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IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in the panel session composed of international judge Agnieszka Klonowiecka-Milart as presiding judge, international judges Martin Karopkin and David Doyscher as panel members, and in the presence of Eriona Brading, as recording clerk, in the criminal case against the accused **VESELIN BESOVIC** nicknamed 'Vesko', father Dimitrije, mother Stana, born on 22 March 1952 in the village of Gorazdevac in the Municipality of Pejë/Pec, where he resided until his arrest on 6 October 2000, of Montenegrin nationality, citizen of the Federal Republic of Yugoslavia, married, father of four children, having completed secondary education and military service in Zare, Croatia in 1975, of medium economic status, with no previous criminal record, in custody since 6 October 2000 and released on 13 December 2002 and taken back in custody on 8 April 2003, convicted of the criminal offence of war crimes of torture and displacement of the civilian population and pillaging committed on 14 May 1999 in Zahaq village in the Municipality of Pejë/Pec and in Qyshk village in the Municipality of Pejë/Pec in violation of Article 142 of the Criminal Code of Yugoslavia (CCY) read with Article 26 of the CCY and charged in Counts 20 and 21 and 22 to 26 of the amended indictment of the district public prosecutor of Pejë/Pec dated 15 October 2002, deciding on two appeals of the defense counsels of the accused both dated November 2003 and the appeal of the district public prosecutor of Pejë/Pec dated 3 December 2003 against the Verdict of the District Court of Pejë/Pec, C/P 136/2001 dated 26 June 2003, in the session held on 27 May 2004, renders this

VERDICT

1. **With reference to criminal acts described in the verdict of the District Court of Peje/Pec, as Count 2 [endangering the safety of other persons contrary to Art. 48 paragraph 2 of the Criminal Law of Kosovo], and Counts 3 to 11 (included) and 14 [war crimes against the civilian population contrary to Art. 142 of the Criminal Law of Yugoslavia] of the Amended Indictment, for which the accused was acquitted, the appeal of the District Public Prosecutor of Peje/Pec is REJECTED and the verdict is UPHELD.**

2. **With reference to criminal acts described in the verdict of the District Court of Peje/Pec, as Counts 20 to 26 (included) of the Amended Indictment [war crimes against the civilian population contrary to Art. 142 of the Criminal Code of Yugoslavia], for which the defendant was found guilty and accordingly convicted, the appeals of the Defense are APPROVED. With reference to these criminal acts, the verdict is OVERTURNED and the case is remanded for retrial.**

3. **With reference to criminal acts described in the verdict of the District Court of Peje/Pec, as Counts 12, 13, and 15 to 19 (included) of the Amended Indictment, [war crimes against the civilian population contrary to Art. 142 of the Criminal Law of Yugoslavia], for which the defendant was acquitted, the appeal of the District Public Prosecutor of Peje/Pec is APPROVED. With reference to these counts, the verdict is OVERTURNED and the case is remanded for retrial.**

4. With reference to criminal acts described in the verdict of the District Court of Peje/Pec, as Count 1 of the Amended Indictment, [insult contrary to Art. 65 paragraph 2 of the Criminal Law of Kosovo], for which the defendant was acquitted, the verdict is MODIFIED *ex officio* and the charges are REJECTED because of the lack of action of the authorized prosecutor.

5. The costs of the appellate proceedings shall be born by the Interim Administration of Kosovo.

REASONING

Procedural and Factual Background

1. The accused was detained pursuant to the decision of the investigating judge in the District Court of Pejë/Peć dated 19 July 2001, following the request made by the international prosecutor, District Prosecutor's Office of Pejë/Peć.

2. On 12 November 2001, the international district public prosecutor issued an indictment dated 5 November 2001. This indictment was subsequently amended on 23 August and 15 October 2002. It was also amended by the panel of the District Court of Pejë / Peć wherein the panel deleted one count, which had been repeated twice, so the indictment contained twenty six (26) counts instead of twenty seven (27). The accused was charged with the criminal acts of insulting pursuant to Article 65 paragraph 2 of the Criminal Law of Kosovo (CCK); endangering the safety of other persons pursuant to Article 48 paragraph 2 of the CCK; unlawful detention pursuant to Article 63 paragraph 4 of the Criminal Law of Serbia (CLS); causing serious bodily injury pursuant to Article 38 paragraph 1 of the CCK; damaging another person's object pursuant to Article 45 paragraph 2 of the CCK; obscene behaviour pursuant to Article 75 as read with Article 79 of the CCK; violent behaviour pursuant to Article 190 of the CCK; and war crimes against the Kosovo Albanian population pursuant to Article 142 paragraph 1 of the CCY.

3. The trial commenced on 20 May 2002 before a panel composed of international judges pursuant to UNMIK Regulation 2000/64 in the District Court of Pejë/Peć. Before the trial concluded one of the members of the trial panel had to leave the mission and the evidentiary proceedings had to commence again in front of the new trial panel.

4. The second evidentiary proceedings before the District Court of Pejë/Peć commenced on 28 January 2003 before a panel composed of two international judges and one local judge. Sessions were held on 10, 17, 18, 19, 25 February; 3, 5, 10, 11, 12, 17, 18, 19, 31 March; 8, 9, 14, 15, 22, 29 April; 6, 7, 13, 29 May; 2, 3, 4, 6, 9, 10, 11, 12, 20, 21, 23 and 26 June 2003 in the presence of the accused.

5. On 26 June 2003, the trial panel rendered its Verdict, C/P 136/2001 pursuant to which the accused was

- acquitted of the criminal acts of insults and endangering the safety of other persons as charged in counts 1 and 2 of the indictment and of war crimes as charged in counts 3 to 19 inclusive, and

- found guilty of the war crimes of torture and displacement of the civilian population and pillaging committed on 14 May (insert the year) in Zahaq village in the Municipality of Pejë/Peć and in Qyshk village in the Municipality of Pejë/Peć in violation of Article 142 of the CCY read with Article 26 of the CCY and charged in counts 20 and 21 and 22 to 26 of the indictment,. The court considered the criminal acts charged in counts 20 and 21 as one single transaction and counts 22 to 26 as one transaction.

- sentenced to a term of 5 years of imprisonment for the criminal acts of war crimes committed in Zahaq and 6 years of imprisonment for the criminal acts of war crimes committed in Qyshk in violation of Article 142 of the CCY read together with Article 22 and Article 26 of the CCY.

- sentenced to an aggregate punishment of seven years' imprisonment.

6. On November 2003, the two defense counsel acting on behalf of Veselin Besovic, respectively filed appeals against the first instance court Verdict based on the following grounds:
- Significant breach of the provisions of the criminal procedure,
- Violation of the criminal code,
- Incorrectly and incompletely established state of facts,
- The severity of the sentence pronounced.

7. On 3 December 2003, the district public prosecutor of Pejë/Peć filed an appeal against the first instance court's Verdict based on the following grounds:
- Essential violation of the criminal procedure law,
- Erroneous establishment of the state of facts,
- The penal sanction.

8. On 6 February 2004, the file was registered with the Supreme Court under AP No. 80/2004.

9. On 9 February 2004, the file was sent to the Office of the Public Prosecutor of Kosovo (OPPK) pursuant to Article 370, paragraph 1 of the Law on Criminal Procedure.

10. On 5 May 2004, the file was brought back to the office of the Registrar of the Supreme Court with the opinion of the OPPK, numbered PPA 08/2004 and dated 29 April 2004.

11. Subsequently, the file was handed over to the Presiding Judge who scheduled the hearing in accordance with Article 370, paragraph 3 of the LCP.

Summary of the defense counsel submissions, the district public prosecutor's submissions and the opinion of the OPPK

Based on the grounds of their appeals, both defense counsel put forward the same proposals, namely that the convicting part of the Verdict be commuted and the defendant be acquitted, or that the Verdict be annulled and returned for retrial with the defendant released. The district public prosecutor alternatively proposed that the Verdict be modified by establishing the defendant's responsibility on counts 1 to 19, by determining criminal responsibility in complicity/criminal association regarding the killings in counts 20 to 26 and that the sentence be increased in accordance with Article 367, paragraph 1 of the LCP. The OPPK opined that the enacting clause of the contested Verdict was flawed to the extent that the Verdict should be annulled and the case sent back for re-trial.

Alleged essential violations of provisions of the criminal procedure

In his appeal to the Supreme Court, defense counsel Jokanovic claims that the Verdict is unclear, incomprehensible and internally contradictory. It does not provide reasons for the decisive facts and the reasons that are given are vague, incongruous and selectively based on the injured party's statements. Further, he states that on the crucial facts, there is a discrepancy between the allegations in the Verdict and the injured party's/witnesses statements resulting in a grave violation of Article 364, paragraph 1, item 11 and paragraph 2 of the LCP.

Similarly, defense counsel Brkljac elaborates that there are absolute violations of the criminal procedure (as per Article 364, paragraph 1, item 11) in that the basic factual elements of the crimes were not stated (time, place and manner of perpetration) – which made the Verdict incomprehensible. Further, he states that there is substantial contradiction between the written Verdict and the announced Verdict of 26 June 2003 in so far as the convicting part of the Verdict is concerned.

Defense counsel Brkljac also claims that there were a number of grave violations of the criminal procedure prescribed in Article 364, paragraph 1, item 11 LCP in that all elements of complicity were not stated in the Verdict and the Verdict does not clearly explain the acts of which the defendant was acquitted. Further, the Verdict fails to give legitimate reasons to support the given decisions and is unclear and inconsistent; this is evidenced in the lack of evaluation of witness testimony contrary to Article 347, paragraph 2 (and Article 357, paragraph 7 LCP) and Articles 15 and 16 LCP, which require the Court to detail its conclusions precisely.

The district public prosecutor of Pejë/Peć claims that essential violations of the criminal procedure with erroneously established facts occurred in the failure of the first instance court to evaluate the evidence in connection with counts 17, 18 and 19 of the indictment. Further, he claims that the Verdict fails to give reasons for the

acquittal of the defendant on counts 1- 16 as required under Article 357, paragraphs 6 and 7 of the LCP.

Essential violations of criminal procedure from Article 364 LCP

In its assessment of the defense's submissions,, the Supreme Court generally agrees with the defense counsel and the district public prosecutor that the Verdict rendered is unclear and incomprehensible in that there are discrepancies between the allegations in the Verdict and the injured party's/witnesses statements.

In particular, this Court considers on an examination of both the enacting clause in the written Verdict and the enacting clause announced at the closing session of the trial on 26 June 2003, that there is in fact a substantial contradiction between the two enacting clauses such as to amount to an essential violation of criminal procedure according to Article 364, paragraph 1, item 11 of the LCP:

In the convicting part of the announced enacting clause, in relation to Counts 20-21, the first instance court made a finding that the accused, in association with a group of paramilitaries and police, committed acts of torture, attempted murder of an injured party, robbery of possessions and burned houses; a number of people were killed and others were expelled by force. These acts were qualified as a war crime under Article 142 as read with Articles 22 (complicity) and 26 (criminal association) CL FRY. In relation to Counts 22 to 26, the first instance court reached a finding that the accused, in association with a group of paramilitaries committed acts of torture, with some people being killed, and attempted murder of 5 injured parties, for the purpose of expelling Kosovo Albanians from Kosovo. Similarly, these acts were qualified as a war crime under Article 142 as read with Articles 22 and 26 CL FRY.

In distinct contrast, the written Verdict of the first instance court reached a finding of that the accused was guilty of having committed war crimes of torture, displacement of the civilian population and pillaging in violation of Article 142 in connection with Article 26 CL FRY (in criminal association) with regard to Counts 20-21 and Counts 22 to 26. In the enacting clause of the written verdict the court did not include murder and attempted murder, which contradicts the findings it made in the announcement of the Verdict. Moreover, in the reasoning part of the Verdict the District Court specifically stated that it did not hold the accused accountable for the killings alleged in these Counts of the indictment.

This contradiction clearly violates the requirements of Article 357 of the LCP, which states that the written Verdict "must fully correspond with the verdict which was announced."

Adding to the confusion, and in violation of the requirements of Article 351 LCP, the enacting clause of the written Verdict fails to specify the elements of the acts attributed to the accused. The verdict merely references the counts of the indictment, thus implying that the averments have been endorsed by the trial court in their entirety – which is then denied in the written reasoning. This problem in particular concerns the factual question of acting in criminal association. The enacting clause of the written Verdict contains the finding of acting in criminal association [Article 26 CL FRY] while the reference to the indictment entails the finding of acting in a group of paramilitaries. In the reasoning the trial court

elaborated on the elements of criminal association or criminal enterprise. The trial court then stated:

"687. […] the panel was of the view that the accused and the groups of people with him had as common design the displacement of the villagers as their primary objective. This conclusion fits in with the ethnic cleansing policy for a Greater Serbia. In the pursuit of that goal the paramilitaries and others robbed the people of their belongings and villagers were killed."

In another paragraph, however, the trial court contradicts this finding:

"685. In relation to the offence of murder and attempted murder are concerned, the panel found that the evidence did not show in a convincing manner that the accused was either an abettor or a participant in a common enterprise."

Accordingly, this renders the enacting clause of the Verdict "incomprehensible, contradictory in itself or to the reasons of the verdict"[1] and constitutes an essential violation of the provisions of the criminal procedure according to Article 364, paragraph 1, item 11 of the LCP requiring complete or partial canceling of the verdict. The discrepancy between the two enacting clauses as well as the contradictions within the reasoning are not purely a formal matter; the substantive disparity, particularly on the issue of murder, raises the possibility that the Verdict had not been completely resolved at the time of the announcement.

In addition to the contradictions discussed above, the Verdict is flawed in that its findings are incomplete.

With regard to the defendant's conduct in relation to the murders, the Verdict makes the following findings:

"685. In relation to the offence of murder and attempted murder are concerned, the panel found that the evidence did not show in a convincing manner that the accused was either an abettor or a participant in a common enterprise. It will be recalled that in the incidents the role of the accused was limited to the gathering of the people along with his associates, lining them up, depriving them of their personal belongings, intimidating them, taunting them with reference to the absence of NATO, forcing them to leave their villages. At no time did anybody give evidence, the nature of which would have enabled the panel to link the accused with the killings that took place in Qyshk and Zahaq on 14 May. Rame Ramaj did state that a person named Sllavishah took a few soldiers with him and he heard shots coming from the house of the Ramaj family. It was only when they came back that allegedly the accused asked whether there was any dead. At this time the witness was 15 meters from the accused and in the view of the panel it was open to doubt whether the witness could have heard such a conversation in times of turbulence. Even on the assumption that such a conversation did take place the panel still found it unreasonable to infer from such an exchange of words that the accused was privy to any killing.

[1] According to the Commentaries on Article 364, paragraph 1, item 11 of the LCP, "incomprehensible" encompasses wide and formal defects including obvious discrepancy between pronounced and announced verdicts (Supreme Court of Croatia Kzz 29/69).

686. In relation to the killings in Qyshk, Isa Gashi stated that though the accused had a weapon he did not use it. Though people were taken inside buildings and shot none of the witnesses could state that the accused was a party to this. Nor was there any evidence to justify such a conclusion. " (page 160-161 of the Verdict)

On a review of various witness testimonies, however, the Supreme Court finds that a number of witnesses did actually make statements indicating that the defendant would not only have abetted but participated in acts of murder and attempted murder: Rame Sali Ramaj (page 264 of the court record) in response to a question from the prosecutor of whether at the time of the shooting at Kuqi the defendant was present, responded as follows: "As I said before, he was by the road." Further, regarding the events in Qyshk, Isa Gashi (page 469-471 of the court record) states that the defendant was "one of the people surrounding us" and in response to a question from the presiding judge of whether he saw the defendant doing anything else on that day, he said "There were 10 to 15 minutes and they arranged us in lines and took us towards execution." Later, on in his testimony (page 467[2] of the court record), this witness states "I have already stated that on the 14 of May he took part in the massacre and it was a massacre not a war." A further witness Hazir Berisha directly testifies that "the accused Veselin Besovic with 4 other people pointed their guns towards us and then I turned my head the other way. They started shooting and I don't know which bullet wounded me," (pages 278 - 283 of the court record). He then goes on to describe how the group of people he was with were all killed and their bodies burned.

Accordingly, the Supreme Court finds that the first instance court disregarded the above testimonies, in particular the testimony of Hazir Berisha. This is particularly inconsistent, as the testimony of all three of these witnesses appears to be relied on for the conviction of the defendant. Hence, the Supreme Court finds that there is a contradiction of the provisions of Article 347, paragraph 2 of the LCP amounting to misrepresentation of the content of the record in the verdict and thus an essential violation of the procedure from Article 364, para 1, item 11 LCP.

Further, it is found that the part of the Verdict entitled, "Findings of the Court on Counts 14-19" makes specific mention only of counts 14 and 16. The Supreme Court agrees with the contentions of the district public prosecutor that in relation to counts 17, 18 and 19 of the indictment the Verdict failed to provide any findings whatsoever, and it notes *ex officio* that the same flaw applies in relation to count 15. In relation to count 16, the Verdict in paragraph 292 states that it "found no evidence for the presence of the accused at the scene"[3]. The Supreme Court, after examining the court record, is aware that counts 15 through to 19 were argued upon the evidence of the witness Neke Bytyqi, who did not appear at the main trial, (this is not mentioned in the summary of evidence on these counts in the Verdict). The presiding judge determined that this witness was "unavailable" and read his prior testimony at the investigation and at first trial into the record, although there was no other indication that the witness was uncooperative. However, there does not appear to be any analysis of Neke Bytiqi's testimony in the Verdict. The Supreme Court wishes to stress that while the trial court has wide discretion in evaluating the evidence, it cannot, however, ignore it without any explanation. In the summing up, the Supreme Court again finds an essential violation of the criminal procedure from Article 364 para 1 item 11 LCP.

[2] Pages are hand numbered in reverse order in the file folders
[3] Paragraph 292

In conclusion, the District Court's Verdict in relation to counts 15 –19, 20-21 and 22-26 have to be overturned and the case remanded for re-trial.

The Supreme Court further notes that in the enacting clause of the written verdict of the District Court, following the ruling on the aggregate sentence of 7 years of imprisonment, it is stated that

"The sentence includes the time that the accused has spent in custody from 06 October 2000 to 13 December 2002 and from 8 April to 26 June 2003".

The enacting clause must be literally interpreted in accordance with the provisions of the LCP, according to which, time spent in pre-trial custody by a convicted person must be credited against the sentence, as clearly stipulated in Art. 351 (6) and Art. 353 (3) of the LCP. However, as counsel Jokanovic rightly points out, in the reasoning part of the verdict, the court of first instance seems to offer a completely opposite interpretation, by finding that:

"699 The court passed a combined sentence of seven years on the accused. As he has spent almost three years in detention he would, if he serves his full sentence, have spent ten years in jail" [page 164 of the Verdict].

The Supreme Court finds that there is an apparent contradiction between the literal meaning of the enacting clause concerning the sentence and the corresponding part of the reasoning in the verdict, which raises doubts as to what length of imprisonment the trial court actually deemed appropriate for the crimes of which the defendant was found guilty. This contradiction, given that the Verdict in its convicting part is overturned, does not require/necessitate any specific ruling in this appellate decision.

Last, the Supreme Court notes that in relation to count 1, the District Court decided a matter which can be heard upon a private action [Article 65 in connection with Article 72 para 1 CLK]. Thus in this part the Verdict was passed in violation of the criminal procedure from Article 364 para 1 item 5 LCP. Therefore, in relation to this part the District Court's verdict has been modified in accordance with the disposition of Article 349 item 2 LCP.

Erroneous or incomplete establishment of decisive facts

Defense counsel Jokanovic claims that based on Article 366 of the LCP the Verdict was based on incorrect and incompletely established facts of key importance, *e.g.*, the defendant's presence at the crime scene at the time of the events. He further claims that no evidence was presented to discredit the defendant's alibi. Defense Counsel Brkljac similarly states that the state of facts on which the Verdict was based were incorrectly established regarding specifically the issues of whether the defendant was really seen in the villages of Zahac and Cusk[4] on 14 May 1999 and whether he really committed the crimes. He critiques paragraphs 293 to 395 of the Verdict and states that the first instance Court appraised the evidence in a "wholly incorrect, superficial and simplified manner." He claims that the most important findings of the Verdict presented in the part entitled "conclusions" under paragraphs

[4] Also referred to as Zahaq and Qyshk.

412 to 420 were erroneous. He further claims that the first instance court based the convictions on the testimonies of eight witnesses: Rame Ramaj, Isak Demaku, Osman Zeqiri, Lisa Sherif, Isa Gashi, Hazir Berisha, Rexhe Kelmendi and Muje Gashi even though the Court accepted these testimonies as only partially believable.

Defense counsel Brkljac analyses the statements of a number of witness and argues their lack of credibility. Briefly, in relation to the Zahaq incident, he states that witnesses Rame Ramaj, Osman Zeqiri and Isak Demaku all differed on the relevant facts and were inconsistent with each other and two of these witnesses were not able to correctly identify the defendant and gave different descriptions of the defendant. Similarly, in relation to the Cusk village incident, the witnesses Isa Gashi and Hazir Berisha claimed to recognize the defendant even though he was allegedly wearing a mask. Other witnesses Haki Gashi, Rexhe Kelmendi and Shkurta Gashi implicated the accused in the event even though they did not know him well and despite the fact that he was wearing a mask or paint on his face. The defence counsel pointed to inconsistencies in their testimonies which he opined were always directed at inculpating the accused. Further, Isa Gashi did not report the defendant to the police before the investigation and Hazir Berisha did not mention him in a statement that he gave to investigators from the International Criminal court for the Former Yugoslavia (ICTY).

In furtherance of this argument, Mr Brkljac claims that many of the witnesses tried to corroborate each others statements, therefore, there were differences, contradictions and incongruity sufficient to invalidate the statements in the parts referring to the identity of the defendant. Noticeably none of the witnesses who claimed to know the defendant well reported the defendant to KFOR, UNMIK Police etc. before he was arrested; if they had known him, it should not have been difficult to identify him. Counsel states that even if they knew him well, they were not able to identify him on the critical day but pointed out that they all nevertheless described him identically and using similar words. Further, Counsel disputed the first instance court's assessment that the witnesses testimonies were delivered in a clear-headed way and without hostility towards the defendant. In this regard he claimed that the majority of witnesses were confused and used the excuse of trauma and forgetfulness to justify gaps in their testimony, while Haki Gashi in open court threatened to kill the defendant.[5]

The Supreme Court notes that in the face of major internal contradictions apparent in the enacting clauses and the reasoning parts of the Verdict as to what the trial court has actually decided, the issue of correct fact finding becomes a secondary matter. The Supreme Court however deems it necessary to address this matter to certain extent because it is concerned about the patent inadequacy of the trial court's approach to evidence, which must be avoided in the re-trial. The Supreme Court agrees with defense counsel Brkljac that the Verdict failed to give sufficient reasons to support its findings, as there is a lack of complete and critical evaluation of the testimonies of the witness contrary to Article 347, paragraph 2 of the LCP.

In relation to the issue of identifying the accused, the Verdict makes the following findings:

[5] The Supreme Court notes that this is reflected in the testimony of this witness before the investigation judge.

"413. In relation to the events in Zahaq both Rame Ramaj and Osman Zeqiri, and in relation to the events in Qyshk, witnesses Isa Gashi, Hazir Berisha, Muje Gashi, Haxi Gashi stated that [they] knew the accused well. Witnesses Rexhe Kelmendi and Shkurta [Gashi] did not [know][6] the accused well.

414. The issue in relation to those witnesses who knew the accused was therefore one of recognition. The accused has said that since a relative of his resembled him and was a policeman at the time of the events there could have been a risk of mistaken identity. The defence witnesses stated that even though the accused and the other Veselin Besovic resembled each other, it would not have been possible for somebody who knew them to make any confusion between them. From the various descriptions given by the defence witnesses the court concluded that though there was resemblance between the two Veselins, somebody who knew them well would not be confused in the process of recognizing or identifying either one of them. The court rejected the suggestion on the state of the evidence that this possibility could be countenanced. The court had therefore no difficulty in accepting the evidence of these witnesses that they had recognized the accused on the critical day in Zahaq and Qyshk." (page 97-98 of the Verdict)

A careful reading of paragraph 413 reveals that the first instance court makes no finding as to which witnesses actually knew the defendant well; it simply avers to the fact that some witnesses "stated" that they knew the accused well. While it appears that this was *intended* to be a finding it must be noted that this is merely a recitation of what these witnesses claimed or alleged. Further the import of the term "knew the accused well' is not explained by the first instance court. This is significant because the entire discussion on the issue of identification is to be found in these two paragraphs – which is inadequate as no specific findings were made as to which witnesses' identification testimony the first instance court credited and what weight it gave to such testimony.

A concrete example of this can be seen in an examination of the testimony of the witness Muje Gashi whose testimony on identification is apparently relied on in the Verdict. In his testimony before the trial court, this witness stated that he knew the defendant well. He also testified that at the time of the incident the defendant's face was "painted" yet at the first trial he states that the defendant was wearing a mask. Later on, this witness states that he recognized the defendant by his walk. Indeed, during the trial, the presiding judge stated that the witness had only identified the defendant by his walk, implying that this was not strong evidence (p.262 of the court record). The Verdict is silent as to which version of this witness's testimony the court accepted, why it did so and how much weight it attributed to this testimony.

The Supreme Court notes that in a decision of over 180 pages,[7] the chapter entitled, "Findings of the Court on Counts 20-26," (page 97 of the Verdict) consists of two and a half (2½) pages and is composed of nine paragraphs. Two paragraphs, previously noted in this decision, are given over to explaining why the court collectively accepted the testimony (of who? all the witnesses or one of them) identifying the defendant and rejecting the possibility that they might have mistaken him for someone who resembled him. Over a page is dedicated to analyzing and rejecting the alibi defense. Only one paragraph, consisting of less than half a page,

[6] The words in brackets are missing from the original verdict.
[7] The e-version of the Verdict was 183 pages, while the official signed version is 181 pages. All references in this decision are to the official version unless otherwise specified.

contains all of the findings of fact and an analysis of the credibility of testimony upon which the entire conviction is based. It reads as follows:

"420. The panel considered that the version given by the witnesses who saw the events, with some of them clearly recognizing or identifying the accused, was credible. The witnesses proved to be reliable and genuine in the testimony they gave. They gave their evidence in a sober manner and without displaying any hostility against the accused. As was to be expected, there were discrepancies in their evidence, but they were not of such a nature as to make their evidence totally worthless. The events were not related in the same sequence as on previous occasions. In some cases, the witnesses stated that they stood by their previous testimony and they gave a summary of their previous evidence at the hearing. This was quite understandable as the witnesses were giving evidence for the third time in front of judicial institutions after giving statements to the police and other organizations. The panel felt that it could safely act on the evidence of the witnesses in relation to the events in Zahaq and Qyshk." (page 99 of the Verdict)

In considering Article 366 of the LCP, the Supreme Court finds that the above paragraph is, on its face, entirely inadequate. The Supreme Court finds that it is unable to determine if the first instance court considered all the evidence relating to the decisive facts, and it finds that there is a lack of reasoning which indicates that the decisive facts may have been incorrectly established.

An example of the significance of this issue is seen in the summary of testimony of the witness Haki Gashi (also spelt Haxi Gashi in the Verdict) under the heading, "Evidence" with regard to count 26. In the summary, it is acknowledged that this witness gave two different versions of how the defendant appeared on 14 May 1999. Before the Investigating Judge, the witness stated that the defendant wore a "dark mask which covered all his face." He went on to explain that it did not matter because "he could tell that it was him because of the way he walked." However, at the trial the same witness said that on the day in question, the defendant was "painted' and he denied that in his earlier testimony he had stated that the defendant wore a mask.

Yet, the summary of "Evidence" also notes that in his testimony before the Investigating Judge, this witness stated that only the defendant's eyes and teeth were visible. This is inconsistent with his trial testimony in which he stated that the defendant's face was painted and he rejected the fact that he had previously stated the defendant wore a mask.

The Verdict does not explain whether the first instance court found that the defendant was painted or wearing a mask. Such findings are critical to the issue of identification and credibility regarding this witness. To simply state with regard to this inconsistency: "there were discrepancies in their evidence, but they were not of such a nature as to make their evidence totally worthless," is clearly inadequate. It is also unacceptable that the Verdict fails to address inconsistencies in the testimony which were highlighted in the Verdict itself.

The declaration in the Verdict that the evidence was not "totally worthless," is of critical importance and relevance to the standard of proof upon which the first instance court convicted the accused. The testimony relied on for conviction must establish the facts beyond a reasonable doubt. The Verdict in addition to stating

that the evidence was not “totally worthless,” merely asserts that the panel felt it could “safely” act on the evidence. The Supreme Court finds that this is not a sufficient statement of the standard for conviction and indeed indicates some hesitancy on the part of the first instance court that is inconsistent with the standard of proof required for conviction.

All of this is compounded by what can only be described as confusion in the Verdict. In its summary of the testimony of Haki Gashi, the first instance court notes that he testified that, “The accused with a lot of friends killed 47 people…” (paragraph 374, page 90 of the Verdict). Additionally the witness testified that “he saw it with his own eyes that the accused killed Berisha,” who is described as an old man, (paragraph 375, page 90 of the Verdict). Further on in the summary there is an indication that the witness might not have actually seen the shooting. A review of the court record indicates that the above statements were made to the Investigation Judge. Further, the record reveals that at the first trial the witness when asked about Berisha stated, ”No I don’t know about this old man but Hazir Berisha was wounded and this person is not an old man.” He went on to say that “Hazir Berisha was wounded not killed.” Also in the first trial the witness withdrew from what he had said before the Investigating Judge: when he said in the investigation that the accused burned his brothers but did not kill them, he really meant that the accused first killed them and then set the houses on fire with them inside. Haki Gashi blamed the confusion on poor translation.

Nevertheless the Verdict does not explain why it did not accept this testimony as either direct or circumstantial evidence that the accused killed Berisha and upon what criterion it chose to believe this witness in relation to other acts encompassed in count 26.

The Supreme Court finds that it is unacceptable that the first instance court recounts some testimony but fails to mention the fact that at the subsequent proceeding the witness testified in a different manner about the same event. This leaves open the possibility that the first instance court was not aware of the inconsistency and did not consider it in evaluating this witnesses testimony. The Supreme Court also finds unacceptable that the court does not address the specific findings it made regarding the testimony of this critical witness upon whose statements the conviction is, in some measure, based. This is yet another indication that the first instance court “has erroneously established some decisive fact” or “has failed to establish it,” in accordance with Article 366 of the LCP.

The testimony of Haki Gashi has been discussed in detail as it represents an illustrative example of insufficient scrutiny of this witness’s evidence. The Supreme Court finds that inconsistencies or obvious contradictions, as rightly pointed out by defence counsel Brkljac, were present in the testimony of the remaining witnesses relied on in the conviction, and with similar nonchalance were disregarded in the evaluation by the trial court.

Accordingly, regarding Count 20, (previously count 21), Count 21 (previously 22), Count 22 (previously Count 23) Count 23 (previously Count 24), Count 24 (previously 25), Count 25 (previously Count 26) and Count 26 (previously Count 27) on which the defendant was found guilty, the Supreme Court decides that the verdict as to these counts must be overturned and these counts are returned for retrial.

Regarding counts 12 and 13, the first instance court at paragraph 259 of its Verdict (page 61) refers to count 12 but does not analyze the evidence of Rrustem Kastrati, while it does not refer directly to count 13 though it somewhat discusses the evidence of Haxhi Kastrati. On examining the court record, the Supreme Court finds that in relation to Rrustem Kastrati, during the trial he claimed to be emotionally disturbed and traumatized by the events, hence, it was agreed that his previous statements be read into the record. Haxhi Kastrati did testify at length and does in fact implicate the defendant in a number of instances, he mentions that the defendant was leading a group from Krushev village heading to Doberdol and that he fired shots and sang Chetnik songs (page 196 of the record), he states that the accused together with other police beat up the families who were tied to tractors (page 184 of the record) and that the accused together with Miodrag was responsible for the burning of houses (page 179 of the record). The first instance court fails to present arguments and analysis on why it found that this witness did not "implicate the witness in a convincing manner" and it fails to assess the credibility of the witness. Consequently, the acquittal on counts 12 and 13 must be reversed and these counts are returned for re-trial, as there is no assessment of the evidence.

The Supreme Court stresses that in every instance the court needs to examine the nature of the contradictions, such as: whether they concern substantive or secondary factual elements, whether they are explicable or not and whether, in the light of the overall circumstances, they point to deliberate untruthfulness on the part of the witness.

The Supreme Court agrees with the District Court that the presence of contradictions or inconsistencies does not automatically and *a limine* disqualify the witness testimony. In general the court should not treat minor discrepancies between the evidence of different witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence as a whole where that witness has nevertheless recounted the essence of the incident charged in acceptable detail. However, this approach should vary according to the quality of that witness' evidence in relation to the essence of the incident charged. Where the main issue determinant for the question of criminal responsibility of the accused is the identification of the accused in the criminal event, contradictions pertaining to specifics such as the description of the accused, whether he was masked or not, actions attributed to him and prior knowledge of the accused should not be easily dismissed as immaterial.

The Supreme Court also agrees with the District Court in that inconsistencies and contradictions in witness evidence can result from natural vagaries of human perception, especially in witnesses who were forced on several occasions, due to unfortunate circumstances, to give their account of the same events. However, having accepted that with the passage of time people naturally forget facts, the trial court should apply particular scrutiny where a pattern of increasing inculpation is detected in the witness testimony, particularly where the recognition of the accused is built into the testimony only in subsequent hearings.

Finally, the Supreme Court accepts that the reliability of witnesses, including any motive they may have to give false testimony, is a determination that must be made in the case of each individual witness. It would be neither appropriate, nor correct,

to conclude that a witness is deemed to be inherently unreliable solely because he or she is a member of particular ethnic group, nor even if a victim of crimes committed by persons of the same ethnic group as the accused. That is not to say that ethnic hatred cannot ever be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made in the light of the circumstances of each individual witness, his or her involvement in the event and interest in the proceedings and such concerns as could be substantiated upon evidence. With this in view the District Court should in its evaluation of the incriminating testimony relate in a more detailed way to the defence's claims about the fabrication of the charges, bearing in mind such factors as: that it was undisputedly established that there had been repeated attacks on the house of the accused; that there was evidence of a theft from the forest belonging to the accused; that war crime complaints against the accused were brought following his acquittal from a robbery charge; that the accused alleged specific motives on the part of some of the witnesses, in particular Haxhi Kastrati, which does not appear to have been disproved; that the record of the investigative hearing reflects that Haki Gashi threatened to kill the accused and finally that some of the witnesses who inculpated the accused in the events pertinent to the instant proceedings had not reported his involvement in their earlier statements .

Only upon the examination of all such circumstances can the court evaluate the overall quality of the witness' testimony in relation to the thesis that it is offered to prove.

The Supreme Court notes that inconsistencies in the enacting clause do not effect counts 1 through to 19. The inconsistent statements in the oral and written enacting clauses do not apply to counts for which the defendant was acquitted by the court of first instance as no reference is made to those counts in the disputed parts of the respective enacting clauses.

Regarding counts 2 through to 11, inclusive, the Supreme Court finds that there is sufficient reasoning in the Verdict to find that these counts were correctly found to be unsubstantiated by the evidence. Consequently, and based on Article 384 LCP the appeal in relation to these counts is rejected and the acquittal upheld.

Regarding count 14, the Verdict purports to address counts 14 to 19 in paragraphs 290 through to 292 (page 69-70 of the Verdict):[8]

"290. The court agreed that the incidents averred in counts 14 to 19 had taken place. The issue was whether the accused had been properly identified as one of the participants and his involvement in them.
291. Whether the witness had seen the accused in the course of the incidents was an issue of recognition, as he knew the accused. In relation to the averments in count 14 at no time did the witness involve the accused in any manner. All he said was that in July 1998 the accused had come with one Miga and had broken down the gates of his house. When he was asked to clarify the number of cars he had seen on that day as he had mentioned three before the investigating judge and he mentioned in the first trial, his answer was it was dark. The events happened

[8] Regarding the counts in the Indictment and in the Verdict: the trial panel found that Count 18 duplicates Count 17 so it decided to omit count 18 and renumbered the remaining counts, so that the Indictment lists 27 counts while the Verdict lists 26 and every count after 17 is one number less than that found in the Indictment.

quickly and the alleged perpetrators were masked. In the same breath he added that though the accused was 700 meters away he could recognize him. He went on to say that his own house was burnt on 26 March but that he did not see the accused on that day. The court concluded that no proper and safe recognition could have been possible in these circumstances. As for the burning of the house on 26 March the accused was not present at the scene. That count was dismissed.
292. On count 16 the court found no evidence of the presence of the accused at the scene of that incident. The witness himself said he did not see the accused."

This part of the Verdict deals with the following counts and witnesses:

(i) Count 14, Witness Mete Krasniqi, date 24 to 26 March 1999, location Doberdol,
(ii) Count 15, Witness Neke Ramush Bytiqi, date 26 March 1999, location Poqest,
(iii) Count 16, Witness Neke Ramush Bytiqi, date 5 or 6 May 1999, location Nabergtan,
(iv) Count 17, Witness Neke Ramush Bytiqi, date 6 July 1998, location Poquest,
(v) Count 18 (previously 19), Witness Neke Ramush Bytiqi, date 6 July 1998, location Poquest,
(vi) Count 19 (previously 20), Witness Neke Ramush Bytiqi, date 26 June 1999, location Poquest.

In its analysis of these counts, the Verdict begins with reference to "the witness." As is apparent above, there are in fact two witnesses relating to these counts and the first instance court analyzed the testimony of only one of these witnesses. From a review of the record, it is apparent that the unnamed "witness" is Mete Krasniqi.

The Supreme Court notes that it is stated in the Verdict that Mete Krasniqi refused to testify at the main trial so his testimony from the previous trial was considered in evidence. The Verdict states at the end of paragraph 291 "that count is dismissed," apparently with reference to count 14. The Supreme Court has reviewed the minutes from the previous testimony of Mete Krasniqi and concurs with the conclusion of the trial court that it provides insufficient evidence upon which to base a conviction. Therefore this count was correctly found to be unsubstantiated on the evidence. Consequently, on the basis of article 384 LCP the prosecutor's appeal with regard to this count has been rejected and the acquittal upheld.

Erroneous application of the provisions of the criminal law

The prosecutor claimed that the Verdict incorrectly found the accused not criminally responsible for the murders associated with counts 20 to 26, claiming that there were factual findings that clearly make the defendant criminally liable in complicity/criminal association. Accordingly, the prosecutor considered that the Verdict should have found the defendant guilty of war crimes in connection with the murder.

Lack of any reliable findings as to the facts established in the case renders abstract the discussion about the application of the substantive criminal law. In order to give guidance for the re-trial proceedings, the Supreme Court will therefore limit itself to two legal issues of a general nature, namely [1] the singularity of the crime of war crime against the civilian population, raised by counsel Brkljac and [2] the

applicability of international humanitarian law in war crimes proceedings, which the Supreme Court addresses *ex officio*, as it appears that somewhat vague position expressed by the District Court may potentially lead to a violation of the criminal law to the detriment of the accused.

Singularity of the crime of war crime against civilian population

The identity of a complex criminal act is one of the most difficult - theoretically and practically – issues in the criminal law. This difficulty is particularly poignant in relation to crimes in which statutory elements by their nature contain multiple acts [such as war crimes, trafficking in persons, terrorism], continuing criminal acts and extended criminal acts. The statutory definition of a war crime against the civilian population as set out in Article 142 CL FRY is constructed upon underlying offences listed in this Article, in such a way that the criminal act, dependent of circumstances, can be directed against the civilian population as a whole or against particular individuals or property. A war crime against the civilian population can contain several transactions, some of which, ordinarily, *i.e.*, out of the context of the situation of an armed conflict and without the nexus to the armed conflict, could qualify as other criminal acts, such as murder, bodily injury, robbery, kidnapping etc. The occurrence of a criminal act of war crime requires a presence of one or more of the underlying offences or a multiplicity of underlying offences, still, however, not excluding the singularity of a criminal act of war crime.

The concept of singularity of the act of war crime on the ground of Yugoslav jurisprudence was strongly expressed by Lazarevic: "*The incriminated activities have been alternatively put in the law, so that the act can be performed by each of the activities. However, if one person performs several identical activities or several different activities incriminated in this Article, this will be only one criminal act of war crime against civilian population, since in this case, it ensues from the very legal description of the criminal act that this is a unique criminal act, regardless of the number of the performed individual activities. According to the verdict of the Supreme Court of Serbia Kz-2539/56, there is one criminal act of war crime against the civilian population, in spite of the perpetrator performing particular acts in different places, against different persons, in longer time periods and in a different manner*"[9].

The Supreme Court endorses the foregoing insofar as it affirms the legitimacy of qualifying several underlying offences as one war crime. At the same time, however, the Supreme Court considers that the concept of singularity for a war crime under Article 142 CL FRY is not absolute. Among factual scenarios of concrete cases there can be instances where qualifying several underlying offences as several war crimes would be justifiable. This is for the following reasons:

To accept the concept of singularity of a war crime at its extreme, i.e., that the multiplicity of underlying offences, diversity of time, place, intent and *modus operandi* are irrelevant for the oneness of the criminal act, would practically mean reducing the unifying factor of all behaviour prohibited under Article 142 to one element only – that of the armed conflict as a historical event. In other words, such concept of singularity could be expressed as a doctrine "one war – one crime". Given a very broad time span that potentially might be in question [as broad as the

[9] Ljubisa Lazarevic, Commentary to the Criminal Law of Yugolavia, Savremena Administarcija, Belgrade 1995

time span of the armed conflict], likewise potentially broad territorial extent and wide range of prohibited behaviour falling under the definition of Article 142 [ordering or carrying out broadly described underlying offences], the approach one war – one crime would undermine the legal certainty in the aspect of ascertainable ambit of the subject of the trial [*litis pendentio*] and matter resolved [*res iudicata*].

Moreover, the Supreme Court considers that a broad statutory definition of war crime does not abolish common sense principles applicable in the determination of identity of complex criminal acts, i.e., that there should be a factor unifying objective and subjective element of the complex criminal act. In our opinion, acts discernible upon a combination of subjective and objective elements, specifically the element of criminal intent in conjunction with significant time intervals between the criminal transactions should be treated as separate war crimes. Accordingly, a perpetrator who orders or executes an order to kill civilians will be responsible for one war crime irrespective of the multiplicity of individual acts of killing, diversity of places and the time span of his actions, as long as the unity of underlying offences ensues from the same order constituting an attack against the civilian population as a whole. On the other hand, in the absence of the intention to order or execute an overall attack against the civilian population, a member of a belligerent party who commits unrelated to one another and remote in time acts against civilians, would be responsible for separate criminal acts each qualified as a war crime. This distinction should not be confused with the element of nexus between the acts of the perpetrator and the state of an armed conflict, the element required upon Article's 142 CL FRY reference to international humanitarian law, which must be present in any event.

The singularity or plurality of a war crime against the civilian population, being connected to the element of criminal intention as well as to the objective element [*actus reus*], is a factual circumstance subject to proof, directly or conclusively. The Supreme Court appreciates that repeated acts of underlying offences, especially when committed in the same opportunity, would often justify a conclusion about a single intent, whereas circumstances indicating separate acts of war crime can practically be rare. However, once established as a single act of war crime, such charge is subsequently indivisible in the procedural sense, one of the consequences of it being that the proceedings can only result in one decision in relation to the charge as a whole, irrespective of differences in findings pertaining to specific underlying events. Accordingly, when the results of the main trial confirm only some of the underlying acts, averments that were found not proven must not result in acquittal of these parts of the charge; rather, the court should explain in its opinion which specific facts have been found to be unsupported.

In the instant case, the approach taken in the indictment was to treat acts described in counts 3-26 [previously 27] as separate war crimes [" *Veselin 'Vesko' Besovic is therefore on each and every count from count 3 to 27 charged with War Crimes contrary to Article 142 as read with Articles 22 and 26 of the Criminal Code of Yugoslavia* "]. The prosecutor's statement in this respect was not quite clear. Though certain acts included in counts 3-26 [previously 27] were also charged according to other articles of the criminal law, factual questions as to whether the acts charged constituted one or more war crimes charges were not discussed at all. Nevertheless, as long as the factual identity of acts charged in the indictment and acts attributed in the verdict is retained, the trial court is free to make findings in support of the singular or plural character of the war crime; moreover, in the

situation when factual elements decisive for this question [time, place, opportunity, motive] are undisputedly established in accordance with the averments, the issue of singularity or plurality of a war crime becomes a question of legal qualification, where the court is not bound by the legal evaluation proposed by the prosecutor [Art. 346 para 2 LCP]. In any case, the District Court should have considered whether factual elements are present upon which acts attributed to the accused could legally be treated as separate war crimes.

The Supreme Court accordingly instructs the District Court to make specific finding on this matter if upon re-trial a conviction for a war crime becomes an issue. Relatively narrow time span, territorial unity and similar *modus operandi* of the alleged offences would indicate that the offences should be treated as a single war crime. In any case, however, in relation to each underlying offence, the trial court would need to determine whether the nature of the alleged offence places it within the ambit of prohibited conduct defined in Article 142 CL FRY, whether the alleged underlying offence was committed in the period of armed conflict and whether in that period the accused could be considered a party to the armed conflict.

Applicability of international humanitarian law in war crime proceedings

In paras 428-441 of the verdict the District Court appears to have accepted that pursuant to the 1974 SFRY Constitution, Article 210, and FRY Constitution of 1992, Article 16, treaties which are ratified are self-executing and directly applicable by the courts, including in the field of criminal law. The District Court goes on to say that by the virtue of Article 16 of the FRY Constitution also generally accepted rules of international law [customary law] are applicable to criminal proceedings.

In making this statement the District Court overlooked two aspects of the applicability of the legal regime as defined by UNMIK Regulation 1999/24. Firstly, the applicability of the regime as of 22 March 1989 in Kosovo recognizes only one derogation: in any individual criminal proceedings, any subsequent law to the law of the SFRY before 23 March 1989 will be dispositive of the issue, if it is more lenient to the accused. Secondly, the applicable law in force on 22 March 1989 results in the *prima facie* reference to the constitutional principle of legality as established in two articles of the SFRY 1974 Constitution:

Art. 181: "*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 envisaged. Criminal offences and criminal sanctions may only be determined by statutes"* .

Art. 210: "*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".*

Accordingly, the constitutional principle of legality presupposes that criminal offences and punishments must be provided for in specific domestic legislation. The principle of legality in criminal matters laid down by Art. 181 SFRY Constitution does constitute *lex specialis* in relation to Art. 210. As a result, international treaties, which have been ratified and promulgated, are a constituent part of the internal legal order; however, direct application of international treaty law is not allowed in

domestic criminal proceedings unless the provisions of international law do correspond with the domestic criminal law in terms of their contents.

The 1992 FRY Constitution did not change the fundamental relationship between principle of legality in criminal matters and the principle of direct applicability of international law in the internal legal order, as *lex specialis* derogating provisions of a general nature:

Art. 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. [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 international legal order.*

Art. 27: "No one may be punished for an act which did not constitute a penal offence under law or by law at the time it was committed, nor may punishment be inflicted which was not envisaged for the offence in question. Criminal offences and criminal sanctions shall be determined by statute".

Notably, after the promulgation of the FRY 1992 Constitution, international customary law became a constituent part of the national legal system, in addition to ratified international treaties. This, however could not have an impact on the prosecution of war crimes in UN-administered Kosovo, since conduct set out in Article 142 CL FRY constitutes a war crime pursuant to that Article only if it at the same time constitutes a violation of international law effective at the relevant time. Hence, taking into account that the SFRY provisions are *prima facie* dispositive in criminal matters pursuant to Regulation No. 1999/24, and that subsequent provisions can be applied only if more favorable to the accused, in practice the conduct set out in Article 142 of the Criminal Law of FRY constitutes a war crime only if it constitutes a violation of the relevant ratified treaties. Any developments in international humanitarian customary law to support war crimes prosecutions instead of prosecution for ordinary crimes cannot be considered as applicable in the domestic courts of Kosovo in so for as the implementation of Article 142 CL FRY is concerned; the guarantees contained in Art. 210 SFRY Constitution are to be applied, as they are more favorable to the accused.

Therefore, in the application of Article 142 CL FRY it would not be legitimate to resort to international customary law in such an areas as primarily defining prohibited conduct, defining the basis of individual criminal responsibility and punishment. International custom as well as the jurisprudence of international tribunals can however be used for the purpose lending assistance to the interpretation of the concrete prohibitions contained in Article 142 CL FRY and relevant international treaties applicable in times of war, armed conflict or occupation. This was for example, correctly done by the District Court in relation to the notion of "torture".

Sentencing

The defense counsel contend that the sentence imposed by the first instance court was too severe and that the trial court referred to the sentencing practice of international tribunals as opposed to principles of the applicable law. Similarly, the district public prosecutor claims that the penal sanctions were incorrectly applied

but in relation to the actual sentence, classifies it as 'low' and that that the court's evaluation did not justify the low sentence.

In the light of the case being remanded for re-trial on the basis of a lack of reliable findings, the Supreme Court does not find it necessary to elaborate on this issue, save that the first instance court in evaluating the sentence should analyze, with reference to the concrete circumstances of the case, how the given punishment is supposed to serve the purposes of punishing: retribution and the individual and general prevention. For the evaluation of the gravity of crimes found the trial court must be cognizant, as far as possible, of the precise nature of acts [actions or criminal omissions] actually committed by the accused. This element is obviously missing in the instant case where the trial court merely recited from the indictment general allegations of torture, pillaging and causing displacement, without having ever specified what the accused had actually done. For this reason alone the trial court's explanation of the sentence imposed was inadequate.

Concerning the deference to standards applied by international tribunals, the Supreme Court considers it appropriate as far as the trial court finds it persuasive and relevant to the facts and the law of the case before it on this matter. It appears, *eg.,* that general factors governing punishment identified by the trial court upon selected ICTY and ICTR cases did not differ from such factors defined in Article 41 CL FRY. The trial court should however be cautious in allowing itself to be guided by the length of punishments imposed by international tribunals, and this could only constitute a point of reference where the court evaluates decisive factors in these cases in comparison with the case before it. However, a reference to the judgments of the international tribunals cannot simply replace a substantive discussion of the gravity of the crime, including the specific elements of the acts attributed to the accused, the concerns of prevention and specifics of mitigating and aggravating circumstances, when such are present.

Based on the foregoing, in conformity with Articles 384 and 385, paragraph 1 and 3 of the LCP, the Supreme Court decided as in the enacting clause of this Judgment.

The measure of securing the presence of the accused before the court has been determined in by a separate decision of the Supreme Court.

SUPREME COURT OF KOSOVO
AP-KZ NO. 80/2004, 7 SEPTEMBER 2004

Recording Clerk — Presiding Judge

Eriona Brading — Agnieszka Klonowiecka-Milart