

ANNEX 3 to
Prosecution response to Veseli Defence appeal against the ‘Decision on Motions
challenging the jurisdiction of the Specialist Chambers’

Public

UNITED NATIONS
United Nations Interim
Administration Mission
in Kosovo



NATIONS UNIES
Mission d'Administration
Intérimaire des Nations Unies
au Kosovo

Interim Administration of Kosovo
Administrata Përkohshme e Kosoves
Privremena Adminstracija Kosova

AP – KZ 139/2004

The Supreme Court of Kosovo held a panel session pursuant to Article 371 of the Yugoslavian Law on Criminal Proceedings (Official Gazette No. 26/86) on 7 and 8 July 2005 in the District Court building in Pristina, Kosovo, with International Judge Kathleen Weir as Presiding Judge, with International Judge Larry Eisenhower and International Judge John Connolly as members of the panel, and with Tamara Brnetic as recording clerk, in the criminal case number AP-KZ 139/2004 against the following defendants:

LATIF GASHI, also known as Commander "Lata," a Kosovar Albanian; father's name Riza; mother's name Raba; born on 12 September 1961; place of birth Doberdol, municipality of Podujevo; married with three children; graduated from the Faculty of Law in Pristina; Director of Intelligence Service of Kosovo and reserve officer of the Kosovo Protection Corps (TMK); without previous convictions or pending criminal proceedings; living in Pristina city center off Mother Theresa Avenue, grid coordinates EN 1328 2333; in detention since 28 January 2002;

NAZIF MEHMETI, also known as "Dini," a Kosovar Albanian; father's name Hajredin; mother's name Shabe; born on 20 September 1961; place of birth Shajkofc, municipality of Podujevo; married with three children; graduated from the Faculty of Law in Pristina; Kosovo Police Service (KPS) officer in Pristina, Station 3; without previous convictions or pending criminal proceedings; living in the village of Shajkofc and/or SU 3/2, second floor, number 9, Pristina; in detention since 28 January 2002;

NAIM KADRIU, also known as "Lumi," a Kosovar Albanian; father's name Halit; mother's name Mihane; born on 5 March 1973; place of birth Turqice; married with two children; literate; employed by Kosovo Petrol; without previous convictions or pending criminal proceedings; living in Podujevo at grid coordinates EN 1630 5062; in detention since 28 January 2002;

RRUSTEM MUSTAFA, also known as "Remi," a Kosovar Albanian; father's name Musli; mother's name Nefise; born on 27 February 1971; place of birth Perpellac; married; graduated from the Faculty of Law in Pristina; without previous convictions or pending criminal proceedings; living in Podujevo, Fiteria Street, at grid coordinates EN 1601 5245; in detention since 11 August 2002.

All of the above four defendants were charged in an indictment dated 19 November 2002, amended on 4 February 2002 and amended on 30 June 2003, with war crimes in violation of Article 142 of the 1977 Criminal Code of the Socialist Federal Republic

of Yugoslavia (hereinafter referred to as CCSFRY), as read with Articles 22, 24, 26 and 30 of the CCSFRY, made applicable in Kosovo by United Nations Mission in Kosovo (hereinafter referred to as UNMIK) Regulation 1999/24, as amended by UNMIK Regulation 2000/59. The amended indictment dated 30 June 2003 contained fourteen counts, all under Article 142 of the CCSFRY, as read with Articles 22, 24, 26 and 30 of the CCSFRY. The charges are more fully discussed in the Reasoning of this Decision and are incorporated in this portion of this Decision by reference. The trial commenced in the District Court of Pristina on 20 February 2003; the verdict was announced in public on 16 July 2003; the written verdict is dated 11 November 2003.

The charges against all four defendants arise from incidents which were alleged to have occurred between August 1, 1998, and mid June 1999, in an area in the north eastern part of Kosovo near the Serbian administrative border, an area referred to by the Kosovo Liberation Army (hereinafter referred to as KLA) as the Llap zone. All four defendants were alleged to have been members of the KLA during that period of time and all the victims of the war crimes were alleged to be Kosovar civilians.

Six appeals in this case were lodged against the Verdict of the Pristina District Court No. 425/2001 dated 11 November 2003:

1. Appeal of defense counsel Mexhid Sylja and Bajram Tmava, for the defendant Latif Gashi, dated 31 December 2003;
2. Appeal of defence counsel Fazli Balaj, for the defendant Nazif Mehmeti, dated 30 December 2003;
3. Appeal of defense counsel Hamit Gashi, for the defendant Naim Kadriu, dated 30 December 2003;
4. Appeal of defense counsel Tome Gashi, for the defendant Naim Kadriu, dated 30 December 2003;
5. Appeal of defense counsel Aziz Rexha, for the defendant Rustem Mustafa, dated 29 December 2003;
6. Appeal of the International Prosecutor Philip King Alcock dated 13 January 2004.

Deliberations by the Kosovo Supreme Court occurred on 11, 12 and 13 July 2005 and the Kosovo Supreme Court panel hereby makes the following

DECISION

1. **The appeals of all defense counsel for the four defendants LATIF GASHI, NAZIF MEHMETI, NAIM KADRIU and RRUSTEM MUSTAFA are GRANTED AND APPROVED and Verdict No. 425/2001 of the Pristina District Court dated 11 November 2003 is ANNULLED AND CANCELLED IN ITS ENTIRETY and the case is remanded for retrial.**
2. **The appeal of the International Prosecutor is rejected.**
3. **The costs of the appellate proceedings in this case shall be borne by the United Nations Interim Administration of Kosovo.**
4. **The defendants LATIF GASHI, NAZIF MEHMETI, NAIM KADRIU and RRUSTEM MUSTAFA are hereby released from custody subject to**

the conditions set forth in a separate Order by the Kosovo Supreme Court, such Order being incorporated in this Decision by reference.

REASONING

Legal Basis of Appeals

Defense counsel have raised various issues in their appeals based on provisions of the Yugoslavian Law on Criminal Proceedings (Official Gazette No. 26/86). This procedural code is applicable because Article 555 of the Provisional Criminal Code of Kosovo effective 6 April 2004 mandates that indictments filed prior to 6 April 2004 is governed by the Yugoslavian Law on Criminal Proceedings (hereinafter referred to as LCP). Article 363 of the LCP allows for contesting the trial verdict on these grounds:

1. An essential violation of the LCP.
2. A violation of the criminal law.
3. Erroneous or incomplete establishment of facts.
4. Imposition of improper penal sanctions.

One issue raised on appeal by the defense is an allegation that the trial verdict in this case violated Article 364, Paragraph 1 (11), of the LCP. Violations of that provision of the LCP are classified as "essential" violations. If there is an essential violation of the LCP, there is an irrefutable presumption that it had a detrimental effect on the verdict. In turn, Article 385, Paragraphs 1 and 3, of the LCP mandate that a verdict containing an essential violation of the LCP be completely or partially cancelled. Article 385 specifically provides¹:

(1) In honouring an appeal or ex officio, the court in the second instance [the Kosovo Supreme Court] shall render a decision cancelling the verdict in the first instance [the trial verdict] and shall return the case for retrial if it finds that there has been an essential violation of the principles of criminal procedure... or if it feels that, because the state of facts was erroneously or incompletely established, a new trial should be ordered before the court of original jurisdiction.

...

(3) The court in the second instance may also cancel the original verdict partially if certain parts of the verdict can be taken separately without damage to proper rendering of judgment.

Article 364 of the LCP sets out the "essential" violations. It provides, in pertinent part, as follows:

- (1) The following shall constitute the essential violation of the provisions of criminal procedure:
- ...

¹ See also First Commentary, Momcilo Grubac & Tihomir Vasiljevic, to Article 364 of the LCP, 1982, 2nd edition.

(11) If the enacting clause of the verdict was incomprehensible, internally inconsistent or inconsistent with the grounds of the verdict, or

if the verdict had no grounds at all, or

if it did not cite reasons concerning the decisive fact or those reasons were altogether unclear or contradictory to a considerable extent, or

if there is a considerable discrepancy concerning the decisive fact between what is cited in the grounds of the verdict concerning the content of documents or records concerning testimony given in the proceedings and those documents or records themselves.

[The enacting clause embraces the identity and personal data of the defendant, the charge(s) against him and the disposition of those charges by the trial verdict. See Article 357 of the LCP.]

- (2) It shall also be an essential violation of the principles of criminal procedure if the court has not applied or has improperly applied some provision of this Law to preparation of the main trial or during the main trial or in rendering the verdict, or if in the main trial it has violated the right of the defense and this affected or could have affected the rendering of a lawful and proper judgment.

A second issue raised on appeal by the defense is an allegation that the trial verdict contained violations of the criminal law. Article 365 of the LCP provides that a violation of criminal law can occur on the following points:

1. As to whether the act for which the accused is being prosecuted constitutes a criminal act.
- ...
4. If a law which could not be applied has been applied to the criminal act which is the subject of the charge.
5. If the decision on the sentence...exceeded the authority which the court has under the law.

A third issue raised on appeal by the defense is an allegation that the trial verdict incorrectly or incompletely established facts. Article 366, Paragraph 1, of the LCP provides:

A verdict may be contested because the state of facts has been incorrectly or incompletely established when the court has erroneously established some decisive fact or has failed to establish it.

The appeal by the International Prosecutor Philip King Alcock raised only an objection to the term of the sentence imposed by the trial panel on Latif Gashi. The trial panel imposed a single sentence upon Latif Gashi of ten (10) years of imprisonment. It imposed a single sentence upon Nazif Mehmeti of thirteen (13) years of imprisonment. It imposed a single sentence upon Naim Kadriu of five (5) years of imprisonment. It imposed a single sentence upon Rrustem Mustafa of seventeen (17) years.

Ex officio review of applicable international law

Article 376, Paragraph 1(2), of the LCP mandates that the Kosovo Supreme Court review ex officio whether any of the provisions under Article 365 of the LCP have been violated. Article 365, Paragraph 4, of the LCP, as above mentioned, relates to a trial verdict which utilized criminal law which was inapplicable to the case. Article 388, Paragraph 1, of the LCP, provides that the Kosovo Supreme Court evaluate in its decision those violations of law which it takes up ex officio. For that reason, the Kosovo Supreme Court turns to the applicability of international law in this case.

As a prerequisite to any analysis of law applicable in Kosovo, it is necessary to refer to UNMIK regulations promulgated by the Special Representative of the Secretary-General pursuant to United Nations Security Council Resolution 1244 of 10 June 1999. UNMIK Regulation 1999/24, On the Law Applicable in Kosovo, is dated December 12, 1999. UNMIK Regulation 2000/59, amending Regulation 1000/24, is dated October 27, 2000. Section 1.1 of that Regulation provides that the law applicable in Kosovo shall be:

1. the Regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder and
2. the law in force in Kosovo on March 22, 1989,

with the Regulations taking precedence in case of a conflict. Section 1.4 provides:

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 22 March 1989 and the date of the present regulation.

There is no question that the CCSFRY was in force in Kosovo on March 22, 1989, and is, thus, applicable to this case. The amended indictment dated 30 June 2003 charged the four defendants with war crimes under Article 142 of the CCSFRY, which reads, in pertinent part, as follows:

Whoever in violation of rules of international law effective at the time of... armed conflict... orders that civilian population be subject to killings, torture, inhuman treatment...immense suffering or violation of bodily integrity or health....application of measures of intimidation and terror...imposing...illegal arrests and detention, deprivation of rights to fair and impartial trial....or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

Clearly, Article 142 of the CCSFRY requires that a person charged with war crimes under Article 142 must be shown to have violated an international law effective at the time of the armed conflict and, at the same, committed a specified act set forth under that Article 142, such as murder. Thus, the first analysis must be to determine what international law was in effect at the time of the armed conflict in Kosovo set forth in the amended indictment of 30 June 2003; i.e., August 1, 1998, to mid June 1999.

The 1974 Constitution of the Socialist Federal Republic of Yugoslavia was in effect in Kosovo on March 22, 1989, the date referred to in UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59. Article 210 of that Constitution provides:

International treaties shall be applied as of the day they enter into force, unless otherwise specified by the instrument of

ratification or by agreement of the competent bodies. International treaties which have been promulgated shall be directly applied by the courts.

Article 181 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia provides:

No one shall be punished for any act which before its commission was not defined as a punishable offence by law or a legal provision based on law, or for which no penalty was threatened. Criminal offenses and criminal sanctions may only be determined by statute.

Accordingly, Articles 181 and 210 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia set the parameters in this case for what human conduct or act committed in Kosovo constitutes a war crime, as well as what punishment is applicable to that specifically defined crime, subject to UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59.

As to the international law, the four Geneva Conventions were adopted on August 12, 1949, and entered into force on October 21, 1950. Those four Conventions were ratified by the People's Republic of Yugoslavia on April 21, 1950. Additionally, Protocol I and Protocol II were adopted on June 8, 1977, and entered into force on December 7, 1978. Both of those Protocols were ratified by the Socialist Federal Republic of Yugoslavia in 1979. Those Conventions and Protocols were in force in Kosovo as of March 22, 1989, and, thus, were in force during the armed conflict in Kosovo pursuant to the above-mentioned UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59.

There is no question that Article 3 Common to the 1949 Geneva Conventions Relative to the Protection of Civilian Persons in Time of War is applicable to this case. Article 3 Common of the Geneva Conventions provides in pertinent part as follows:

In the case of armed conflict not of an international character....each party to the conflict shall be bound to apply, as a minimum, the following provisions:

... Persons taking no active part in the hostilities...shall in all circumstances be treated humanely To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever...

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

(b) Taking of hostages.

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment....

There is no question that Protocol II Relating to The Protection of Victims of Non-international Armed Conflicts is applicable to this case. Its purpose was to develop and supplement Article 3 Common to the Geneva Conventions. Article 1 of Protocol II specifically states that it

shall apply to all armed conflicts...which take place in the territory of a party between its armed forces and dissident

armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...

Protocol II, Article 5 Persons Whose Liberty Has Been Restricted, provides:

1. ... the following provisions shall be respected, as a minimum, to those persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained...

(a)to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict...

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

...
(c) Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;

...
(e) Their physical or mental health and integrity shall not be endangered by an unjustified act or omission...

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Protocol II, Article 6 Penal Prosecutions, provides:

1. This Article applies to the prosecution and punishment of criminal offenses related to the armed conflict.

2. No sentence shall be passed and no penalty executed...except pursuant to a conviction pronounced by a court offering the essentials guarantees of independence and impartiality...

However, Protocol II, Article 6, does not apply until the end of the armed conflict. That is pointed out in Article 2(2) of Protocol II where it specifically provides:

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

It has been argued that Article 16 of the Constitution of the Federal Republic of Yugoslavia (composed of Serbia, including the province of Kosovo, and Montenegro) adopted in 1992 is applicable to this case. Article 16 provides:

- (1) The Federal Republic of Yugoslavia shall fulfil in good faith the obligations contained in international treaties to which it is a contracting party.
- (3) 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.

However, this argument is contrary to the express provisions of UNMIK Regulation 1999/24 as amended by Regulation 2000/59. The plain meaning of those Regulations is that the laws applicable in Kosovo, apart from UNMIK regulations, are:

1. Those laws in effect as of 22 March 1989 and
2. Those laws passed between 10 June 1999 and 27 October 2000 that are not discriminatory.

To interpret those Regulations to mean that the laws in effect in Kosovo include those laws in force in Kosovo subsequent to 22 March 1989 would defeat the clear meaning of the words used by the United Nations. Section 4 of those Regulations provides that all legal acts which occurred between 10 June 1999 and the date of Regulation 2000/59 (that date being 27 October 2000) shall remain valid so long as they comport with the standard of non-discrimination. To interpret the meaning of Section 4 to include all laws passed between 10 June 1999 and the present time in 2005 (or any future date) would defeat the clear meaning of the words used by the United Nations. Moreover, to interpret the words in those Regulations in any other fashion than to give them their plain meaning would create potential ambiguity in the intention of the United Nations.

Accordingly, the 1992 Constitution of the Federal Republic of Yugoslavia falls outside the parameters of UNMIK Regulation 1999/24 as amended by Regulation 2000/59; i.e., it was adopted subsequent to 22 March 1989 and clearly does not fall within the ambit of laws passed between 10 June 1999 and 27 October 2000.

In summary, Article 142 of the CCSFRY, under which the four defendants were charged with war crimes, requires a violation of international law effective at the time of the armed conflict. The international law in force in Kosovo at the time of the subject internal armed conflict that is applicable to this case is Article 3 Common to the 1949 Geneva Conventions and its related Protocol II.

Accordingly, the trial verdict in this case violated Article 365, Paragraph 4, of the LCP by referring to "customary international law" or "generally accepted rules of international law." Those concepts do not fall within the parameters of Articles 181 and 210 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia and, thus, were erroneously relied upon in the trial verdict.

Review of Law on Sentencing for War Crimes Committed under Article 142 of the CCSFRY

The range of punishment for war crimes committed under Article 142 of the CCSFRY is a minimum of five (5) years of imprisonment and a maximum of fifteen (15) years of imprisonment based on the following analysis.

As cited above, the original version of Article 142 of the CCSFRY provided for a penalty for war crimes of not less than five years or the death penalty. However, Article 38, Paragraph 2, of the CCSFRY allowed the court to impose a prison term of twenty years instead of the death penalty.

The original Article 142 was changed by the amendments to the Criminal Code of the Federal Republic of Yugoslavia (hereinafter referred to as CCFRY) dated July 16, 1993, in that it removed the death penalty and substituted for it the words "by imprisonment of twenty years." With the removal of the death penalty, Article 38, Paragraph 1, of the CCFRY affects sentencing. Article 38, Paragraph 1 provides that punishment of imprisonment may not be longer than fifteen years.

It is correct that Chapter XIV of the Provisional Criminal Code of Kosovo (hereinafter referred to as PCCK) provides for imprisonment of at least five years or long-term imprisonment (twenty-one to forty years pursuant to Article 37, Paragraph 2) for war crimes. It is also correct that UNMIK Regulation 1999/24, amended by UNMIK Regulation 2000/59, dated October 27, 2000, at Section 1.5 abolished the death penalty for all cases in Kosovo. At Section 1.6 it provides that, for an offense which was punishable by death under the law in effect on March 22, 1989, the penalty will be a term of imprisonment between the minimum provided by law and a maximum of forty years. However, Section 1.4, as stated above, provides:

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 22 March 1989 and the date of the present regulation.

Therefore, the sentences applicable in this case for charges under Article 142 of the CCSFRY must be the most favorable provided by law as of 22 March 1989 or as provided by law between 22 March 1989 and 27 October 2000. The most favorable sentencing law applicable is the minimum five (5) years of imprisonment set forth under Article 142 of the CCSFRY and the maximum fifteen (15) years of imprisonment under Article 38, Paragraph 1 of the CCSFY.

Accordingly, the trial verdict violated Article 365, Paragraph 5, of the CCSFRY by imposing seventeen (17) years of imprisonment upon defendant Rustem Mustafa.

Review of The Internal Armed Conflict in Kosovo

On appeal, defense counsel, pursuant to Article 366, Paragraph I, of the LCP relating to the right to contest a verdict because the state of facts has been incorrectly or incompletely established, asserts that an "internal armed conflict" within the meaning of Article 3 Common to the Geneva Conventions of 12 August 1949, its related Protocol II of 8 June 1977, and Article 142 of the CCSFRY did not exist throughout the time period specified in the amended indictment dated 30 June 2003; i.e., from August 1, 1998, through mid June 1999.

Article 3 Common of the Geneva Conventions of 1949 refers to a non-international armed conflict between parties that takes place in the territory of a party to the Geneva Conventions, Yugoslavia being one of those parties. Protocol II to the

Geneva Conventions, also ratified by Yugoslavia, requires that the conflict take place in a territory of a party to the Geneva Conventions between armed forces of that territory and dissident armed forces in that territory who are under responsible command and exercising such control over a part of its territory as to enable them to carry out sustained and concerted military operations. The commentaries under Article 118 of the CCSFRY also refer to a non-international armed conflict as being between national forces and other forces within the same state (territory).

United Nations Security Council Resolution 1199 dated September 23, 1998, refers to the July 7, 1998, communication from the Prosecutor of the International Tribunal for the Former Yugoslavia to the Contact Group (United States, England, France, Italy, Germany and Russia) in which the situation in Kosovo is referred to as an armed conflict. That communication also referred to clashes between the UCK and Serbian forces in January 1998, Serbian attacks on two villages in late February, and an assault on the village of Donki Prekaze/Prekazi I Poshtem in March when 54 people were killed, including a local UCK leader. [UCK is also referred to as KLA.]

The trial verdict in this case refers to the testimony of Latif Gashi wherein he admitted that the KLA was operative in the Llap zone in the middle of May 1998. The trial record does, in fact, reflect that testimony as well as the testimony by Latif Gashi that the KLA was created to contend with the repression in Kosovo of Albanians by Serbs, including physical executions of Albanians. He further testified that a few days before May 15 or 16, 1998, the KLA was publicly announced and that the KLA considered itself a legal army and expanded from that time forward.

The North Atlantic Treaty Organization (NATO) embarked upon a military campaign against the armed forces of the Republic of Serbia and the Federal Republic of Yugoslavia (FRY) on March 24, 1999. However, the fact that NATO was engaged in an international armed conflict with those forces does not negate the existence of an internal armed conflict in Kosovo between the KLA and those forces of Serbia and Yugoslavia. As the learned Kosovo Supreme Court International Judge Agnieszka Klonowiecka-Milart wrote in the decision in Case Against Kolasinac, AP-KZ 230/2003 5 August 2004, Kosovo Supreme Court:

...the Supreme Court accepts that the armed conflict in Kosovo between March 24, 1999, and June 1999, consisted of an international conflict between the FRY and NATO alongside an internal one between FRY and the KLA.

Clearly, there was an internal armed conflict in Kosovo within the meaning of Article 3 Common to the Geneva Conventions and its related Protocol II. The trial verdict concluded that the goal of the KLA during the period of August 1, 1998, through mid June 1999 was to further its war efforts and to enlarge the geographical area under its control. It also concluded that the activities of the KLA were not sporadic, isolated events but, rather, part of an overall plan to combat the Serbian and federal Yugoslavian armed forces. There was sufficient evidence in the record to support these conclusions. Additionally, the very fact that the KLA was detaining Kosovar civilians suspected of conduct hostile to the aims of the KLA reflects the extent of their control over part of the territory.

Despite defense counsel arguments to the contrary, it was not necessary for the trial panel to establish the precise day on which the internal armed conflict in Kosovo commenced. Similarly, it was not necessary for the trial panel to establish the precise day on which the internal armed conflict in Kosovo ceased. It had only the obligation to establish that an internal armed conflict within the meaning of Article 3 Common to the Geneva Conventions of 1949 and its related Protocol II existed throughout the time period alleged in the amended indictment of 30 June 2003; i.e., August 1, 1998, to mid June 1999.

Review of Essential Violations of Article 364, Paragraph 1 (11) of the LCP and Other Violations of the LCP

The appeals of defense counsel in relation to essential violations of the LCP under Article 364, Paragraph 1(11) are meritorious in some instances. The trial panel verdict contains inconsistencies between its enacting clause and its reasoning. It also contains unclear and/or contradictory reasoning, internally, to a considerable extent.

Because the sole basis for the appeal by the International Prosecutor was related to the sentence imposed on Latif Gashi, the Kosovo Supreme Court will not analyze those counts in the amended indictment of 30 June 2003 which the trial verdict found were not proven; i.e., Counts 4, 6, 7, 10 and 13. Count 4 charged Latif Gashi and Rustem Mustafa with inhumane treatment of civilian Kosovars between August 1998 and late September 1998 at a detention center at Bajgora. Count 6 charged Latif Gashi, Naim Kadriu and Rustem Mustafa with inhumane treatment of Kosovar civilians between May 1999 until mid June 1999 at a detention center at Koliq. Count 7 charged Latif Gashi and Rustem Mustafa with torture of Kosovar civilians between August 1998 and late September 1998 at a detention center at Bajgora. Count 10 charged Latif Gashi and Rustem Mustafa with killing a Kosovar civilian between August 1998 and September 1998 at a detention center at Bajgora. Count 13 charged Rustem Mustafa, Latif Gashi and Nazif Mehmeti with inhumane treatment of a Kosovar civilian at Bajgora and other locations in the Llap zone.

Pursuant to Article 388 of the LCP, there follows an analysis of the various counts set forth in the amended indictment of 30 June 2003 which the trial panel found were proven, those being only Counts 1, 2, 3, 5, 8, 9, 11, 12 and 14.

Count 1, found to have been proven by the trial verdict as to defendant Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From the beginning of August of 1998 until late October 1998, Latif GASHI and Rustem MUSTAFA, acting in concert with other unidentified individuals, and pursuant to a joint criminal enterprise to unlawfully detain Kosovo Albanian civilians, ordered and participated in the illegal arrest and detention of Kosovo Albanian civilians and held those civilians in a detention center located at Bajgora. Among those civilians arrested and illegally detained were VICTIM "1" illegally arrested on 28 August 1998 and illegally detained at Bajgora detention facility from 28 August 1998 until his murder in August or September of 1998; Sabit BERISHA illegally arrested in August of 1998 and illegally detained at Bajgora detention facility from August of 1998 until his release in September of 1998;

By ordering and participating in the illegal arrest and detention of Kosovo Albanian civilians, Latif GASHI and Rustem MUSTAFA incurred personal and superior

responsibility for the war crimes of illegal arrests and detention pursuant to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 1

Article 142 of the CCSFRY requires that the defendant, during a time of armed internal conflict, must either order or commit an act specifically identified in Article 142 and that act must also be a violation of international law in effect at the time of the specified act. It is true that Article 142 of the CCSFRY specifies illegal arrest and illegal detention as prohibited acts. However, those acts of illegal arrest and illegal detention alleged in Count 1 of the amended indictment of June 23, 2003, must also be a violation of international law in effect at the time of the commitment of the acts specified. At the time specified in Count 1, as discussed above, Article 3 Common of the Geneva Conventions as well as its related Protocol II was in effect in Kosovo. Neither Article 3 Common of the Geneva Conventions nor Article 6 of its related Protocol II refers to illegal arrest or illegal detention during the period of an armed internal conflict.

It is true that both Common Article 3 of the Geneva Convention IV and Protocol II refer to the right of civilian persons detained for reasons related to an internal armed conflict to have a fair trial in any criminal prosecution before an independent and impartial tribunal. However, it must be noted, again, that Article 2(2) of Protocol II provides for that trial process to occur after the armed conflict has ended. It specifically states as follows:

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict...shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Before the end of the armed internal conflict, Article 5 of Protocol II affords protections to detained civilians in terms of health, shelter and safety. Article 6 of Protocol II then sets forth the right to be tried before an independent court on criminal prosecutions but, again, that is a right afforded to detainees after the end of the armed conflict.

For the above reasons, the charges in Count 1 found proven in the trial verdict are not grounded in the law and, pursuant to Article 365, Paragraph 1, and Article 363, Paragraph 2, of the LCP are **CANCELLED IN THEIR ENTIRETY**.

Count 2, found to have been proven by the trial verdict as to defendants Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003, as follows:

From October of 1998 until late April of 1999 Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, acting in concert with other unidentified individuals, and pursuant to a joint criminal enterprise to unlawfully detain Kosovo Albanian civilians ordered and participated in the illegal arrest and detention of Kosovo Albanian civilians and held those civilians in detention centers located at Llapashtica, Majac and Potok. Among those civilians arrested and illegally detained were Anonymous Witness 7 illegally arrested in November 1998 and illegally detained at Llapashtica detention facility from November 1998 until release in late December 1998;

Anonymous Witness 4 illegally arrested in November 1998 and illegally detained at Llapashtica detention facility from November 1998 until his release in late March 1999; Drita Bunjaku illegally arrested in January 1999 and illegally detained at Llapashtica and Majac detention facility from January 1999 until her murder in April 1999; Witness H illegally arrested in January 1999 and illegally detained at Llapashtica detention facility until his release in January 1999; Agim Musliu illegally arrested in November 1998 and illegally detained at Llapashtica detention facility from November 1998 until his conditional release in January 1999; Agim Musliu illegally arrested in February 1999 and illegally detained at Llapashtica detention facility and Majac detention facility from February 1999 until his murder in April 1999; Idriz Svarqa illegally arrested in November 1998 and illegally detained at Llapashtica detention facility and Majac detention facility from November 1998 until his murder in April 1999; Alush Kastrati illegally arrested in February 1999 and illegally detained at Llapashtica detention facility and Potok detention facility from February 1999 until his murder in April 1999; Hetem Jashari illegally arrested in January 1999 and illegally detained at Llapashtica detention facility and Potok detention facility from January 1999 until his murder in April 1999; Witness V illegally arrested in January 1999 and illegally detained at Llapashtica detention facility until his release in January 1999.

By ordering and participating in the illegal arrest and detention of Kosovo Albanian civilians, Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA incurred personal and superior responsibility for the war crimes of illegal arrests and detention pursuant to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 2

For the reasons set forth as to Count 1 above, the charges in Count 2 found proven in the trial verdict are not grounded in the law and, pursuant to Article 365, Paragraph 1, and Article 363, Paragraph 2, of the LCP are **CANCELLED IN THEIR ENTIRETY**.

Count 3, found to be proven by the trial verdict as to defendants Latif GASHI, Naim KADRIU and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From May of 1999 until mid June of 1999, Latif GASHI, Naim KADRIU and Rustem MUSTAFA, acting in concert with other unidentified individuals, and pursuant to a joint criminal enterprise to unlawfully detain Kosovo Albanian civilians and ordered and participated in the illegal arrest and detention of Kosovo Albanian civilians and held those civilians in a detention center located at Koliq. Among those civilians arrested and illegally detained were Witness Q illegally arrested in early June of 1999 and illegally detained at Koliq detention facility until his release in early June 1999; Witness R illegally arrested in early June 1999 and illegally detained at Koliq detention facility until his release in early June of 1999.

By ordering and participating in the illegal arrest and detention of Kosovo Albanian civilians, Latif GASHI, Naim KADRIU and Rustem MUSTAFA incurred personal and superior responsibility for war crimes of illegal arrests and detention pursuant to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 3

For the reasons set forth as to Count 1, the charges found proven in the trial verdict are not grounded in the law and, pursuant to Article 365, Paragraph 1, and Article 363, Paragraph 2, of the LCP are **CANCELLED IN THEIR ENTIRETY**.

Count 5, found to have been proven (only as to the Llapashtica detention center) by the trial verdict as to defendants Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From October 1998 until late April of 1999, Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the establishment and perpetuation of the inhumane treatment of the Kosovo Albanian civilians illegally detained in the detention centers located at Llapashtica, Majac and Potok by housing those civilian detainees in inhumane conditions, depriving them of adequate sanitation, food and water and needed medical treatment. The inhumane treatment of the civilian detainees caused immense suffering or was a violation of the bodily integrity and health of those detainees and constituted an application of measures of intimidation and terror. Among those civilians subject to inhumane treatment were Anonymous Witness 7; Anonymous Witness 4; Drita Bunjaku; Witness H; Agim Musliu; Agim Musliu [detained a second time]; Idriz Svarqa; Alush Kastrati; Hetem Jashari; Witness V.

By ordering and participating in the establishment and perpetuation of the inhumane treatment of the Kosovo Albanian civilians, Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA incurred personal and superior responsibility for the war crimes of inhumane treatment and immense suffering or violation of the bodily health of the civilian detainees and constituted an application of measures of intimidation and terror contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 5

The trial verdict refers to the detention center set up in Llapashtica, describing it as a small stable approximately three meters by four meters, with only one window and without heat or water. Its floor was damp and the detainees had only sponge mattresses for sleeping. It was adjacent to the main entrance gate of the enclosed courtyard of the headquarters of the military police of the Llap zone.

Article 142 of the CCSFRY includes inhumane treatment as prohibited conduct during armed conflict. However, under Article 142, in order for inhumane conduct to be treated as a crime, it also has to be a violation of applicable international law. The applicable international law, as discussed above, is Article 3 Common to the Geneva Conventions and its related Protocol II. Protocol II, Article 5(1) (a) provides that detainees during an armed conflict must be provided with food, drinking water and safeguards to health and hygiene "to the same extent as the local civilian population." Thus, it was incumbent upon the trial panel to determine the circumstances relating to the health and security of the civilian population as compared to the circumstances relating to the health and security of the civilian detainees. There was no comparison made in the trial verdict and no such findings in the trial verdict.

For the above reasons, the trial verdict as to Count 5 is in violation of Article 366, Paragraph 1, of the LCP in that the state of facts was incompletely established.

Count 8, found to have been proven (only as to the Llapashtica detention center) by the trial verdict as to defendants Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From October 1998 until late April of 1999 Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention centers located at Llapashtica, Majac and Potok in an attempt to force those detainees to confess to acts of disloyalty to the KLA. Among those civilians subject to beatings and torture were Anonymous Witness 7, Anonymous Witness 4, Drita Bunjaku, Witness H, Agim Musliu, Agim Musliu [detained a second time], Idriz Svarqa, Alush Kastrati, Hetem Jashari, Witness V.

By ordering and participating in the beating and torture of Kosovo Albanian civilians illegally detained in the detention centers located at Llapashtica, Majac and Potok, Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA incurred personal and superior responsibility for the war crimes of inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 8

The trial verdict refers to Rustem Mustafa as the KLA commander of the Llap zone from some time in September 1997 throughout the entire time period specified in the amended indictment of 30 June 2003; i.e., August 1, 1998, through mid June 1999; that Rustem Mustafa had knowledge by September 1998 that civilian persons were being held in detention centers in the Llap zone and that those detainees were being subject to physical violence and psychological terror. The trial verdict refers to Nazif Mehmeti as the deputy commander of the military police in the Llap zone from October 1998 throughout the time period specified in the amended indictment of 30 June 2003; that one of his duties was to ensure the physical security of the detainees; that Nazif Mehmeti took orders from Rustem Mustafa. The trial verdict also refers to a register (the "Brown Book") compiled at the instruction of Nazif Mehmeti that included the identity of fifty-two Kosovar civilians detained from November 2, 1998, to March 27, 1999. The trial verdict refers to Latif Gashi who worked with the KLA in logistics and then became the director of intelligence for the KLA in the Llap zone in November 1998. Various anonymous witnesses testified to beatings of detainees by the KLA, the use by the KLA of prods to inflict electrical shocks to detainees, the forcing by KLA of detainees to inflict violence upon each other, and other cruel treatment of Kosovar civilian detainees.

Defense counsel has raised in their appeals issues relating to the testimony of anonymous witnesses. Those issues are without merit. UNMIK Regulation 2001/20, Section 5.2, provides that guilt cannot be founded solely or to a decisive extent upon the evidence of testimony given by a single witness whose identity is anonymous to the defense counsel and the accused. In regard to Count 8, there were several -- not a single -- anonymous witnesses. Moreover, six of the anonymous witnesses testified in person at the trial and the other two were permitted to give their trial

testimony in a private booth at the side of the court so as to protect their physical appearance from the sight of the defendants. Defense counsel knew the identity of those two witnesses; defense counsel had the opportunity at trial to cross examine those witnesses. Thus, the rights of defendants as enshrined in Article 6(3) (d) of the European Convention on Human Rights were not violated and the trial court properly based its findings on the testimony of these witnesses.

Count 9, found to have been proven by the trial verdict as to defendants Latif GASHI, Naim KADRIU and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From May of 1999 until mid June of 1999 Latif GASHI, Naim KADRIU and Rustem MUSTAFA, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Koliq in an attempt to force those detainees to confess to acts of disloyalty to the KLA. Among those civilians subject to beatings and torture were Witness Q detained at Koliq and subjected to beatings and torture during early June of 1999 inflicted by Latif GASHI, Naim KADRIU and other unidentified individuals, and Witness R detained at Koliq and subjected to beatings and torture during early June of 1999 inflicted by Latif GASHI, Naim KADRIU and other unidentified individuals.

By ordering and participating in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Koliq, Latif GASHI, Naim KADRIU and Rustem MUSTAFA incurred personal and superior responsibility for the war crimes of inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 9

The trial verdict refers to Naim Kadriu as the KLA chief of the sector of public information for the KLA in the Llap zone from late February 1999 through mid June 1999. The trial verdict also refers to writings by Naim Kadriu describing events relating to the victims in Count 9 and another written document, a civil complaint, describing events relating to the victims in Count 9. These documents formed part of the basis upon which the trial verdict relied for its findings.

Defense counsel raised issues relating to the admissibility of the pre-trial statement of Witness Q. Defense counsel also raised issues relating to the validity of the searches that produced documents relied upon in the trial verdict. However, in light of the fact that this case is being remanded for retrial, those issues may be more fully addressed before the retrial panel.

Count 11, found to have been proven by the trial verdict as to defendants Nazif MEHMETI and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From October of 1998 until late April of 1999, Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA, acting in concert with other unidentified individuals and pursuant to a joint enterprise, ordered and participated in the killing of Kosovo Albanian civilians illegally detained in the detention centers located at Majac and Potok.

Among those civilians killed at the detention centers were Drita BUNJAKU detained by the UCK in Llapashtica in January of 1999 and Majac on 25 or 26 March 1999, and killed by unidentified members of the UCK in April of 1999; Agim MUSLIU detained by the UCK in Llapashtica in November of 1998, conditionally released in January of 1999, re-detained in Llapashtica in February of 1999 and Majac on 25 or 26 March 1999, and killed by unidentified members of the UCK in April of 1999; Idriz SVARQA detained by the UCK in Llapashtica in November of 1998 and Majac on 25 or 26 March 1999, and killed by unidentified members of UCK in April of 1999; Alush KASTRATI detained by the UCK in Llapashtica in February of 1999 and Potok in March of 1999, and killed by unidentified members of the UCK in April of 1999; Hetem JASHARI detained by the UCK in Llapashtica in January of 1999 and Potok in March of 1999, and killed by unidentified members of the UCK in April of 1999;

By ordering and participating in the killing of Kosovo Albanian civilians illegally detained in the detention centers located at Majac and Potok, Latif GASHI, Nazif MEHMETI and Rustem MUSTAFA incurred personal and superior responsibility for the war crime of killing members of the Kosovo Albanian civilian population contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Supreme Court Analysis of Count 11

The trial verdict refers to Rustem Mustafa, commander of the KLA in the Llap zone, as having overall command of all military activities, including the power to arrest, detain, release or otherwise deal with civilian detainees accused of collaborating with enemy forces and that Nazif Mehmeti kept Rustem Mustafa informed about the status of the civilian detainees. The trial verdict refers to the first detention center holding Kosovo civilians as being established by the KLA in Bajgora in August 1998 and operating until at least October 1998; the second detention center holding Kosovar civilians as being established by the KLA at Llapashtica in late October or early November 1998 and operating until it was abandoned in March 1999; detention centers holding Kosovar civilians as being established in Majac and Potok at least as early as March 27, 1999, when Llapashtica was faced with a Serb offensive. The trial verdict also refers to the areas of Majac and Potok as coming under heavy pressure from enemy military forces in April 1999, and the KLA abandoning both Majac and Potok by the end of April 1999.

The trial verdict refers to the Brown Book (mentioned under the analysis of Count 8) as including the names of the five deceased persons identified as victims under Count 11 and that the handwriting of their names in the Brown Book was different than the handwriting for other civilian detainees. The trial verdict also refers to those five persons as being considered by the KLA as serious collaborators with enemies of the KLA. The trial verdict also refers to the bodies of Agim Musliu, Idriz Svarqa and Drita Bunjaku being found in a shallow grave near Majac and the bodies of Hetem Jashari and Alush Kastrati being found in a shallow grave near Potok, those graves being near the military headquarters of the KLA. The trial verdict reflects that various anonymous witnesses testified that they had been told, by unidentified sources, that the KLA had killed these persons. The trial verdict also reflects that both Rustem Mustafa and Nazif Mehmeti testified that, on April 5, 1999, Rustem Mustafa ordered Nazif Mehmeti to go to Majac and Potok to release the civilian detainees.

The trial verdict found that Rustem Mustafa ordered Nazif Mehmeti to ensure that all of the five identified victims were killed and that, in turn, Nazif Mehmeti ordered unidentified KLA soldiers to commit the killings.

A defendant standing trial for a crime is presumed to be innocent of the charge against him. In order to find a person guilty of a crime, the prosecution must present evidence, beyond a reasonable doubt, of that guilt².

There was no finding in the trial verdict, and there is no evidence in the trial record, that any witness heard, or had personal knowledge of, an order given by Rustem Mustafa to Nazif Mehmeti to have the five victims in Count 11 killed.

There was no finding in the trial verdict, and there is no evidence in the trial record, that any witness heard or had personal knowledge of an order given by Nazif Mehmeti to any person to kill the five victims in Count 11.

There is no finding in the trial verdict as to the exact cause of death of any of the five named victims in this Count 11. However, the trial record does reflect in the autopsy reports that four of the five victims died as the result of being shot by a firearm.

There was no finding in the trial verdict, and there is no evidence in the trial record, that any witness observed the killing of any of the five above-named detainees.

The finding in the trial verdict that the charges under Count 11 had been proven was based solely on circumstantial evidence. The Branko Petric Commentary to Article 366 of the LCP, states at paragraph II (1) as follows³:

...Erroneously established facts can be, particularly, contested as erroneous in circumstantial evidence if the complex of the established facts is not such that it rules out any other possible conclusion....

The findings of the trial verdict do not meet the burden of proof; i.e., the proof is not beyond a reasonable doubt. There is not proof beyond a reasonable doubt that Rustem Mustafa ordered Nazif Mehmeti to ensure the killing of the five victims. There is not proof beyond a reasonable doubt that Nazif Mehmeti ordered some unknown and unidentified person or persons to carry out the killings of the five victims. The circumstantial evidence is insufficient to rule out other possible conclusions.

Accordingly, the trial verdict is inconsistent between its enacting clause and its reasoning pursuant to Article 364, Paragraph 1(11) of the LCP, an essential violation of the LCP.

Count 12, found to have been proven by the trial verdict as to defendants Latif GASHI and Rustem MUSTAFA, reads in the amended indictment of 30 June 2003 as follows:

From 2 August 1998 until late September 1999, Rustem MUSTAFA, Latif GASHI and Nazif Mehmeti, acting in concert with other unidentified individuals, and pursuant to a joint criminal enterprise to unlawfully detain Milovan Stankovic, a Serbian forest

² See Momcilo Grubac & Tihomir Vasiljic, Commentary to Article 15 of the LCP, 1982, 2nd edition, paragraph (1); see also Case Against Vyrtyt Miftari, AP-KZ 91/2002, 4 September 2002, Kosovo Supreme Court.

³ Branko Petric Commentary to Article 366 of the LCP, 1986, 2nd edition

ranger, ordered and participated in his illegal detention in detention centers located at Bajgora and other surrounding locations within the Llap Zone.

Supreme Court Analysis of Count 12

For the reasons set forth under Count 1 above, the charges in Count 12 found proven in the trial verdict are not grounded in the law and, pursuant to Article 365, Paragraph 1, and Article 363, Paragraph 1, of the LCP, are **CANCELLED IN THEIR ENTIRETY**.

Count 14, for which defendant Latif GASHI was found guilty, reads in the amended indictment of 30 June 2003 as follows:

From 2 August 1998 until late September 1999 Rustem MUSTAFA, Latif GASHI and Nazif MEHMETI, acting in concert and with other unidentified individuals, and pursuant to a joint criminal enterprise ordered and participated in the beating and torture of Milovan Stankovic, a Serbian forest ranger who they illegally detained in detention centers located at Bajgora and other surrounding locations within the Llap Zone in an attempt to force him to confess to acts against the KLA or to provide intelligence information.

Supreme Court Analysis of Count 14

The trial verdict refers to the arrest by the KLA on August 2, 1998, of Milovan Stankovic and his detention, first, at Bajgora and then at other detention centers in the Llap zone and, during his detention, his repeated beatings by masked and unidentified members of the KLA. The trial verdict describes an incident during his detention at Bajgora when Milovan Stankovic was blindfolded by unidentified KLA members, tied to a tree in the woods, forced to open his mouth, a gun was put in his mouth and he was told to confess or he would be killed. The trial verdict then relates the testimony of Milovan Stankovic that he was later taken back by jeep to the scene where the events just described occurred and that, on one occasion, he testified that the officer in the jeep was Latif Gashi and, on another occasion, he testified that he was not sure who that officer was. The trial verdict states:

To the trial panel Stankovic ultimately stated that he was sure 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.

There is no finding in the written verdict that Latif Gashi committed or ordered the beating and torturing of Milovan Stankovic at Bajgora. Moreover, the finding in the enacting clause of the trial court verdict that the charge in Count 14 was proven is inconsistent with and contrary to the reasoning of the verdict.

Accordingly, pursuant to Article 364, Paragraph 1(11) of the LCP, the trial verdict as to Count 14 is inconsistent and contrary between its enacting clause and its reasoning, an essential violation of the LCP.

Conclusion of the Kosovo Supreme Court

The trial verdict treated the various counts in the amended indictment of 30 June 2003 as one singular war crime as to each defendant. The treatment of these acts as one singular war crime, as opposed to multiple war crimes, was not discussed in the trial verdict. However, having treated them as one singular war crime and having imposed sentences accordingly, the Kosovo Supreme Court has no choice but to remand the entire case for retrial based on Article 385, Paragraph 1, of the LCP. The second Commentary to Article 385 of the LCP⁴, states, at paragraph (14) as follows:

A verdict shall be annulled as a whole for all the actions constituting an extended criminal act if the higher court finds that the state of facts has been established incorrectly or incompletely. An extended criminal act is a single integral criminal act. A verdict may be partly annulled if it contains several criminal acts, but it may not be annulled concerning only a part of one criminal act.

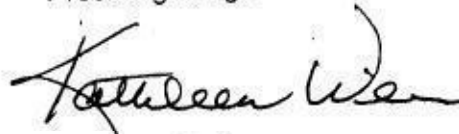
Based on the foregoing, the Kosovo Supreme Court decided as in the enacting clause of this Decision.

Supreme Court of Kosovo in Pristina
AP – KZ 139/2004, 21 July 2005

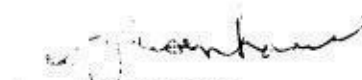
Recording Clerk


Tamara Brnetić

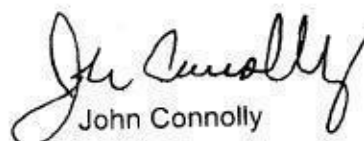
Presiding Judge


Kathleen Weir

Panel Member


Larry Eisenhauer

Panel Member


John Connolly

Momcilo Grubac & Tihomir Vasiljevic, 1982, 2nd edition