[37] *"We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the amicus curiae brief submitted by the Government of the United States, where it is contended that:*

"the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. Amicus Curiae Brief, at 35.)

[35] ICTY jurisprudence strongly supports this approach: *" The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of existing provisions of international customary law"; P v Delalic et al, (Celebici case*), IT-96-21-T, 16th November 1998, para 170.

[36] ICTY, Appeals Chamber, Decision of 2nd October 1995 (case no. IT-94-1-AR72).

[37] *P v Tadic* Decision on the Defence Motion for Interlocutory Appeal On Jurisdiction IT-94-1-AR 72, Appeals Chamber of the ICTY, 2nd October 1995, para 83.

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in opinio juris of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (see above, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994, the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts."

In view of the materials cited, it is not clear why the Appeals Chamber was so ready to dispose of the view expressed in the amicus curiae brief submitted on behalf of the Government of the United States, a point that Judge Abi-Saab takes up in his separate opinion. Further, it must not be ignored that the Tadic case concerned factual events in 1992, whereas the present case concerns atrocities committed in 1998 and 1999, a substantial time after the exceptionally significant event of the agreement between the parties of 1st October 1992 relating to Bosnia-Herzegovina, which provided for the prosecution of those guilty of grave breaches of humanitarian law in the context of a conflict that was unquestionably internal.

In further support of this approach, the right to habeas corpus enshrined in paragraphs 3 and 4 of Article 9 of the International Covenant for the Protection of Civil and Political Rights 1966 is a fundamental principle of international law which has been described as "non-

derogable at any time and under any circumstances"[38]. Few human rights are more important than liberty of the person. Reluctance of states to incorporate these principles in relation to internal armed conflict does not undermine their validity or customary nature in the hearts and minds of ordinary people and is not determinative of whether they are or are not a part of customary international law. All civilised persons reasonably expect that persons arrested, taken into custody and liable to prosecution, other than those clearly taking an active part in hostilities, will have the opportunity to seek review of their detention by an independent body. Accordingly, imprisonment of such persons without any provision for judicial review, and followed by some ill-defined trial procedure that fails to satisfy basic international norms of fairness, is both arbitrary and illegal and cannot be defended on the basis that it was inevitably necessary for security or any other reasons, as assuming such reasons might exist does not exclude the requirements for judicial review and proper procedural protection of detainees, without which their prima facie status as civilians cannot be denied. The fact that detainees in this case were not merely deprived of their proper judicial rights but whilst in detention were exposed to a regime of beating, torture and in some cases murder, demonstrates with emphatic clarity the critical consequences that flowed from the absence of appropriate guarantees in this case.

It follows that such a regime of detention is a breach of a rule protecting important values, which, in the circumstances of this case, the Court is sure had serious consequences for the victims. In the view of this Court, treaty based law has failed to reflect the full extent of customary international law in relation to illegal imprisonment following the detention of persons who should have been but were not afforded requisite judicial guarantees.

At the heart of these issues is the fundamental though not absolute right to liberty of the person. The essence of the protection afforded by a whole raft of conventions is that deprivation of liberty must not be arbitrary. The fact that customary international law in this area cannot solely be determined by reference to ratified treaties is also demonstrated by the fact that states frequently and enthusiastically ratify treaties that assert matters of principle concerning human rights issues, particularly in relation to liberty of the person, yet are often highly reluctant to provide any specific legislative mechanism for enforcement under international law. It is not consistent with the reasonable expectations of civilised people that this awkward discrepancy should be resolved in a manner that is inconsistent with the protection of so fundamental a human right[39].

To summarise the position, it is a fact that some states in taking their respective positions in treaty negotiations relating to internal armed conflict, have a positive interest in denying rather than asserting the full extent of developed customary law. Were it not so, the army of commentators who for many years have criticised the inappropriateness of the distinction imposed by the internal/international qualification of the conflict would have had much less to complain about. Accordingly, Courts should be vigilant to ensure that customary international law is not eroded by the assertion that ratified treaties represent the full extent of developed customary international law, and thus ensure that the tension between the

[38] Report of the Special Rapporteur on State of Emergency of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. UN doc. E/CN. 4/Sub.2/1996, para 13.

[39] See Natalie Wagner *"The development of the grave breaches regime and of individual criminal responsibility by the International Criminal tribunal for the former Yugoslavia"* IRRC June 2003 Vol 85 No. 850, p.351 at p. 372, footnote 129: *"In its ruling in Prosecutor v Kupreskic the Tribunal referred to the "…progressive trend towards the so-called 'humanisation' of international legal obligations…" and in particular, to the Martens Clause, which, as a minimum, enjoins reference to the "principles of humanity" and "the dictates of public conscience (..) and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates", Kupreskic judgment, Case No. It-95-16, 14th January 2001, para 540.*

interests of individual human beings on the one hand, and the artificial body of the state that purports to represent them on the other, does not result in inadequate protection for individuals in times of internal armed conflict.

In the context of international armed conflict, the rights of protected persons in respect of internment and assigned residence are dealt with in Articles 42, 43 of the Fourth Geneva Convention, and Article 147 thereof specifically refers to the deprivation of the right to fair and regular trial. Concerning internal armed conflict, provision is also made for protection of the rights of detainees in circumstances of prosecution[40]. However, "Illegal detention," as such is neither mentioned in Common Article 3 nor in Additional Protocol II. Nonetheless, the ICC Statue makes provision for the offence of war crime in the event that proper judicial process is denied for protected persons in international armed conflict, and similar provisions apply for those taking no active part in hostilities in internal armed conflict[41].

In the vast majority of cases, persons were detained for reasons that the trial panel found were insufficient, sometimes grossly so, even for the preliminary step of arrest to be justified. In those cases, detention was arbitrary from the moment of arrest. In cases where the trial panel found that the reasons could justify arrest it was clear that no independent process of review, nor any subsequent judicial process was established by which a detainee could challenge the order for his or her detention. In all cases, the intention to prosecute detainees for their alleged offences or other violations according to the KLA, was pursued in breach of the requirements of Common Article 3 and Protocol II.

The evidence in the case indicates that whether or not a detainee was released from detention depended on the view of the senior KLA commanders and no one else. In this case the trial panel found that during the armed conflict of 1998 and 1999 Kosovar Albanians accused of being collaborators were forcibly abducted or in some cases summoned and placed into detention for alleged infractions that were at best ill-defined The essence of the allegations varied although in most cases the affect was to assert that the conduct of such persons was inappropriate or disloyal to the KLA. It was clear from the evidence of the defendants that the detention of the detainees was effected with a view to some form of summary trial process being carried out. The fact that such trial proceedings as took place lacked basic judicial guarantees, and yet the detention of many persons was maintained, leads inevitably to the conclusion that the detention of those persons was a blatant breach of Article 9 of the ICCPR, Common Article 3 and Article 6 of Protocol II[42]. The absence of any clear legal directives by the KLA governing detention and trial in areas of Kosovo under KLA control only serves to aggravate this situation.

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[40] Sub-paragraph 1 (d) of Common Article 3 demands that all persons taking no active part in hostilities who are subject to prosecution must be afforded *"all judicial guarantees which are recognised as indispensable by civilised people"*.

[41] Although there is a difference in the wording of the two relevant provisions (Article 8 (2) (a) (vi) and Article 8 (2) (C) (iv)), the provision concerning internal armed conflict directly reflects the terms of Article 6 (2) of Protocol II.

[42] Concerning Article 9 paragraph 4 of the ICCPR, the commentary of the Office of the High Commissioner for Human Rights asserts *"Also, if so-called preventative detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para.4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9 (2) and (3), as well as Article 14, must be granted"*.

In all these circumstances the detention of the detainees in the KLA Llap zone was implemented and maintained with such serious disregard for the fundamental procedural rights of the detainees that it can only properly be assessed as illegal and arbitrary[43].

As explained above, the fact that international treaty based law fails to reflect the entire content of customary international law, particularly in the area of armed conflict, is understandable and, perhaps, inevitable.

Having considered all the above matters and for the reasons given, the Court concludes; a) that the victims in the present case were victims of unlawful confinement due to the absence of proper procedural guarantees aggravated by their treatment whilst in detention, and that their confinement was therefore arbitrary and illegal, and thus those responsible committed serious breaches of international humanitarian law; b) that the rule described was, at the time of the events, and to the extent that persons so described were entitled to independent and prompt review of the orders for their detention, and other essential and basic procedural guarantees, part of the established customary law of internal armed conflict and enforceable by prosecution for the offence of war crime.

Article 142 of the CCY proscribes and criminalises a substantial number of actions, including *"other forms of illegal imprisonment"* committed *at the time of war, armed conflict or occupation"*, as long as the subject event is in violation of the regulations of international law; thus, those responsible for such offences in Kosovo can be prosecuted for the offence of war crime regardless of the nature of the conflict, always assuming that the other pre-conditions for the offence to be qualified as a war crime are also established[44].

Command responsibility in internal armed conflicts and the Applicability of Customary International Law in Kosovo.

There are two essential arguments in this area. First, that by virtue of Section 1.1 of UNMIK Regulation 1999/24 the applicable law in Kosovo from the 10th June 1999 comprises of a) regulations established by UNMIK and b) the law that was in force in Kosovo on the 22nd March 1989. Thus one argument is that since Article 210 of the 1974 SFRY Constitution was applicable at that date, international law is excluded from the internal legal framework save to the extent that it is contained in ratified treaties[45]. Further, Article 181 of the 1974 Constitution, which was restated in Article 27 of the 1992 Constitution, provides that "Criminal offences and criminal sanctions may only be determined by statute".[46] The argument also rejects reliance on Article 16 of the 1992 Constitution of the SFRY[47], which extended the terms of the previous Article 210 by

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[43] See Article 9 of the ICCPR, *(habeas corpus)* and P v Krnojelac, IT-97-25-T, 15th March 2002.

[44] See paras 132 to 134 of the Tadic decision, footnote 43 above, where the tribunal charts the progressive adoption of criminal liability for violations of the rules concerning internal armed conflict by the constituent Article of the former Yugoslavia and concludes: (at para 134) *"All of these factors confirm that customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat"*.

[45] Article 210 of the 1974 SFRY Constitution provided *"International treaties shall be applied as of the day they enter into force, unless otherwise specified by the instrument of ratification or by an agreement of the competent bodies. International treaties, which have been promulgated shall be directly applied by the courts"*.

[46] An alternative translation substitutes the word *"statute"* with the word *"law"*.

[47] Article 16

"(1) The Federal Republic of Yugoslavia shall fulfill in good faith the obligations contained in international treaties to which it is a contracting party.

incorporating generally accepted rules of international law into the internal legal order, as firstly being post 22nd March 1999, and also for being less favourable to the defendant and thus allegedly outlawed by Section 1.4 of Regulation 1999/24[48].

However, Section 1.3 of Regulation 1999/24 provides that where a matter "is not covered by the laws set out in Section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with Section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law". Customary international law is not covered elsewhere under the laws set out in Section 1.1 of the Regulation, and Article 16 of the 1992 Constitution is not discriminatory. The Court finds that the terms of Article 16 of the SFRY Constitution of 1992 comply with the human rights standards and conventions referred to in Section 1.3 of the Regulation. As Article 16 incorporates generally accepted rules of customary international law into the internal legal order the inevitable consequence is that from 1992 onwards the reference in Article 142 to "*international law*" must be read as including both ratified treaty and customary sources of international law.

The second basis for asserting that customary international law is not applicable in Kosovo refers to the terms of Section 1.4 of UNMIK Regulation 1999/24, and asserts that the position under the 1974 Constitution was more favourable to the defendant and thus must be applied by the Court. If this argument is right, regulations imposed by UNMIK will have prevented the enforcement in 2003 of humanitarian law in Kosovo which had already been recognised and specifically endorsed by Article 16 of the 1992 SFRY Constitution and otherwise. It hardly needs to be stated that this was clearly not the intention of UNMIK: the entire contents of Regulation 1999/24 are directed towards ensuring that internationally recognised human rights standards, which the 1992 SFRY Constitution itself sought to embrace, were recognised and firmly established in Kosovo.

Further, this interpretation of Section 1.4 of Regulation 1999/24 is entirely different from the explanation provided by the then SRSG in his letter of 29th December 2000, which clarifies that Section 1.4 was intended to provide that a defendant should have the benefit of a more lenient sentence in the event that the stated punishment for the offence was reduced between the date of commission of the offence and the eventual sentence.[49] Understood in this way Section 1.4, therefore, specifically does not entitle a defendant to pick and choose at will between the various laws in force between 22nd March 1989 and the 10th December 1999, (which would be quite novel in principle), but seeks to adopt and implement a very well recognised rule of human rights law.

The alternative to these arguments is that customary international law is directly applicable in Kosovo. With regard to Article 142 CCY, this argument proposes that there is no breach of the principle that criminal offences and punishments must not be retroactive where the Court adopts no more than, "an expansive adaptation of some legal ingredients of criminal

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(2) International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order.

[48] Second sentence of Section 1.4 *"In criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22nd March 1989 and the date of the present regulation"*.

[49] "The intent of Section 1.4 was to reflect the principle set forth in Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), namely that 'if, subsequent to the commission of the offence, provision is made for the imposition of a lighter penalty, the offender shall benefit thereby": Paragraph 4 of the Answer of the SRSG to the Request of Judge Agnieszka Klonowiecka-Milart for clarification of the applicable law, made pursuant to Section 2 of the said Regulation.

rules to new social conditions".[50] In *CR. V. United Kingdom*[51], the European Court held that in general the ECHR could not be read, "as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen"; (paragraph 34). Hence it is clear that the Court focused heavily on considerations of accessibility and foreseeability. This assessment is also firmly supported elsewhere.[52]The proper limitation of this approach is that no defendant should be able fairly to claim that he was surprised to find that his conduct or omission rendered him criminally liable under international law. Thus, the essence of the offence must remain the same, the development of the understanding of the offence must be consonant with fundamental principles of international law, and criminal liability must be foreseeable.

In the context of the present case, liability for command responsibility in an internal armed conflict: 1) would not create a new criminal offence, but would amount at most to an adaptation or better understanding of the criminal offence of war crime envisaged by Article 142 in connection with Article 30 (command responsibility as a criminal act by omission); 2) would implement and reflect the principle of international criminal law namely that command responsibility can apply as a customary rule of international law in both internal as well as international armed conflict in accordance with the evolution of the doctrine of human rights; and 3) would reflect the clear fact that criminal liability under international law was wholly foreseeable by the accused taking into account the trend in the application of international humanitarian law from a State-sovereignty–oriented approach to a human-being-oriented approach (See *Tadic, Jurisdiction Decision*, 2 October 1995).

In order further to explain the view that some customary rules had evolved in the international community criminalising conduct in internal armed conflict, the Appeal Chamber in P v Tadic (Interlocutory Appeal, paragraphs 94-137) emphasised the rationale behind this evolution, as follows: *"A State-sovereignty-oriented approach has been gradually supplanted by an human-being-oriented approach. Gradually the maxim of Roman law hominum causa omme jus constitutum est (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering where two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted, "only," within the territory of a sovereign State? If international law, while of course safeguarding the legitimate interest of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy gradually loses its weight"* (paragraph 97).

Thus, ICTY jurisprudence has held that violations of the humanitarian law of internal armed conflict amounts to war crime proper as a result of the evolution of customary rules in the international community with the rationale of a gradual passage from a State-sovereignty-oriented to a human-being-oriented approach. Following this reasoning it is logical to accept that the same gradual process has led to an acceptance of the principle of command responsibility to the point that it is now established as a customary rule of

[50] See A. Cassesse *"International Criminal Law"*, Oxford University Press, p149 for discussion on this issue.
[51] C.R v The United Kingdom, ECHR, 27th October 1995.
[52] See A. Cassesse, supra p153, and *P v Hadzihasanovic and others*, decision on joint challenge to jurisdiction, 12th November 2002; and decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16th July 2003, IT-01-47-AR72.

international law in internal as well as international armed conflicts. Command responsibility is pivotal within any military unit engaged in any form of conflict: a) for ensuring discipline and compliance with national and international humanitarian law, and b) in order to protect civilians and human beings against abuses and unnecessary suffering. No credible reasoning can support a difference of approach as to the application of criminal liability in this field based on nothing more than whether the conflict should be assessed as internal or international in character – a factor that is wholly irrelevant in humanitarian terms. Command responsibility in internal armed conflict is also a natural consequence of the principle of responsible command included in Article 1 of the 1977 Geneva Protocol II, as explained in the *Hadzihasanovic*[53] Appeal decision on Jurisdiction, where the court succinctly states that, "the duties comprised in responsible command are generally enforced through command responsibility, the latter flows from the former".

Furthermore, the existence of domestic case-law, emphasizing that war crime against the civilian population may also be committed against a state's own population (SC of Bosnia Hercegovina Kz. 663/53), adds further support in favour of the theory of the foreseeability of the offence. Finally, and most emphatically, the existing constitutional framework at the time of the commission of the offences, the 1992 SFRY Constitution, which made generally accepted rules of international law a constituent part of the internal legal order reinforces the legitimacy of the criteria of forseeability and accessibility as do the statements given by the accused during the main trial that they were aware of their obligations under international humanitarian law. In these circumstances there can be no real doubt that at the time of the omission that resulted in the finding against Rrustem Mustafa that he was guilty of an offence pursuant to the principle of command responsibility, the defendant knew or should have known that he was committing an offence against international and domestic law.

Nonetheless, the issue arises as to whether the terms of Section 1.4 of Regulation 1999/24 prohibit this Court from recording a conviction and sentence for an offence pursuant to the principles of command responsibility explained above, even though the defendant would or should have been under no illusion that he was committing such an offence at the time of commission. Two points should be noted in connection with Section 1.4 of Regulation 1999/24. Firstly, the correct understanding of Section 1.4 is as explained by the then SRSG, Mr. Bernard Kouchener, and referred to above; it is not intended to allow a defendant to defeat a prosecution by reference to an earlier legal provision which had been amended prior to the date of his offence. Secondly, the second sentence of Section 1.4 clearly was not addressing the embodiment of fundamental principles of international law for the overall benefit of society through the medium of constitutional change. Thus, this Court considers that the argument that the terms of Section 1.4 prohibit recourse to Article 16 of the 1992 constitution is misconceived.

In any event, the conclusive point is that even if the widest interpretation is given to the second sentence of Section 1.4 of Regulation 1999/24, not even an UNMIK Regulation can stand in the way of the implementation of fundamental rules of international law, as international human rights standards have primacy over domestic law, something both recognised and endorsed in Section 1.3 of the very same regulation and Chapter 3 of the Constitutional Framework.[54] In this context, UNMIK Regulations are a form of domestic law and have no particular international or superior quality.

[53] See above.
[54] See UNMIK Regulation 2001/9.

Finally, it is a well-established rule of international law that in order to seek to avoid the applicability of customary international law a state must consistently and regularly assert its opposition to the same and thus show clearly that customary international law shall not apply within its territories. Not only is there no example of this within the modern history of Yugoslavia, or any of its component parts, but the adoption and implementation by the FRY of the essential human rights conventions and the broadening of the definition of international law in Article 16 of the Constitution in 1992, clearly indicate that the intention of the legislature was to embrace and not reject customary international law.

Accordingly, this trial panel holds that the customary international law of internal armed conflicts including the doctrine of command responsibility was well established as particle of the internal legal order in Kosovo by the time of the events with which this case is concerned and that nothing in any UNMIK regulation has or could have impeded the prosecution and conviction of a defendant in appropriate circumstances of an offence contrary to the same.

Mens Rea

It is sufficient for criminal liability for war crime that the defendant intended to commit the substantive underlying offence (torture, murder etc), and that the offence was committed in circumstances that satisfy the other conditions under Article 142 including customary international law. The vast majority of the acts established against the defendants are direct positive criminal actions, which by their very nature demonstrate that the perpetrator was acting deliberately with a full awareness of the nature of his conduct and with a positive intent to act in that way.

The assessment of the conduct of Nazif Mehmeti as aiding and abetting Latif Gashi and Rrustem Mustafa in the regime at Llapashtica is a classic example of that concept and comes fully within the terms of Article 24 of the CCY.

In relation to the offence committed by Rrustem Mustafa concerning his command responsibility at Bajgora, there is no inconsistency between the domestic provisions of Article 30 of the and customary international law. Each establishes that criminal liability may be imposed in particular circumstances as a result of a culpable omission. Rrustem Mustafa himself accepted that in the event that any one or more of those under his control in the KLA Llap zone committed some offence he, as commander, was subject to a duty to investigate and, where appropriate, punish,[55] and the KLA clearly recognised and actively asserted its duties in this area[56]. The only rationale for such a duty is that the same is an essential feature and consequence of responsible command and exists for the promotion of good order and discipline, which is both an important military purpose, and a legitimate expectation of civilised society.

Measures taken for the protection of witnesses.

UNMIK Regulation 2001/20 (as amended by Regulation 2002/1), enabled the Court, pursuant to receiving a written petition from the Public Prosecutor, to order measures for the protection of injured parties and witnesses. The measures that the Court could grant in

[55] TM 14.03.03, p9.
[56] See Exhibit 14, item 18, document from Rrustem Mustafa concerning duties of personnel, and his evidence TM 17.03.03, p5 *"There was a clear chain of command in the KLA, which was made clear in training and writing"*.

acting upon any such petition are unlimited[57] save that the Court must first be satisfied that a) the person concerned is an injured party witness, and b) that a serious risk, as defined, exists. In ordering any measures for the protection of a witness, the Court must be vigilant to ensure that the rights of the defendants to a fair trial were not violated. Thus, despite the fact that the Regulation provides no right for the defence to be heard in opposition to such a petition, the trial panel determined that the defence should be notified in Court of the substance of any petition for protective measure, as far as was possible without compromise to any sensitive content, and invited to express their comments and/or objections thereto. As a result of this process, the Court refused a number of petitions for protective measures or ordered lesser measures than those requested by the Public Prosecutor.[58]

The European Court of Human Rights has dealt with the issue of protective measures on a number of occasions. It is very well established that whilst ordinarily evidence in trial must be produced at a public hearing, in the presence of the accused and with a view to oral examination and cross examination, in certain circumstances the Court can take measures for the protection of witnesses, including going so far as to hear witnesses anonymously, without contradicting the principle of fair trial enshrined in Article 6 of the ECHR.[59] Obviously, the measures taken should be the minimum necessary in the individual case.

In this case the Court was faced with unusually grave if not unique considerations in relation to the safety of witnesses. The Court received extensive, confidential petitions from the International Public Prosecutor and emphasises, as was frequently observed in the trial, that Kosovo is small in area and is a society with powerful social and family contacts.[60]

The specific details of the petitions of the Public Prosecutor for protective measures are confidential. The orders made by the Court are not confidential and are available to the parties and the public. Accordingly, the Court sees no purpose in setting out in this verdict

[57] See Section 3.1 *"The Court may order <u>such protective measures as it considers necessary</u>, including but not limited to:(a) to (h).*

[58] See for example decision re Milovan Stankovic TM 09.06.03, p4.

[59] See for example *Doorson v The Netherlands,* ECHR 26th March 1996, (Applic. 47698/99; 48115/99) and *Birutis and others v Lithuania*, ECHR 28th March 2002 (Applic. 47698/99; 48115/99).

[60] The following is taken from the decision of the Court dated the 18th March 2003: *"Having carefully reviewed the entire history of this case including the police reports, the materials recovered in searches of premises connected to some of the defendants, statements made to the police, the statements taken by the Investigating Judge, the information concerning threats made to witnesses to change their testimony, the occurrence of a shooting incident concerning one witness, the undoubted fact that certain witnesses have changed their testimony in circumstances that indicate they may have been intimidated into doing so, and the contents of the motion (petition) of the International Public Prosecutor referred to above, the panel finds that the requirements set out in Section 2.3 of Regulation 2001/20 are satisfied. It is clear from the history of this case as mentioned herein that a serious risk, meaning a warranted fear of danger to life, health or property as an anticipated consequence of the giving of testimony in court, exists in the case of any witness or injured party who gives evidence which incriminates or may incriminate any of the defendants, and that such risk extends to their family members.* Due to the extensive relevant factual history in this case the trial panel has no doubt whatsoever that such risk applies in the case of all witnesses and injured parties (and to the members of their families) proposed by the prosecutor and is further satisfied that the protective measures are necessary to prevent serious risk to those witnesses, injured parties and family members. Furthermore, it is true that following an unrelated but similar case tried in Pristina at the end of 2002, a witness and two relatives with him at the time were shot dead, thus demonstrating the extent to which danger to witnesses and injured parties in cases of this type may also extend to family members."

the reasons for ordering protective measures in individual cases. Nonetheless, the Court should explain the principles that led to the specific measures being taken.

By its order of the 18th March 2003, and in response to the first petition of the Public Prosecutor for protective measures to be applied pursuant to Section 3 of the Regulation the Court, in relation to the witnesses identified in the petition, ordered:

- The names, addresses, working places, profession, and any other data that can or may be used to identify the witnesses or injured parties shall be omitted and expunged from the Court records.
- That each witness and injured party may, at his or her request, testify in a room separate and hidden from the courtroom and may give his or her testimony to the court via electronic translation equipment: this may include the use of a translator to relay the testimony to the court and voice altering equipment.
- A pseudonym, either a number or letter shall be used to identify each witness or injured party for the purpose of giving evidence.
- During the testimony of the witnesses and injured parties, the public shall be excluded from the courtroom and the court building and from its secure curtilage.
- Defence counsel are hereby ordered not to reveal the identity of any witness or injured party nor to disclose any material or information that might lead to any such identity being revealed.

Subsequently, the International Public Prosecutor presented further petitions to the Court pursuant to the Regulation and having heard the submissions from defence counsel and, in some instances, some of the defendants, the Court granted specific orders in relation to individual witnesses within the confines of the general order set out above. In particular, the Court modified its approach to the issue set out under item 2 herein, considering that the Court should only permit a witness to give evidence from the booth in the most exceptional circumstances. Accordingly, the Court permitted witnesses to give evidence from the booth in just two instances and for the reasons explained. The Court will deal further with the orders made for individual witnesses in the course of the review of their testimony.

In addition, concerning Witness "4", the International Public Prosecutor submitted a petition to the Court in which he asked for an order that Witness "4" be allowed to remain anonymous to the defence. This witness had given testimony before the Investigating Judge on the 18th October 2002; some defence counsel were present on that occasion and all defence counsel had been informed of the hearing. From the records of that hearing the defence knew that the witness was a person who had been detained at Llapashtica in the period of November 1998 to March 1999. Although the trial panel granted a request that the identity of the witness remain technically anonymous to the defence, the defence were permitted access to the Brown book (Exhibit 4, item 12), as an essential exhibit in the case, which together with the witness' own account revealed a number of facts relevant to his personal identity. In the event, the identity of the witness was or could easily have been known to the defence. Accordingly, the trial panel considers that this witness was not someone whose identity truly remained unknown to the defence.

It is necessary to consider the correct interpretation of Regulation 2001/20. The principal Sections are Sections 3 and 4. Section 3 is concerned with protective measures that do not impinge on the ability of the defence to know the identity of the witness: the Section is concerned with protection of the witness from risks that might be engaged in the event that

the identity of the witness becomes known to the public.[61] On the other hand, Section 4 provides for orders for anonymity. Section 4.2 applying to a witness not proposed by the defence, is aimed at situations in which the Court is asked to order that the witness remain anonymous to the, "accused and the defence attorney". The paragraph states that, "anonymous", refers to the absence of revealed information regarding the identity or whereabouts of an injured party or witness. In understanding these words it must be remembered that they are provided in order to assist the implementation and purposes of Section 4. A useful means by which to understand the concept of anonymity is to consider the other side of the same issue, namely the means by which the identity of a person is established. Frequently, a name alone will be sufficient information for the identity of the person to be clear. However, should name alone not suffice to identify the person concerned, then other personal details may be needed, for example date of birth. In the result, the issue of whether an injured party or witness is or is not anonymous to the defendants and defence attorneys cannot be settled other than by an examination in each particular case of the extent and nature of information relevant to the issue that was in the hands of or available to the defence and their reasonable understanding of that information.

The International Public Prosecutor further requested that Witness "4" and Witness "H", be permitted to give their testimony from the private booth at the side of the court. In the case of Witness "4" and Witness "H", who was prepared for his name to be revealed, but not in front of the public, the trial panel first examined the witnesses in closed session. The Court took this step pursuant to Section 2.4 of the Regulation in order that the Court would be in the best position to decide whether and if so what protective measures should be ordered, and also in order to have the opportunity to observe the demeanour of the witness when confronted with questions from the panel. Having followed this procedure the trial panel considered that it would be able satisfactorily to assess the testimony of each of these witnesses notwithstanding that they remained in the private booth during their testimony. Accordingly, the trial panel granted the request and allowed both witnesses to give their testimony from the private booth, thereby protecting the physical appearance of the witnesses from sight of defendants and their counsel. With regard to witness 4 he was the first witness to give evidence in the case. At that time, and in the light of the factors outlined above, the concerns of the Court as to the security of witnesses were at their highest. The Court formed the view from the demeanour and apparent fear displayed by the witness when spoken to in closed session that the witness was gravely afraid of giving evidence in Court. In the case of witness, "H", a young man, he had been in protective custody for about eighteen months and appeared at court wearing a bulletproof vest. The Court considered that he was probably in greater danger than any other witness in the case. Further, due to his youth, his appearance may well have changed markedly over the passage of time since the events in question, and therefore it was highly desirable to ensure that he was not seen by any person unless absolutely necessary. Accordingly, the Court considered that he should give evidence from the private booth. The defence knew the identity of Witness "H". These were the only cases in which witnesses gave evidence from the private booth. A total of 46 witnesses gave live evidence in the case.

The evidence then proceeded in the normal manner with the parties able to put their questions to the witness through the translator. The Court considered this method of examination to provide a satisfactory quality of judicial process, and notes that in a number of instances the Court is permitted to evaluate the evidence of witnesses who are not, "seen", in trial by either the defence or the panel: thus, the testimony given with the use of voice and image distorting equipment is considered acceptable in appropriate cases, and of

[61] See the examples of protective measures in item (a) to (h) in Section 3.

course subject to the defence having at some point in the judicial process having had the opportunity to cross-examine, the Court is permitted in specific circumstances to evaluate testimony of witnesses not before the Court.[62] In the present case, however, the Court did see and speak to the witnesses prior to their testimony being given and most importantly the Court also had the benefit of the testimony given by these witnesses before the Investigating Judge.

Principles relating to the Assessment of the Evidence

In assessing the evidence in the case, the trial panel is obliged to evaluate all the material that is presented by way of evidence in the main trial[63]. In the case of a witness who was examined by the Investigating Judge the trial panel is not bound to accept the evidence of the witness given in the main trial but may, as long as the matter is properly examined at trial and where appropriate, reasons justify this course, adopt instead part or all of the account of the witness given in the investigation.[64] Clearly this is important in a case where a defendant or witness at trial gives an account wholly different from that given to the Investigating Judge, particularly bearing in mind the positive duty of the Court to seek to establish the truth[65].

Material or Physical Evidence

The trial panel compiled a list of the material or physical evidence, referred to as "Exhibits", that it intended to evaluate in the trial. Many of the exhibits evaluated by the trial panel were recovered from the offices of the Kosovo Albanian Information Service, known as "KSHIK" or "KIS", by international police following the arrest of Latif Gashi, Nazif Mehmeti and Naim Kadriu in late January 2002. Latif Gashi worked at the KSHIK at that time,[66] and confirmed that, *"All materials seized from the offices belonged to the KIS"*. Although the defence raised a number of objections to the lawfulness of the search, based upon alleged breaches of the LCP, the trial panel had no doubt whatsoever that it was right to admit the documents recovered in that search and to evaluate them in the trial.

Latif Gashi stated that he was seriously impeded in the presentation of his defence by the alleged loss of a contemporary diary that was said to have been in his office at the time of the search and in which he stated that he had included details of all the battles that he had participated in: the implication was that this document had been lost either by the police or subsequently by the Court. Mr. Gashi had mentioned his diary when first examined before the Investigating Judge on the 28th January 2002 and raised the issue again before the trial panel. During the trial, pursuant to a proposal of the defence counsel on behalf of Latif Gashi, the Court heard evidence from Albana Muhaxhiri. She stated that she was present when Latif Gashi's office was searched and stated that all the documents in his office were

[62] See e.g. Article 333 (1) and (2) of the Law of Criminal Procedure of the Federal Republic of Yugoslavia – circumstances in which the trial panel may read the testimony of witnesses not before the Court.
[63] Article 347 (2) LCP: *"The court has a duty to conscientiously evaluate each piece of evidence individually and, in connection with other evidence and on the basis of that assessment, to frame a conclusion as to whether the fact has been proved"*.
[64] See decisions of Supreme Court of Croatia I Kz. 962/72, July 26th 1972, and I Kz. 13329/76, 20th January 1977, and Article 16 of the LCP: *"The right of the courts and of government agencies to participate in criminal proceedings in evaluating the existence of non-existence of facts shall not be bound nor restricted by the formal rules of evidence"*.
[65] Article 15 (1) LCP: *"The courts and government agencies participating in criminal proceedings must truthfully and completely establish the facts which are important to the rendering of a correct and lawful verdict"*.
[66] TM 25.02.03, p3,4.

taken away by the police. Later in her evidence, in relation to a direct question from Latif Gashi as to whether she had ever been asked to write something private or personal for him, this witness stated that she had been working on the transcription of his diary onto his office computer during the weekend immediately prior to his arrest and had left the original on the top shelf of his desk. When this matter was explored further the witness stated that she had not saved the work she had completed on either the computer itself or on a disk, but then she contradicted herself by saying that, *"The truth is I did save it for a short time and then I was deleting it"*. The witness went on to say that she would save her work until Latif Gashi had read it and only then would delete it. Realising that this evidence suggested that her work would still be on that computer, the witness stated that she had saved the work that she had completed, *"but later it was deleted by a virus"*.

In the Court's view this witness was prepared to alter her answers with complete disregard for the truth in whatever manner she believed might assist her in giving evidence. Latif Gashi also confirmed that this witness had been working on the transcription of his diary during the weekend prior to his arrest, however the Court noted that he had never previously spoken in these terms either to the Investigating Judge or to the trial panel, and accordingly the trial panel was clearly of the view that this was untruthful evidence manufactured in order to strengthen the complaint relating to the allegedly missing diary. The trial panel also noted that the evidence of Latif Gashi in trial was remarkable for the conspicuous detail with which he was able to recount his movements during the period under scrutiny between mid 1998 and the end of hostilities in mid June 1999. In particular, he was able to give precise details of dates and places when he took part in battles, and dates and identities relating to KLA persons wounded or killed. Accordingly, the Court concluded that whether or not the diary referred to was lost in the course of the search, it was clear that Latif Gashi had available to him detailed information as to his whereabouts over the relevant period and, therefore, that he was not significantly hampered in his defence. In so far as Latif Gashi was seeking to say that it was impossible for him to have committed any of the acts alleged against him due to his participation in fighting, the Court is aware due to the relatively small area of the territory in which the KLA Llap zone was operating that it was possible for a person to travel from one place to another within the zone in a short time, even in the most difficult times during 1998 and 1999. Further, the Court was satisfied that senior KLA personnel had vehicles in which they could travel when necessary.

Pseudonyms of witnesses.

In the course of the judicial investigation into this case many of the witnesses were referred to by pseudonyms. In order to ensure the safety of witnesses at trial and for convenience, many witnesses were also referred to at trial by the same pseudonyms, although this was not necessary in all cases. This did not mean that the witnesses were anonymous to the defence as the defence knew the identity of these witnesses. The purpose of the trial panel in following this practice was to seek to reduce as far as possible the risks to those witnesses.

ASSESSMENT OF THE EVIDENCE

Introduction.

In assessing the evidence in this case the trial panel found that the most helpful approach was, in general, to consider the evidence chronologically in relation to each significant separate location that featured in the case.

Bare/Bajgora: August/September 1998[67].

The accounts of the defendants.

Latif Gashi stated that he had assisted in the sectors of health and logistics from May until September 1998 and that he had first been involved in heavy fighting on the 15th September at Kacandoll. Concerning all detainees he said *"It is not true that I participated in the questioning of any of them or that I have maltreated any of them or that I have murdered any of them".*[68] He was a member of the zone command during that time but had not attended zone command meetings. He alleged that the witness Myrvette Konushevci had received threats from members of the Kosovo Police Service. In simple terms, Mr. Gashi's account was that he had nothing whatsoever to do with events at the detention centre at Bare/Bajgora during August and September 1998.

Nazif Mehmeti stated that he was not involved at all with the KLA until, at the earliest, late October 1998, and as explained below, the trial panel found that this was truthful and accurate.

Naim Kadriu was not charged in relation to any events relating to Bare/Bajgora.

Rrustem Mustafa stated that he was Commander of the KLA Llap zone from September 1997. He stated that there was only one detention centre and that it was located at different places including Bajgora, Majac, and Llapshtica. He stated that he kept himself informed about detainees but was not informed about everything. Mr. Mustafa stated that the zone did not wish to question detainees. He gave relatively little detail about the situation of detainees at Bare/Bajgora, however in general terms the defence was that he was not aware of any ill-treatment of detainees and that conditions for detainees in the various detention centres was certainly no worse than the conditions affecting the civilian population. He explained that the KLA was obliged to take action against those who threatened the security of the people, that their intention in detaining persons was to prevent those people from continuing with their actions, and in effect that the measures taken were those unavoidably necessary in the circumstances.

Detention and the Detainees.

It was clearly established that some form of detention facility operated at Bare/Bajgora in August and September 1998[69]. Rrustem Mustafa stated, "*Concerning Bajgora, some people were detained there, this may have been around the end of August 1998"*. Witnesses who spoke of detention at Bajgora were Milovan Stankovic, Fadil Sulevici and Islam Ahmeti. As to the dates of his detention Stankovic stated that he was detained on the 2nd August 1998 and released after 56 days on the 26th September 1998[70]. Stankovic gave his evidence in public. He stated that he was detained in a total of four different places including

[67] It is clear from the evidence that during the months of August and September 1998, the detainees were moved between Bare, Bajgora and other locations, with Bajgora being the main location. Sometimes witnesses and defendants referred to Bajgora as the generic name for the detention facilities in use at that time (see Rrustem Mustafa below): the trial panel also on occasions refers to Bajgora in this way.
[68] TM 20.02.03, p10.
[69] See TM 14.03 03, p9.
[70] TM 09.06.03, p8.

Bare/Bajgora, and when he was freed he was given a release order which gave the date of his release as the 26th September 1998 (Exhibit 27). Defence counsel allege that this document is a forgery, however forgeries are normally created in order to serve some improper purpose. Whilst it is true that the document is not written in precisely the same style as other documents said to have been issued by the KLA, it is also true that those other documents are not uniform in nature. In this case, the panel cannot see that the document serves any purpose that would be consistent with forgery: that Stankovic was in detention until at least the 15th September was confirmed by the evidence of other witnesses detained with him, and the trial panel cannot see any purpose in adding an extra ten days to that already substantial period especially when Stankovic himself does not allege that anything of fundamental significance happened during that time. In addition, it is quite possible that the form of documents varied from time to time bearing in nature the limitations under which the KLA was operating especially during 1998. Finally, the text of the document is wholly consistent with KLA authorship. The date of the 2nd August appears on a number of medical reports (see Exhibit 28). Although the latter date, 26th September, was disputed, the defence arguing that it was no later than the approximately 15th or 16th September when Stankovic was released, the trial panel noted that a very similar date, the 27th September, was given in a medical report concerning the condition of Stankovic and prepared in March 1999 (Exhibit 27).

Stankovic stated that while he was in detention so also were approximately six Albanians including Sabit Berisha and Osman Sinani.

Sabit Berisha[71](read) said that he had been detained on, he thought, the 18th August 1998 and was held for about twenty days by the KLA at Bajgora. He stated that he had been in detention with Stankovic who had been released some half an hour before him. According to this account, he and Stankovic were released on about the 7th September 1998, a date unsupported by any other evidence and considered by the panel to be inaccurate.

Fadil Sylevici[72]gave evidence in public and stated that he was detained by the KLA in Bajgora from the 23rd August 1998 until the 15th September when the detainees there were evacuated to Llaush from where they were released on the 17th or 18th September 1998: he stated that Stankovic was released one day before him.

Islam Ahmeti[73] (read) stated that he was detained from the 2nd September 1998 at Bajgora and confirmed that amongst approximately five other detainees were two called "Stank" and "Sabit": clearly these were Stankovic and Sabit Berisha. He stated that after about seven days all the detainees were moved to Majac village from where he was released on about the 12th or 13th September. He stated that he had learnt from a detainee called, "Naz", who was released after him, that Stankovic had been released after Naz: thus Islam Ahmeti was not able to assist as to the date when Stankovic was released. Bajram Ahmeti (also read) stated that he had made enquiries to trace his brother and succeeded in locating him. He stated that the detainees were moved from Bajgora and he was able to see his brother in Majac. He stated that his brother had no idea why he had been detained.

Witness Myrvette Konushevci stated[74] that contrary to police reports she had not been detained by the KLA during the conflict. She stated that she had gone to the KLA voluntarily as she had problems with her boyfriend, Agim Musliu, who had *"sold"* her to a

[71] TM 10.06.03.
[72] TM 17.06.03.
[73] TM 10.06.03.
[74] Statement to the Investigating Judge, 28.10.02.

Serb policeman, who had then maltreated, raped and beaten her. She stated that she had been held for three years by that man and had gone to the KLA, *"in order to save my life"*. The Investigating Judge noted that the witness appeared to be anxious which the witness said was due to her reliving her experiences. This witness stated that she had spoken to the UNMIK police on three occasions, and stated that she had spoken to them because Agim's sister had forced her to do so and that two of his brothers had taken her to a house and beaten her. According to the witness, however, she had told the truth to the UNMIK police namely that her life had been saved by the KLA and then the police had told her that they would take her to any country she wished in order to have her as a witness. She continued by saying that the police had shown her a photograph and she had identified the person saying that he had saved her life.

The witness continued to insist that she had not changed her account. The witness also stated that she had not complained to the UNMIK police as to the maltreatment that she had received at the hands of someone called "Bec" as she was frightened of him.

In order to assess the credibility of this witness it is necessary to consider also the evidence given by Witness "J" whose statement to the Investigating Judge dated 19th February 2002 was read by consent in the trial on the 23rd June 2003. This witness stated that she was present when members of the KLA kidnapped her brother from the family home on 23rd February 1999 and described that event in detail. She recognised three of the men as Jetullah Zhdrella, Jashar Ejupi and Hajredin Berisha. She asked for but was not told the reasons for the arrest of her brother and their request that he be permitted to attend the KLA Headquarters on the following day was refused after the soldiers had contacted their command by radio. The witness herself had joined the KLA on the 5th September 1998, and had been interrogated by Latif Gashi who had behaved in a lewd and insulting manner towards her. She had been a member of the KLA in Bajgora and could state that Myrvette Konushevci had been detained by the KLA at that time. Specifically she stated that her colleagues had told her that Myrvette Konushevci had been maltreated by Latif Gashi who had broken all her teeth. This witness had seen Myrvete Konushevci while the latter was kept in detention and saw that she was in a very miserable state and was held for three days. Latif Gashi had asked the witness whether Myrvette Konushevci was a girlfriend of her brother. The witness stated that she was unaware as to whether there were any other detainees, and that she had no particular interest in Myrvette Konushevci.

In assessing the testimony of Myrvette Konushevci and the evidence given about her by Witness "J", which, as stated, was read, the panel was faced with a situation, which was largely the word of one person against another. The panel had grave doubts about the truthfulness of the evidence of Myrvette Konushevci but ultimately felt that in the absence of clear support for the evidence of witness "J" in relation to her account concerning Myrvette Konushevci, the panel should give the benefit of the doubt to the defendant, and accordingly the panel did not find that any acts had been established against any defendant with regard to allegations concerning Myrvette Konushevci. The panel found however, that no such difficulty existed with regard to the evidence of witness "J" in so far as that witness spoke about her brother, as that part of her account is essentially consistent with the evidence of witness "I" and also with the panel's general findings as to the conditions and treatment of detainees in Llapashtica, which matters the panel evaluates in detail below.

Nuredin Ibishi[75]gave evidence in public and stated that the KLA had been in Bajgora since July 1998 and that Brigade 151, of which he was in charge, was established there by the

[75] TM 22.05.03, and 23.05.03.

end of August or beginning of September. He was aware of Stankovic being detained. The trial panel found that this witness was evasive when repeatedly asked to state who it was that was in charge of detainees at Bajgora, as all he would say was that, *"I know it was the soldiers who took care of their security. As to who was responsible I do not know"*. Given that Nuredin Ibishi was in charge of Brigade 151 operating in the area, this statement is plainly false: it is inconceivable that he did not know who was in charge of the detainees in Bare/ Bajgora. Accordingly, his statement that Stankovic *"was not maltreated"* whilst in detention is viewed as worthless by the trial panel, coming as it does from someone who was deliberately concealing the truth in the course of giving evidence. Nuredin Ibishi said that he was a party to the decision to release Stankovic and that Stankovic was not released until some time after the 18th September 1998: *"By 18th September when we were obliged to leave Bagora we did not have all the information we needed about Stankovic. I can't say if he was questioned, but we were then obliged to move and faced with a number of problems, his release was delayed"*. This part of the evidence of Nuredin Ibishi is entirely consistent with the evidence of Stankovic.

Having considered all the above evidence the trial panel is satisfied that detention of Kosovar Albanian persons including those named herein, and also the Serb Milovan Stankovic, took place at detention facilities at Bajgora in the Llap zone during the period from the beginning of August 1998 until mid September 1998, and that in relation to Milovan Stankovic the trial panel, for the reasons explained, accepts that the document Exhibit 26 is genuine and finds that he was detained by the KLA Llap zone until the 26th September 1998.

Treatment of Detainees at Bare/Bajgora

Stankovic gave a detailed account of how he had been treated whilst in detention both to the Investigating Judge and to the trial panel. Whilst the trial panel noted some discrepancies, the major elements of his account remained consistent. In addition he alleged that whilst in detention another detainee, the Kosovar Albanian Sabit Berisha, had also been badly beaten[76]. Stankovic alleged that he had been subjected to repetitive beatings and that he had had both a broom handle and a gun put in his mouth, and that his toes had been beaten with the broom handle. Sabit Berisha denied that he had been beaten or that Stankovic or anyone else had been beaten in his presence when he gave evidence to the Investigating Judge, however his distress was evident. From her questions it is clear that the Investigating Judge thought that this witness was not telling her the truth and it is very clear to the trial panel that the witness was frightened when he gave his account to the Investigating Judge[77]. Important evidence concerning Sabit Berisha, however, was provided by Fadil Sylevici who stated that Sabit Berisha had complained of being beaten during the time when they were both in detention, although he, Sylevici, had not seen any signs of beatings on Berisha or, for that matter, Stankovic. Islam Ahmeti said that he knew nothing of any beatings of either Stankovic or Berisha and neither of them had complained to him about being beaten.

[76] TM 09.06.03, p6 where Stankovic states that after a few days of beating *"It was on the 21st August when Sabit Berisha and me sustained the gravest of injuries…They beat us so severely that we both remained unconscious for two days"*. Stankovic went on to allege that he had suffered three broken ribs, a torn kidney and that his teeth were broken.

[77] See statement to the IJ 18.07.02, p8, when the witness denied speaking to the police about the case stating that he had been too afraid to speak to them.

In the view of the trial panel the timely complaint by Berisha to Sylevici supports Stankovic when he alleges that both he and Berisha were beaten. In addition, the trial panel examined the medical records produced by Stankovic (Exhibit 27). These show that Stankovic received medical treatment from the 30th September 1998 and that he had physical injuries consisting of a fractured or possibly fractured 12th rib, urological problems and substantial psychological difficulties. The medical documents relate that Stankovic complained of having been kidnapped, beaten and "tortured" whilst held by the KLA.

It is of interest that Stankovic states that the beatings stopped after he was moved to Bajgora although it was whilst at Bajgora that he suffered the worst psychological treatment when one night he and Osman Sinani were taken into the woods blindfolded and they were tied to separate trees: "*We were there tied separately. I was tied to one tree and he was tied to a different one. They told Osman Sinani to confess that he collaborated with the Serbs. I heard when they said this and I was still blindfolded. I heard them ask him three times to confess and he said he had nothing to confess and he was not collaborating with the Serbs. Then I heard three shots. Whether they shot him or not I cannot say, it was night, they had masks over their heads: dark socks over their heads. One person approached me and said, "Stankovic, open your mouth, confess or we will kill you". I said, "Kill me", I said, "Shoot once, you cannot shoot me five times". I opened my mouth and the gun clicked. It was an empty gun. I do not know who held the gun as the persons were masked. The other man was tied very tightly to a tree. I know he remained and they placed me in a Lada Niva car. I was taken to the car and he remained".*

The trial panel has very carefully analysed the evidence given by Stankovic and paid particular attention to the fact that initially, to the questions of the Presiding Judge, he denied that he had been taken back to the same place in the woods on another occasion. When this was explored further, however, Stankovic confirmed that this event had happened and the trial panel accepts that he did not fully understand the purport of the questioning on the first occasion.[78] Further, the trial panel examined with care the fact that initially Stankovic was unsure of the identity of the officer in a jeep[79] who had asked him to sign some papers and who said to him "*Stankovic, we kept animals but you are the worst animal we ever kept. We tortured you but you never confessed"*. To the trial panel Stankovic ultimately stated that he was sure that this man in the jeep was Latif Gashi, however in view of the fact that he had stated that he was not sure about this on more than one occasion, the trial panel considers that the benefit of the doubt should go to the defendant and does not base any conclusion adverse to the defendant on this part of the evidence of Stankovic.

Having fully reviewed this part of the evidence, the trial panel regards the evidence of Stankovic as essentially reliable, supported, as it is by medical documentation confirming some at least of his injuries and disabilities and referring to his earlier complaint of being beaten and tortured and also in view of the complaint made by Sabit Berisha to Fadil Sylevici which in the view of the trial panel would not have been made unless Sabit Berisha had indeed been beaten; thus Berisha is contradicted and Stankovic corroborated on this issue.

<u>Conditions at Bare/Bajgora.</u>

[78] TM 09.06.03 p 10, 11. and 13.
[79] TM 09.06.03 p10.

Stankovic stated that he weighed only 46 Kg when released having been 86 Kg when initially detained, but this fact is not alluded to in the medical records that were available to the Court. Whilst satisfied that he had indeed lost a substantial amount of weight, the Court was not able to make a definite finding as to the precise extent of that loss; further, there is a real possibility that some degree of loss of weight related to his ability to eat being affected by his injuries and this being due to physical maltreatment rather than insufficient food. There was no other significant evidence in the case as to the inadequacy of food during this period. As to the general conditions affecting detainees, Stankovic stated that more than one doctor visited detainees on occasions, which he found bizarre in view of the repeated beatings he was receiving. Further, asked specifically about conditions he stated, *"At the beginning they were very difficult. I had no food, just bread and water and during that time I was being beaten and we had to sleep in the cellars and on wet concrete floors. This applied to me as the single Serb and to all the Albanian detainees"*[80]. Later, Stankovic added that he was compelled to use a box in the room for a toilet. The other witnesses who gave evidence about detention at Bajgora did not make any substantial criticisms as to their general conditions of detention.

As to the other witnesses who spoke about conditions at Bajgora, Sabit Berisha stated that he was detained in a, *"normal room"*, with a window and sofa, and said that he was merely ordered not to talk to any other detainee. In view of his obvious fear when testifying before the Investigating Judge, together with his inaccurate evidence as to dates of detention, the trial panel concluded that he was generally an unreliable witness. Fadil Sylevici said that detainees were sleeping on mattresses and that the food was good, however earlier in his evidence he had said that, *"circumstances were not pleasant"*[81]: the witness stated that he had meant that he was being detained which was not a pleasant circumstance. The trial panel considered this explanation to be disingenuous and considers that when the witness made the remark about the circumstances he was alluding in a general way to the conditions affecting the detainees. Islam Ahmeti stated that when he was detained he was taken to a house. He said, "*When I got there we were talking together, we were smoking and telling jokes, laughing"*. Islam Ahmeti also stated that the detainees had mattresses to sleep on and blankets. This witness further stated that they were all given two boxes of cigarettes each morning – something no other witness suggested. In the view of the trial panel, the attempt by this witness to portray the conditions and atmosphere of the detention facility as pleasant and happy, where the detainees were relaxed and well looked after, was patently untrue: no person held against his will in conditions of great uncertainty could have felt other than very fearful and anxious.

In the event, the trial panel concluded that the conditions at Bare/Bajgora fell below an appropriate standard for detainees.

Was the detention illegal?

A number of issues arise for consideration: a) whether members of the KLA had any right to detain persons; b) if they did, then whether the initial detention of detainees was lawful, and c) if so, did detention become unlawful thereafter to the extent that it constituted an act of war crime by reference to both domestic and applicable international law.

[80] TM 09.06.03 p11.
[81] TM 17.06.03 p9.

The right of members of the KLA to detain persons.

As already stated, liberty of the person is one of the most important rights attaching to life, and it is not necessary further to reinforce this point by reference to the many different source materials in this area available on the international stage; nonetheless, the right to liberty is not absolute. Accordingly, essential guarantees in this area attach not to liberty as such but to the nature and quality of the procedure according to which liberty is restricted. Protocol II makes no reference to specific requirements for the assessment of the legality of deprivation of liberty of civilians during internal armed conflicts, dealing only with the fundamental guarantees for the treatment of detainees. However, paragraph 4568 of the ICRC commentary points out that the term, (persons) *"deprived of their liberty for reasons related to the armed conflict"*, concerns both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law, provided there is a link between the situation of conflict and this deprivation of liberty. Thus, the commentary seems to accept that internment of civilians may be justifiable on grounds of reasons of security in internal as well as international armed conflict. As issues of security or safety of persons are in no sense affected by the definition of a conflict as internal or international, this would seem a logical approach.

The trial panel heard a good deal of evidence from the defendants, especially Rrustem Mustafa on this issue. It was stressed many times that the defendants' case was that detention was a preventative measure which it was considered was justified as necessary in the light of all the conditions that existed at the time and was the only measure that could be taken with any prospect of alleviating the dangers caused by Kosovar Albanian collaborators.

The issue should be considered in two parts: first, initial detention or arrest, and second further detention thereafter. It is axiomatic that in armed conflict of whatever nature all parties thereto will have understandably heightened concerns as to safety of those persons whom they seek to represent in combat. The point is well illustrated in the present case where, as explained above, the admitted detention of persons by members of the KLA Llap zone was defended as justified, and in accordance with law, with the argument that such persons as were detained represented a grave threat to the security and safety of members of the KLA and Kosovar Albanians generally, and that their detention was reasonable and the minimum step necessary until such time as it was safe to release them, following trial, due to cessation of hostilities, or when sufficient guarantees from family members or otherwise were forthcoming to ensure that they no longer posed such a threat.[82]

In the view of the trial panel it is reasonable to accept that under international law in principle, and depending on the circumstances, a party to an internal armed conflict may lawfully detain persons for genuine security reasons[83]. As to whether the initial arrest may be lawful, a party to the conflict will not be acting unlawfully when effecting the arrest of a person provided that the detaining authority has a genuine suspicion that the person concerned is a threat to the security of the detaining authority or those whom it represents

[82] See the evidence of RM – TM of 14th March 2003, p7 *"All the actions, all our actions were taken under the circumstances of a necessity for defence. All our war was undertaken as a necessity for defence imposed by the enemy. We could not just sit there in vain, watching the genocidal actions of the enemy forces, so that they would slit our throat and slaughter us like sheep. We could not tolerate the actions of Albanian individuals who were collaborating with the enemy forces against our army and the civilian population. Therefore I consider that we have by right detained this small number of Albanian(s) who in cooperating with the enemy forces were endangering our army and the civilians we were protecting."*

[83] This is the natural consequence of Protocol II, Articles 4, 5 and 6 and is obviously consistent with the principle of self-defence.

in the conflict. The index of suspicion necessary to justify such action must reflect the fact of armed conflict, and so suspicion, which is genuine and not so insubstantial as would cause a reasonable person immediately to reject it, would suffice to justify the arrest.

The reasons for arrest of those detained at Bajgora.

Stankovic states that he was carrying out his work as a forester when he was captured by the KLA. Nuredin Ibishi stated that the arrest of Stankovic took place as, *"…we had a report that he had interfered with one of our positions in Potok and so he was detained. I should add that the hunters and foresters knew the area very well and sometimes informed the Serb paramilitaries, which resulted in some of the massacres in that region"*. Earlier in his evidence, this witness stated that Stankovic had been in possession of a gun when detained. As stated above, Stankovic stated that he had simply been ambushed. The trial panel has already stated that it regards the evidence given by Nuredin Ibishi as lacking reliability. Accordingly, the trial panel rejects the account of Nuredin Ibishi and accepts the account of Stankovic as to the circumstances of his arrest, and concludes that Stankovic was arrested merely because he was a Serb who was found in the forest. It is highly improbable that a Kosovar Albanian would have been arrested in the same circumstances, and therefore the trial panel concludes that the arrest of Stankovic was effected due to his ethnicity and without any lawful justification.

Sabit Berisha stated that he was arrested at about 06.00 am from his home by five members of the KLA: he did not know the reason for his arrest. He was questioned about collaboration with Serbs, which he denied and was eventually told his account had been confirmed and then he was released. There is no other evidence as to the reasons for his arrest and accordingly the Court concludes that his arrest was unlawful.

Fadil Sylevici gave evidence that after he was detained by members of the KLA he asked to see the person responsible for his arrest. He stated that a young man came and introduced himself as Commander Remi and that he had explained to Remi that he himself was a member of the KLA and Remi, *"..was interested to know to which political faction my group of soldiers was affiliated with and whether this was organised by me as a group opposing the KLA or if it was a regular group of KLA soldiers formed by Headquarters":* Mustafa confirmed this in evidence. Sylevici also stated that he was spoken to by Hysri Talla who said that they suspected that he may have been sent by the Serb police for the purpose of inciting conflict in the region. Hysri Talla later told him that his account had been verified and he was released. Sylevici made a statement to the Investigating Judge, which he confirmed at trial, and in which he explained that prior to March 1998 he had been employed by the Serbian police in Pristina. In these circumstances the trial panel can understand that members of the KLA Llap zone could have had genuine and not unreasonable suspicions as to the true nature of his activities in August 1998 in connection with forming a group of soldiers, and therefore concludes that the arrest of Fadil Sylevici was not unlawful.

Islam Ahmeti stated that he was stopped in his car by persons in civilian clothing and told that he had to go to the Headquarters to give information. He was taken to a house, searched and placed in a room with Sabit (Berisha) and Stank (Stankovic). He was questioned the same day by two soldiers who asked him about his private life and accused him of collaborating with the Serbs. At the time he had just been divorced and thought that possibly his former wife had falsely incriminated him. His brother, Bajram, stated that his

brother had no idea why he had been detained by the KLA. There is no other evidence as to the reason for his arrest and the Court finds that his arrest was unlawful.

Continuing detention after initial arrest.

Whether or not initial arrest can be justified is, however, not at the heart of this case as detention that was initially lawful may become unlawful thereafter. Whilst unlawful arrest is serious enough it is obviously a very grave matter indeed for a person to be detained without good reason over an extended period of time. As explained above, in internal armed conflict, persons placed in detention with a view to prosecution for alleged criminal offences and other alleged infractions, are entitled to independent and prompt review of the order for detention, and all the other guarantees provided under Common Article 3 and Protocol II.[84]

In this case the trial panel is satisfied that despite being reasonably well organised and established in the Llap zone by the beginning of August 1998, the KLA provided detainees with no form of adequate judicial process by which to satisfy their obligations under Common Article 3 and Article 6 of Protocol II. Rrustem Mustafa,[85] and Nuredin Ibishi,[86] and some of the detainees who testified before the trial panel and the Investigating Judge, stated that there was no form of independent judicial process available to them. However, documents suggesting otherwise recovered during the searches show that some form of judicial process was contemplated and that those taken into detention by the KLA were considered to have committed offences that would result in trial at some point in time. The defendants stated at trial that they intended to hold trials after hostilities had ended, and that they did not have the ability to hold any trials during the war. Those who are held in detention with no more than the indefinite prospect of trial at some undefined point in the future must not be in a worse position than those whose trial proceeds expeditiously. The evidence of the OSCE witness[87] was to the effect that much more specific information concerning trials was given to her by Latif Gashi. Her contemporary account of this meeting, and other relevant information concerning this aspect of the KLA, appears in an important extract of the OSCE Report "Kosovo: As Seen, As Told"[88]:

> *"Arbitrary detention by the UCK*
>
> *In an effort to assert its legitimacy, the UCK early on decided to create its own military police and judicial system. Through this exercise the UCK tried to justify what amounts to abductions of civilians who had contravened UCK dictates or its conduct of operations. Individuals and small groups of people, often accused of being "traitors or collaborators", were forcibly taken and sometimes subjected to summary trial procedures for infractions that were defined to embrace conduct deemed inappropriate by the UCK[89]. There appeared to be no legal basis for these proceedings under international or domestic law[90].*

[84] See Article 9 of the ICCPR, adopted by the former Yugoslavia in 1971, the report of the Working Group on Arbitrary Detention, 19th December 1997 (E/CN.4/1998/44), *Prosecutor v Krnolejac*, IT-97-25-T, ICTY 13.03.2002.
[85] TM 17th March 2003 *"There was no process by which a detainee could challenge his detention nor a process in which it could be decided if a suspect detained was a collaborator, they were all suspects"*.
[86] TM 22.05.03 "*We did not have a court structure competent enough to pronounce a decision or sentence…*".
[87] See below.
[88] "As Seen, As Told", p.13.
[89] Examples are given of this point.
[90] *"Article 6 (2) of Protocol II additional to the four Geneva Conventions states that "no sentence shall be passed and no penalty executed on a person found guilty of an offence except pursuant to a conviction pronounced by a*

Even if a legal basis had existed to enable the UCK to organise such a judicial system, the absence of predictability as to what constituted punishable conduct under this system would have rendered all detentions effected under it arbitrary. Moreover, these detentions were generally the result of on-the-spot decisions made by UCK members in the field, which the UCK command then tried to justify as amounting to some kind of lawful detention under a so-called "Criminal Code of War" (see below). This again underscored the arbitrary nature of such detentions.

The OSCE-KVM made several attempts at gaining access to UCK detention facilities which were denied for "security reasons". It was explained that those in the custody of the UCK were kept in houses and had to be moved around depending on the level of the fighting. However, the OSCE-KVM was on one occasion granted access to eight alleged detainees Kosovo Albanians charged with "looting, stealing or collaboration with the enemy", and was able to interview the detainees in private[91]*. The OSCE-KVM was also informed by UCK commanders that several people were kept under some form of house arrest.*

The general detention procedures of the UCK were described as follows: after information was received by the UCK police that a "Crime" (i.e. infraction of UCK codes) had been committed or when collaboration was alleged, an "invitation" was issued to the person concerned. If that person did not respond to the summons, he was taken into custody by the UCK police. These were reported to have acquired a degree of sophistication, with files, fingerprints, witness statements, UCK intelligence and so on, which corresponded to the claim of legitimacy and procedural correctness. With respect to procedure, the UCK asserted that each brigade in the UCK had a military police chief who had the authority to indict according to UCK military rules. UCK officials claimed that when people were indicted they were held in detention for up to two or three months before being brought before a court, which was said to be composed of a board of judges, an investigating judge, and a jury, all of whose members were lawyers or officers; the OSCE-KVM was not permitted to observe these trials."

This extract is, in the opinion of the trial panel, an accurate assessment of the approach of the KLA to the detention of the vast majority of persons whom they detained during the armed conflict. The KLA intended that such persons should be tried in respect of the allegations that had resulted in them being detained. Whilst the precise nature of any trial process was withheld from the OSCE-KVM it is clear that a) those arrested were not informed of the nature of the charges against them; b) the trial process was in many cases delayed indefinitely; c) there was no predictability as to what conduct was punishable; there was no independent court or tribunal.

The loose pages in Exhibit 4, item 21 include examples of written summonses for informative talks, lists of detainees "still under investigation", and decisions to release certain individuals conditionally so that they could defend themselves at liberty; these documents further demonstrate that the intention of the KLA was to mount prosecutions and hold trials against persons who were held in detention.

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court offering the essential guarantees of independence and impartiality. Few if any of the guarantees listed in the Article were provided in UCK proceedings".

[91] *"OSCE-KVM, Human Rights Division (HQ), Record of a meeting on 18th February with the UCK Zone Commander and the UCK Military Police Chief in Llapashtica (Podujevo) regarding detention visits, 26 February 1999; PZ/00/60/99."*

Accordingly, the trial panel is satisfied that the detention of those detainees took place at Bajgora in full and complete breach of all international norms as to judicial guarantees and with total disregard for the fundamental human rights of detainees.

In these circumstances, the trial panel is fully satisfied that the detention of all persons in KLA detention, whether or not initial arrest might be justifiable, was arbitrary and illegal, that is "No legal basis can be invoked to justify the deprivation of liberty"[92].

The trial panel has no reason to doubt the evidence given by the witnesses as to the dates of their detention, save, as explained, in the case of Sabit Berisha, and thus finds that Stankovic was detained for 56 days (2nd August to 26th September), Sabit Berisha from approximately the 18th August to the 12th September (or thereabouts, the earliest date given by any other detainee), Fadil Sylevici from the 23rd August to the 17th or 18th September, and Islam Ahmeti from the 2nd September to about the 12th September. Each detainee alleges that they were questioned by members of the KLA while in detention as to their activities based upon such information or suspicion that was in the hands of the KLA.

Interrogation of detainees

The panel finds evidence to the effect that detainees were not questioned whilst in detention to be wholly incredible. This was the stance taken in evidence at trial by the defendants and, particularly in relation to Llapashtica, by many witnesses who had formerly belonged to the KLA in the Llap zone. The trial panel finds such evidence to be entirely untruthful and cynical. It is inconceivable that having detained persons suspected of collaborating with the enemy no steps should be taken to find out as much as possible from them as to the nature and extent of their collaboration. Furthermore, it is clear that in some cases release took place after the account of a detainee had been confirmed; no such account could have been confirmed without it first being made available,[93] and it is unreasonable to consider that this could have taken place without questioning. The credibility of Latif Gashi, and Rrustem Mustafa, and also Nazif Mehmeti in relation to Llapashtica, was very heavily damaged as a result of their insistence before the trial panel that no interrogation or questioning of detainees took place. In the view of the trial panel statements such as, *"..it is not true that I participated in the questioning of any of them (the detainees)"*[94], *"Nobody decided who was to be questioned, it was a general principle that people would not be interrogated as we were unable to organize it during the period*[95]*"*, were totally and deliberately false.

The plain truth is, of course, that detainees were questioned at Bare\Bajgora, and thereafter at Llapashtica, and that the questioning was for the purposes of assessing whether the person had committed any act of collaboration and trying to compel an admission. In relation to Stankovic and Berisha, violence was meted out on them whilst in detention with serious injury being inflicted certainly on Stankovic, who also suffered exposure to extreme psychological trauma. Taking all these matters into account, the trial panel has no hesitation in concluding that a regime of detention, illegal under international and domestic law was in place at Bajgora from the 2nd August to the 26th September 1998.

[92] *P v Krnolejac* supra.
[93] See for example the evidence of Fadil Sylevici, a member of the KLA himself, who confirmed that he was released after Hysri Talla told him that his account had been confirmed.
[94] Latif Gashi, TM 20.02.03, p10.
[95] Rrustem Mustafa TM 14.03.03, p10.

The death of Osman Sinani[96].

The admissible evidence relating to Osman Sinani was very modest in scope. Stankovic was unable to say whether Sinani was actually killed by gunfire or not, and on balance the autopsy suggests that he was not.[97] There was no evidence as to the circumstances that had resulted in the detention of Sinani, nor any clear evidence as to his treatment whilst in detention that could shed any light on whether the event in the forest was real or mock. There is no clear evidence as to when he was killed. It is correct that his body was recovered in May 2002 and that the post-mortem showed that he had probably been killed by blunt trauma; this in turn suggests that the event in the forest may well have been a mock not real execution[98]. The only material that does support the view that he was killed by the KLA is the evidence contained within the Serbian intelligence document from Exhibit 2, item 49[99]. Whilst the Court has no reason to doubt the integrity of that document, the statement contained therein does not assist in identifying the perpetrators of the crime.

Liability of the defendants.

As to the involvement of any of the defendants in that illegal detention, the Court reached the following conclusions. The Court accepted the evidence of Stankovic that Latif Gashi was centrally involved in the multiple occasions on which Stankovic was brutally beaten. Further, the Court accepts that Stankovic was correct in his evidence that Latif Gashi was *"some kind of a superior":*[100] the Court notes how closely this evidence coincides with evidence as to Latif Gashi's activities later in 1998 and in 1999[101]. The Court considered that Stankovic truthfully implicated Latif Gashi; the Court noted that although he could have implicated Gashi in the events when Stankovic was forced to be present at a real or mock execution in the forest, and he, himself, was threatened with death when a gun was put in his mouth, Stankovic stressed that he had not seen Latif Gashi on that occasion. The Court finds that Latif Gashi was fully involved in the violence that was inflicted upon Stankovic and Berisha and further, that it is an inescapable conclusion that Latif Gashi also knew in advance and approved of the further attempt to coerce Stankovic by compelling him to witness the real or mock execution event in the forest and threaten him with death. In relation to Stankovic, whether the event was a real or mock execution is not critical as the effect upon Stankovic would have been the same in either case. It is also clear from the evidence of Stankovic that the purpose of the brutal physical and psychological treatment that he experienced was to force him to confess to his activities in the war in particular with a Serb nicknamed, "Mica", and also with Albanians.

The Court also noted the criticisms of the defence in this area of Stankovic's evidence as before the Investigating Judge he had mentioned not only the name of Mehmeti but also the name Naim Kadriu, and there was no other evidence of Kadriu being involved in the KLA until 1999. Stankovic himself was unsure of this part of his evidence. The Court found that

[96] Referred to originally as "Victim 1" but referred to here by name, as no witnesses gave evidence in his case who could be considered to be at risk as a result of his name being disclosed.
[97] No evidence of bullet wounds or fragments were discovered on autopsy.
[98] See also the statement of Dr. Marek Gasior to the Investigating Judge 28.02.02.
[99] See document dated 15th December 1998 from item 49: *"They (the KLA) killed two of their compatriots, Osman Sinani and Ragip Ibrahimi, and they kidnapped and beat up several of them among others including Sabit Berisha, Hakif Hoti, Muja Zejnulahu, Emin Berisha etc"*.
[100] TM 09.06.03 p7.
[101] See the analysis of Latif Gashi's role at Llapashtica November 1998 to March 1999 below.

whilst Stankovic was a truthful witness his recollection as to some parts of his evidence had to be treated with considerable caution as they had clearly been affected by information that he had heard later and the difficult psychological state in which he found himself after his experiences.

The Court reached the conclusion that there was no clear evidence of the involvement of Nazif Mehmeti in the KLA Llap zone prior to the beginning of November 1999 as he himself accepted. As to Rrustem Mustafa, the Court had to consider his position as Commander of the Llap zone and the fact that he certainly had some knowledge and involvement of what was happening, as demonstrated by the evidence of his meeting with Fadil Sylevici. The Court also noted that Mustafa stated that, *"there was only one (detention centre), Bajgora, Llapashtica, Majac is all one"*. The Court did not feel, however, that the evidence proved conclusively that Mustafa had initiated the regime of detention. In the course of his evidence Mustafa stated that the *"General Headquarters made the decisions about detention centres"*, and the issue of whether Mustafa took part in the decision concerning Bare/Bajgora remained unproved[102]. On the other hand the Court finds that it is established that he must have come to know of the illegal nature of the regime at some point prior to the 26th September 1998 as it is unthinkable that he could have remained ignorant of the treatment suffered by Stankovic and Berisha, and further he must have been aware that there was no judicial process for detainees. In this respect, the Court notes that Mustafa stated that, *"I kept myself informed about detainees but I was not always informed about everything"*. Further it is important to note that the KLA Llap zone was a closely knit and small organization in which the issues of detainees was obviously important.

The Court reaffirms its ruling that no verdict can be based upon the accounts of persons who were potential witnesses given orally to investigating police officers, and who do not give evidence at trial or before the Investigating Judge. To allow evidence of such oral communication would wholly contradict and undermine the procedural guarantees envisaged by Article 83 of the LCP and UNMIK Regulation 2002/8 which, taken together, only permit the use of written statements made to the investigating police in limited circumstances. Accordingly, the Court does not evaluate the evidence concerning the case of Osman Sinani that was given by various of the police witnesses.

Acts established against Latif Gashi and Rrustem Mustafa.

The Court carefully scrutinised the evidence in relation to the treatment of Stankovic by Latif Gashi and those acting under him. The repeated physical violence was severe in nature, and the psychological maltreatment could, by itself, justify the description of, "torture"; when taken together with its purpose of extracting a confession and information, there is no doubt that the maltreatment of Stankovic reached a level at which torture is the appropriate description. In accordance with the legal principles set out at the beginning of this verdict the Court concluded that Latif Gashi had beaten and tortured Milovan Stankovic during the latter's detention in the period 2nd August 1998 to 26th September 1998, and in doing so in the regime established at Bare/Bajgora had aided and abetted the illegal detention of Milovan Stankovic: Articles 142, and 24 of the CCY. In this way he had committed acts of war crime (Finding 3, Gashi, Counts 12 and 14). Rrustem Mustafa had certain knowledge that an illegal regime of detention with features of repeated violence and lack of any reasonable judicial process was operating at Bajgora between 2nd August

[102] TM 14.03.03, p9.

and 26th September 1998; Mustafa did nothing whatsoever to seek to prevent the regime from continuing or to identify or punish those responsible: Articles 142, and 30. Accordingly, the Court found these facts established, and found that they constituted acts of war crime pursuant to his command responsibility (Finding 1, Mustafa, Counts 1 and 12).

For these reasons the Court found that all the conditions had been established for the above described acts to be qualified as war crime under both domestic and international law.

Acts relating to Bajgora that were not established.

Although satisfied that Latif Gashi knew that Albanian citizens were being illegally detained at Bajgora, the panel was unable to reach any clear conclusion as to the role of Latif Gashi in relation to those detainees, even though he was rightly identified as, *"some kind"* of superior by Stankovic, nor was the panel able to conclude that at that time he had the power to prevent further illegal detention or punish those responsible. (Residual issues, Gashi, Count 1)

Concerning allegations of inhuman treatment of Kosovar/Albanians at Bajgora, not every act of violence or every fault in conditions of detention will amount to so serious a breach of humanitarian law as to constitute an act of war crime. In relation to the beating of Sabit Berisha, when the Court accepts that Latif Gashi was present and participating in the beating of Milovan Stankovic, as pointed out above there is insufficient evidence as to the extent of the beating of Berisha, and no clear evidence as to the identities of those involved in the real or mock execution of Osman Sinani, nor whether that event was, if mock, carried out with Sinani's knowledge that it was to be mock. Concerning conditions for detainees at Bajgora, as set out above, the Court concluded that they fell substantially below appropriate standards. The Court rejected the defence argument that the conditions were no worse than the conditions in which at least some sections of the ordinary population were living at the time. Whilst it was true that many civilians were displaced from their homes and had to seek shelter when and where available, those people were able to draw on assistance from others, including, according to Rrustem Mustafa and Latif Gashi, the KLA itself. In the event, the person or persons responsible for those conditions at Bajgora could not be identified. Accordingly, the Court concluded that inhumane treatment in relation to Kosovar/Albanian detainees at Bajgora had not been established. (Residual issues, Gashi, Mustafa, Counts 4, 13)

The Court could not determine the true nature of the event of execution or mock execution involving Osman Sinani. Although the Court considers that it is more likely to have been mock, as pointed out above, if the event was a mock execution it is not clear whether Sinani knew or did not know that this was to be the case: the possibility that Sinani knew it was a mock execution cannot be excluded given that coercion of Stankovic may have been the real purpose of this event. The Court also found that whilst satisfied that Albanian detainees at Bajgora had been the subject of beating, it was not established that this had reached the necessary gravity to constitute, "torture", and thus acts of war crime. Accordingly acts of torture against Albanian citizens at Bajgora were not established. (Residual issues, Gashi, Mustafa, Count 7)

The Court found no evidence that demonstrated who was responsible for the death of Osman Sinani. (Residual issues, Gashi, Mustafa, Count 10)

There was no evidence that Rrustem Mustafa took any part in (as opposed to learning later of) the torture of Stankovic. (Residual issues, Mustafa, Count 14)

Concerning Nazif Mehmeti apart from the uncertain evidence of Stankovic referred to above there was no evidence at all that he was involved in the KLA prior to late October 1998, and accordingly the acts alleged against him in relation to Stankovic were not established. (Residual issues, Mehmeti, Counts 12, 13, 14)

Llapashtica, Majac and Potok: November 1998 to April 1999.

In contrast to the limited sources of evidence available to the Court in respect of events at Bajgora, the Court was able to examine a great deal of evidence in relation to the detention of Kosovar/Albanian persons at a detention facility operated by the KLA Llap zone in Llapashtica, and later at Majac and Potok.

As the Court has found, by the end of September 1998, Rrustem Mustafa had clear knowledge of the detention of persons at a detention facility in the Llap zone in circumstances where there was no adequate judicial process available to detainees and further that this regime was subjecting detainees to physical violence and psychological terror with a view to coercing information and confessions. Latif Gashi had been personally involved in those illegal and brutal actions. Against this background, it falls to the Court to assess the events that are disclosed in the evidence concerning Llapashtica, Majac and Potok. The Court considers that the events proven concerning Bare/Bajgora are of the utmost importance in understanding and evaluating the testimony concerning the actions and liability of the defendants in this central area of the case.

There is really no evidence as to the detention of persons during October 1998; save that it may be that the detention facility at Llapashtica was first operational right at the end of that month. However, Rrustem Mustafa stated[103] that the issue of collaborators was discussed from time to time and the most important meeting concerning the problem posed by collaborators was held in October 1998 when all authoritative people in the Llap zone including from Pristina and Podujevo were present, along with political parties, non-governmental organisations and government.[104].

On the 27th June 2003, the Presiding Judge and panel member Judge Assira, were able to conduct an ocular inspection of the premises at Llapashtica where detainees were incarcerated on various dates between, as a minimum, the 2nd November 1998 and the 24th March 1999. Photographs were taken[105]. There was no dispute as to the location. Photographs 8 and 9 show the entrance and interior of the small stable in which the detainees were held. Even in the middle of a summer's day once the entrance door was closed the interior was pitch black; as can be seen on the far left hand side of photo 9, the only window had, at some unknown time, been blocked up. 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*"[106]. This stable was adjacent to the main entrance gates and within the enclosed courtyard of the Headquarters of the Military Police of the Llap zone. Llapashtica

[103] TM 18.03.03, p2.
[104] It can hardly be a coincidence that Llapashtica was up and running within a few weeks thereafter: this also shows just how critical the collaborator issue was viewed at that time.
[105] Attached to TM 27.06.03.
[106] Prosecution closing speech, 09.07.03, p1.

itself is a small village and the Main Headquarters of the KLA Llap zone was itself situated in another house no more than three hundred metres distant from the Headquarters of the Military Police.

Amongst many important documentary exhibits evaluated by the trial panel with regard to Llapashtica, one in particular, Exhibit 4, the Brown book from item 21, was of singular importance. At pages 37 to 41 (numbered by the panel for ease of reference) this book included a register of detainees held at Llapashtica in the period 2nd November 1998 to at least the 27th March 1999. For reasons that will be explained later the trial panel found that the entries relating to detainees allegedly being released after the 27th March were false, however the trial panel had no reason to doubt the essential accuracy of all other entries in the register. Nazif Mehmeti stated that he had become deputy Commander[107] of the Military Police in Llapashtica at the beginning of November 1998[108] and that this register was compiled on his instruction[109]. This register records personal details, dates of arrest and (in most cases) release of detainees, on whose orders the persons were brought to the detention facility, and by whom they were brought. On other pages of the book can be seen entries relating to information that had been received[110], and statements or part statements of detainees, both at Llapashtica and before[111]. Also found in the same book was a bundle of loose pages numbered 1 to 18, as described below:

- Printed Amnesty decision dated 05.04.1999, signed Remi (Mustafa). For reasons set out below, the trial panel concluded that this document was not a genuine decision.
- Typewritten Amnesty decision dated 17.01.1999, signed Remi (Mustafa).
- Handwritten Amnesty decision (apparently a part only) undated but ref no, 003/03/99, indicating in the view of the trial panel that it was the third such decision of the year 1999 and was prepared in the month of March.
- Decision relating to Muje Zenullahu dated 31.12.1998, recording that he is, *"entitled to being tried in liberty"*.
- Printed Amnesty dated 31.12.98, signed Remi (Mustafa).
- Decision relating to Bedri Ademi dated 18.01.1999, signed (illegible).
- Decision relating to Agim Gjaka dated 31.12.98, signed Dini (Mehmeti).
- Decision relating to Naim Havolli dated 31.12.1998, signed Dini (Mehmeti).
- Decision relating to Rushit Ballofci dated 31.12.1998, unsigned.
- List of persons detained, "still under investigation", dated 13.02.1999 signed Dini (Mehmeti).
- List of persons detained, "still under investigation", dated 18.02.1999 signed Dini (Mehmeti).
- Various copies of certificates of custody relating to detention by the military police of the KLA Llap zone.

Summary of Evidence of the defendants Gashi, Mehmeti and Mustafa in relation to Llapashtica/Majac; November 1998 to April 1999.

[107] But in fact was acting commander - see TM 26.02.03 p10 *"..and I signed under the title of commander as we did not have a commander, I carried out those functions as commander"*.
[108] TM 27.02.03 p5.
[109] TM 10.03.03 p2.
[110] Date entries between 06.11.98 and 09.12.98, see p17A to 23.
[111] Including a part statement from Stankovic, p17.

Latif Gashi[112], known as "Lata" or "Fati", stated that it was true that the Headquarters of the Llap zone, of which he was a member, following and respecting international conventions and the statement of the General Headquarters of the KLA, allowed the detention of some enemy collaborators, *"as well as some other people who had done bad things"*, however, it was not true that he personally had issued any orders for detaining any such persons nor had he participated in the questioning of the detainees, nor maltreated or murdered any of them. Persons were detained in order to prevent collaboration and he considered that such detention was legal[113]. Collaborators had provided the Serbs with information that included giving the locations of KLA anti-tank mines and details of KLA movements that had resulted in ambushes and deaths of Albanians. In addition, collaborators had tried to create a parallel police force in order to divide the Albanian people; thus the collaborators were a, *"serious obstacle"*[114]. The KLA had organised people in the villages to gather information and planned to hold trials of detainees after the war ended.

He was appointed Director of the Intelligence Unit of the KLA Llap zone in November 1998, and as such was a member of the zone command. Prior to that time he had worked in supporting the development of KLA logistics and health. He had participated in many battles, the first of which was at Kacandoll between the 15th and 19th September 1998. He stated that he had to move around the zone on foot, however it was clear to the trial panel that vehicles were available to members of the zone command as stated by Nazif Mehmeti, and in the Serb documents, Exhibit 2, item 49, there is a photograph of Latif Gashi in battle dress standing next to a jeep type vehicle. He continued by stating that the intelligence service had never become properly operational, as he was involved in fighting much of the time, which included digging trenches between Majac and Dobratin during the months October 1998 to January 1999. Further, his assistant, Hysri Talla, was killed in December 1998. He gave details of battles in which he stated he had taken part Regular meetings took place of the zone command, but between February and May 1999 he was only able to participate in one meeting, on which occasion the issue of detainees was discussed; decisions were taken by consensus at those meetings. The KLA was very well organised.

Concerning detainees, he stated that they were housed in a normal building just like soldiers and civilians, however he had never entered that building. At a meeting in March 1999, the military police reported that conditions for the detainees were as good or better than those of civilians[115]; in general at that time civilians were living in makeshift conditions having fled from their homes. Human rights of detainees were respected and an order had been issued by the Headquarters requiring this to be so, he knew of no incident of beating of any detainee. Detainees were moved to safer places due to the fighting. All detainees had been released, but when Serb forces arrived it was not possible to protect them. He did not learn that detainees had been killed until after the war; had the KLA intended to kill detainees they would not have taken the trouble to detain, feed and protect them. The zone commander made the decision to release the detainees although he took part in meetings when amnesties had been discussed. Amnesties were granted when it was believed that detainees had stopped collaborating and it was thought they would no longer do so, as the Serb offensives placed the detainees in danger, and not because the KLA had difficulty in maintaining the custody of detainees. No detainees had been released upon

[112] TM 20, 21, 24, and 25.02.03.
[113] TM 25.02.03 *"It was the will of the people that caused certain detention of certain individuals"*, and later *"The people who take the side of the enemy are always detained by all armies"*.
[114] TM 25.02.03 p5.
[115] TM 24.02.03 p3 *"I do admit again that our position of Headquarters zone was that everything, which was possible, be done to provide the best possible conditions to the detainees"*.

condition of killing a Serb. He could not really explain how the opinion was reached that detainees who were about to be released were no longer likely to commit acts of collaboration except to say civilians had withdrawn from their villages and balances had shifted so they could not act with Serb forces in a way that might endanger the people. He denied being the superior of Nazif Mehmeti, and described a KLA commander known as "Ylli" as a good man, a martyr.

He stated that from late 1998 international monitors had visited several centres where detainees were held and the commanders' policy was to permit the monitors to visit the detainees. On an occasion in 1999 he met with one or more monitors at the door of the detention facility.

He asserted that the case against him was fabricated by Serb intelligence forces, which, he said, were still operating in Kosovo. He accepted that amongst the documents recovered in the search of his office were Serbian documents, (Exhibit 2, item 49) which he alleged had been deliberately and falsely created by the Serbs in order to implicate him in criminal activity. He had information that one witness, Myrvette Konushevci, had received threats from the Kosovo Police Service in connection with UNMIK police, and had read of pressure being applied to some witnesses including offers of money, and change of residence or identity, in statements made to the Investigating Judge. He denied that any persons were invited to attend the KLA zone or military police Headquarters for the purpose of informative talks.

Latif Gashi presented a number of documents, "D 1"[116], to the panel including organograms of the KLA Llap zone, and an order of the General Headquarters dated 2nd December 1998. This latter document ordered the commands of the operative zones of the KLA in Kosovo to order the military police of each zone to detain those persons who had supported or joined any police force other than the KLA.

Nazif Mehmeti[117], known as "Dini", stated that from the end of October 1998 he had taken up the duty of deputy commander of the military police of the Llap zone, he had something less than twenty people under his command. The duties of his military police officers included patrolling, checking vehicles, providing security as necessary for the Headquarters of the zone and for visiting delegations or representatives. One of his principle duties was to ensure the physical security of the detainees. He had no authority, *"either de facto or de jure"*, only the zone command could order detention. He took orders from the zone commanders but did not have frequent contact with them. Conditions for detainees were not ideal but, with Remi's approval he had tried to obtain improvements to the conditions by having the building cleaned, painted and the floor covered with wood; he also arranged for blankets, mattresses, pillows, candlelight and fresh air; visits were permitted unless prevented by war circumstances. The detention building had been used to store wheat and vegetables previously and was roughly 6 x 4 meters: at any one time some 10 to 12 detainees might be held there. Due to the overcrowding of detainees, the shelling of the Serbs and the demands on his unit he often proposed the release of detainees to the zone command. The building had no heating but many civilians were obliged to manage without heating at that time. A simple toilet was available to detainees a few meters from the detention room. Detainees washed themselves at the same place as the military police, as there was a wood stove for heating water in the military police building, and they could take a shower. Detainees received two meals a day. He did not have conflicts or problems

[116] TM 25.02.03.
[117] TM 26, 27.02.03 and 10.03.03.

with the zone command regarding the detainees. Despite these problems, conditions for detainees were very good. A doctor was available for detainees as necessary, but there were no serious medical problems. He knew about international conventions concerning human rights as he had taught in this area for 5 or 6 years.

He did not investigate, interrogate or even speak with detainees as this was not his job, nor, to his surprise, did anyone else interview detainees at Llapashtica. He knew of no occasion when any civilian attended at the military police Headquarters in response to a written summons; persons normally responded to written requests from the organisations of people in the villages known as the civilian defence. Further, he did not know the reasons for the detention of individuals. Concerning questioning, all that was obtained from the detainees was their personal data. There were no procedures by which detainees could challenge or seek review of their detention. He had banned torture[118] and there were no occasions of torture to his knowledge at Llapashtica, although he had once prevented a guard from slapping a detainee. Detainees had not been beaten before they were brought to Llapashtica. He did not have significant contact with nor did he take orders from Latif Gashi.

During the Serb offensive of 24th March 1999, the detainees were moved from Llapashtica and were later released by the military police without formal approval of the zone command. Subsequently, the detainees were re-arrested following an order from a higher authority, and on the 7th April he had explained to the Headquarters, then in Burice, how the unauthorised release had come about. He gave a detailed account of how, also on the 7th April 1999, the detainees still held in custody were released during the evening from Majac and Potok, and that he had actually conveyed the order for their release from Mustafa to the military police by visiting firstly Majac then Potok before returning and spending the night at the military facility at Majac. He instructed his military policemen to tell the released detainees in which direction to go but beyond that there was nothing that could be done to ensure their safety.

International observers visited very frequently, although he had not witnessed any observer actually enter the facility. The detention centre operated in Llapashtica from early November 1998 until the 24th March 1999 and detention facilities operated at Majac and Potok from about the 27th March to the 7th April 1999. Ten of the detainees held at Llapashtica were transferred to Majac and two were taken to Potok. On about the 6th April one detainee, Enver Sekiraqa, escaped from the yard at Majac, however this did not cause trouble with the zone command.

When asked what measures were taken that had secured the rehabilitation or improved conduct of detainees, as recorded in the last paragraphs of three alleged amnesty documents,[119] and a decision concerning release,[120] he stated that no measures were taken save detention[121]. Further, concerning other decisions[122] relating to release of detainees where the words, *"released with the right to defend himself in freedom"*(or similar), appear; he had no knowledge as to what these words meant. A small percentage of entries in the brown book (Exhibit 4) may be inaccurate due to the circumstances of war. Although the book also contained notes of information provided during November and

[118] Although he later stated *"Concerning whether I gave an order prohibiting torture, if it had been necessary to ban torture I would have done so but it was not necessary"* see TM 10.03.03 p4.
[119] See Exhibit 4, item 21, loose pages, ps 2,3 and 6.
[120] Same Exhibit, p 7.
[121] TM 27.02.03, p5.
[122] See Exhibit 4, item 21, loose pages, ps 5,9, 10.

December 1998, he did not consider these notes as information as such as there was nothing to say that the information was true. Despite the fact that his nickname, "Dini", appears as the signature on a number of the loose pages from Exhibit 4, Mehmeti stated that he was only sure that he had signed one release order. He and members of the zone command had cars available to them that were supplied by their logistics section.

He left the KLA in late April 1999 but he had neither been removed nor resigned from his job.

Naim Kadriu[123] stated that he was, *"Chief of Public Information"*, in the Llap zone from the 28th February 1999 until the 24th March 1999. He was not part of the military police, and denied that he knew Latif Gashi personally although he knew of him by reputation. Thereafter, he was released from his position because his left foot, which had been injured in an accident some ten or twelve years previously, prevented him from being able to march as was necessary at that time; after the 24th March he had simply been an ordinary citizen, who had stayed at different houses as and where he could until the war finished. He took no part in the events at Llapashtica. Whilst the charges against him fall to be considered in relation to the events concerning witnesses Halil Sinani and "Q", the documentary materials created by him are, at least in part, relevant to the events at Llapashtica. He accepted that he had kept and collected many notes, both factual and fictional, and which were to be found in a number of diaries and papers recovered by the police in the search of his house after his arrest. These items included Exhibit 9, (item 2), a black book, Exhibit 10, (item 9), also a black book, plus loose pages, Exhibit 11, (also known as Exhibit "B"), a blue note book, and Exhibit 12, (also known as Exhibit "A"), a pink note book. These books and notes, especially Exhibits 9 and 10, were said by Naim Kadriu to be the combined product of his fertile imagination and reports of actual events brought to him by citizens after the war.[124]The trial panel carefully reviewed these documents and reached the conclusion that the vast majority of entries were reliable accounts of Naim Kadriu's own personal experiences. This conclusion was based upon the particular detail both important and insignificant included within the various entries all of which strongly supported the view that they were accurate records of personal experiences, and not, as he stated, a mixture of his fantasies and reports from others. The Court concluded that much of Naim Kadriu's desire to assert that parts of the documents were fantasy was the result of his fear that the documents would, if accepted as accurate, not only implicate him but also Latif Gashi and Rrustem Mustafa, a view that was supported by the remark which he made at the conclusion of the case[125]. Accordingly, and in the context of Llapashtica, the following entries are relevant and found by the Court to reflect matters of fact:

Exhibit 9

> *"Lata assigned me to be responsible for the informative service within Brigade 151. This is a very important division with a lot of responsibility".*
> *"Around 19.00 I was called by the military police to question one Roma who had been arrested by some people from Shtedime".*
> *Reference to "informative talks" with a father and son from Tamave.*

[123] TM 11, 13 and 14.03.03.
[124] See for example TM 11.03.03 p4
[125] TM 14.07.03 *"The biggest punishment would be if my personal notes be used by you against others. Therefore, I would kindly ask you, that if you consider that those personal notes as evidence, if you might use them only against me".*

"Today Lata came to me for the issues of the station of the security service. I informed him on the measure taken and he accepted them and starting from today… to establish the office of the intelligence service".

Exhibit 10

All entries refer to information gained and recorded by the KLA, often in relation to questioning of suspects, during the period 28.02.03 to 26.04.1999, and the loose pages from Exhibit 10 which also include formal written summonses issued by the KLA, Llap zone Military Police, requiring certain persons to attend for what were described as "Official Talk(s)" at a military police headquarters in Konushevc.

Rrustem Mustafa[126] stated that he had no knowledge of any criminal acts committed by any of his subordinates. Latif Gashi had been appointed as Chief of Intelligence in the Llap zone but was unable to complete his duties as he was committed to fighting. Mustafa had received reports on the detainees from Nazif Mehmeti, which included details of conditions, numbers and the general situation. Mustafa never entered the detention facility itself although the Headquarters of the zone was only 200 or 300 meters from the military police facility where the detainees were held. He personally ordered the release of some detainees based upon the recommendations of his subordinates but he did not know what information his subordinates had reviewed in order to make their recommendations. Decisions of the command were collective decisions and he had no power to overrule them. He had issued orders to ensure the proper conduct of his soldiers and the order of 29th December 1998 was one such order (Exhibit 14, item 18). A clear chain of command existed in the KLA, which was made clear in training and writing. Torture and beating were prohibited.

Detention of Albanians who were collaborating with Serbs was legal and necessary for military reasons, as the Serbs were trying to undermine the efforts of the KLA and had, amongst other things, tried to create a parallel police force; the efforts of the collaborators had caused much injury, damage, and loss of life. The detention of detainees took place at the behest of units of civilian defence, which were organised in the villages. These units would report information about individuals and either they or the Brigades brought the persons into detention. He could not exclude the possibility that some innocent persons might have been detained. Persons might also be verbally summoned to the military police, but he knew nothing of written summonses. There was no process by which a detainee could challenge his detention or by which a decision could be made as to whether grounds for detention did or did not exist[127]. Asked what steps were taken to ensure that no innocent person was detained, Mustafa stated that the KLA decided to assign people to the units who were professional and reliable so that delegated duties would be handled properly and professionally. Initially he stated that questioning of detainees did take place but then he retracted this and stated that there was a policy that questioning would not take place. He stated that the KLA, *"did not, by questioning, wish to find out everything that (the collaborators) had been doing"*. He stated that the KLA had informed detainees that the KLA *"knew what they had been doing"*.

[126] TM 14.03.03.
[127] TM 17.03.03, p4.

He ordered three amnesties for detainees, the dates of which were 31st December 1998, 17th January 1999, and 5th April 1999. Concerning the last paragraph of the amnesty of 5th April 1999 which mentions releases being ordered after, *"measures taken by the investigative military bodies"*, the only measure taken was physical detention, nor could he explain how, "*rehabilitation"*, of detainees had been achieved. The main reason for the earlier amnesties was that information had been received from the support groups that these persons had improved and that their actions would not be repeated. Persons were released after guarantees for their future conduct had been received from villages or relatives, and as time went by conditions of war changed so that it was considered that the detainees would no longer be able to help the enemy. Lastly, it became difficult for the KLA to keep the detainees due to frequent alterations to their locations. He never considered the possibility that any detainee might, upon release, continue to help the enemy. He learnt of the release of some detainees by the military police, and these persons were re-arrested due to the fact that their initial release had been irregular. He could not say why those persons had then been further detained for about two weeks.

He was not concerned that the eventual releases of the remaining detainees, on the 5th April, took place in the evening with no notice and no special precautions even though he said Serb forces were in the area, as there were also more than 30,000 civilians in the area as well.

Concerning the conditions for the detainees, they were as good as the war circumstances would allow. Civilians were living in the open, in improvised tents and in very difficult conditions. According to him, both soldiers and civilians were living in worse conditions than the detainees. Nazif Mehmeti had suggested improvements for the conditions for the detainees. In February 1999, he had given permission for the OSCE to visit the detainees. He stated that family visits for detainees were permitted.

Detention and the Detainees at Llapashtica.

In evaluating issues of fact, credibility of witnesses and the culpability of the accused in relation to events at Llapashtica, it would be arbitrary and unreasonable to ignore the findings of fact that the panel has reached in relation to Bajgora. In essence, these prior findings demonstrate that by late September 1998, a regime of unlawful detention, with features of violence, total lack of due process, and with questioning directed towards coercing confessions or information from detainees, had become well established. Latif Gashi was found to have participated in that regime, and Rrustem Mustafa had full knowledge of its nature by the end of September. Further, as referred to above, there had been a major meeting of important figures in the Llap zone in October of 1998 in which the issue of collaboration was discussed. It follows that the issue of collaboration was regarded as of the utmost seriousness by the KLA at that time and the trial panel concludes that a positive decision was then taken which resulted in the creation of the detention facility at Llapashtica, which, on all the evidence, was operational no later than the beginning of November 1998. In this context, the fact that at this time Latif Gashi was appointed Chief of Intelligence, and Nazif Mehmeti as Chief of Military Police in Llapashtica, can only be interpreted as directly relevant to the establishment of the detention regime in Llapashtica. Events at Llapashtica formed the major focus of the evidence in this case and accordingly this verdict will review the evidence in considerable detail.

The witnesses.

Witness "4"[128] told the panel that he had been involved in dealing with wood with Serbs, and this was his only source of income. He stated that he had had problems with the Serbs as they had learnt that he had handed a weapon to the KLA. As a result he had become frightened for his safety and so had approached the KLA and sought security. Thus, he had gone to Llapashtica voluntarily and had stayed in the room, which was about 8 by 10 meters. There were mattresses on the floor, and about another six persons in the room. He said: *"We ate the same as the soldiers did and our conditions were the same as the soldiers had"*. He was able to leave the premises freely in order to visit his brothers and also received visits: *"There was no prohibition on my free movement"*. He stayed there until the 24th March when they were moved due to the intensity of the Serb offensive, and later he was released.

Asked about what he had stated to the Investigating Judge at page 3 of the minutes of 18th October 2002, he alleged that everything he had stated to the police and to the judge happened after the police told him that he could gain 100,000 Euros and could go to any country he wished to live in, if he gave such a statement; the police had dictated the statement to him. He went on to allege that the Investigating Judge had also told him that it was better that he speak in those terms. According to the witness, the Investigating Judge told him to say that he knew Lata, and that Lata had maltreated him, however, he added that he could not remember when the Investigating Judge had told him these things, nor could he remember what the Investigating Judge had said to him.

According to the minutes[129], he stated to the Investigating Judge that when questioned in detention he had been asked why he hung out with the Serbs and was told to write down that he spied for the Serbs. Before the trial panel he was asked, but failed to explain why, if he had decided to implicate Lata, pursuant to pressure from the police and Investigating Judge, he had stated on page 4 of the same minutes that on an occasion mentioned on that page Lata had not beaten him, saying only that he did not want his child to suffer the consequences of him saying such things. He denied being interrogated at Llapashtica. He stated that he recalled visits from the Red Cross but not OSCE; he had been interviewed but had not been instructed by the KLA as to what he should say. He stated that Alush Kastrati was released at the same time as he was released on the 24th March.

The trial panel found the evidence given at trial by this witness to be wholly implausible. There was no other evidence in the case to suggest that anyone who was held in the detention facility was there voluntarily for his own safety. The statement of the witness, *"All those with me in Llapashtica told me in conversation that they had come there voluntarily*", is in the context of this case, nothing short of absurd. The register, in the brown book, Exhibit 4, item 21, shows that this witness was brought to the detention facility by the order of the Headquarters of the KLA Llap zone, and was held in detention for four months until the 20th March 1999. The trial panel concluded that the only possible reason for his present account of the facts was that he was extremely frightened of the consequences of telling the truth, and so was lying to the trial panel even about such basic details as to whether or not he was detained as opposed to being voluntarily resident at Llapashtica. His account about the conditions of detention was wholly contradicted by the ocular inspection, which revealed a room that imposed grossly inhumane conditions on those who were detained therein. Further, the trial panel found that the witness' explanation as to his testimony before the Investigating Judge wholly untrue. In addition to the

[128] TM 20/21.03.03.
[129] All hearings were recorded by tape recording equipment.

considerations as to credibility already set out, the Trial Panel found that the testimony given by the witness to the Investigating Judge had all the appearances of being true. That testimony included considerable detail, and discriminated between events and those responsible, choosing to avoid the very requirement which, if his account as to pressure and intimidation from UNMIK police and the Investigating Judge was true, would have been an essential feature of the account. Accordingly, the court disbelieved the account of the witness at trial but accepted as true the account given to the Investigating Judge[130].

The trial panel concluded that this witness had been detained against his will at Llapashtica, together with the other detainees recorded in Exhibit 4, item 21. Further, the only reason for his detention was that through business he had some associations with Serbs; thus his detention was not due to reasons of security but based solely on association with civilian members of a different ethnic group, and was unjustified ab initio.

Concerning the events that took place during his detention, the trial panel accepts the description of those events as given by the witness, in the presence of defence attorneys, in his statement before the Investigating Judge on the 18th October 2002. The essential features of that account were as follows: after his arrest, the witness had been interrogated first at Bradash where he had been threatened at gunpoint and badly beaten as his interrogators tried to compel him to admit that he was a spy for and collaborator with the Serbs. He was then taken to Llapashtica. On his arrival, Lata spoke to the military police and said, *"This is a person who stays together with the Serbs"*, and so he was beaten up by the military police using their hands and the butts of their weapons in front of the camp; this was plainly an example of a detainee being subjected to punishment for alleged collaboration. He was then detained in a room, "*where the cattle were kept*". He could not say whether Lata was present during the beating. The first night that he was detained there were at least eight other detainees in the room and they had only two mattresses between them. Other detainees were suffering from injuries inflicted by beating. After three or four days he was blindfolded, and taken for interview. He was beaten and tortured by the use of an electric prod as they made him make a confession of collaboration. The persons responsible used the nicknames, "Bil" and "Ciga". Detainees were compelled to inflict violence on each other. Apart from being provided with more mattresses, (six for twenty one to twenty four persons) conditions did not improve and food was insufficient. There was no heating in the room. Their heads were shaved, as it was difficult to keep clean. Sometimes candles were provided, but a small window was covered over with thick nylon. Toilet needs had to take place within the room using a bucket, before eventually they were allowed to use a separate toilet. Other detainees complained of being beaten when interrogated. He had no information as to how long he might be held in detention. Visits from family members were not allowed. He only saw Latif Gashi in Llapashtica on the day that he was first detained there. He never found out who was responsible for the detainees. He gave a written list of those who were detained with him.

[130] This is not to say that the trial panel approved of all aspects of the questioning by and conduct of the Investigating Judge about which many complaints were raised by defence counsel, especially in the early stages of this trial. The trial panel expresses its concern in relation to the conduct of the Investigating Judge in the examination of Witness "K" (see below) and also is aware that after the verdict was announced but prior to the written verdict being completed, the investigating judge published an Article in which she offered certain views about the proceedings. The trial panel for reasons that are obvious, considers that this was inappropriate. In view of these features of the case, the trial panel has at all stages carefully scrutinised the answers of witnesses to the Investigating Judge in order to establish whether the conduct of the Investigating Judge could have had any bearing on the accuracy of any answers given by any witness; such scrutiny has not, however, led the trial panel to the view that anything said by any witness to the Investigating Judge should be treated as unreliable, save as mentioned in the case of witness "K".

When the detainees were released they split into two groups, 16 went towards Majac and 5, including himself, towards Kacandoll. The 16 that went towards Majac had been re-arrested by the KLA. After his release he had heard from persons who had been detained that certain detainees had been forced by the military police to dig holes; these persons included Agim Tocku (Musliu), Idriz Sfarca, Enver Sekiraqa and possibly Drita Bunjaku. According to what he had heard, Agim was afraid and had soiled his pants. *"Then I received this information from some of the persons who were together with him. In the evening they were taken to the holes they were digging but Enver Sekiraqa was able to escape and run towards an unknown direction but the other three, Agim Tocku, Idriz Sfarqa and Drita were killed there"*[131]. The trial panel found this reported information credible in that it was consistent with the note in the "Amnesty" document dated the 5th April 1999, *"Enver (Hamit) Sekiraqa – born on 08.11.1973 in Pristine, "Jabllanica" street, no.196; detained since 30.01.1999 at 13.00 hours. Remark: Enver Sekiraqa – escapes from detention one day before all the detainees become subject to amnesty",* and further, as was clearly established in the trial, the bodies of these three victims were indeed discovered in a shallow grave within approximately three hundred meters of the military police facility in Majac at or close to which place detainees were held after the abandonment of the Llapashtica facility in late March 1999.

During his time in detention, the military police usually but not always wore masks. On two occasions, about one month prior to his release, representatives from the Red Cross visited and met certain detainees. Prior to meeting with Red Cross representatives, specific detainees were chosen, including the witness, who should speak with the Red Cross representatives. Those detainees were told what to say to the representatives by the military police, and there was also a guard outside the door during the interview, so the detainees were not able to tell the truth to the representatives.

In reaching its conclusion as to the veracity of the account just referred to, the trial panel has kept in mind that the first hearing of this witness by the Investigating Judge proceeded on the 14th May 2002 in the absence of the defence attorneys, which was clearly an error. At the request of the witness, the Investigating Judge permitted the witness to refer to that statement during the testimony that he gave on the 18th October 2002, however the trial panel found no significant contradiction or discrepancy between the earlier and later statements of the witness[132].

Witness "7"[133] stated that he had previously been an "anonymous" witness but was now prepared to give his name, which he did, in the presence of defence counsel but with the public excluded from the session. His account to the trial panel was that whilst on his way to Podujevo he was stopped by three persons and taken to Llapashtica, put in a room, and questioned by a soldier. The soldier told him that he had been detained for collaboration with the enemy, and afterwards he was taken to the room where other detainees were located, which was like a flour warehouse. He was detained from the 26th or 27th November 1998 until the 31st December. To the trial panel he made no complaints as to his treatment or the conditions of detention and stated that he was not questioned at all while in detention save by the soldier on the first day. Asked repeatedly why he had told the Investigating Judge that Lata and Nazif Mehmeti were questioning him, and that he was questioned some three or four times in all, he said this was not true and that he did not accept that he had said these things. Further, he denied that he had been maltreated while in detention, and said he had not related this to the Investigating Judge either. In summary, this witness

[131] IJ 18.10.02, p12.
[132] Statement of 14.05.02 is included within the file marked *"Witness Identity – Confidential"*.
[133] TM 31.03, and 01.04.03.

denied that he had said anything incriminating to the Investigating Judge. Despite this, later in his testimony the witness stated, *"The statement I gave to the Investigating Judge was imposed on me by the police and the Public Prosecutor. The things I said in that statement were imposed upon me but the truth is the statement that I gave yesterday and today"*. This observation was wholly inconsistent with the earlier testimony of the witness to the effect that what he had said to the Investigating Judge was the same as he was saying to the trial panel but, for whatever reasons, the record of his testimony before the Investigating Judge was totally inaccurate. He went on to state that the police had told him, *"to say that I had been interrogated by Lata and that Nazif had beaten me up"*. It cannot be regarded as mere coincidence that his statement to the Investigating Judge happens to record exactly this information. Asked why he had not complained to the Investigating Judge about the fact that the police had imposed a false statement upon him he said he did not think anything could be done and, *"The Judge and the Prosecutor were all the same to me"*.

In his statement of the 23rd August 2002, given in the presence of defence counsel, this witness had stated that he was detained in a stable at Llapashtica. Latif Gashi, known as "Lata" who was the Commander and Nazif Mehmeti, known, as "Dini" who was a military policeman, questioned him. He was taken to questioning with a sack over his head. Questioning consisted of accusations of spying being put to him and took place on three occasions in all; the questions referred to the fact that he had worked with the Serbs in order to help obtain passports. He alleged that Nazif Mehmeti beat him while Latif Gashi was questioning him. An electrical stick was used to inflict electric shocks to him, and he had lost his senses for about a minute as a result. In consequence of his maltreatment he had bruises all over his body. On the third occasion of questioning he was asked if he wanted to be a member of the KLA, and Nazif Mehmeti again beat him. On that last occasion he was unable to walk for a day. When he was released Nazif Mehmeti gave him a piece of paper stating that together with three others he was released by amnesty. He stated that conditions were not good; there was no heating, and it was cold with ice inside the building although there were enough mattresses whilst he was there. He was able to see a doctor on one occasion as he had back pain due to being beaten and the cold. He stated that other detainees were also beaten and complained of this after they had been interrogated. He also stated that the detainees were made to beat each other and would themselves be beaten if they refused. He stated that there was an electric lamp in the stable. He was able to wash and shave himself on just two occasions in the 37 days that he was in detention. And others were able to wash only very infrequently. He stated that conditions in Llapashtica were not of the same conditions as most people live in; he described them as, *"Worse, they were very bad. It was a catastrophe. Only cows live in that facility"*. He confirmed that after the war he had seen Latif Gashi in a coffee shop in Pristina that Gashi owned and he was sure this was the same man as he had seen at Llapashtica. He had also seen Nazif Mehmeti after the war on one occasion at police station number 3 in Pristina. The trial panel noted that this evidence coincided exactly with the personal data given by Nazif Mehmeti at the start of the trial, *"KPS Officer in station 3, Pristina"*. It is of significance that this witness stated that he had received a telephone call some three months before giving his testimony in which he was told that he would be given as much money as he asked for if he did not testify against Lata. In the view of the trial panel the witness had no reason to relate this matter to the Investigating Judge unless he had in fact been subjected to such an approach.

For the reasons cited previously, and because the testimony of this witness to the Investigating Judge bears a striking degree of similarity on all major issues to that of Witness "4", the trial panel concludes that the account of this witness to the Investigating Judge is essentially true and in particular that his account of the beatings to which he and

fellow detainees were exposed and of the conditions at Llapashtica, reflected genuine experiences suffered by detainees at the instigation of Latif Gashi and with the assistance of Nazif Mehmeti. Further, the Court concluded that the reasons for his detention were again based upon his business contacts with Serbs and there was no evidence to suggest that he posed any threat to the security of the KLA Llap zone or those whom it represented. The reference to an electric light bulb in the stable is odd as by far the majority of the evidence from other sources indicates that if there was any lighting it was by candle. Accordingly, the trial panel finds that this aspect of the account of this witness is unreliable, but this conclusion does not affect the remainder of his testimony.

The Court heard next from a witness who had worked for the OSCE in 1999. This witness gave her name and her evidence in front of the defendants, their counsel and the court, but in the absence of the public. The OSCE had received reports of Kosovar Albanian's being kidnapped by the KLA and were able to arrange a meeting at the KLA Headquarters in Llapashtica; the meeting took place on the 18th February 1999. The witness described meeting Commander Remi (Mustafa) who stated that the KLA did have Kosovar Albanians in detention. He explained to the witness that the KLA exercised policing authority within the jurisdiction of the Llap region in the absence of any functioning of the Serb authorities and that detainees were being held for reasons of ordinary crimes and due to collaboration with the enemy. Remi stated that he was not familiar with the, *"legal procedures"*, and referred the witness to the military police commander, called Fati. The witness then spoke with the military police commander who stated that when a crime was reported to the KLA an invitation for an informal talk would be issued and the person would either come voluntarily to see the police or would be taken into custody. *"He explained that he had authority to issue indictments and normally kept persons in pre-trial detention for two to three months. He then said that they would go through a trial and the procedures again would consist of a Judge and Investigating Judge and a Jury but that the accused did not have the right to choose their own defence. We were not allowed access to the actual detention facility and this was explained by security reasons"*. Both Fati and Remi denied that any detainee had been maltreated, and conditions were the same as for the KLA soldiers. The witness added that she had spoken to eight persons who were said to be detainees but was not able to verify whether this was in fact the case; all maintained that they were well treated. The witness had asked if she could give the detainees paper on which to write to their families but this was denied. Remi had denied the witness access to the detention facility. The military police commander said the KLA had held an unspecified number of trials and that convicted persons were held in a prison the location of which he would not disclose. According to the military police commander visits by family members were allowed although they discouraged visits by women and children.

The witness stated that the OSCE was working very closely with the International Committee of the Red Cross, *"..who, to my knowledge, were also denied access,"* and added, *"I doubt very much if any of my OSCE colleagues in the Llap zone were able to speak to any detainee in detention"*.

During her evidence the witness identified Remi as the defendant Rrustem Mustafa and stated that she thought that the second man, introduced to her as Lata, could be Nazif Mehmeti. At the conclusion of her evidence, Rrustem Mustafa confirmed that he had met and spoken to the witness, saying that she had given a, *"most correct statement"*. Nazif Mehmeti stated in terms that he had never met the witness, whereas Latif Gashi who had earlier stated that he was known as "Fati" as well as "Lata", made no comment. The trial panel concluded that the witness was mistaken in her possible recollection of Nazif Mehmeti but was wholly accurate in her recollection that the second man to whom she had

spoken, and whose discussions with her are summarised above, was "Fati", or Latif Gashi. This conclusion is further supported by the fact that Latif Gashi was centrally involved with questioning detainees and extorting confessions and information from them by violence amounting to torture. It was thus fully clear that Latif Gashi was indeed introduced to her as, *"Commander of Military Police"*, and this reflected the reality of his position at Llapashtica and that he was the immediate superior of Nazif Mehmeti.

The trial panel accepts the evidence of the witness that she was told by Latif Gashi that the KLA had judicial processes including trials: this was a matter in which the witness had a keen interest and her recollection about it is not likely to be wrong. Witness "D" (see below) stated that Ylli had told her that some court process was taking place. The panel concludes that Latif Gashi, Nazif Mehmeti and Rrustem Mustafa were aware of the obligation of the KLA to establish proper judicial processes for detainees arrested for alleged criminal offences and other infractions considered to be capable of prosecution. However, the trial panel finds that such process as occurred was a sham, with none of the guarantees in place required by Article 6 of Protocol II and thus bore no relation to proper and fair judicial hearings. As was the case at Bajgora, no adequate judicial process existed in Llapashtica.[134]

The witness stated that the OSCE enjoyed a certain amount of trust with some KLA commanders including Commander Remi and that he was courteous and forthcoming; he referred the witness to the Military Police Commander for details of the detainees. The Llap zone was the only KLA zone that the OSCE was able to visit, and the witness agreed that one Serb had been released from the Llap zone after negotiations but other reports of missing Serbs remained unresolved.

The trial panel finds that the witness was not permitted access to the detention facility. Security reasons are not maintainable as the basis for this refusal in circumstances where the detainees were held within a secure military police compound. The only credible reason for this refusal is that Rrustem Mustafa knew that any OSCE witness to the incarceration of persons in the conditions in which they were held in Llapashtica was likely to report grave concerns as to the welfare of those detained persons. There is some evidence in the case that indicates that members of the Red Cross made some visits to the detainees. However, in the light of the evidence of this witness the trial panel finds that the evidence of Latif Gashi, Nazif Mehmeti and Rrustem Mustafa to the effect that OSCE and Red Cross personnel frequently visited the detention facility and detainees at Llapashtica is untrue, and that in fact very few international monitors save for this witness succeeded in gaining any access at all. As far as those persons are concerned with whom this witness was able to speak at Llapashtica, on the assumption that they were actual detainees, the trial panel finds that they had been instructed as to the account they should give to this witness by one or more of those responsible for their detention. Direct evidence from the Red Cross was not available due to the widely respected privilege that that institution enjoys in relation to its work in this area.[135]

Witness "D"[136] was heard by the trial panel on the 7th April 2003. She stated that she trusted the KLA and still did so but possibly someone had made a mistake with regard to her husband. She stated that members of the KLA arrested her husband on the 7th February

[134] Again, see TM 17.03.03, p4, when RM stated *"There was no process by which a detainee could challenge his detention, nor a process in which it could be decided if a suspect detained was a collaborator, they were all suspects"*.
[135] See Exhibit 40, letter from the Red Cross dated 4th June 2003.
[136] TM 07,04.03, and 09.04.03.

1999 late in the evening. Two of the men who came to the family house were Naser Hyseni and Zotina, but the other men were masked. Her husband was told that they needed him, *"for information"*, but did not give any further particulars except that they were looking for weapons which her husband said had been given to the Serb police. Naser Hyseni had struck him while he was still asleep. Her husband was psychologically unfit. The day after her husband was taken away she tried to find him in Llapashtica. The witness could not identify any reason why her husband had been arrested by the KLA except perhaps that he had bought land from the Serbs. The arrest had been arrogant and the behaviour of the KLA soldiers had caused her husband and children to panic.

In the course of trying to find her husband she was speaking with a KLA soldier when Latif Gashi had approached and told the soldier not to speak with her. Later she spoke to Commander Ylli who told her that her husband was innocent and that he was trying to help him as much as he could. Ylli said that her husband was defending himself and mentioned that some court sessions had taken place and told the witness to go and speak to the family of Latif Gashi, as he was the man responsible for her husband's situation, and she did indeed visit the family of Latif Gashi in order to try to achieve progress towards her husband's release. Ylli also asked if there were any problems between Latif Gashi and the family of the witness and she had told him there were none. Ylli told her that her husband was suffering pain due to being beaten and maltreated. Ylli arranged a secret visit for her to her husband that took place at Bradash on the 17th or 18th March. When she saw her husband he looked weak, pale and tired – almost dead. Her husband said he had been tortured and maltreated and said, *"They are killing me"*. Her husband further stated that Ylli was saving him and that the family should treat him as a son. The witness had taken her husband some food, which he ate as if he was very hungry, and he said that conditions were very difficult; she saw that he had lost a lot of weight, his lips were sore, and his hands were dark blue or grayish blue. Later she learned that he was in detention at Potok and her daughters had visited him there in April. They had told her that he looked psychologically better and had hoped that he might then be released in a few days.

Some days after this she first began to hear rumours that her husband had been killed by the KLA and this was prior to the commencement of the Serb offensive which started on about the 27th April. Ultimately, on the 29th July 1999, she was able to retrieve her husband's body. The body was located in a remote place and she would not have found it without assistance. The body was found in a shallow grave with the body of the other detainee who was the husband of Witness "C". She had heard that for two days KLA soldiers had guarded her husband's body as it lay by the roadside. Later she spoke to Nazif Mehmeti who told her in a stern manner that all her questions would be answered in 2 years when a book was to be published. She had also spoken to Remi just one day after speaking to Nazif Mehmeti and he told her that he did not know her husband at all. The witness, rightly in the view of the trial panel, did not believe Remi as her husband had been in detention for three months, *"and this was a sufficient period for me to disbelieve Remi when he said he did not know him"*. In this context the trial panel recalls Remi's own evidence that he kept himself informed about detainees and that Nazif Mehmeti had produced lists of persons detained from time to time which included the name of this detainee, (examples of those lists are to be found in the loose pages of Exhibit 4, item 21), and finally that Remi himself had signed the "Amnesty" document of the 5th April which included this detainee's name.

The trial panel had no doubt as to the sincerity of this witness. There were no significant discrepancies between her testimony to the trial panel and that given to the Investigating Judge. Further, the trial panel observed that this witness clearly felt great loyalty to the cause of the KLA and found it hard to criticise its members. The trial panel could identify

no reason why the witness would wish to implicate any of the defendants falsely. Accordingly, the trial panel had no doubt that the testimony of this witness was true and reliable.

Witness "E"[137]. This witness is the daughter of witness "D". At the beginning of her evidence this witness pointed at Nazif Mehmeti and stated *"..this man I last saw with my father, he is Nazif Mehmeti otherwise known as Dini"*. The witness confirmed the circumstances of the arrest of her father and the attempts, which she, together with her mother and sister, had made to try to find her father. At one point she spoke with Commander Mixha who said that her father was in KLA hands and had behaved, *"very, very badly with us"*. She was also able to speak with Ylli and added that Ylli had said that Latif Gashi hated her father, was interrogating him and making other soldiers beat him, and was not giving her father his medication. Ylli had arranged for a doctor to see her father. When she saw her father he seemed 20 years older – he was tortured and ill, was eager to eat, and his face, body and hands were swollen. Her father said he was being kept in a place where animals stay and there were lice.

On the 13th or 14th April she went with her sister to Potok where they saw their father for the last time. On the way there they had spoken to some soldiers who said that he *"was in the hands of 'that dog'"*. Nazif Mehmeti and a man called Murrizi brought their father out of detention to see them and they spoke to him for a short time. He was in a bad condition and did not dare to speak freely as Nazif Mehmeti was there. He did say that he was being forced to work and that he was not being given medication. Although he tried to hide his hands and said he was not being beaten she saw that his hands were bruised. He was, however, able to say, *"If something happens to me, you should know that it is Latif Gashi's fault"*.

Witness "G"[138] also gave evidence about the arrest of her father and the subsequent attempts of herself, her sister and mother to locate him. She rejected any question of payment for her evidence by UNMIK or KFOR. She stated that Nazif Mehmeti had given the wrong date regarding the release of her father, as he was not released on the 7th April, as Nazif Mehmeti had said in evidence, as it was either the 13th or 14th April, when she had last seen her father. She confirmed that when on an earlier occasion they saw her father, as a result of the intervention of Commander Ylli, he was in a dreadful condition, and that her father had begged them to go to speak to Latif Gashi's family. Ylli had said that Latif Gashi was beating her father.

When she and her sister went to Potok and were successful in seeing their father they had also seen Nazif Mehmeti and eventually they were able to speak to their father in a place in the open air near a haystack. Their father told them that Latif Gashi was keeping them but not to worry, as he would be released in a few days. He was trying to hide his hands, which were scratched and blue. It was clear to the trial panel that on that occasion the detainee was, with considerable courage, attempting to reassure his daughters as to his situation whilst at the same time having the gravest of doubts as to whether he would ever be released alive. This witness confirmed that her father told her sister and herself that Latif Gashi was holding and beating him. She further pointed out that they had heard that people had seen her father's body lying by the road and it was not possible that people could have seen this if the death had happened after the Serb offensive had begun. It was just one week after they had visited their father in Potok that they began to hear rumours of his

[137] TM 08.04.03.
[138] TM 08.04.03.

death. The witness also stated that the family had received approaches from Mohammed Latifi who was trying to persuade them to withdraw the charges against Latif Gashi.

The trial panel found the evidence of both Witnesses "E" and "G" to be reliable and true. Not only did they correspond in their evidence with the evidence of their mother but also they were consistent in their evidence with the testimony that they had each given to the Investigating Judge. The trial panel noted that they did not attempt to exaggerate their accounts and further the panel saw and assessed as genuine the distress of witness "E" as she related the events before the court.

Detention of the husband of witness "D" is, of course, confirmed by the entries in the brown book, Exhibit 4, item 21, and in the "Amnesty" document dated 5th April 1999 contained within the loose pages of the same exhibit. No adequate reason was ever given for the violent arrest and detention of this detainee. It is clear that even Commander Ylli was at a loss to understand why this man was being held and thought that it may be due to some family dispute between the family of Latif Gashi and the detainee. The only hint of any other reason concerned whether the detainee had authorisation for a gun, by itself no reason at all for his detention. Accordingly, the trial panel finds that there was no legitimate reason connected with security of the KLA Llap zone or those whom they represented for the detention of this detainee.

Witness "F"[139] was a relative of Witnesses "D", "E" and "G". He confirmed the events of the night when armed and mostly masked members of the KLA took the husband of Witness "D" away from the family home, and the efforts that the members of the family had made thereafter in order to try to trace him. He was also present together with Witnesses "E" and "G" when they saw their father for the last time at Potok. He described the condition of the detainee at Potok as, *"very, very weak"*, and stated that on one occasion, he believed in Bradash, when he had seen the detainee as a result of Commander Ylli's help, the detainee said that Lata was holding him. This witness had also attended at the gravesite of the detainee near Potok and had assisted in recovery and reburial of the body. The trial panel found no significant inconsistencies in the testimony of this witness, which was in accordance with the evidence that the court had heard from the previous three witnesses.

Accordingly, the Court found that the husband of Witness "C" had been illegally arrested for reasons not connected with security, that he had been maltreated and repeatedly beaten whilst in detention at Llapashtica to a severe degree and with a view to making him confess to disloyalty to the KLA and thus was tortured. Further, that the torture of this detainee took place at the direction of Latif Gashi and that throughout his time in detention the detainee was exposed to conditions that fell far below what was acceptable and were much worse than was the case for ordinary citizens represented, for example, by the family members of the detainee who, despite the difficulties of the times, did not begin to suggest that they faced similar levels of hardship and deprivation as did their husband/father. These conclusions are relevant to, and accordingly are taken into account by the trial panel in connection with, events concerning the detention of other persons at Llapashtica.

Witness "C"[140]. This witness stated that her husband tried to enlist in the KLA and four days later, on the 31st January 1999 he was summoned to the KLA Headquarters and drove there without hesitation. On the 4th February, when he had not returned, she went to the

[139] TM 29.04.03.
[140] TM 29.04.03.

Headquarters and met Latif Gashi, who was in a military uniform, and Nazif Mehmeti who was wearing a black military police uniform. Her husband was then brought into the office. He had difficulty walking and was biting his lip in pain and appeared sick. Gashi and Mehmeti then alleged that the detainee was married to another woman, a Serb, which the witness regarded as, *"totally ridiculous"*, and that a person called Safet Hasani had made a complaint about a fight. Safet Hasani was a known criminal and she could not believe that they would act on his word in preference to that of her husband who was a teacher. They told her to return and surrender her husband's weapon. They had tried to intimidate her but she had responded with harsh words to Latif Gashi. As her husband had left the room he had said, *"Don't worry because either dead or alive they can never label me as a collaborator"*. On the 9th February 1999, the witness handed over her husband's weapon to Latif Gashi and Nazif Mehmeti as instructed. Despite asking why he was being detained further she was never given any satisfactory reason. In May 1999 she had to leave Kosovo and went to Germany. In mid April she heard that her husband had been killed, and a relative found his body. The witness stated that in the Llap zone the KLA was regarded as a, *"very good thing"*. She had heard from another detainee that the ICRC visited her husband.

The witness denied that her husband had taken part in the Yugoslav army in Knin, Croatia during May/June 1993, saying that this was impossible, and stated that documents submitted to her by defence attorney Mr. Tmava were fake.[141]Having considered the documents submitted by the defence the Court considers that they are copies of genuine and not fake documents. The Court is of the opinion that in this area of her evidence the witness was attempting to distance her husband from any suggestion that he had ever had any active role in the Yugoslavian army. This conclusion does not mean that the whole of the witness' testimony must be rejected. The detention of her husband is once again proved by entries in Exhibit 4, item 18, and in the "Amnesty" document dated 5th April 1999 contained within the loose pages therein. Therefore the Court is satisfied that her husband was detained at Llapashtica from about the 31st January 1999. Further, her husband's body was discovered with that of the husband of Witness "D" in the same shallow grave at Potok. In addition, witness "S" confirmed that her sister had visited Llapashtica and reported that she had met both Latif Gashi and Nazif Mehmeti in the presence of her husband. In those circumstances and bearing in mind the evidence of witnesses "D", "E" and "G", as to the involvement of Latif Gashi and Nazif Mehmeti with that other detainee during his detention, and the analysis of the evidence of other detainees referred to above, the trial panel is satisfied that witness "C" was being truthful and accurate when she stated that she had spoken to and confronted Latif Gashi and Nazif Mehmeti on more than one occasion and that the very last time that she had seen her husband was in an office when they were both present.

Witness "S"[142] said that she had tried to visit her brother many times during his detention but was never permitted to do so. She stated that one week before the Serbs withdrew she began to hear that her brother, the husband of witness "C", had been killed. Approximately one month after the war she started looking for the body, and heard that he had been killed in Potok. Eventually a man led her to the grave, which was in a very remote area. This man said that he had heard that this detainee was killed immediately after being released, and that thereafter his body was lying in the road for two days where numerous people saw it before being buried in the same grave as the body of the husband of witness "D". A soldier

[141] Documents attached to TM 29.04.03.
[142] TM 30.04.03.

told her that "our" police killed him, meaning the Albanian or KLA police at about 3.00 am. The unidentified man took the witness to the grave where she saw the bodies of both men. The witness confirmed that her brother had been a soldier, *"when he was very young"*. The trial panel considers this witness to be truthful and reliable. She demonstrated deep loyalty to the KLA to the extent that she found it impossible to contemplate that the KLA might be responsible for the death of her brother, and the panel considered that in view of this it was highly improbable that she would give false evidence that might implicate members of the KLA.

Accordingly, the trial panel concluded that the husband of Witness "C' was detained at Llapashtica for reasons which cannot be considered as relating to security, that he was beaten and tortured and that this took place at the direction of Latif Gashi, and that the conditions of his detention were essentially the same as for the husband of Witness "D".

Witness "H"[143] stated that together with his mother he was arrested at gun point by a man in black uniform at 6.30 a.m., while walking to his uncle's house. They were placed in a car, and hoods were placed over their heads, then they were driven to a house before being taken to Llapashtica where they were placed in a basement. They were given a heater for the room and they stayed there for three days and three nights. The room had a table and chairs but no mattresses. During that time Nazif Mehmeti and Latif Gashi came and took them to the second floor in order to interrogate them. The witness was placed in a room on the right side and his mother was placed in an adjacent room. Either Nazif Mehmeti or Latif Gashi brought a piece of paper to him and said, *"Write down your opinion of your mother"*. A little later the witness opened the door to his room and went onto the balcony. *"There was a window close to my door and I saw my mother sitting on a chair in the middle of the room. Mr. Gashi had a gun in his hand and Mr. Mehmeti had a little tape recorder. Mr. Gashi said to her, "You have to say 'I am a traitor of the people'". She answered, "I cannot say something that is not". Then he was putting his handgun sometimes in her mouth sometimes in her neck"*. A short time later he returned to his room and then Nazif Mehmeti came in and removed the piece of paper. Subsequently his mother told him that she had been accused of spying and that Latif Gashi had threatened to send her to her grave. On the day of his release he was told by Latif Gashi that if he told anyone what he had seen *"You will know what will happen"*. Sometime after the war he had learnt that his mother's body had been discovered in a mass grave near the village of Majac. He went to the gravesite and found some parts of his mother's body including her head, which was wrapped in a sweater. He stated that he has received *"hundreds"* of threats from ex-KLA soldiers who had come at night and thrown stones and fired guns at his home.

This witness, who was 19 years old at the time when he gave evidence during the trial, and only 14 at the time of the events about which he was speaking, firmly denied that he had been subjected to any pressure, threats, bribes or promises from the police and denied the account of Witness "5" who had alleged in his evidence that Witness "H" had told him of the same. The trial panel refers to its assessment of the credibility of Witness "5" above, and found no serious inconsistencies in the evidence of Witness "H" save that to the Investigating Judge he had stated that he did not know who had pointed the gun at his mother[144]. The witness explained to the trial panel that he was sure that this person was Latif Gashi and that the record of the investigative hearing could be mistaken. However, the trial panel notes that the witness was describing only two persons as having participated in this event. Those persons were Nazif Mehmeti and Latif Gashi, and the witness had

[143] TM 05.05.03.
[144] Investigation hearing 05.02.02, p5.

described them acting together to the Investigating Judge. Further, the trial panel also noted that the witness was fully prepared to say if he was not sure of an issue such as identity, as he had demonstrated at the beginning of his evidence. The panel therefore reached the conclusion that the evidence given by this witness that Latif Gashi was the man who used the gun against his mother was accurate and true. As for the reasons for detention of the witness and his mother, there were absolutely no reasons whatsoever for the detention of this 14 year old save that he was with his mother when the arrest was effected; his detention was, accordingly, entirely unlawful. In relation to his mother, there is evidence suggesting that she may have had frequent contact with the Serb police[145]. It is not necessary for the Court to determine whether such contact actually gave rise to a legitimate suspicion of collaboration as it would be sufficient in the context of this criminal prosecution if it might have done. The Court considers that such alleged contact might be a sufficient reason to detain someone at least in order to investigate properly and fairly whether or not the person in question posed a security threat. However, nothing could justify the appalling torture to which the mother of witness "H" was subject. Again, the fact and details of her detention were corroborated by the entries in Exhibit 4, item 21 and the "Amnesty" document contained within the loose papers therein.

At the ocular inspection the Court was able to inspect the building which had been used as the Military Police Headquarters in Llapashtica and noted that it was as described by this witness. It was clear that the witness and his mother had been kept separate from the other detainees. It was also clear, contrary to the arguments of the defence, that the witness could indeed have seen into the room where he states that his mother was being interrogated and abused. As to the manner in which and how badly his mother was treated, the trial panel also relied upon the fact that ultimately she was one of those detainees who was killed.[146] In these circumstances, and again bearing in mind the Court's assessment of the credibility of other witnesses, the trial panel concluded that the mother of Witness "H" was illegally detained at Llapashtica, and that she was beaten and tortured under the direction of Latif Gashi.

Witness "P"[147]. On the 2nd November 1998 the brother of this witness was taken by the military police of the KLA, and he was later told by a masked soldier that his brother had been taken for informal talks and was now in Llapashtica: the soldier begged him not to tell anyone that he had been given this information. The next day, together with his father, he had gone to see Latif Gashi but Gashi had impolitely refused to see them. He had gone to Llapashtica nearly every day to try to see his brother and the next time he saw Latif Gashi he and his father were threatened by Gashi who had a Scorpion gun and pointed it at the father saying, *"If I see you again I will kill you"*. On a later occasion his brother had smuggled a letter to the family inside a sweater; another detainee called Afrim Molloku brought the letter to them. In the letter his brother had said that he did not know why he had been arrested and stated that he had been questioned by Latif Gashi about, *"stupid things he had not done"*, and said that Gashi had beaten and tortured him. The letter also stated that Nazif Mehmeti was in charge of the detention facility. His brother requested that the family approach Adem Demaci for assistance. The witness could not say why his brother had been arrested but could only speculate that it may have been linked to a family feud dating back many years between the witness' family and the family of Nazif Mehmeti. After the war he tried to get information as to his brother and was able to speak to Latif

[145] See for example the evidence of Witness " P" who stated that the mother of Witness "H" was a degenerate person who was *"on very good terms with the Serbian police commander of Lluzhan":* TM 06.05.03, p12.
[146] See the view of witness "I" below as to why the five persons including this witness' mother were killed and not released.
[147] TM 06/08.05.03.

Gashi. Gashi told him that, *"no serious act"* had been attributed to his brother. Enver Sekiraqa had told him that Latif Gashi and Nazif Mehmeti had executed his brother. Sekiraqa had said that he had been ordered to dig a trench and, being suspicious, he had managed to escape, and further that the hole that he and others had been obliged to dig was where his brother's body had been found. The witness had also heard that the Serbs came no nearer to this area than 4 or 5 kilometres. He had also heard from a blacksmith, Islami, that Lata had killed his brother.

The witness produced a note which he stated he had taken from Enver Sekiraqa in which it was alleged that Latif Gashi was responsible for ordering the execution of the brother of the witness, and also a letter on Red Cross paper: Exhibit 19. The letter on Red Cross notepaper comprises at least two and possibly three different styles of handwriting, and the Court was accordingly concerned as to its authenticity. The notes were written down on two pages from a book similar to an exercise book. The trial panel has no positive reason to doubt that Enver Sekiraqa handed the letter to the witness but in the absence of hearing the testimony of Enver Sekiraqa, despite many attempts to locate him, the trial panel does not feel that it should rely upon the contents of that document against the defendants. As to the notes that the witness himself took from Enver Sekiraqa the trial panel takes the same view namely that it would be wrong to place any weight on the contents of those notes in the absence of the court, the defendants and their counsel ever having the opportunity to question Enver Sekiraqa, especially given that the information received by the Court was to the effect that Enver Sekiraqa was living in Pristina at the time of the trial but was deliberately avoiding being summoned by the Court.

This witness also stated that he had spoken to a lady who was a member of the ICRC and who said that she had visited his brother in prison; she had told him that the conditions were difficult but that the Red Cross could not be involved in issues concerning the war and the army. This explanation is consistent with the established and internationally accepted approach of the ICRC to their work in situations of conflict and as explained in the letter of the ICRC to their work in situations of conflict as referred to above. The witness stated that he had no complaint against Naim Kadriu whom he considered to be a fair person and whom he had seen once during the period of March to June 1999 when Naim Kadriu was helping the civilians. The witness stated that he had heard that Latif Gashi himself was a collaborator of the Serbs. The trial panel considers that this was not in fact true, as the Serb intelligence documents (Exhibit 2, item 49) clearly show that Serb interest in him was as an enemy and as a leader of the KLA; the importance of this part of evidence of this witness is that it shows that wholly unreliable rumours were circulating in the Llap zone during the time in question and, therefore, how heavy was the burden on those who effected the detention of citizens, to adopt and implement fair procedures for the proper determination in each individual case of whether detention was or was not justified for security reasons. The witness stated that his opinion was that 80% of the blame for his brother's death lay with Nazif Mehmeti and only 20% with Latif Gashi whereas he did not blame Commander Remi at all.

Witness "W"[148] was an elderly man and the father of witness "P". He stated that after his other son was detained by the KLA he managed to speak to Latif Gashi who was very rude to him and threatened to break his teeth. On a later occasion Latif Gashi had threatened to kill him. The witness became distressed during the hearing. He stated that Enver Sekiraqa had visited him after the war and had reported to him that *"The KLA murdered your son"*, and that other people had told him the same. The witness identified Latif Gashi in court.

[148] TM 08.05.03.

Despite the criticisms of the defence to the effect that the witness had received improper assistance from his son during a short break in proceedings the trial panel found the evidence of this witness reliable. It was significant that he made no criticism of either Naim Kadriu or Rrustem Mustafa. In the event, his evidence against Latif Gashi was little more than an indication that Latif Gashi had been uncouth and threatening to him as he tried to find out what had happened to his son; had the witness wished to invent evidence against Latif Gashi it would have been easy for him to fabricate much more incriminating testimony. In so far as he reported what Enver Sekiraqa had told him whilst the trial panel accepts that this what Sekiraqa told the witness the trial panel does not place any reliance on this testimony in the absence of hearing direct testimony from Sekiraqa. The panel does accept, however, that it was the case that there were rumours at the time to the effect that the KLA had killed his son.

Having considered the evidence of Witnesses "P" and "W", together with all the other evidence that bears on the issue of detention and treatment of detainees at Llapashtica, the trial panel is in no doubt that the son of witness "W" and brother of Witness "P" was detained in Llapashtica, was badly beaten and tortured and held in the same conditions as other detainees. This conclusion was reached notwithstanding the evidence of Arif Mucolli, concerning the letter from the detainee, and whose evidence the trial panel found unsatisfactory as explained below.

Witness Fatmir Mustafa[149] stated that he received a summons to attend at Llapashtica and he did attend on the 8th January 1999. He was taken before Commander "Dini", Nazif Mehmeti, who then questioned him. Dini asked him why Serb officers used to come to his café, and whether he knew anything about the Serb army. Fatmir Mustafa explained that he knew nothing whatsoever about the Serb army. The witness explained to the trial panel that he had a café business from 1983 until 1997. He was detained in Llapashtica for a total of seven or eight days (according to the entry in Exhibit 4, item 21 his detention lasted for ten days), after initially being told that he would be kept there for one month. He stated that he was detained in the same room as about five or six other detainees, and that conditions were not that bad.

According to this witness there were enough mattresses for the detainees and although it was cold it was not so bad as to cause him to complain. The single small window was covered over with nylon. The room had previously held cattle. The detainees were allowed to clean it and could go outside and smoke in the compound. He did not hear complaints from others nor did he see any signs that any detainee had been beaten. He also stated that the detainees were provided with sufficient food. This witness stated that he repeatedly asked why he was being detained and said Mehmeti did not maltreat him. He added that he was interrogated three times in all, and that Commander Suzuki was also involved in questioning him. He stated that the detainees stood and faced the wall of the detention room when anyone opened the door. Detainee Idriz Zvarqa was in charge of the detention room and explained the rules to him although he could not remember them. Of the other detainees one named Bedri had looked ill and frightened and when this witness first arrived he had also expressed concern as to why he had been brought there. Fatmir Mustafa stated that he was allowed to wash and shave just before his release and stated that he did not need to wash or shave before that time. The trial panel noted that the witness displayed reluctance to confirm what he had said to the Investigating Judge namely that it appeared as if other detainees were being questioned in the same way as had happened to him, thus implying that all detainees had been questioned while in detention.

[149] TM 15.05.03.

In the view of the trial panel, this witness gave a deliberately sanitised account of the conditions that applied during his time in detention. The trial panel accepts that the witness was interrogated by Nazif Mehmeti, contrary to the accounts of Mehmeti, Gashi and Rrustem Mustafa that interrogation did not take place, and further that he was not maltreated by Nazif Mehmeti. Nonetheless, it is impossible to see how any person can have no real complaints about being detained with five or six other people in a room that had previously housed cattle. Further, given that the room had no heating and that the witness stated that it was cold outside, the panel considers that the witness was not telling the truth when he stated that it was not cold inside. The trial panel regarded the witness as withholding the truth from the panel when stating that he could not confirm that other persons were interrogated as he had stated to the Investigating Judge. This witness was detained for a relatively short period of time. The trial panel accepts that in his case his release followed the KLA reaching the conclusion that he had no information that might be of interest to the KLA. In the view of the trial panel there were never any credible grounds for his detention; he was arrested and questioned, as the nature of the questions demonstrates, because at a time long before the armed conflict he had a café that was frequented by Serbs as well as Albanians. Therefore, his detention was not justified and was accordingly illegal; however for the reasons given the trial panel regards his account of the conditions under which he and other detainees were held as unreliable.

Gani Zuka,[150] known as "Suzuki", was a guard at the detention facility in Llapashtica and was under the direction and control of Nazif Mehmeti. He stated that detainees were kept in a small renovated house, were not maltreated and were fed three or even four times a day. He stated that there were 15 or 16 mattresses. He had been dismissed from his job as a KPS officer as a result of the intervention of the Public Prosecutor who considered his testimony before the Investigating Judge to be insincere. In the opinion of this court, such action by the Public Prosecutor was plainly wrong and should not have happened, and in assessing the credibility of this witness the trial panel has ignored what was a clear expression of disbelief of the witness by the then Public Prosecutor. The witness stated he did not know if detainees were questioned and *"…could not remember"*, escorting them from the detention room for that purpose. However he later stated that the military police had to *"interrogate, advise and discipline,"* the detainees. He had heard that the Red Cross had visited but had not seen them himself.

Save in respect of his evidence that he had not seen any personnel from the Red Cross visiting the detention facility, the trial panel is clear in its view that this witness did not tell the truth. As one of the principal guards of the detainees he should have been able to confirm visits by such persons if they had in fact take place. Accordingly, his testimony that he had not seen any such visits is strong evidence that they did not generally occur. However, both common sense and witnesses in the case including, on this point Fatmir Mustafa whose evidence to the Investigating Judge was mentioned in paragraphs 149 and 150 herein, and the witness, Kamber Hoxha, contradict his evidence that detainees were not questioned. The evidence of Gani Zuka that there were 15 or 16 mattresses in the detention room is incredible as the panel could see that there was insufficient floor space for more than 5 or 6 mattresses. Further, his testimony to the panel as to the very detention room itself, which was not a renovated small house as he said but a former cattle stable, showed that he was prepared to tell blatant lies. The trial panel accordingly rejects the major part of the evidence of this witness as being a clear and cynical attempt to mislead the Court.

[150] TM 15.05.03

Kamber Hoxha[151] joined the KLA in February 1999 and was a guard at Llapashtica, according to him for a period of about one month after Gani Zuka, and also he acted under the direction and control of Nazif Mehmeti. According to him *"Detainees were questioned but very briefly"*. He said that questioning would be for just ten or fifteen minutes. He stated that the detainees were kept in a room that had been used as a warehouse, there was no heating but there were blankets and mattresses. The detainees could use a toilet and could wash *"in quite primitive conditions"*. This witness gave a detailed account of the events at Majac, which followed the abandonment of the Llapashtica facility in late March 1999. For the reasons given previously the trial panel does not accept the account of this witness that questioning happened only very briefly. Further, this witness later changed his evidence[152] and stated that the only occasions on which any detainee was questioned was when two or three detainees asked to be mobilised in the KLA: in the view of the panel this demonstrates the unreliability of this witness. Even if the initial account of the witness had been maintained it is impossible to understand what the point would be of merely very brief questioning, and further very brief questioning is clearly inconsistent with the level of concern and interest that the KLA had in those persons whom they considered as collaborators. Overall, the trial panel considers that this witness demonstrated obvious partiality to the defendants to the extent that the court regards his evidence on important matters as unreliable.

Idriz Bajrami[153] joined the KLA at the end of December 1998 and was under the control and direction of Nazif Mehmeti at Llapashtica. According to his evidence he *"had almost nothing to do with the detainees"*. He stated that he was not aware whether detainees were questioned by Nazif Mehmeti and that he never went into the detention facility himself. The witness mostly gave evidence as to the circumstances of the detainees and their alleged release from Majac, said to have taken place in April 1999, and which is dealt with below. The witness stated that during April and May 1999 he was in charge of a special unit whose duties were to locate and recover the bodies of dead persons and presented notes, which he said gave details of those operations. In view of the witness' very limited evidence as to the issue of detainees at Llapashtica the trial panel was unable to derive any real assistance from his account.

Arif Mucolli[154] was Deputy Commander of Brigade 152 and a member of the zone command. He described the organisation and training of the KLA Llap zone in the summer of 1998 and stated that he knew of no detainees in Bajgora at that time. He stated that the KLA organised units of civilian defence comprising of trusted people in the villages and these units provided information as to persons considered to be likely collaborators. As a result of their efforts persons so identified were sent to Llapashtica. He stated that there was no process by which detainees could defend themselves and that questioning did not take place. He had taken part in the decision resulting in the amnesty that was said to have been granted on or about the 5th April 1999. He stated that the amnesty was issued, as the persons in detention could no longer collaborate due to the fact that civilians were being displaced and a parallel police force was no longer a possibility. He stated that the KLA did issue summonses but that the purpose was not to require persons to attend for informative talks. He stated that he had seen Latif Gashi digging trenches. He had participated in battles with Latif Gashi on a number of occasions including 15th September 1998, 24th September 1998, 27th December 1998, 9th January 1999, 24th or 25th March 1999, 27th March to 3rd April 1999, and 25th May 1999, and he gave the locations of those battles.

[151] TM 16.05.03, and 19.05.03
[152] TM 19.05.03 p5.
[153] TM 19/20.05.03.
[154] TM 20.05.03.

The trial panel, for the reasons identified previously, again rejects the evidence of this witness in relation to his assertion that questioning of detainees did not happen and will address later his evidence as to the "Amnesty" of 5th April 1999. The trial panel is sure that in many cases detention of detainees took place as a result of information being passed to the KLA by villagers, but this process of information gathering followed by arrest was wholly inadequate to justify detention without independent review; as stated previously, whether or not it provided a sufficient reason for arrest would depend on the facts of individual cases.

Nuredin Ibishi.[155] In paragraph 51 above the trial panel explained its reasons for regarding this witness as evasive in relation to the identity of the person in charge of the detention facility at Bajgora. The witness stated that Latif Gashi was Chief of the Secret or Intelligence Services but was mostly engaged in fighting and added: *"I am not aware that he had any role in relation to those suspected of collaborating"*. The trial panel entirely rejects this statement. Nuredin Ibishi was appointed Chief of Staff in December 1998 and was a member of the zone command. As such he would have been well aware of the involvement of Latif Gashi in the detention and questioning of detainees at Llapashtica. It is noteworthy that he stated that Nazif Mehmeti was constantly presenting requests for release of detainees to the command. The trial panel considers that this is grossly exaggerated; not even Nazif Mehmeti says that he was making such requests. The trial panel is no less critical of this witness in relation to his statement that he did not know whether summonses were issued to people in writing or orally: in view of the importance of the issue of collaborators to the command and the existence of written summonses in the case it is inconceivable that he did not know of their existence. The witness stated that the KLA acted in accordance with international conventions, thus demonstrating knowledge albeit not compliance.

The witness produced a video said to be of the displaced population and a document that he said was part of the KLA training program, which set out a brief summary of certain relevant matters concerning the laws of war. The witness sought to establish the date of this document by reference to a picture of himself in which he said the same document could be seen on a wall behind himself sitting at a desk. Careful inspection of the photograph revealed that the document in the photograph was different from that produced to the Court. Later the witness stated that the document relied on was itself behind the document shown in the photograph. Bearing in mind the fact that inspection of the photograph reveals no sign of any other document underneath the one shown in the picture, and that the Court considers this witness to be untruthful in a number of significant respects, the Court does not accept this explanation and does not regard the document produced to the Court on the 22nd May 2003 headed *"International Law and International Conventions of War"* as genuine.

Naip Gubetini[156] was a military policeman in Llapashtica under Nazif Mehmeti for about three weeks. He stated that this was during October 1998 but as he said that he stayed for three weeks and then moved to another post as Chief of Military Police in Brigade 152 some three weeks before the New Year, and the evidence shows that Llapashtica did not become operational until the end of October 1998 at the earliest, the trial panel concludes that he worked at Llapashtica during November 1998. He stated that he did not know of any detention facility in Llapashtica, saying *"Whilst I was in Llapashtica there were no*

[155] TM 22.05.03 and 23.05.03
[156] TM 23.05.03

detainees nor any room for holding detainees". However, the witness then went on to say that he recalled the names Jashari and Kastrati as referring to two people who were transferred to Llapashtica although it was not his task to take care of their security. According to him these two persons were not detained for more than two weeks. As Exhibit 4, item 21 makes clear, the evidence of the witness that there were no detainees in Llapashtica at that time is totally incorrect. The witness also stated that he had come across the same two detainees in Potok and that their health and physical condition were just the same as in Bradash. Again, referring back to the evidence of Witnesses "E" and "G" the trial panel rejects this evidence as wholly untrue. He considered Commander Ylli to be a very trustworthy man, a matter which the trial panel consider true and which supports the view that what Ylli had said to witnesses "E" and "G" as to the responsibility of Latif Gashi for the treatment of their father was also true and reliable. This witness stated that he released Hetem Jashari and Alush Kastrati from detention in Potok pursuant to receiving an order to do so from Nazif Mehmeti, however the trial panel refutes this account by reference to the analysis below regarding the events at Potok and considers that this evidence is no more nor less that a clear attempt to conceal the true facts as to how Alush Kastrati and Hetem Jashari died.

Jashar Ejupi[157] joined the KLA in Llapashtica on the 3rd October 1998 and later moved to Brigade 151 of which the Headquarters was based in Konushevc. According to him Nazif Mehmeti was already in Llapashtica at that time. The trial panel considers that whilst the witness would be likely to remember the date on which he joined the KLA he could be mistaken as to whether Nazif Mehmeti was actually in Llapashtica at that time, and on this point the trial panel prefers the evidence of Nazif Mehmeti that, at the earliest, he took up his post in Llapashtica at or close to the end of October 1998. In February 1999, the Commander of Brigade 151, Idriz Shabani, ordered this witness and other KLA soldiers to arrest Agim Musliu and take him to Llapashtica, which they did. He knew nothing of any earlier arrest of Agim Musliu. He also stated that he had taken another person to Brigade 151 and he talked to that person and warned him not to repeat his conduct. He detained and questioned a person called Mehmet Mehmeti about receiving money and weapons from a Serb and misrepresenting himself as a member of the KLA and stated that Mehmeti had given a full statement. In this part of his evidence, this witness provided yet further confirmation that questioning of arrested and detained persons was an integral part of KLA procedure. The Musliu family subsequently brought a legal action against him in relation to the arrest of Agim Musliu. He also stated that Latif Gashi was involved in a number of battles. Otherwise, the witness gave no useful evidence relating to the detention of persons at Bajgora.

Jetullah Zhdrella[158] was also a member of the KLA who had commenced his duties in Llapashtica before moving after about three weeks to Brigade 151 based in Konushevc. He had taken part in the arrest of Agim Musliu in February 1999. Agim Musliu had requested that he be allowed to attend the next day at the Brigade Headquarters and this request was referred to the command of the Brigade who denied the request and therefore Agim Musliu was arrested and taken away immediately. The witness stated that he did not know the reasons for the arrest, and said that he was simply acting under orders. The witness disputed that this event was in fact an arrest saying that as Agim Musliu agreed to go with the soldiers, and was not handcuffed, he was not technically arrested. The trial panel rejected this explanation as wholly unrealistic; it was obvious to all concerned that had Agim Musliu shown any resistance he would have been taken forcefully, thus he was

[157] TM 26.05.03.
[158] TM 26.05.03.

compelled to go with the soldiers against his will. The witness said that although he had been fighting on the frontline in Majac he had never seen Latif Gashi involved in fighting and furthermore that it was the young and not the older soldiers who were digging trenches. The witness stated that he had no contact with detainees in Majac during March or April 1999, as he was preoccupied with fighting. This witness gave no useful evidence relating to detainees in Llapshtica.

Ramadan Miftari[159] was a military policeman based in Llapashtica from the 20th November 1998. According to him even though part of his duties was to guard the detention facility he knew nothing about the detainees save that on one occasion he had visited the detainees with Nazif Mehmeti in order to give them some blankets but he had never been inside the detention facility itself. Despite this he stated that he escorted foreign monitors who visited the premises. During March 1999 as a result of a Serb attack on the Headquarters in Llapashtica the military police and detainees were moved to Majac and the remainder of his evidence falls to be considered in relation to the events at Majac in March and April 1999.

Witness "K".[160] The statement of this witness to the Investigating Judge[161] was read into the record with the consent of the parties. This witness stated that together with his three brothers and the son of an uncle, he was arrested and detained at Llapashtica, and finally for about ten days or two weeks thereafter at Majac. Although his younger brother and his uncle's son were released, he was himself detained for a little over two months. Exhibit 4, item 21 shows that this witness was in detention from the 15th January 1999 but no entry appears therein as to the date of his release. At Llapashtica he was detained in a stable or barn, it was very cold, although the detainees had sponge mattresses on the floor. He was questioned about whether he had stolen and spied for the Serbs and had to sign a sheet of paper. He stated that the detainees were given the same food, bread and soup, as the army.

At a point in the hearing before the Investigating Judge when the witness was being asked whether he had been maltreated, he failed to answer a question and appeared to be less than fully positive. The Investigating Judge then ordered a break of ten minutes. The following entry appears in the record of the minutes of that hearing[162]: *"Accordingly the IJ requested a ten minute break to check the recording equipment and to speak with the witness alone"*. Whatever was said between the Investigating Judge and the witness was not recorded on tape. After the recess, defence attorney Mr. Tmava objected to the fact that the Investigating Judge had spoken to the witness privately stating that the witness had been pressured to continue with his statement against his will. The Investigating Judge vehemently rejected this challenge. The fact is however, that a private discussion between a witness and the Investigating Judge, especially at a critical moment in the witness' account, is bound to give rise to the suspicion that some inappropriate communication has passed between the witness and the judge. Furthermore, in her response to Mr. Tmava the Investigating Judge stated *"I talked to this witness to find out the reasons for his reluctance to give a statement"*, but failed to state what, if any explanation the witness had given in reply.

Thereafter, it is clear from the contents of the minutes that the witness was unclear in answering a number of questions particularly questions that were concerned with whether or not he had made certain statements to the police which, if true, would have incriminated the defendants. In addition, during the later part of his testimony the witness showed great

[159] TM 29.05.03.
[160] TM 10.06.03.
[161] TM 28.02.02.
[162] Investigation hearing 28.02.02.

reluctance in answering the questions from the Investigating Judge as to whether or not he had told the police that he had been put under pressure to say or not say certain things during his testimony. The trial panel also notes that even before the break called by the Investigating Judge this witness had shown himself reluctant to give his story. In all these circumstances the trial panel considers that the testimony of this witness is unreliable on critical issues including the conditions of detention and treatment of detainees at Llapashtica. However, the trial panel has no evidence of any genuine suspicion that would support the view that this witness was a threat to the security of the KLA, or those whom the KLA represented, and as with all detainees, no judicial process was available to him in detention. Accordingly the trial panel concluded that this witness was illegally detained. The witness produced a copy document, which the trial panel accepts was the form of release order that he was given on his final release from Majac[163].

Afrim Maloku gave a statement to the Investigating Judge,[164] which was read with the consent of the parties. He stated that he was detained from the 17th February until the 21st February 1999 (Exhibit 4, item 21 shows dates of the 16th to the 20th February 1999). He said that he was detained due to an argument with KLA soldiers in which there had been a misunderstanding over his identity as the soldiers had thought he was Bashkim not Afrim Maloku. Accordingly he had been arrested and detained for four days. As can be seen from Exhibit 4, item 21, there was no mistake at all as to his identity when his personal details were entered in the detention register, no judicial process existed and no legitimate reason existed for his detention, which accordingly was illegal. This witness stated that a soldier questioned him on the same day that he arrived at Llapashtica, and he stayed in a room with mattresses on the floor until he was released. He stated that there was an electric light bulb, which worked when the generator was in use. He denied being beaten while in detention. He stated that he had met Idriz Sfarqa in detention at Llapashtica. In answer to a question as to whether Idriz had given him any message for his family the witness answered, "yes", and then began to explain that Idriz had given him a sweater for his family to wash and return. The witness denied, however, that the sweater had contained any message. In view of the connection that the witness made between the question concerning a message and the sweater, which at that stage had not been mentioned, and in view of the evidence of witness "P", the trial panel has no doubt that Idriz Sfarqa did indeed pass a secret message to his family through this witness and that this witness is deliberately concealing the truth by denying this event. In the light of this conclusion, and the evidence referred to earlier herein concerning the treatment and conditions of detainees during detention, the trial panel considers the evidence of this witness as to the conditions and treatment that he experienced in Llapashtica to be unreliable.

Sabri Gashi[165] joined the KLA in October 1998 and worked as a military policeman under Nazif Mehmeti. He remained at Llapashtica until the end of March 1999. Although at the time he did not know the reason for persons being detained he stated that later Nazif Mehmeti had told him that detainees were held as some had cooperated with the enemy and some had committed theft. He said he knew nothing about detainees being released except that Remi had ordered some releases. He denied ever going into the detention room and said he had no knowledge of interrogations. He confirmed that the window of the detention room was blocked by bricks. He had heard from Mehmeti that orders for arrest and release came from Headquarters. He had not seen any detainee receive visits. After the military police and detainees left Llapashtica he and the other military police decided to release the detainees.

[163] Exhibit 28.
[164] TM 13.07.02.
[165] Investgating Judge 17.07.02.

The trial panel finds that this witness was deliberately withholding evidence. In view of the fact that he was stationed at Llapashtica for the entire period of operation of the detention facility, he would have been able to give the Investigating Judge a great deal more information than he did. In the event, the trial panel is of the view that little reliance can be placed on his account.

Kapllan Parduzi[166] stated that he was a KLA soldier in charge of the security for Nuredin Ibishi, also known as Commander Leka. Both he and Nuredin Ibishi were wounded in a battle on the 9th or 10th April 1999. He stated that he knew Naim Kadriu who was *"one of the best-behaved soldiers"*. He stated that Naim Kadriu had been present when the witness was wounded on the 9th or 10th April 1999, and that he had served with Naim Kadriu on the front line for about 7 to 10 days. When asked why he had stated that he considered Naim Kadriu to be one of the best-behaved soldiers, he said this comment applied to all KLA soldiers, and that since the war his relationship with Latif Gashi and Rrustem Mustafa was *"stronger than brothers"*. The trial panel found that this witness was very partial towards the defendants during his testimony, however he in fact gave no evidence relevant to the issue of detainees at Llapashtica or elsewhere. The trial panel considered nonetheless that there was no reason why he should give evidence to the effect that Naim Kadriu had been involved in active fighting during April 1999 unless that matter was true, and further that this evidence supports the opinion of the trial panel that the entries in the diaries and notebooks of Naim Kadriu represented his own personal experiences.

Fetije Potera[167] spoke of her husband being summoned by a written notification: the trial panel finds that this part of the testimony is consistent with the evidence of written notifications seen in the loose pages of Exhibit 4, item 21. According to the register in the same exhibit, the witness' husband was detained on the 2nd February 1999, which date the trial panel considers is correct; his release date is given as the 5th April 1999 at 10.00hrs, and this and other similar entries for the 5th April will be discussed later in this verdict. Her enquiries resulted in her attending Llapashtica where she was told that her husband had been detained on suspicion of stealing some gold. The witness stated that she did not see her husband until after the war and had not asked him how long he had been detained. This witness alleged that the international police had told her that she could be relocated out of Kosovo and was also offered money. Concerning whether she had signed a statement that she had made to the police the witness gave answers that the trial panel regards as highly unsatisfactory. Even less acceptable were the answers of the witness to the questions from the Investigating Judge concerning a photograph of Latif Gashi shown to the witness by the police and on which the witness had written, *"This person is the one who questioned me about my brother's gold and maltreated me for four hours"*. The witness stated that her husband had been shot, but not killed, in August 2002. Having reviewed her answers as to the testimony she gave to the Investigating Judge the trial panel finds that her account was largely untrue and reflects fear of the consequences of revealing the truth.

Safet Gashi[168], a cousin of Latif Gashi stated that he knew nothing about detainees or detention centres in Llapashtica or Bajgora. He did say, however, that Latif Gashi was stationed in Llapashtica during the war and also that he took part in battles. Apart from that he added nothing of value to the case.

[166] Investigating Judge 25.02.02.
[167] Investigating Judge 07.11.02.
[168] Investigating Judge 07.08.02.

Muhammet Latifi[169] stated that he was one of the founder members of the KLA, and from 15th September 1998, he was appointed to handle issues concerning the civil defence in the Llap zone. He spoke about the digging of extensive trenches by members of the civilian defence and stated that Latif Gashi had also worked on that task, *"in a very distinguished manner"*. He confirmed that the KLA detained persons whom they considered to be collaborators saying *"it was more than fair and normal during war to pay particular attention to those persons"*. He was a member of the zone command. People in the civilian defence units in the villages provided information that would result in the arrest and detention of suspected collaborators. This witness spoke of detention being *"temporary"*, and intended merely to prevent those persons from acting to the detriment of the KLA. He stated that the KLA was not interested in finding out what collaborators knew about and had told the enemy, but later said that it was not that the KLA was uninterested in this but that they were unable to create the proper structures to deal with collaborators. Later still the witness was referred to a statement he had made to the Investigating Judge[170] when he said, *"I participated in a decision to interview Alush Kastrati"*, and did not deny that this was true. According to this witness, evidence of collaboration would be frequent contact with enemy forces or members of the secret service, but that marriage, friendship or a work relationship with a Serb would not be such evidence. The trial panel notes that this definition would not be satisfied in the vast bulk of cases of detainees at Llapashtica. Again the trial panel finds that this witness was not being truthful with the Court when stating that the KLA was either not interested in or unable to interrogate detainees as to their alleged activities with the enemy and rejects his account that detention took place merely as a measure of physical restraint.

Witness "M"[171] was a detainee in Llapashtica. According to the register in Exhibit 4, item 21, he was detained on the 15th January and no entry appears as to his release. He stated that someone called "Raci" and four civilians took him and his brother to a shop at a place called Kacybeg, where he and his brothers were beaten and told that their father had worked with the Serbs. They were then taken first to Konushevc and then to Llapashtica. At Llapashtica he was put in an animal stable with a concrete floor, which had no windows and was not painted and entirely without furniture. The stable did contain some thin sponge mattresses but had no heating, although he stated that it was not cold as they had some blankets. The toilet was outside. In all there were, *"20, or 10, or 6 people"*, in the stable. He stated that the KLA members in Llapashtica interrogated them, but he could not name those people and said they were wearing masks. He was accused of collaborating with Serbs and looting. He stated that he was not beaten nor were other detainees. He stated that it was crowded in the stable and that they ate the same food as the soldiers. After the Serb offensive the detainees were sent into the mountains and then released and split into two groups one of which went towards Podujevo and the other headed towards Majac. Thereafter, the detainees were again kept in custody by the KLA in a house in Majac where they were kept for two weeks in the basement whilst the soldiers used the upper floors of the house; conditions in Majac were, *"good"*. At the conclusion of that period at about 9.00pm one evening the detainees were told that they would be released, and were called one by one and given certificates. On their release, the detainees had split into two groups. According to this witness the second group contained Idriz (Zfarqa), Agim (Musliu), and Enver (Sekiraqa). The two groups walked past the mosque and separated at the intersection with soldiers escorting both groups.

[169] TM 12.06.03.
[170] Investigating Judge 21.08.02 p12.
[171] Investigating Judge 14.03.02.

This witness confirmed that he had told the police that whilst visiting his brother in the detention centre at Pristina in March 2000 he had been approached by two men in black uniforms who had told him that he had to go to "Nura" and make a statement to the effect, *"that all the prisoners were released and that none of them were killed by the KLA"*, and that he *"had to report this otherwise his brother would remain in prison for a long time"*. The witness confirmed that these men were asking him to go to UNMIK police station 92 to meet Nura and give a false statement about the incident in Majac, and said that if he did not do so then, *"they will do to me again what they have done to me before"*, meaning he would again be arrested and detained. The witness confirmed that he did not go to the police station but had been followed by these men.

The trial panel finds that parts of the account of this witness are reliable and true, however he is wrong as far as the details of the final events at Majac are concerned as it is clear that Enver Sekiraqa had in fact escaped one day at least before any detainees were released from Majac. Further, the trial panel finds that whilst the panel has no direct evidence to the effect that he was beaten, his account that he was unaware of others being beaten can only be understood as reflecting the fact, also spoken of more clearly by Rifat Ejupi, that detainees were reluctant to admit that they had been beaten. The fact that detainees were beaten is illustrated, for example, by the account of Witness "4" to the Investigating Judge in which that witness confirmed that other detainees had suffered injuries from beatings. In addition, the trial panel finds that it was obvious to each detainee that detainees were being beaten even though they were often unwilling to speak about their experiences; such reluctance to admit the truth reflects the degree of violence and intimidation to which they were subjected. The panel accepts, and regards it as particularly significant, that at a time prior to the arrest of any of the defendants, this witness was placed under pressure by members of the KLA who sought to compel him to make a false statement to the effect that none of the detainees at Majac were killed by the KLA. Such pressure, in the opinion of the trial panel, is of some importance with regard to the issue of whether any such detainee was killed by members of the KLA. The panel regards the account of this witness as to the conditions and treatment of detainees at Llapashtica as having been improved to some extent for the benefit of the defendants, probably as a result of the pressure that had been put upon him.

Rifat Ejupi[172], also known as "Murrizi" joined the KLA in Llapashtica on the 28th November 1998 as a member of the military police. He stated that he was present in Llapashtica for less than one month. In evidence to the Investigating Judge this witness showed a marked reluctance to reveal details as to the functions of other persons in the military police with whom he worked. He denied knowing any details as to the detainees, yet he confirmed that Alush Kastrati had received a visit from family members while in Potok. He stated that he had no knowledge as to what had happened to Alush Kastrati after that time. According to the witness, Alush Kastrati looked *"normal"* whilst at Potok. He denied seeing Nazif Mehmeti but admitted seeing Latif Gashi in Potok. In the opinion of the trial panel this witness was generally evasive when giving testimony to the Investigating Judge and his evidence is accordingly rejected as unreliable.

Vesel Jaha[173] stated that before the war he had acted as a middleman between Serbs and Albanians and made money by assisting Albanians to obtain various kinds of documents from the Serb administration by bribery. On the 11th March 1999 he received a summons in the form of a letter, which required him to appear before the UCK Headquarters in

[172] Investigating Judge 26.07.02.
[173] Investigating Judge 11.07.02.

Bradash. He attended as required and was then taken to the detention centre in Llapashtica. According to the opinion of the witness he was taken into detention as he had previously insisted on seeing the area where the KLA was training soldiers. He had enquired of the soldiers who arrested him and asked if they suspected him of acting as a collaborator and they confirmed that this was so. He was put in the detention room which he described as dark with only a small window, about 40 cms square, there were about 20 detainees inside, the floor was partly wood, partly concrete, some four or five sponges (mattresses) on the floor and some blankets, no heating; he estimated the room as about 4 meters square. Two or three persons had to share each mattress. He stated that the number of persons in the room helped with respect to the cold. His description of the conditions is regarded as accurate by the trial panel bearing in mind the other reliable evidence on this issue and the ocular inspection. He was in detention until the end of March; Exhibit 4, item 21, shows the release date as the 27th March. He stated that he was interrogated twice but not beaten. Concerning other detainees he stated that he never saw them being beaten but, *"I was afraid it might happen"*. Asked to explain this, he stated that his friends had warned him that such a thing might happen and that he might be thrown down a well. He stated that during his interrogation he was asked whether he was sure that he had not collaborated with the Serbs and if he would maintain the same account even if they, *"applied other measures on me"*, and that he had confirmed that what he was saying was the truth. On each occasion, his interrogator had shown him the police baton. The witness further stated that he felt that his sincerity perhaps saved him from being beaten.

Concerning other detainees, Vesel Jaha confirmed that they were interrogated individually and that this happened *"almost every day"*. He continued, "*They would come, pick up the people, bring them back, we would ask them if they had been beaten, they would say 'no'. We would say, 'we do not believe you'. I noticed that they would laugh at me when I said, 'no, I had not been beaten'. They did not believe me"*. The trial panel does not accept this part of the account of this witness; the reaction of the other detainees when each stated that he had not been beaten confirms that beating of detainees was the norm, and that none of the detainees accepted the denials of beatings made by their fellow detainees. Vesel Jaha stated that the entire day was spent inside and it was terrible; the food was acceptable as it was the same as the soldiers ate although some detainees fought over food. The detainees could generally use the toilet in the yard but he, Vesel Jaha, was not able to wash himself although others did do so. During his period in detention although he did not see Latif Gashi he understood that he was very important and heard from other detainees that he was the commander of Llapashtica. He stated that he had not seen injuries on any of the people in detention. His evidence again confirms that questioning did take place.

This witness stated that he was released after the detainees and military police had gone into the forest as a result of the bombing and fighting, and stated that the military police had given them their documents back prior to allowing the detainees to leave. Eventually he had joined the KLA. In the opinion of the Court this witness gave some reliable evidence; the fact that detainees did not overtly complain of their treatment, as explained previously, does not mean that they were treated properly, and the evidence of this witness provides considerable insight into that matter. In the view of the trial panel, the discernable reasons for the detention of this witness show that he was detained on nothing more than a vague suspicion that he was an associate of Serbs; this is not an adequate reason and no judicial process was available; accordingly the trial panel considers that he was illegally detained ab initio.

Haredin Berisha[174] was a member of the group of KLA soldiers who went to arrest Agim Musliu on an evening he believed in either February or March 1999. The soldiers were all armed, and he served under Jashar Ejupi. He stated that he had no other involvement with detainees. This witness gave no other useful testimony.

Witness "V"[175] stated that he had received a written summons and had attended the KLA at Llapashtica on the 7th January 1999. He was placed in a room that was used as a cell where there were 12 or 13 other people. That night two soldiers came in and one of them kicked him several times and asked him why he was hanging around with Serbs. Four or five other detainees were also beaten on that occasion. He was interrogated four times in all prior to being released on the 19th January. The witness also described how he was arrested, and beaten by the Serb police later in the war, and then sentenced to five years imprisonment. He was arrested because the KLA had suspicions that he may have given information to the Serbs. Once again, a review of his evidence shows that such suspicions were formed without any credible grounds. The witness stated that the next day he was interviewed by a person who told him that the beating would not happen again, and in fact he was not beaten on any other occasion. However, later in his evidence to the Investigating Judge this witness stated that he had been threatened by both interrogators that he would be beaten again if he did not tell the truth. The witness stated that he had been a friend of Latif Gashi for ten years.

In the view of the Court, this witness was concealing certain facts. It is not acceptable that first of all in his evidence he stated that the day after he was beaten he was told that it would not happen again, only later to say that his interrogators had actually threatened that he would indeed be beaten again if he did not tell the truth. In the light of all the testimony relating to the beating of detainees, the trial panel concludes that this witness was beaten as it is impossible to see what other response would have followed his repeated denials of guilt. The trial panel regards the evidence of this witness when he denied having been beaten as unreliable.

Witness "J"[176], speaking of Llapashtica, said that in November 1998 she had been asked by Latif Gashi to bring her brother, Agim, to him and she had done so. When her brother was brought to Latif Gashi, Gashi had laughed at her as if he had tricked her, but he had told her that her brother would be back home in 6 or 7 days after he had completed a task, which was to kill three Serb policemen. The witness stated that she often went to try to see her brother in detention but was never successful. Agim was kept in a stable at Llapashtica with as many as 22 other people and was released in January 1999. On his release, Agim had told members of his family as to what had happened to him whilst in detention. He said that he had been beaten by masked persons whilst in the stable and that Latif Gashi himself had beaten him; he showed the family scars that he had sustained as a result of the beatings, and complained of pains in the back and neck. Agim had stated that Latif Gashi, *"was the most dangerous person"*. Further, Agim said that the place where they were kept was always *"dim"* and that although there had been a small window the KLA had got some bricks and had blocked it up. When he had returned home, Agim was covered in lice, as he had not been able to wash himself. Agim had told them that a prison guard, Gani Zuka, had been very kind to the detainees. There had been insufficient room for all detainees to lie down. Gashi had kicked Agim on his neck. Agim had given the names of other detainees that included Idriz Svarqa, Enver Sekiraqa, Alush Kastrati, Hetem Jashari and Fehmi Potera who, Agim stated, had been badly treated. When he was released, Latif Gashi had placed a

[174] Investigating Judge 26.04.02.
[175] Investigating Judge 01.03.02.
[176] Investigating Judge 19.02.02.

condition upon him that he was to kill a Serb otherwise he would be arrested again in seven days. Agim's father had prohibited this, and eventually on the 23rd February, the KLA had come to the home and kidnapped Agim once more. Thereafter, the witness had continued to try to find out about the fate of her brother and ultimately her sister and brother spoke with Nazif Mehmeti who had introduced himself as a high-ranking inspector, but he had ordered two soldiers to remove them from the yard.

Once NATO bombing started this witness and her family could not remain in their houses and so it was not until after the war finished that she was able to try once again to find information about Agim. After hearing a number of different rumours eventually she spoke to a friend who had been a soldier in Majac village who reported to her that he had heard from colleagues that some people had been killed on the night of the 7th or 8th April; this man gave her a sketch of where he believed the persons were buried although he could not be sure that her brother would be among them. The witness went to the place identified and on her way there took a cart and talked with the driver. The driver stated that the persons who had been killed were killed by Commander Dini. On reaching the gravesite the witness saw her own red ski jacket, so she had dug at the ground and recognised her brother's body. She was able to recover his passport from his shirt pocket. The witness very precisely described the location of the gravesite about 150 meters up a track from the mosque without a minaret at Majac village, and less than ten minutes from the place where she believed her brother had been detained in Majac. Her brother, who was also present, was able to identify the head of a woman as that of Drita Bunjaku. The next day, the family recovered Agim's body and reburied it according to tradition. The witness stated that she understood from KFOR personnel who were present that her brother had been shot from behind. The witness added that after the second arrest of her brother she had gone to appeal to Adem Demaci who was a spokesman for the KLA in Pristina and he had said that he would see what he could do. Following that meeting she had gone again to Llapashtica where she and her brother had spoken to Nazif Mehmeti who had said "You dirty scum: you even went to complain to Adem Demaci". The witness also learnt that the KLA had released three Serb detainees which release was attributed to media pressure. The witness confirmed that she understood that there were no Serb offensives in the area of Majac at the time when she understood her brother was killed.

The trial panel found that the evidence of this witness including the evidence that she gave of what her brother had told her was reliable and true. Agim's account to her distinguished between the actions and behaviour of different personnel at the detentions facility and she gave direct evidence of his condition on release that is wholly consistent with Agim having been kept in conditions of severe deprivation. Further, her account of the psychological torture imposed upon Agim is identical to the later event concerning Witness "Q". Her evidence concerning the reaction of Nazif Mehmeti when he learnt that she had been to see Adem Demaci shows that he adopted a hostile attitude to relatives of detainees who had died. This is a further indication of his guilt in relation to the events at Majac, as had he not been culpably involved he would have had no reason to react to this witness in the manner that he did.

Witness "I"[177] gave evidence to the trial panel in the absence of the public on the 20th and 23rd June 2003. He confirmed that on the 23rd February 1999, he had been at his home close to where his brother Agim lived when his sister came unexpectedly and explained that the KLA had come. He also recognised some of the soldiers who were present. He explained that this was the second time that Agim had been detained by the KLA and on that occasion

[177] TM 23.06.03.

he had been detained for about 60 days. Later Agim had told him about his experiences whilst in detention. Agim had said that he had been accused of dealing in prostitution and was alleged to have sold Albanian girls to Serbs. Agim had alleged that he had been questioned by Latif Gashi and kept in a stable. He confirmed that on one occasion together with his sister he had been able to speak to Nazif Mehmeti who had eventually thrown them out of the compound. Agim had complained to him of being beaten naming especially Sheqir Mehmeti had beaten him the most. Agim had been released on condition that he should kill a Serb but the whole family was against such action. Approximately 20 days later, the KLA had returned and taken Agim away again. All those to whom this witness spoke told him that his brother was being interrogated by Latif Gashi and so he decided to go to see Latif Gashi's family who received him very well; he begged on his knees that they should help to save his brother and Latif Gashi's father said he would tell his son to save Agim's life. This witness had also visited Adem Demaci, and had spoken to other high-ranking members of the KLA for the same purpose. Some three or four days after the 4th April he was in Koliq and was asking people if they knew anything about his brother when he first heard that some prisoners had been released and some killed. It was only after the NATO forces entered Kosovo that the family was able once more to pursue the question of what had happened to Agim.

The trial panel found witness "I" to be highly credible, and his report of the account of Agim truthful and accurate. The trial panel noted that the essential features of the account of this witness corresponded with that of his sister, and that he was not inclined to allocate blame or guilt in the absence of good reason to do so. It is clearly correct that Agim was kept in a stable, and further, as the trial panel has noted previously, the psychological torture that was applied to Agim, namely that he should kill a Serb in order to atone for his alleged sins, was precisely the same type of threat that was applied to Afrim Sinani when he was detained later at Potok: such a remarkable correspondence of detail, in the absence of any reason to think that the witnesses to these two separate events had any opportunity to confer with each other, shows a pattern of behaviour which the panel regards as highly significant, and is strongly supportive of the testimony of the witnesses concerned.[178]

The witness Agim Rrustem Shaholli[179], denied that he knew anything about the detention of Agim Musliu or that he had ever been spoken to by witness "I" about Agim's detention. This witness stated that he had been a member of the KLA Llap zone group "U 66". The panel rejected the evidence of this witness as the panel found that the evidence of witness "I" to the effect that he contacted persons whom he thought might be able to assist him to find his brother was wholly credible and in accordance with common sense, and further that in view of Agim Shaholli's position as a member of "U 66" it was perfectly understandable that witness "I" would approach and talk with him. Further, the trial panel noted the manner in which this witness greeted the defendants when he entered the Court, which gesture the panel found indicated partiality to their cause. This partiality was reflected in his answers when he was very ready to say that any person who said that he had been approached by any relative of Agim Musliu was a liar, thus allowing nothing for the possibility of innocent mistake.

Kadri Kastrati[180] was the deputy Commander of the Llap zone. He confirmed that a number of detainees were held in detention by the KLA. He stated that the persons detained had put at risk the interests of the KLA in the Llap zone. He stated that the KLA was afraid that the civilian population would take revenge against these persons and so they were detained

[178] See also the diary of Naim Kadriu, Exhibit 9, item 2, further confirming the threat/condition imposed.
[179] TM 24.06.03.
[180] TM 16.06.03.

"for a short period of time". The trial panel found that this statement was clearly and intentionally misleading. He stated that the general amnesty in April was ordered due to the fact that the war was becoming more intense and the KLA could detain people no longer. This witness stated that collaborators had given information to the Serbs that was valuable to the KLA, but nonetheless he said it was not of interest for the KLA to interrogate these persons as "I would not believe them". Again, the trial panel rejects this evidence as wholly untrue. As already explained, it would be of paramount interest to the KLA to know exactly what had been said to the enemy so that, amongst other reasons, the KLA could revise its own plans as necessary. This witness gave contradictory evidence as to whether or not detainees were or were not interrogated,[181] and the trial panel found him to be evasive in this area of his evidence. He stated that the conditions for detainees were the same as for KLA soldiers, a proposition which the trial panel has already rejected as wholly untrue.

Tafil Avdiu[182] was deputy and later Commander of Brigade 151. He stated that he was not involved with detainees but had heard about them. He alleged that he had participated in meetings in villages with civil defence personnel and at one such meeting the case of Agim Musliu had been brought up. According to the witness the villagers said that Agim Musliu had been seen having meetings at the Serb police. There is, however, no other evidence to support this allegation and the trial panel finds that it is an example of unsubstantiated rumour insufficient to demonstrate the existence of legitimate concerns as to security reasons and thus insufficient to justify arrest. This witness stated that he advised the Commander, Rrustem Mustafa, not to question detainees, as at that time the KLA had not been able to arrange for court hearings. In the context of a violent internal armed conflict such a reply surely misses the point. The issue at the time was not at all whether or not such persons had committed some crime but what damage they may have caused to the KLA cause, something that could only be addressed by questioning. The attempt of this witness to argue that the KLA was not detaining people but rather temporarily interfering with their liberty in order to prevent them from carrying out their activities was at best disingenuous and at worst dishonest. The witness stated that summonses were issued verbally and not, as far as he knew, in writing. Again, the panel is satisfied that this is untrue evidence as the panel has seen examples of written summonses issued by the KLA, and this witness was a senior officer in the KLA. This witness stated that if some person had been killed in the zone, then the KLA would quickly hear about that event, which part of his evidence the trial panel considers is true.

Agim Dibrani[183] stated that he had been the chairman of the Emergency Council based in Podujevo from February to September 1999 and in that capacity had first met Latif Gashi in either March or May after which time he had had many contacts with him.

Idriz Shabani[184] was the Commander of Brigade 151. He stated that the Brigades received information from the civilian defence and that in zone command meetings decisions were taken from time to time that certain individuals suspected of collaboration should be detained. Once detained by the Brigade, those persons would be taken to Llapashtica, but the witness knew nothing of the conditions in which they were held. This witness also stated that there had been an amnesty decision taken by the zone command at the beginning of April 1999 as the war circumstances were getting worse and, "the detainees no longer

[181] To the Investigating Judge, he stated that detainees were interrogated; to the trial panel he stated that he did not know whether or not this happened.
[182] TM 17.06.03.
[183] TM 19.06.03.
[184] TM 19.06.03.

presented a risk as there was nothing they could do in the circumstances", further explaining that the civilian population had been displaced by that time. The trial panel rejects this explanation. If these persons were considered to present a sufficient degree of risk to KLA activities that it was necessary to detain them then a worsening of the war did not reverse that situation, if anything it created a heightened degree of risk. In addition, the displacement of the civilian population did not mean that the population was free from risk. Collaborators could, for example, inform the enemy of the movement of the civilian population, thereby exposing large numbers of people to great danger. This witness also stated that the KLA did not interrogate detainees. For reasons already explained herein the panel also rejects the evidence of this witness on this issue. It was significant that this witness confirmed that three of the detainees who had been detained by Brigade 151, and who were later found killed, were considered very serious cases of collaboration. This witness stated that he had not taken any steps to find out in what circumstances those detainees were killed.

Milazim Veliu,[185] gave no useful evidence to the Court.

The panel heard the evidence of Dr. Skender Murati,[186]a medical doctor, who stated that he was Chief of Sanitation in the KLA Llap zone, and thus a member of the KLA Llap zone command in 1998/1999. This witness stated that from approximately late November 1998 he visited detainees and that he had conducted his tasks, "with full responsibility and high professionalism regardless of the circumstances in a situation of war". This witness gave evidence that was patently untrue. The appalling conditions that were spoken of by some detainees and which were confirmed by the trial panel in the subsequent ocular inspection, were presented by this witness in evidence as perfectly satisfactory, if not enviable. This witness was evasive and unreliable on the issue of whether detainees had any heating in the detention room,[187] and ultimately suggested that the room was not cold in winter due to the body warmth of the detainees, a proposition that the trial panel considered bordered on the obscene. For those reasons, the trial panel disbelieves this witness in relation to his many attempts to portray the circumstances of the detainees as satisfactory.

Bajram Krasniqi[188] gave evidence in relation to the document that the panel later decided to separate from the case file, and accordingly the trial panel places no reliance on the evidence of this witness.

Police Evidence

Much of the police evidence in the case concerns Llapashtica and accordingly it is convenient to review this area of evidence at this point in the verdict. The trial panel accepted the proposal of the defence, made on the 2nd July 2003 after the panel had heard a number of police witnesses, to the effect that unless a statement was produced to the court in conformity with Regulation 2002/7, the trial panel in the case of any person who might have become a witness should evaluate no hearsay evidence from any police officer, and that ruling is reflected in the summary of their evidence herein.

Officer Steve Petty[189] interviewed some 45 to 50 potential witnesses in the case. He stated that no money had been offered to any witness he had seen and that the issue of relocation

[185] TM 20.06.03.
[186] TM 17.06.03.
[187] See TM 17.06.03, ps 15 and 16.
[188] TM 01.07.03.

of witnesses, although originally a possibility for some witnesses, had ceased to exist some two months into the police investigation as the relocation program was not up and running at that time. Some witnesses had been told that if they were at risk as a result of their evidence then the issue of relocation would be considered. This witness also stated that some 4 or 5 witnesses in the case he believed had been threatened in various ways. The most serious threats had included a car bomb last December in Pristina which, he believed, was aimed at a potential witness in the case. The witness also explained that in many cases the police used a Serbian language assistant when speaking with witnesses as those to whom they were speaking felt uneasy at the prospect of using an Albanian language assistant as they feared that what they said might not remain confidential.

This witness stated that whilst he had not participated in the arrest of Latif Gashi by UNMIK police he had been made aware of the fact that Latif Gashi had resisted the arrest, there had been a struggle and Latif Gashi had sustained some minor injuries.

Officer Richard Griffin[190] also mentioned that in the initial stages of the inquiry the police had been authorised to offer the possibility of relocation to witnesses but that had been stopped after a short time when it was realised that the relocation program was not established. This witness stated that money was never offered by the police to any witness, and also confirmed that he had heard that Latif Gashi had suffered some minor injuries during his arrest. This witness rejected the suggestion that the police had told witnesses what they wanted to hear from them or that the police had ever prepared witness statements in advance. The witness confirmed that he was not given any instruction to act either for or against the KLA during the inquiry. The witness stated that he had no concerns as to the integrity of the search of the office of Latif Gashi and that the police had never come across a diary of the sort described by Latif Gashi and said by him to be missing from his office.

Officer Michael Kijowski[191] stated that he had handed back certain property to the relatives of Latif Gashi but he had not seen any item that resembled a diary; he confirmed that a full search of the remaining items recovered in the search of the offices of Latif Gashi and no such item had been located. The witness produced a document obtained during a traffic stop, however the panel later agreed with the defence motion that this document should be separated from the case file, and accordingly the trial panel attaches no weight to that item.

Officer Mario Sherer[192] also interviewed a number of witnesses during the police investigation into the case: he denied that he had ever offered either money or relocation to any witness in exchange for testimony. One witness had asked him for a small amount of money, some 50 euros, which he had refused.

Ralf Gheling[193] was the initial police investigator in this case, and described the difficulties that the police experienced in obtaining evidence and maintaining confidentiality. He also refuted the suggestion that offers of money or relocation had been made by the police to potential witnesses, and that at the time when the investigation began there was no possibility of relocation.

In the view of the Court, whilst it is clear that mention of the possibility of relocation was made to some witnesses by the police, it is also clear that the police could not offer any

[189] TM 24.06.03.
[190] TM 25.06.03.
[191] TM 25.06.03.
[192] TM 01.07.03.
[193] TM 01.07.03.

promise of relocation as that was a matter for the witness protection programme. Further, the programme was only effective for a short time. In those circumstances and having heard a number of police personnel on this issue, the trial panel has no doubt that the police did not offer promises of relocation in return for testimony. The trial panel is also satisfied that the police did not offer money to potential witnesses, and that the police officers had no prior expectations of any witnesses nor was anti-KLA or other bias a part of their investigation. The trial panel is satisfied that the police never recovered any diary of the sort described by Latif Gashi: had the police recovered such an item it would have been of marked interest to them and thus would have been preserved.

Based upon the above review, the trial panel reached the following conclusions as to the events at Llapashtica.

Detention and Detainees.

As explained above, the Brown Book, Exhibit 4, item 12, is considered by the trial panel to be a reasonably accurate record of persons detained in the detention facility at Llapashtica during the period 2nd November 1998 to late March 1999, but that the entries after the 27th March 1999 are unreliable and in some cases deliberately falsified. A total of 52 (fifty two) persons are registered as detainees in that book during that period. As to the reasons for the arrest and detention of those detainees about whom there was no detailed evidence, the testimony of those witnesses whom, in the above evaluation, the trial panel considered reliable on this issue, shows clearly that the pattern commenced in Bare/Bajgora, whereby persons were arrested and held in detention very often on nothing more than rumour, was adopted, developed and promoted at Llapashtica. The evidence heard by the trial panel undoubtedly showed that even allowing a generous margin for the difficulties facing the KLA, in that they were heavily outnumbered by FRY and Serbian forces, any reasonable review of the identified reasons for arrest shows that they were often insubstantial and insufficient to qualify as reasons genuinely related to security concerns.

Much worse, however, were firstly the complete absence of any form of judicial process whereby a detainee might challenge his or her detention before an independent tribunal, and secondly the ever present and immediate threat and fact of severe repeated violence in conjunction with questioning; as mentioned previously, it was clear to the panel that the regime of detention begun and developed at Bare/Bajgora was extended and promoted at Llapashtica. In these circumstances, the trial panel has no hesitation in reaching the view that whether or not the arrest of any detainee might be capable of justification, the detention of all 52 detainees was illegal under international and domestic law once detention had become an established fact.

Treatment of Detainees at Llapashtica.

The trial panel has no doubt that the treatment of detainees at Llapashtica was appalling. As emphasised above, the conditions in the room in which as many as fifteen or sixteen detainees were incarcerated were unquestionably inhuman. Again, as at Bare/Bajgora, the proposition of the defendants that questioning did not take place is simply untrue. Further, the trial panel finds that those who were detained for substantial periods of time were subject to routine beatings in an attempt to cause them to confess to acts of disloyalty to the KLA and/or to extract information or confessions from them. The treatment of those detainees thus amounted to torture.

Was the detention illegal?

The arguments set out in relation to events at Bare/Bajgora are equally relevant in relation to Llapashtica and accordingly the trial panel finds that the detention of the detainees at Llapashtica was illegal under international and domestic law.

Events at Majac and Potok following evacuation of the facility at Llapashtica.

There is much evidence and general agreement that on a date around the 23rd or 24th March 1999, the KLA was compelled to move the Headquarters and detention facility from Llapashtica. The evidence shows that the Headquarters and most of the detainees were moved to premises at Majac. The Headquarters was established in the house of Bajram Isufi, and although at one stage it was not fully clear where precisely the detainees were held the trial panel has concluded that they were detained in the basement of the same house[194]. It was not possible for the trial panel to locate the precise whereabouts of the Headquarters and detention facility in Potok, save that it was clear that it was located in that region which is a particularly remote and mountainous area of North East Kosovo.

The detainees at Majac included all save two or three of those removed from Llapashtica. On an occasion just a few days after being taken to Majac, around the 27th April 1999, events in that area became very dangerous and so the military police took the detainees into the mountains. At that place, a decision to release all those prisoners was taken by the military police without reference to or permission from KLA headquarters. When Rrustem Mustafa heard of this, he ordered the immediate re-arrest of all those persons. Mustafa explained this action on the basis that these persons had been released without proper documents which were needed if they were to be able to pass through KLA checkpoints. In the view of the Court this explanation was clearly false, as the provision of the correct paperwork could have been completed within a matter of hours whereas in truth these detainees were held in detention for at least another ten days before, as will be seen, some were released and some were killed. Further, no such release papers were found on the body of any of the five killed detainees, thus indicating that they at least were not to be released.

According to Rrustem Mustafa, on the 5th April 1999 he issued an amnesty for all remaining detainees – see Exhibit 4, item 12, loose pages 1 and 2. Both he and Nazif Mehmeti state that Mustafa ordered Mehmeti to deliver the news of this amnesty to prisoners at Majac and Potok and to ensure their release. Mehmeti, and the guards at those two detention facilities state that this is what happened and that Mehmeti visited first Majac and then Potok on the same evening. The trial panel is sure that Mehmeti did indeed visit both Majac and Potok but that the reason for his visit was to enable the release of some detainees only and to ensure that the remainder was eliminated. However, for reasons which it was not possible to establish, the killings of the detainees at Potok were delayed for sometime as the trial panel accepts the evidence of witnesses "E" and "G" that they last saw their father alive on the 13th or 14th April 1999 as very clear and accurate evidence[195]. As to why some detainees were released and some killed, whilst it is not strictly necessary for the trial panel to resolve this matter, the panel considers that the explanation proffered

[194] See the evidence of Ramadan Miftari TM 29.05.03, p3 – 5, who clearly indicated that the detainees and the Military Police were housed in the same building with the detainees in the basement.
[195] See above for the panel's assessment of the evidence of these witnesses.

by witness "I", namely that those who were killed were considered the most serious collaborators, is probably correct.[196]

The trial panel found that Nazif Mehmeti's account that he was instructed to ensure the release of these detainees, and thus Mustafa's account of having issued an overall amnesty order to him, was false. Firstly, it is clear that three of the detainees from Majac were killed and buried in a shallow grave within a very short distance, approximately 250 meters, from the gates of the Headquarters at Majac, and in a location that was remote and lonely, ideal, it must be said, for execution; the evidence of family members as to identity was supported by the evidence of Dr. Tefik Gashi[197] who stated that the bones recovered from the shallow grave were the bones of three individuals and included the bones of a woman an well as male bones. Secondly, the trial panel is satisfied that there were no Serb forces in the area at the time when these three persons were killed. Had such forces been so close to Majac at that time the panel is sure that other incidents of attacks by Serbs would have been reported, and further, that the KLA would have at least attempted immediately to move its Headquarters from Majac, something which no witness suggested happened until early May, nearly four weeks later[198]. Thus, the proposition that Serbs might have killed those three persons so near to the KLA Headquarters is unfounded. Thirdly, the trial panel found the account of the guards and Nazif Mehmeti to the effect that at Majac the guards had accompanied the detainees for a short distance outside the gates of the detention facility was only explicable on the basis that they had done so in order to carry out the killings: there was no other conceivable reason for accompanying those people for that short distance. Fourthly, similar fates befell two detainees at Potok who were said to have been released and yet were found dead within a short distance of the Headquarters. Although the distance could not be precisely established it is again true that no credible evidence exists which could suggest that these deaths were other than caused by the KLA. Further, Naip Gubetini stated to the investigating judge that he was sure that the order on which Nazif Mehmeti acted (and that resulted in the killings) was given by Rrustem Mustafa to Nazif Mehmeti.[199]

According to Witness "S",[200] she was told that the detainees from Potok who were later found dead were killed at about 03.00 am on the night that they were sent out of the detention centre. The person who gave her this information provided a large amount of detail including the fact that the two detainees were killed as soon as they had been released and the bodies lay by the roadside for two days. Serb forces were certainly not in the area of Potok in mid-April, as around the 11th or 12th April 1999 the wounded Nuredin Ibishi was taken by Latif Gashi to the hospital in Potok, had surgery and was still in the hospital at Potok at the end of April.[201]. Specifically, the Court heard that the Headquarters and hospital at Potok were not abandoned until the 28th April[202]. Rumours began to circulate that the detainees at both locations had been killed by the KLA. The fact that the deaths at both locations happened so soon after alleged release and within a short distance of the detention facility cannot be regarded as a mere coincidence but is powerful evidence of a systematic approach to killing.

[196] It is noted that according to the entries in the Brown book, Exhibit 4, item 21, all those killed had been held in detention for many weeks.
[197] Investigating Judge, 04.10.02.
[198] See for example the evidence of Idriz Shabani, TM 19.06.03, p9 *"The Serbs went into Majac in April 1999 after my units withdrew, this was around the end of April 1999"*.
[199] TM 23.05.03, p6.
[200] TM 30.04.03, p3.
[201] See his evidence TM 22.05.03, p10.
[202] See Skender Murati, TM 17.06.03, p18.

In addition, the trial panel has concluded that a number of entries in the Brown book, Exhibit 4, item 21, relating to detainees who were killed or who may have been intended to be killed are false and represent a crude attempt to cover up the killings. The relevant entries are those that allege that various detainees were released at 10.00am on the 5th April 1999. Not only can it be seen that those entries are made in a wholly different pen and hand from the vast majority of other entries but it is noticeable that the writer did not bother to make similar entries for the detainees who were actually released. As to why this happened the only explanation is that the writer was trying to make it appear that those who died had in fact been released; again, this strongly suggests that these persons were killed by the KLA. The trial panel agrees with the arguments of the Prosecutor to this effect at pages 27 and 28 of his final speech. Lastly, in this context, the trial panel could not avoid observing the demeanour of Nazif Mehmeti during the trial and also noted that he had taken the enormous step of relinquishing his position in the KLA late in April 1999; hardly any moment in time could have been more critical for the KLA in the Llap zone, as this was when both Majac and Potok came under such pressure that both had to be abandoned. In the view of the trial panel, Mehmeti would not have taken this dramatic decision unless he had the most overwhelming reasons for doing so. His explanation for leaving the KLA, namely that conditions for detainees were not good, and that he did not like the way that matters were being handled, especially in relation to security issues concerning detainees, is quite simply not a sufficient explanation for leaving the KLA at its time of greatest need. In the view of the trial panel, Nazif Mehmeti was troubled by his own actions and those of his superior commander in regard to the killings of the five detainees. He had carried out his order with some regret; it bore heavily on his conscience, and continues to do so even now. He feels, rightly, that he could and should have taken no part in such dreadful acts.

Accordingly, the trial panel found that Rrustem Mustafa had ordered the release of some detainees and the killing of others. The "Amnesty document" of the 5th April 1999 is a fraudulent attempt to portray the event as an overall release of all remaining detainees.

Acts established against the defendants Latif Gashi, Nazif Mehmeti and Rrustem Mustafa relating to Llapashtica, Majac and Potok

In view of his undoubted knowledge of the detention facility operating at Bare/Bajgora, his failure to take any steps to prevent the abuses taking place there or to punish those responsible, and the highly significant meeting of important persons within the zone during October, the trial panel found that it was an inescapable conclusion that the regime at Llapashtica was implemented under the direction of Rrustem Mustafa as Commander of the Llap zone. The evidence showed that Latif Gashi was centrally involved in the operation of the detention facility at Llapshtica, that the torture of detainees was carried out under his direction and that he was the superior of Nazif Mehmeti. For his part, Nazif Mehmeti had the duty of ensuring the physical security of the detainees, and was the supervisor of the guards; he knew of the torture of the detainees.

Latif Gashi was, contrary to his evidence, unquestionably the de facto Commander of the Military Police at Llapashtica, and this role was maintained after detainees were transferred to Majac and Potok. He is directly responsible for the illegal detention and torture of detainees, and for their inhuman treatment at Llapashtica. His actions were carried out with the approval and endorsement of his zone commander, Rrustem Mustafa with whom he had a close relationship: Articles 142, and 22 CCY. (Finding 1, Gashi, Counts 2, 5 (part) and 8 (part)).

Rrustem Mustafa knew of, approved, sanctioned and directed the carrying out of the regime just described and was fully complicit with Latif Gashi in the perpetration of the acts just described of illegal detention and torture, and the inhuman treatment to which detainees were subject at Llapashtica: Articles 142, and 22 CCY. (Finding 2, Mustafa, Counts 2, 5 (part) and 8 (part)).

The participation of Nazif Mehmeti at the detention facility was in the role of head of the detention facility, and as already stated, he was subordinate to Latif Gashi, and thus to Rrustem Mustafa. As such, his liability is truly expressed in terms of aiding and abetting the regime of illegal detention, torture and inhuman conditions previously described pursuant to Articles 142 and 24 CCY. (Finding 1, Mehmeti, Counts 2, 5 (part) and 8 (part))

Concerning the killings of the five victims, three at Majac and two at Potok, the Court found that these murders were directly ordered by Rrustem Mustafa: Article 142 CCY (Finding 4, Count 11, Rrustem Mustafa). Nazif Mehmeti was allocated the task of conveying the orders to unknown KLA soldiers and ensuring that the killings took place, which he then did: Article 142, and 22 CCY (Finding 2, Count 11, Nazif Mehmeti).

Acts in relation to Llapashtica, Majac and Potok that were not established

The Court found that there was insufficient evidence to demonstrate the conditions in which detainees were held at either Majac or Potok with any clarity, and observes that the periods that detainees spent in detention at those places was much shorter than at Llapashtica.[203] As a result, the Court concluded that the allegations of inhuman treatment relating to the conditions in which detainees were held had not been established in relation to Majac and Potok (Residual issues, Gashi, Mehmeti, Mustafa, Count 5).

Similarly, there was insufficient evidence to establish that detainees had been beaten and tortured during the relatively short periods during which they were held at Majac and Potok (Residual issues, Gashi, Mehmeti and Mustafa, Count 8).

There was no direct or compelling indirect evidence of the involvement of Latif Gashi in the events relating to the deaths of the five detainees at either Majac or Potok. The trial panel could not conclude that it was an inevitable inference that Latif Gashi must have been involved in those events and accordingly the panel considered that the involvement of Latif Gashi in those matters had not been established. (Residual issues, Gashi, Count 11)

The incidents concerning Witness "Q" and Halil Sinani, Koliq (Counts 3, 6 and 9), and events at Koliq.

Latif Gashi and Rrustem Mustafa denied having anything whatsoever to do with any violent behaviour towards either Witness "W" or Halil Sinani. Naim Kadriu stated that he was not responsible for any such offending as was alleged in the indictment and that the notes made by him were no more than a record of information received by others, to some extent amended by himself.

[203] Detainees were held at Majac during the period late March to around the 7th April 1999, and at Potok from late March to around mid April 1999.

Halil Sinani, also known as Halil Kozici, (originally witness "R"),[204] stated that he wanted to give evidence without his identity being protected in any way. He stated that his son, witness "Q" had gone to Kolic to look for tractors and cars that belonged to the family and when after five days the son had not returned Halil Sinani had gone to look for him. He himself was attacked and beaten for about three hours and as a result suffered broken ribs, his throat was scarred with a knife and he suffered much bruising. He stated that as the beating was taking place he heard some of the attackers use certain names "Latif" and "Naim", but immediately added "But I suppose if I wanted to do something wrong I could put a false name on somebody". This remark was the first of many attempts by this witness to deny that those involved in this attack included Latif Gashi and Naim Kadriu. Nonetheless, he went on to say that he had heard the full name "Latif Gashi" during the attack. The witness was left in an unidentified location where his son found him in a very bad condition the next morning. The witness went on to say that he filed a court action against the perpetrators and that later the UNMIK police came and told him that they had caught the men responsible but that when he went to court to identify the persons he realised that they, Latif Gashi and Naim Kadriu, were not in fact the guilty men.

The statement of witness "Q"[205] was read with the consent of the parties. This witness stated to the Investigating Judge that he had been abducted at gunpoint on the 1st June 1999. During the course of the events that followed he was beaten and he heard the name "Naim" mentioned and the following day during the course of interrogation he was questioned by both Naim and Lata. He was told that he would be released if he agreed to kill a Serb, the head of the municipality. As mentioned previously herein, this requirement precisely replicates the condition imposed by Latif Gashi upon the release of Agim Musliu, a fact sufficient in itself to establish that Latif Gashi was the man concerned in each of these incidents. Witness "Q" stated that Naim had beaten him each day he was held in detention. He was detained for some days with some other people before eventually being released. He described finding his father, who had been left in the open air, as if he was dead. Witness "Q" removed his father to a place of safety. Later, to the police, he had identified photographs of Latif Gashi as one of the men concerned whom he had seen in posters on the streets shortly after the arrest of the defendants and he had also identified Naim Kadriu from photographs shown to him by the police. However, on his second appearance before the Investigating Judge he denied that either identification was in fact correct.

The trial panel had the advantage of inspecting two copies of the statement compiled by Halil Sinani for the purposes of the action brought by him. This document was found first by the UNMIK police in their search of the KSHIK offices[206]. The fact that such a document naming "Latif Gashi" was found in offices in which Latif Gashi, the defendant in this case was then working, is clear evidence that he was the Latif Gashi against whom the indictment was directed by the complainant. The second copy of this document was also found in the prosecutor's file relating to this complaint[207]. The conclusion that Latif Gashi is correctly identified as the defendant in this case gives some support for the fact that the "Naim Xhakollia Kadriu" is also Naim Kadriu, the defendant in this case as it is evidence of a particular association between the two men. The conclusion that the identity of Naim Kadriu is clearly established does not, however, depend on this matter, as in one of the most remarkable exhibits in this case the Court was able to read the account of part of what happened to Halil Sinani and witness "Q" in a diary written by the defendant Naim Kadriu.

[204] TM 12.05.03, 13.05.03.
[205] IJ 1.02.02, 11.02.02.
[206] Exhibit 13, item 27.
[207] Exhibit 20.

The court has already commented upon the totally incredible explanation that Naim Kadriu gave concerning his voluminous writings. In this document,[208] between the dates 02.06.1999 and 05.06.1999, Naim Kadriu gave a full description of the arrest of witness "Q", his examination, the passing of a message to Halil Sinani to the effect that if he did not attend then witness "Q" would not be released, and the eventual beating of Halil Sinani. Further, the account mentions the condition under which Halil Sinani was released, namely that he had to kill Serboljub Bisecic, stating: "Remi and Lata left this responsibility to me". This entry demonstrates that the detention of Halil Sinani was grossly illegal in that it was being and would continue to be maintained unless Sinani agreed to a condition amounting to psychological torture. In the same Exhibit, under earlier dates between 01.05.1999 and an illegible date in June 1999 the background to the arrest of Halil Sinani is set out. Naim Kadriu considered Halil Sinani to be a collaborator.

In these circumstances, the Court has no doubt at all that the allegations in Counts 3 and 9 are established against Latif Gashi, Naim Kadriu and Rrustem Mustafa. The evidence shows that the physical actions were carried out in complicity between Gashi and Kadriu, with no significant difference in criminal responsibility and culpability between them, and that Gashi and Mustafa imposed the condition that Halil Sinani be released from illegal detention only upon agreeing to kill a Serb; the Court is satisfied that the only reason why Naim Kadriu mentioned that "Remi and Lata left this responsibility to me" is because that was the truth. The torture of Witness "R" was directly ordered by Rrustem Mustafa: Article 142 CCY (Finding 3, Counts 3 and 9, Rrustem Mustafa). The physical violence was carried out by Gashi and Kadriu with Kadriu also imposing the condition upon the release: Articles 142, and 22 CCY (Finding 2, Counts 3 and 9, Latif Gashi, Finding 1, Counts 3 and 9, Naim Kadriu).

Witness "5" stated that on the day of his detention he was making his way towards his home village when he was stopped by two soldiers from the KLA who told him that he could not go there as the Serbs were in his village. The witness did not believe the soldiers who then prevented him from going to his village and ordered him to go with them. He was taken to the village of Dyz where he slept that night and the next day he proceeded to his village and was eventually reunited with his family in another village called Svecel.

This witness stated that the police stopped him and that the police would not even tell him what the case was about prior to arriving at the police station. He further alleged he was the victim of grossly improper conduct on the part of the police and the Investigating Judge, and stated specifically that at the police station the Investigating Judge, *"presented us (witness and his father) with some statements"*. He stated that the Investigating Judge had told him that he had to sign the statement, and that he had replied that he could not as the statement was not his. According to him, the Investigating Judge had threatened him that if he did not sign the statement he would be imprisoned, and so ultimately he had signed the statement. This witness stated that nothing in the statement was true. The witness then confirmed, however, that the statement was true when it recorded that two KLA soldiers had taken him to Dyz village where he had spent one night, and that he was released the next day, one day after NATO entered Kosovo, as also referred to in the statement. According to this witness, a further witness, Witness "H", had told him that he had been asked by the police to give evidence against the defendants, and that that witness had never told him that his mother had been murdered after being held in detention. He alleged that witness "H" had told him that despite the fact that nothing had happened to him he would

[208] Exhibit 9, item 2.

give evidence against the defendants as he had been offered a lot of money and promised relocation. He stated that nothing untoward had happened to him at the hands of the KLA.

In the view of the trial panel, Witness "5" was clearly lying when he said that the Investigating Judge had presented him with a statement that was not his. As the witness himself accepted the statement included true details of the occasion when he was stopped and detained by the KLA for one night that could only have been known to the witness. Further, the trial panel is sure that Witness "H" was indeed a witness to appalling events affecting his mother and thus it is highly improbable that he stated that "nothing had happened to him" as he had allegedly stated according to Witness "5". Accordingly, the trial panel rejects the account of this witness given at trial. It follows from the account of this witness to the Investigating Judge that the events that he experienced occurred at or just after the time when NATO entered Kosovo, and accordingly the trial panel is not sure that they occurred within the period of the armed conflict as defined earlier herein. The trial panel also finds that there is very limited evidence available concerning events at Koliq and accordingly is not satisfied that it can safely accept as true the account of this witness as to the allegations he made to the Investigating Judge concerning Naim Kadriu for the purposes of recording any conviction based upon that account.

Acts in relation to Koliq that were not established.

There was insufficient evidence concerning the conditions in which detainees were held at Koliq, and accordingly the allegations relating to those conditions were not established (Residual issues, Gashi, Kadriu, Mustafa, Count 6).

SENTENCING

In deciding upon the appropriate sentences the Court took into consideration the following aggravating and mitigating circumstances, pursuant to Articles 33, 38, and 41 of the CCY.

Latif Gashi

Latif Gashi had been involved at the heart of the regime of interrogation and torture of detainees from the early days in Bajgora and throughout the period when the Headquarters was based in Llapshtica. He had personally and with the assistance of others beaten and tortured many detainees causing them great suffering and had caused them to be detained in grossly inhuman conditions. In view of the fact that it was not established that he had taken any part in the killings of the victims in this case it was appropriate that his sentence should be lower than the sentences imposed on Nazif Mehmeti and Rrustem Mustafa. The Court could not identify any mitigating features in his case save that he had not been convicted before. Accordingly the Court assessed the correct sentence in his case to be one of ten years imprisonment.

Nazif Mehmeti

The Court considered that Nazif Mehmeti bore a heavy responsibility for the offences relating to the deaths of the five victims and also for the regime of detention and ill treatment at Llapashtica. However, his responsibility was diminished to some extent as firstly, he was not involved in the events at Bare/Bajgora, and secondly he did not instigate the regime but actively supported its operation. In mitigation, it was clear that although he

did not apologise for his actions he was nevertheless affected by the gravity of the events in which he had taken part. The Court also took the view that he had made at least some basic efforts to improve conditions for the detainees, and concluded that he had not generally maltreated detainees himself. Finally, the Court noted that he had not been sentenced before. Nonetheless, he could have refused to convey the order from Rrustem Mustafa that resulted in five persons being killed, and his culpability in this area is reflected in the major part of the sentence passed upon him. Thus the Court concluded that the correct sentence in his case was thirteen years imprisonment.

Naim Kadriu

Although the acts proven against Naim Kadriu fall into a small compass they are undoubted serious and demonstrate that given the opportunity, he was ready and willing to engage in extreme violence with no regard to the pain and suffering that he was inflicting. The minimum sentence for an act of War Crime is five years imprisonment. The Court could identify no mitigating features in relation to his conduct, save that he had not been sentenced before. In the circumstances the Court considered that a sentence of five years imprisonment was appropriate.

Rrustem Mustafa

As aggravating circumstances, the court considered the position of this defendant as Commander of the Llap zone, the fact that within the KLA he had both de jure and de facto power over his subordinates, and the fact that the accused did not express any regret. As mitigating circumstances, the Court considered the fact that the accused has never been sentenced before.

In addition, concerning each of the accused the Court bore in mind that the offences happened during an armed conflict and therefore that the responsibility of the accused may have been affected to some extent by those circumstances.

As a result of the abolition of the death penalty, the applicable law foresees a sentence of between five and twenty years imprisonment, as per Articles 142/3 of the CCY as read with Section 1.5 of UNMIK Regulation 1999/24 as amended by Section 1.6 UNMIK Regulation 2000/59.

Prior to UNMIK, a sentence of twenty years of imprisonment could be imposed for the most serious criminal acts; otherwise the Court was restricted to sentences not exceeding fifteen years. Thus where a Court considered that a particular case could justify a sentence of twenty years and also considered that a sentence of fifteen years was unduly lenient, the court had no alternative but to pass a sentence of twenty years imprisonment as no sentence in the bracket between fifteen and twenty years was permissible.[209]

However, as pointed out above the Court can now impose any sentence of between five and twenty years imprisonment. Therefore, where a Court considers it is dealing with a case in which the proven acts can properly be described as “most grave” the Court now has an additional power to draw back from imposing the full twenty year sentence. Such an approach is consistent with Section 1(4) of Regulation 24/1999, as an accused facing a sentence of twenty years imprisonment, and knowing that the Court considers the facts of the case too serious for a sentence of fifteen years to be passed, would undoubtedly argue

[209] See Article 38 (1) and (2) of the CCY.

that the Court can and should impose a sentence of between fifteen and twenty years as an alternative to the maximum sentence.

In this case the trial panel considered the acts proved against Rrustem Mustafa, which included direct responsibility for the murder of five people together with grave culpability for a regime of illegal incarceration and torture, to be so serious that despite the fact that he had not been sentenced before a sentence of twenty years could be warranted. Nonetheless, the Court, mindful of the fact that the possibility that even more serious cases might yet come before the Court in relation to the events of 1998/1999 considered that by reference to the above principles the Court should draw back from imposing the full sentence of twenty years imprisonment upon this accused. Accordingly, the Court considered that a sentence of seventeen years imprisonment was appropriate.

Bethan Moss
Court Recorder

Timothy Clayson
Presiding Judge

DISTRICT COURT PRISTINA
11th November 2003

Legal Remedy: An appeal can be made within 15 (fifteen) days of receipt of the written verdict. The appeal shall be made to the Supreme Court of Kosovo through this Court.