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THE SUPREME COURT OF KOSOVO, in the panel session with International Judge Agnieszka Klonowiecka-Milart as Presiding Judge, International Judge Gustin Reichbach and International Judge Edward Wilson as members of the panel, with Eriona Brading as recording clerk, in the criminal case P. No. 226/2001 against the accused **ANDJELKO KOLASINAC**, of Serb nationality, father's name Dobrivoje, mother's name Natalije Mihajlovic, born on 11 January 1951 in Rahovec/Orahovac (hereinafter Rahovec), last permanent residence Rahovec, Str. Nemanjina No. 13, married, father of four children, completed the Law Faculty of Pristina University, lawyer, with average economic status, no criminal record, in detention since 20 August 1999, charged with the criminal act war crime against the civilian population pursuant to Article 142, paragraph 1 of the Criminal Code of Yugoslavia (CCY) in connection with Articles 22 and 24 of the CCY, all made applicable by UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59, according to the Second Amended Bill of Indictment of the District Public Prosecutor's Office of Prizren from 15 January 2003, deciding on the appeals of the Defense Counsel of the accused, Nikola Radosavovic, Brkljac Miodrag and Zivojin Jokanovic against the Verdict P No. 226/2001 of the District Court of Prizren dated 31 January 2003, after holding a hearing on 22 October 2003 and deliberation held on 9 January 2004, renders this:

DECISION

1. The appeals of the Defence Counsel of the accused **ANDJELKO KOLASINAC** are **APPROVED** and the Verdict P. No. 226/2001 of the District Court of Prizren dated 31 January 2003 is **OVERTURNED** and the case is remanded for re-trial;

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

3. The detention of the accused has been terminated by the virtue of a separate decision of this Court.

REASONING

The Averments and the Verdict

The indictment, in its final form resulting from two amendments, alleged that:

Andjelko Kolasinac, in the period from 1 July 1998 until 12 June 1999, during which time he was President of the Municipal Assembly of Rahovec and later Commander of the Headquarters of the Civilian Protection of Rahovec, committed a war crime through:

(a) ordering and committing, aiding, assisting and complicity in the crime of violating the regulations of international law including the Geneva Red Cross Convention IV, On Protection of Civilian Persons in Time of War, particularly but not limited to Common Article 3 as well as Additional Protocol 2 Relating To The Protection Of Victims Of Non-International Armed Conflicts during war and armed conflict against the civilian population causing: (a) displacement or forced de-patriation; (b) illegal detention; (c) the application of measures of intimidation and terror; (d) collective punishment; (e) forcing forced labour; (f) the confiscation of property; (g) the pillaging and looting of the property of the population; and (h) the illegal and self-willing destroying and taking possession of property in great scale, which is not justified by military needs, committing War Crimes Against the Civilian Population in violation of Articles 22 and 24 of the CCY and Article 142, paragraph 1 of the CCY.

(b) aiding and assisting and complicity in regard to the offenders who committed the crime of deportation by concealing the traces, things and evidence, of the crime of deportation through destruction of the property of the deported victims, violation by the offenders of Article 142 of the CCY and these acts on the part of Kolasinac violated Articles 22 and 24 of the CCY and Article 174, paragraphs 1 and 2 of the CCK.

(c) aiding and assisting the offenders who committed the crime of murder by assisting them in concealing the traces and things, the bodies of the victims and evidence, of the crime of murder, in a mass grave and specifically aiding the Serb authorities in murder carried out in a brutal manner in violation of Article 30, paragraph 2, item 1; murder for base motives, specifically because of the victim's ethnic group in violation of Article 30, paragraph 2, item 3 and murder committed in a ruthless manner of many persons in violation of Article 30, paragraph 2, item 5, of the CCK, together with violation of Articles 22 and 24 of the CCY and Article 174, paragraphs 1 and 3 of the CCK.

On 31 January 2003, the trial panel of Prizren District Court rendered a verdict in which it found that:

1. During April/May 1999, the accused acted in complicity with other Serb officials in organizing the registration of the population for use in connection with the forced displacement and deportation of Kosovar Albanians in Rahovec. The first registration required the name of the head of the household and the number of persons in the household purportedly for use in connection with humanitarian aid. The second registration, however, was organized only a few weeks later at the request of the military and required information as to ethnicity, age and gender. Such information was clearly intended for use in connection with the forced displacement and deportation of the Kosovar Albanians in Rahovec;

2. During April/May 1999, the accused acted in complicity with other Serb officials in organizing an estimated one hundred Kosovar Albanians from the

Rahovec municipality to be utilized as forced labour in connection with the "cleaning" of the roads in Malishevë, which were covered with the forcefully abandoned property of thousands of Kosovar Albanians that had been forcefully displaced and deported by the military. In addition, during May 1999, the accused acted in complicity with other Serb officials in organizing hundreds of Kosovar Albanians from the Rahovec municipality to be utilized as forced labour in connection with the pruning of the vineyards in the Rahovec area. Such forced labor was organized by the accused in complicity with other Serb officials through the use of intimidation, without voluntary agreement, and without remuneration.

3. Moreover, during the "cleaning" of the roads in Malishevë/Mališevo (hereinafter Malishevë) municipality in April/May 1999, as organized by the accused, the accused, as Commander of the Headquarters of the Civil Defense, failed to prevent the looting, pillaging, and destruction of the forcefully abandoned property of the thousands of Kosovar Albanians that had been forcefully displaced and deported by the military.

Accordingly, in committing these criminal acts, the accused was found criminally liable for War Crime Against the Civilian Population pursuant to Article 142, Paragraph 1, of the CCY in relation to: (a) the displacement or forced de-patriation through registration, in connection with Article 22 of the CCY; (e) forced labour, in connection with Article 22 of the CCY; (g) the pillaging and looting of the property of the population, including (h) the illegal and self-willing destroying and taking possession of property in great scale, under the doctrine of command responsibility;

In the same verdict the accused was found not guilty in relation to the allegation of concealing the traces of forced deportation through the destruction of the property of the deported victims, based upon the legal principle of absorption. Accordingly, he was acquitted of the charge of aiding a perpetrator after he has committed the criminal act, Article 174, paragraphs 1 and 2 of the CCK together with Articles 142, paragraph 1 and Articles 22, 24 of the CCY.

Likewise, the accused was found not guilty in relation to the allegation of aiding and assisting in the concealment of murders through the preparation of mass graves, due to lack of evidence. Hence, he was acquitted of the charge of aiding a perpetrator after he has committed a criminal act, Article 174, paragraphs 1 and 3 of the CCK together with Article 30, paragraph 2, items 1, 3 and 5 of the CCK and Articles 22 and 24 of the CCY.

The accused was sentence to eight (8) years of imprisonment, time spent in custody since 20 August 1999 credited against this punishment.

Summary of the submissions

In the appeals, the Defence alleged errors belonging to all grounds for appeal from Article 363 LCP:

- essential violation of provisions of the criminal procedure code from Article 364 LCP
- erroneous and incomplete establishment of the facts
- violations of the criminal law to the detriment of the accused
- excessive severity of punishment.

They Appellants proposed that the accused be acquitted or that the verdict be quashed and the case remanded for retrial.

The International Public Prosecutor of the OPPK opined that the appeals of the Defence were grounded in relation to the finding of liability for expulsions and deportations of the Albanian civilian population. He joined the Defence's contention that the causal link between the registration carried out by the accused and the expulsions and deportations had not been sufficiently established. However, the OPPK Prosecutor considered that the appeals were not grounded in relation to the claimed essential violations of criminal procedure, the liability for forced labour and looting of property abandoned by the civilian population. He proposed that the verdict be accordingly modified, pursuant to Article 387 of the LCP. In relation to the sentence, the OPPK opined that it was too high in respect of the elements proven and the facts established and recommended reducing the sentence to five years.

In this Decision the Supreme Court addresses appellate claims in the following order: first we present and discuss alleged procedural violations; second, we present allegations concerning factual and legal errors in relation to specific charges; third, we address legal issues of general relevance for the charges and last we discuss factual and legal aspects of the specific charges.

Alleged essential violations of provisions of the criminal procedure

Alleged violations of the prescribed form of the verdict, Art. 364 para1 [11]

All three counsel complained that the verdict fell short of the requirements of article 357 [7] and 347 LCP, in that the trial court failed to clearly indicate which facts it had found proven or not proven and on what grounds, as well as it failed to evaluate each piece of evidence, providing specifically an assessment of the credibility of contradictory evidence.

Specifically, it was criticized that the District Court referred to the ICG report although that report was not accepted into evidence nor even discussed in trial. Similar complaint concerned the court's use of an OSCE report "Kosovo – As Seen as Told". That report according to the wording of the verdict, was not accepted as evidence but in an unclear capacity of a "reference", then however the court selectively used it in fact-finding to the detriment of the accused. One counsel criticizes the court's approach to the ICTR verdict in the case of Bagilisheva, although in relation to this item, the counsel appears to claim that the District Court should have used this verdict as evidence, but failed to do so.

Next, there was a wide range of reproaches concerning incomprehensibility of the verdict, the enacting clause alone or in combination with the reasoning. In particular it was alleged that unclear were such issues as: the statement of complicity, which was too broad, the causal link between the registration and the expulsion of the Kosovo Albanians.

Moreover, the Defence alleged a number of violations some of which, although qualified by the complainants as violations falling under Art. 364, in fact rather pertained to the question of fact-finding or to procedural violations not covered by the claimed category. Specifically, one counsel argued that the District Court violated the principle of presumption of innocence]Article 6(2) ECHR and Article 3 of the LCP]

because the Court had not stated in a definite way what was the Defendant's military rank and whether he had carried a weapon; according to the counsel this constituted a violation from Article 364 para 1 [11] LCP. Moreover, the same appellant encompassed under grounds as per Article 364 para1 [11] his polemics with the court's evaluation of the evidence of some of the witnesses as well as polemics with certain wordings used in the reasoning. These allegations have been in this opinion referenced to categories where they *de iure* belong.

The verdict is inconsistent with the ambit of the charges

The Defence argued a violation of Article 364, paragraph 1, item 5 LCP because the District Court had dealt with matters other than those raised at the first appeal. In his appeal of 1 August 2001 the Public Prosecutor's referred only to the acts allegedly committed in relation to Malishevo. Accordingly the Defence contended that based on Article 376, paragraph 1 of the LCP the Supreme Court as well as the District Court in re-trial should have dealt only with that part of the charges, whereas the charges regarding the issues of the registration and work in vineyards, the charges should have been rejected [Article 349, paragraph 5 of the LCP].

Further, it was alleged that there was a lack of correlation between the indictment and the verdict, which also resulted in unclear reasoning in the verdict. This was manifested by the court's assessment of the fate of the Nysret Mullabazi family whereas the indictment had not charged these. Similarly, the trial court referred to alleged participation of the defendant in the expulsion of Myhedin Bekeri, Xhemajli and Muharrem Jaha and his participation in the confiscation of Nezim Spahiu's truck, although these either were not alleged in the Indictment:

One of the counsel, invoking Article 364, paragraph 1, item 7, claimed that the enacting clause of the verdict should have stated that the defendant was acquitted of the allegations regarding his participation in the murder of the sons of Ahmet Shabandula. He reasoned that where a charge of war crimes consists of several underlying specific charges and those not proved should result in an acquittal.

Another counsel brought up that when applying the principle of absorption the Court should only have stated one act in the enacting clause

The use of inadmissible evidence

A violation of Article 364, paragraph 1, item 8 of the LCP was claimed in that the court used the minutes of the defendant's examination before an Investigating Judge (August 1999) at which no defence counsel was present and at which it was three times requested that Defense be summoned. Further, this document was not admitted as evidence, so should have been excluded from the court file**.**

Other procedural violations

The Defence contended that the right to defence was infringed amounting to violation from Article 364, paragraph 2, as well as Article 6(3) (a, b) of the ECHR in that the Second Amended Indictment was filed on 16 January 2003 together with the Prosecutor's closing speech, at which occasion the court failed to summon the accused to furnish his explanations. The Defence maintained that the District Court should have done it ex officio. Significantly, only the Second Amended Indictment

introduced the concept of ‘complicity’, subsequently accepted by the verdict of the District Court.

Discussion and findings concerning alleged procedural violations

Alleged violations of the prescribed form of the verdict, Art. 364 para1 [11]

In relation to alleged violations of the prescribed form of the verdict, the Supreme Court addressed these allegations to the extent that sufficed to make its determination about the necessity to quash the verdict under Article 385 para 1 LCP. Issues pertaining to claimed lack of findings or unclear and contradictory findings are discussed in regard to factual foundation of the specific charges concerned –see *infra*.

As concerns the use of the Bagilisheva verdict of ICTR, the Supreme Court notes that the content of the ICTR ruling was not the factual issue relevant for the subject of the proceedings; rather, the Supreme Court understands that the Defence expected the trial court to adopt certain legal views expressed by ICTR. Accordingly, in this respect the appeal should have alleged rather legal and not evidentiary errors.

Alleged inconsistency of the verdict with the ambit of the charge

In this category we discuss the Defence’s claims which were raised by the Appellants under different statutory grounds of appeal, such as Article 364 para 1 items 5, 7, 9 or 10 LCP. These claims are here addressed collectively due to the commonality of one element – the question of singularity of the war crime charged.

The identity of 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 the statutory elements of which 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 war crime against 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 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. For the occurrence of the criminal act of war crime required is a presence of one or more of underlying offences, multiplicity of the underlying offences, however, does not exclude the singularity of a criminal act of a 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"[1].

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 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 the 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 launches 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 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

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

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 case before the Supreme Court, the acts alleged as well the acts attributed to the accused were dated as April/May 1999, i.e., in close time proximity to one another and causally related. Moreover, as stated in the Amended Indictment and endorsed by the first instance Verdict, acts charged had been allegedly committed with the unity of criminal intent and opportunity. Specifically, the indictment states: "*During all of this period of time the accused, Andjelko Kolasinac, was the President of the Municipal Assembly of Rahovec, a municipality which included 55 villages. At some point in April 1999, the accused was appointed by Serbia to the additional military role of Commander of the Headquarters of the Civilian Protection of and he continued in the dual capacity of President of the Municipal Assembly and Commander of the Headquarters of the Civilian Protection until at least 12 June 1999. […] In his leadership positions Kolasinac gave orders and he also executed orders from his superiors which included seeking discriminatory action against Kosovars of Albanian ethnicity which furthered the war effort and Serbian ethnic aims* […]". In such factual framework – irrespective of the truthfulness of the specific averments – the Prosecutor and the trial court correctly treated the sum of acts alleged as one war crime.

Consequently, the trial court should not have acquitted the accused of any of the averments; likewise, the Defence's appellate claim of acquittal from specific charges is unfounded.

Consistently with the trial court's finding of the singularity of the war crime, an appellate decision affects the verdict as a whole.

The case file shows that on 1 August 2001, following the first main trial, the District Public Prosecutor of Prizren filed an appeal against the verdict of the District Court alleging violation of the law on criminal procedure, violation of the criminal law and wrong and incomplete establishment of the facts. The Prosecutor proposed that the verdict be altered in the part related to Kolasinac to find him guilty of war crime in the aspect of imposing forced labour and looting and destroying property of the population; alternatively the Prosecutor asked that the verdict be quashed and remanded for retrial.

On 2 November 2001, the Supreme Court of Kosovo approved the appeal of the District Public Prosecutor and overturned the verdict having found that the trial court had not established correctly and completely the state of facts regarding the existence of the criminal offense and the criminal responsibility of the accused. Specifically, the Supreme Court instructed the first instance court to assess precisely: (1) the testimonies regarding forced labour under Article 142 of the CCY and "evaluate in particular the existence of coercion, the link with war effort of the parties in conflict and the duration of the work in question in order to determine if it lasted

enough to be qualified forced labour as an element of war crime"; (2) "the testimonies regarding the looting and destruction of the properties, under Article 142 of the CCY, evaluating in particular the role of the accused Kolasinac regarding orders given by him and or received from other police or military authorities," and (3) "the consequences of the two registration drives regarding their possible connection to criminal acts considered as elements of war crime under Article 142 of the CCY." Thus, it is obvious that as concerns Andjelko Kolasinac, the Supreme Court quashed the first instance verdict in its entirety, including that verdict's factual findings.

The limits of modifying the verdict in the appellate proceedings and subsequent re-trial are defined in Article 378 LCP and 390 para 4. These limits apply [1] only to situations where the first verdict is appealed only on behalf of the accused and thus there is a prohibition of worsening the situation of the accused [*non reformationis in peius*] and [2] only in relation to legal qualification and punishment– which was not the case in the previous appellate proceedings and the re-trial. Therefore the Supreme Court finds that the Defence's claim about the trial court having made findings in regard to a matter covered by the prohibition of *reformationis in peius* is unfounded.

In *dictum*, for the purpose of providing guidelines and explanation, this Court stresses that in the prevailing opinion of legal commentaries, even in the situation from Article 390 para 4 the trial court is obliged to make factual findings as substantiated upon evidence, irrespective of the limitations concerning the legal qualification and the punishment.[2]

Alleged use of inadmissible evidence

The Supreme Court does not find anywhere any indication that the District Court relied on the explanations given by the accused to the investigating judge in the absence of the defence counsel. To the contrary, the District Court stated explicitly in its opinion[3] that statements obtained in violation of guarantees attaching to the right to defence not been taken in the consideration.

Alleged violation of the right to defence as per Article 364 para 2

The record of the main trial indicate that following the filing of the Second Amended Indictment on 16 January 2002 [simultaneously delivered to the other party in writing] the trial court indeed did not seek the accused's explanations as to the amendments; instead, the trial court heard the closing speech of the prosecutor and adjourned the proceedings for two weeks, after which, on 29 January, the defence counsel proceeded with their closing speeches. Two days later the court heard the prosecutor's response and ended with hearing to the speech of the accused.

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[2] Branko Petric, Commentary to the Law on Criminal Procedure, Official Gazette 1986: "[T]his Article never mentions the facts, the state of the facts, evidence, or anything else that would indicate, or that would be associated with the principle of the truth, the state of the facts or their restrictions in connection with the prohibition that ensues from this Article"; Momcilo Grubac and Tihomir Vasiljevic, Commentary to the Law on Criminal Procedure, Savremena Administracija, Belgrade 1982: "The prohibition of *reformatio in peius* refers to the enacting clause and not to the justification of a verdict. If a second instance court in a justification to the detriment of the defendant points to the facts and circumstances stemming from the evidence presented that were not examined by the first instance court, without amending either the legal qualification of the criminal act or the decision on the sanction, that should not be considered a violation (SCM, Kz. 3/80, dated 16 June 1980)

[3] p.44 of the verdict, see also part IV A.

The Appellants argued that the trial court's failure to carry out a procedure foreseen in Article 316 LCP, specifically - to summons the accused to express his opinion, violated the right to defence. The view that the trial court had had such obligation was supported by reference to legal commentaries.

The OPPK contended that the Second Amended Indictment did not contain essential changes falling under Article 337 of the LCP, and only in such absent case the charges should have been treated as an improvement of the indictment rather than an amendment. Hence, the OPPK opined that the obligation of the court to seek explanations from the accused had not been triggered.

Accordingly, the Supreme Court addressed first the issue whether the instant case at all involved the necessity to apply any specific procedures following an amendment of the charge. Second, the Supreme Court analyzed whether the trial court's proceedings surrounding the amendment could have entailed an impediment to the right of defence.

By the amendment *sensu stricto* of indictment considered are all changes of the indictment that have legal bearings on the outcome of the proceedings, but only insofar as the historical identity of the events alleged is preserved, i.e., the amended indictments retains the basic elements of the event described in the initial indictment. Classically, amendments of the indictment address elements that are decisive for a privileged or qualified form of a criminal act, such that may affect the form guilt, the form of the commission and/or the form of complicity. In complex criminal acts it also happens that amendments relate to the question of singularity or multiplicity of crimes alleged within the same factual framework, *e.g*., real concurrence versus absorption or real concurrence versus extended criminal act.[4] From the predication that an amendment should have legal bearings it results that it will not be considered an amendment *sensu stricto* when the changes do not affect the essence of the charge, such as deletion, addition or change of those parts of the factual description in the indictment which do not represent the change of facts or circumstances on which the application of a particular criminal regulation is dependent. These changes in the jurisprudence developed on the ground of the LCP are instead considered a harmonization of the indictment with new details of the alleged event.[5]

Without prejudice to the significance of the abovementioned distinction in other aspects of the procedure, the Supreme Court holds that in the aspect of the right to defence it is immaterial whether changes in the indictment constitute an amendment *sensu stricto* or *sensu largo.* The accused has the right to know the charges, to have

[4] *E.g*., when the prosecutor indicted for the extended crime of aggravated theft, he may amend the charge to two concurrent criminal acts; similarly, when the initial indictment qualifies several acts of embezzlement against different persons as individual criminal acts of embezzlement, it can be amended to read as one extended criminal act of embezzlement; *vice versa*, acts the qualified in the indictment as one extended crime of fraud can by the way of amending the indictment be described as several acts of embezzlement in concurrence. However, extended criminal act is a legal and not a factual construction. In such cases the identity of the event charged has been found so obvious that courts considered it would not constitute exceeding of the criminal charge if the courts decided even without the relevant alteration of the indictment, *District Court in Bitola, K. 114/73, Supreme Court of Serbia, Kz. 140/65, Kreho, p. 155*

[5] See, e.g., Jovan Pavlica, Miomir Lutovac, *Commentary of the law on criminal procedure, Art. 337*, Beograd, 1985; Hajrija Sijercic-Colic; Drasko Vuleta, Malik Hadziomeragic *Commentary on Law of Criminal Procedure,* Sarajevo 1999

sufficient time and opportunity to prepare the defence, to present his evidence and to examine the evidence relied upon by the prosecution. Whenever the law allows the prosecution to amend the charge, the focus of the trial court in the aspect of the right of defence is whether the amendment practically affected the exercise of this package of rights of the accused. Therefore, the angle at which the matter should be viewed is that of effective exercise of the components of the right to defence in concrete circumstances of each case, rather than that of compliance with rigid formulas. Consequently, the basis of the appellate claim under Article 364 para 2 LCP is a concrete and not an abstract impediment to the right to defence; such a claim must also prove that the impediment could have affected the result of the case.

The Supreme Court takes note of the fact that several popular legal commentaries to the LCP[6] recommend that following the amendment of the indictment the court should apply the procedure foreseen by Article 316, i.e., inquire whether the defendant understood the charges as amended and whether he wants to furnish additional explanations. The Supreme Court finds such recommendation valid, at the same time however it considers that the recommendation should not be treated mechanically but as a tool for the effective implementation of the right of defence. In particular, it should be read in the light of the requirement from Article 4 LCP, which requires that the court create an *opportunity* [emphasis added] for the accused to state his position on relevant factual and legal issues.

Accordingly, when circumstances surrounding the accused or the complex nature of the change indicate that the accused might have not fully comprehend the amendment, it would be the court's duty to repeat the steps as described in Article 316 LCP as well as to offer information about legal implications of the amendment as justified under Article 13 LCP; in particular, such procedure as a rule should be followed in proceedings where the accused has not retained a counsel. On the other hand, in cases where the accused is represented by a counsel, the trial court can reasonably expect that the need to obtain clarification or the will to furnish additional explanations on the part of the accused will be signaled by the counsel as necessary.

In the case in question the accused, being a lawyer himself, was represented by three defence counsel of his choice, none of whom ever suggested, neither immediately after the amendment nor two weeks afterwards, when the court resumed the session, that as a result of the filing of the amended indictment the accused wished to furnish additional explanations. Notably, the accused at minimum had an opportunity to state his position in relation to all relevant issues during this final speech. Furthermore, even in the appeals the Appellants do not invoke any circumstances about which the accused would have failed to explain before the Verdict was rendered - which further supports that they cannot demonstrate an actual *gravamen* on the part of the defence. Therefore, the Supreme Court concludes that the fact that the District Court had not applied Article 316 following the amendment of the indictment did not compromise the right of the accused to furnish explanations.

The question of enabling the preparation of the defence is addressed in LCP Article 337 in that it foresees for the court a possibility to adjourn the proceedings for this purpose. Practically, an element under consideration in granting the adjournment should be the amount of novelty that is being introduced by the amendment: while massive or evidentiary significant changes in factual description - even if not entailing

[6] *Ibidem*

a modification of the legal qualification - would usually call for consideration of additional time and opportunity for the presentation of the defence, on the other hand, changes of the legal qualification may not justify special concessions for the defence - especially in the light of the fact that the court is anyway not bound by the legal qualification proposed by the prosecutor. However, the Supreme Court considers that in cases where the accused is represented by a defence counsel, the initiative as to the adjournment and its length should come from the defence.

Regarding the case before us we note that the Second Amended Indictment explicitly introduced to the charges the legal element of complicity; it was done by describing factual elements of acting in a collective and by amending the legal qualification accordingly, *i.e*., by quoting Article 22 CL FRY. The element of acting in complicity with others does have legal bearings: depending on the factual situation it might be an element constituting the crime [see analysis of the charges of registration *infra*] or, at minimum, be a factor having impact on the punishment, therefore the change qualified as an amendment *sensu stricto*. We note, however, that the previous version of the indictment in its descriptive part also employed language which clearly indicated acting in concert with other persons, including Serb police and military, as well as acting with an intention to aid other persons who had committed crimes.

Considering the narrow scope of the amendment as well as clear form in which it was communicated, the Supreme Court opines that the Defence was adequately put on notice about the final content of the charges. Furthermore, within the two-week period between the filing of the amended indictment and the next session all counsel had sufficient time to adjust the defence or, alternatively, to ask for further adjournment. Taking under consideration that none of the counsel had requested a further adjournment, it is legitimate to assume that the time to adjust the defence was sufficient. Accordingly, the Supreme Court finds that that the right to prepare the defence was not violated.

Alleged factual and legal errors relating to specific charges

Issues of general nature

The Defence contended that the District Court erroneously applied legal standards applicable to international armed conflict to the facts of the instant case. It maintained that the conflict resulting from the NATO intervention in Yugoslavia was international in character only with respect to the relation between the NATO States and the Army of Yugoslavia and generally regarding the relations between subjects possibly engaged in that conflict only. In all other elements the conflict had internal character, thus the provisions of Geneva Conventions and accompanying Protocols did not apply in their entirety.

Moreover, according to the Defence, it was not convincingly established that the accused could be considered a party to the armed conflict. Namely, it was alleged that the court had no grounds to link the accused to the Yugoslav Army solely on the basis of his position in the Civil Defence, given that the court failed to establish what was the rank of the accused and whether he carried a weapon. It was further argued that anyway the notion of Serb forces employed by the District Court was too wide and the accused had no control over Serb forces so broadly defined. His role was limited to Commander of the Civil Defense; the accused had no jurisdiction over the

army and the police and thus was unable to prevent crimes allegedly committed by them.

There were numerous reproaches concerning insufficient scrutiny in the evaluation of witness evidence. They concerned discrepancies and internal inconsistencies in the witness evidence, which the District Court accepted without sufficient understanding of the socio-political context in which the witnesses testified. The Defence argued that during the time period encompassed by the charges the sense of uncertainty as to the outcome of the conflict and personal insecurity was a common experience, irrespective of ethnicity, and people had to cooperate with one another. The change of the political situation in Kosovo after the conflict resulted in a distorted picture of the witnesses' past relations with the accused - which in fact had been free from any form of coercion.

The charge of contributing to forced deportation

The Defence contested the first instance court's conclusion that the two registrations of the Albanian population in which the accused was involved had the purpose of forcibly displacing and deporting the Albanian population. First, it was argued that the first instance court did not convincingly eliminate other plausible purposes for the registrations, second, that according to evidence relied upon by the trial court, the deportations happened prior to the registrations, last that a census of the population would not have been necessary to expel people. However, the Defence maintained that no proof was offered that the accused could be aware of any unlawful purpose of the collecting of the data.

The charge of forced labour

The Defense contended that the court did not fully take into consideration elements which are implied by the prohibition of forced labour under international law, such as: the extent to which the labour is systematically organised, the conditions in which the labour is performed, the length of work, whether it represents normal civic obligations and whether it contains elements of slavery, coercion or torture.

Further, the Defence argued that the court should have further explored whether measures of intimidation and terror were actually applied to compel the workers. The Defence contended that the court wrongly assessed that the Kosovo Albanians were intimidated and that resulted from selective use of witness testimony, e.g., there was witness testimony that some of the injured parties asked for certificates attesting to completion of the work with the view to possible benefits; on the other hand, in the course of one of the meetings they protested and refused to cooperate without any reprisal. Regarding the use of force to perform the pruning, the court conclusion was contradicted by witness evidence that on one occasion when the work was abandoned whereupon the workers did not suffer any consequences. In respect of the court's conclusion that security guards were used to coerce the workers to perform forced labour, the Defence considered that the court inadequately evaluated evidence showing that the KLA had been responsible for kidnapping workers. Whereupon the guarding was a necessary security measure.

Further, it was argued that the District Court failed to establish whether the workers received payment, especially the Serbs who worked along with the injured parties.

Broadly, regarding the cleaning of Malishevo, the Defence disputed the conclusion of the court that the purpose of the work was to remove traces of the mass expulsions. In relation to the work in the vineyards, it was argued that the court did not consider all the witness evidence that pruning was carried out progressively regardless of the owner with a view to organisation of normal life after the war whereas the court accepted that the purpose of the pruning was to benefit the remaining Serb population, which was unfounded upon evidence.

The charge of failure to prevent looting, pillaging and destruction of abandoned property

The Defence contended that the Civil Defence – and the accused - was justified in its actions in removing the abandoned property from the road, sorting it out and, subsequently, disposing of unusable items while preserving items of usable value. They claimed that the District Court did not fully explore who may have been responsible for the looting however there was no evidence that the accused ordered or was aware of any looting.

The Defence also raised that the court did not resolve the ultimate destiny of the tractors, specifically, failing to relate to the testimony attesting that the KLA took them over after the war, thus they might have been returned to owners.

Moreover, regarding the finding that the accused failed to prevent the looting and destruction under the doctrine of command responsibility, the Defence contended that Article 142 of the CL FRY does not envisage command responsibility in the form applied by the District Court.

Applicable legal standard

In this part of this Decision the Supreme Court addresses three legal issues of a general relevance for the war crime charges: [1] the nature of the armed conflict, [2] the scope of protection of civilians and [3] the command responsibility.

The nature of the armed conflict

The District Court correctly found that in order to fall under the definition of war crime from Article 142 CL FRY, [1] an act must be prohibited under international law effective in the time of armed conflict, and that [2] the criminal liabilities that attach are different for that of international armed conflict under Geneva Convention IV, and that of internal armed conflict under Common Article 3 of the Geneva Conventions and the Additional Protocol II to the Geneva Convention.[7]

[1] The District Court referenced Ljubisa Lazarevic's Commentary to CL FRY, Belgrade 1995: "War crime against civilian population can also be performed in the conditions of civil war, i. e. when it is a non-international armed conflict. In that case, however, according to the 1949 Geneva Convention and Protocol II, the regulations of international war law are applied in limited scope, i. e. the ban of only some of the activities stated in this Article is stipulated. The ban includes the attacks against the life and physical integrity, in particular murder in all forms, injuries, torture and causing suffering, inhumane treatment, humiliating and diminishing treatment, taking hostages, deprivation of the right to a correct and impartial trial, rape, forced prostitution etc. Other activities from this Article, which are not included in the mentioned convention and the supplementary protocol, could not, in case of a civil war, be qualified as a war crime, but, probably, as another criminal act from the federal or republic legislation."

Given that the difference in the scope of regulation by international humanitarian law is dependent on international or internal character of an armed conflict, the Supreme Court concurs with the trial court that the primary issue in establishing the applicable legal regime was that of the nature of the conflict in Kosovo in the relevant time period. In this regard the Supreme Court finds that the trial court should not have allowed ambiguity as to the specific legal regime [*ius in bello*] resulting from the character of the armed conflict, i.e., internal *vs* international. As a result, the verdict reflects a degree of difficulty in deriving the proscription of acts described under specific charges, in particular forced labour. In turn, this difficulty indicates a necessity to clarify more general issues connected with the application of Article 142 CL FRY in the context of international humanitarian law.

The District Court, having established – apparently as a notorious and undisputed fact - that at the relevant time on the territory of municipalities in question existed both an international and an internal armed conflict, subsequently referenced instruments applicable to both types of armed conflict indifferently.[8] Even assuming that in relation to certain acts committed against Kosovo Albanian non-combatants by Serb forces such approach might anyway lead to the same results, the justification given by the District Court is unsatisfactory: *"the Court is quite satisfied that the Serb forces were exercising control over and instituting force against the Kosovar Albanians in the territory of Kosovo, qualifying the Kosovo Albanians as protected persons under the Geneva Conventions and Additional Protocols I and II to the Geneva Convention*"[9]. The Supreme Court wishes to stress that the determination of whether there was one or more armed conflicts is not a mere academic exercise, but is relevant for the question of applicable regime of international humanitarian law, and, ultimately, for the determination whether conditions for criminal responsibility under Article 142 CL are met. Therefore for the evaluation of the trial court's findings further legal analysis is needed.

The critical issue is the impact of the NATO intervention on the character of the on-going armed conflict in Kosovo, assuming [as accepted by the District Court] that the hostilities between the FRY and KLA reached the requisite level of intensity, prior to the NATO intervention in March 1999, to render this conflict internal in character. The conflict between NATO States involved in the Operation *Allied Force* and the FRY was *par excellence* international. Hostilities between the armed forces of more than one State are clearly international[10] and as such ought to be governed by all four Geneva Conventions. In contrast, however, it was undoubtedly the intention of the framers of the Conventions that relations between States and insurgents be governed by Article 3 alone, and not the whole of humanitarian law[11]. Also, as concerns customary international humanitarian law, no sufficient support can be

[8] Page 13-14: "However, because this Court determines that both an international and internal conflict existed during all relevant periods alleged in the Second Amended Indictment, as discussed below, further analysis of the differences is not necessary. Instead, to the extent required, the international law related to both international and internal armed conflict will be referenced with respect to the relevant war crimes charges against Kolasinac". Likewise, on page 15: "As such, this Court finds that an armed conflict of both an internal and international character existed during the relevant time period, as required by Article 142 of the CCY"

[9] Page 15

[10] ICTY's *Tadic* Appeal Judgment, para 84 "It is indisputable that an armed conflict is international if it takes place between two or more States*."*

[11] See Lindsay Moir: *The Law on Internal Armed Conflict*, Cambridge University Press 2002, p. 23-29

found to expand the application of the whole regime of Geneva conventions over internal conflicts, as it would go against what it seems to be a prevailing legal opinion about the scope of customary law.[12]

The question relevant for this case is whether the NATO intervention from March 1999 onwards transformed the character of that conflict into an international one, or whether there remained two concurrent armed conflicts different in character. A finding to the effect that there were two concurrent conflicts raises a question whether the emergence of an international armed conflict could affect the legal situation of the internal armed conflict, i.e., entail the applicability of the legal regime pertinent to international conflicts in relation to both. The Supreme Court holds that in the context of the Kosovo conflict it is justified to speak about an international conflict along an internal one, and that each of the conflicts fell under the legal regime pertinent to its character.

Both academic opinion and jurisprudence support the position that foreign intervention can change the legal character of the conflict. We refer here to ICTY jurisprudence more broadly, considering it the most relevant and often relied upon by Kosovo courts. In respect to the transformation of a *prima facie* internal armed conflict into an international one, the ICTY Appeals Chamber has held in *Tadic* that an internal conflict may be deemed international if "another State intervenes in that conflict through its troops or […] some of the participants in the internal armed conflict act on behalf of that other State."[13] In developing this standard the Appeals Chamber found that depending on the nature of the entity involved, one of three tests could be used to demonstrate that participants in an internal armed conflict acted on behalf of another State: [1] the instructions/approval test, [2] the overall control test and [3] private individuals acting for the state test.

First, there is the specific instructions (or subsequent public approval) test for individuals or militarily unorganized groups. Second, to prove that a State had control over organized and hierarchically structured groups, namely armed forces or militias or paramilitary units, there is another test. It must be shown that the State organized, co-ordinated or planned the military actions of the military group as well as financed, trained and equipped or provided operational support to it.[14] This one thenceforth has become known as the overall control test.[15] The third test to demonstrate that participants in an internal conflict acted on behalf of another State requires proof that private individuals acted "within the framework of, or in connection with, armed forces, or in collusion with State authorities."

For the present case, the relevant test would be the overall control test, which was defined by the Appeals Chamber as follows: "*control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of*

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12 ICTY's Trial Chamber in *Celebici* alluded to the possibility of the customary law having developed the provisions of the four Geneva Conventiions since 1949 by extending their customary scope of grave breaches to cover internal armed conflicts as well; on the same issue more decisively Judge Abi-Saab in Separate Opinion on *Tadic* Jurisdiction Appeal. These views remain isolated. Such far-reaching standpoint has not been endorsed by ICTY majority jurisprudence, neither adopted by ICC Statute.

13 *Tadic* Appeal Judgement, para 84

14 Tadic Appeal Judgement para 137

15 *Ibidem*, para141

specific orders by the State, or its direction of each individual operation. Under international law, it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group".[16]

In this decision the Appeals Chamber explicitly distanced itself from the test applied by the International Court of Justice in the *Nicaragua* case, the so called "effective control" test, which had been: "*whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United states Government, or as acting on behalf of that Government*".[17] As it was subsequently analyzed[18], the Appeals Chamber, in seeking to depart from the *Nicaragua* case, had confused two issues: the determination whether the conflict was internal or international in character and the determination whether the conflict and acts committed therein were actually the responsibility of the intervening State. However, the "overall control" test constitutes the lower threshold for the legal "internationalization" of a *prima facie* internal armed conflict; accordingly when the "overall control" test is not met, the foreign State intervention does not affect the legal character of an internal armed conflict.

Following the *Tadic* Appeal Judgment, ICTY jurisprudence accepted that troops of another State intervening in an existing internal conflict may transform it into an international conflict, however, criteria adopted by the Trial Chamber in determining the nature of the conflicts in former Yugoslavia the Trial Chamber were diverse According to the Trial Chamber's decision passed upon the review of the indictment in *Prosecutor v. Raijc* [19], an internal armed conflict could be rendered international if foreign troops intervene "significantly and continuously" in support of the insurgents against the State's Government, notwithstanding that such finding was in blatant contradiction to the established principle that Geneva Conventions apply in traditional inter-State armed conflicts "regardless of their level of intensity"[20]. In the *Blaskic* Judgment, the Trial Chamber argues that the conflict was international, based on "Croatia's direct intervention in Bosnia Hercegovina" and by suggesting that foreign military intervention, even when only indirectly affects an independent internal armed conflict, is sufficient to render that conflict international[21]. This criterion was subsequently confirmed by the *Kordic & Cerkez* Judgement and by the *Naletilic* Judgement [22].

[16] *Ibidem* para 137
[17] *Nicaragua* case para 109
[18] *Tadic* Appeal Judgmengt, Separate Opinion of Judge Shahabuddeen, para 17; *Rajic* Judgment para 154-158, Lindsay Moir: *The Law on Internal Armed Conflict*, Cambridge University Press, 2002, p.48
[19] paras. 12 and 24
[20] J.S. Pictet [Ed.] *The Geneva Conventions of 12 august 1949, Commentary*, Geneva 1958, Vol. IV, p.20
[21] paras. 75-76 and 94
[22] para 194

Irrespective of this lax interpretation of the "overall control" test, the ICTY already in the *Tadic* Jurisdiction Appeal had decided that there were potentially several distinct conflicts in the territory of former Yugoslavia, and refused to accept that all of these should automatically be regarded as a single armed conflict, wholly international in character[23]. The Appeals Chamber indicated that mixed internal and international elements of the conflicts had been acknowledged and taken into consideration by the UN Security Council when the ICTY Statute was adopted, and it was done in order to "empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either conflict"[24]. The same distinction is upheld by *Tadic* Appeal Judgment, referenced by the District Court, where the Appeals Chamber stipulated: "*In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State*"[25].

However, the determination of the character of particular conflicts was left to the trial chambers to be decided on case-by case basis.

Accordingly, from the ICTY case law, it is quite difficult to find a principled basis for distinguishing internationalized armed conflicts from those "international in character alongside an internal armed conflict". The substantial ambiguity of the statement used in *Tadic* does not, however, allow to maintain that foreign military intervention can be in any case conducive to internationalization of all armed conflicts within a territory; clearly, it did not exclude the eventuality that, following military intervention by foreign troops, an armed conflict may "…depending upon the circumstances be international in character alongside an internal armed conflict". Some scholars have attempted to propose some further explanation. Foe example, it was proposed that only "direct military intervention which has the effect of supporting a campaign is enough to internationalize the conflict".[26] Yet, other scholars have objected that "as a matter of logic it is questionable whether a military intervention that does not involve insurgents acting on the intervening State's behalf could make the insurgent group qualify as "members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging* to a Party to the conflict and operating in or outside their own territory, [Third Geneva Convention, Art. 4 (2), emphasis added], with the result that it becomes meaningful to speak of "resort to armed forces between States" in the meaning of common Art. 2 of the Geneva Conventions.[27]

In substance, the interpretation of the issue of internationalization of an existing internal armed conflict based upon a systemic and combined reading of Art. 4 (2) of Geneva Convention III along with Common Art. 2 of the Geneva Conventions,

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[23] para 72 : To the extent that conflicts were limited to clashes between the Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina [Croatia] they had been internal [unless direct involvement of the Federal republic of Yugoslavia could be proven]"

[24] para 77

[25] *Tadic* Appeal Judgment para 84

[26] R. Cryer, *The fine art of friendship: Jus bello in Afghanistan*, Journal of Conflict and Security Law, Vol. 7, 2002, p. 42.

[27] James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law; A critique of internationalized armed conflict*, in *International Review of the Red Cross*, vol. 85/2003, page 330. See also ICTY *Kunarac* Appeal Judgment, para 56.

supports the application of the "overall control" test for agency also in case of military intervention by foreign troops. In other words, an intervention of foreign troops does not internationalize an internal conflict by itself, unless "the foreign State assumes control over the secessionist groups such that the use of force by the secessionist group becomes a use of force by the foreign state against the local state, thereby giving rise to an armed conflict between states within the meaning of Art. 2 (1) of the Geneva Convention IV."[28]

Notwithstanding the issue of the level of control required to internationalize an internal armed conflict, the question remains of the *ius in bello* applicable to concurrent international and internal armed conflict. The ICTY's jurisprudence, given its flexible approach to the "overall control" test managed to establish the presence of internationalized armed conflict in majority of the cases, and as a result has sparsely dealt with this issue[29]. The classic solution is to employ the theory of pairings, enabling the application of different legal regimes between various parties according to their relationship with each other. This approach was taken by the International Court of Justice in the *Nicaragua* Case, where it was held that the connection between the *Contras* and the United States was not of such character that the *Contras* were acting on behalf of the United States. Fighting between the Contras and the Nicaraguan Government was accordingly non-international and subject to Common Article 3. The involvement of the United States itself, however, as regards its relation with Nicaragua, attracted the regulation applicable to international armed conflicts, i.e., Geneva Conventions as a whole.[30]

The aforementioned double characterization of the conflict is logically unimpeachable, but it entails as a consequence that certain rules and protections granted under international humanitarian law in the context of the international conflict do not directly extend over relations pertinent to the internal component of the conflict. Furthermore, although it might be seen as undesirable for the purpose of prosecuting atrocities, the pairing theory imposes additional evidentiary requirements resulting from the need to differentiate the internal aspects of armed conflicts from the international ones, a process that in the practice of international tribunals has proven convoluted and imprecise; moreover, relations pertinent to internal armed conflict have obviously less detailed conventional protection and might require onerous proving of the contents of the customary law.

In this respect we note that in relation to the pre-Dayton conflicts in former Yugoslavia a view opposite to the pairing approach was expressed, the so- called "global view". According to the global view, an intervention from a foreign State through its troops changes the overall nature and characterization of an existing internal conflict, so resulting in one single international conflict in the entire territory that contains multiple conflicts of international and internal origin, as to which the full body of international humanitarian law applies. The global view has found considerable support and proponents[31], who resorted to arguments of mainly

[28] ICTY's *Blaskic* Judgment, Declaration of Judge Shahabudden
[29] see *infra*
[30] Nicaragua vs. US, [Merits] 76 ILR 5, para 219
[31] From judges Li and Rodrigues dissenting opinion in ICTY case-law (respectively *Tadic Jurisdiction Appeal* and *Prosecutor v. Alekovski, Judgement*, 25 June 1999), the ICTY *Nikolic* and *Mladic* decisions, the United Nations Commission of Experts (*Final Report* 4-27 May 1994, Section II. A), the United States government (Prosecutor v. Tadic, *Amicus Curiae Brief*, 25 July 1995), to several academic scholars, see T. Meron: "*Classification of armed conflict in the former Yugoslavia:Nicaragua's fallout*", American Journal of International Law, Vol.92, 1998, p.238.

practical nature, pointing out that in the circumstances in Bosnia the conflict should be viewed as a whole, because its segments were indiscernible upon any agreed-upon criteria. Prevalence of practicality over legality in this approach is best illustrated by the following opinion: "*This [Tadic Jurisdiction Appeal] first decision by the appeals chamber is unfortunate in that it complicates unnecessarily the further work of the Tribunal by suggesting that each prosecution will have to involve arguments and decisions as to the characterization of the armed conflict in which the alleged offenses occurred*".[32]

Arguments invoking practical and humanitarian concerns were certainly well made in the face of several conflicts concurrently breaking out on the territory where one State, the SFRY, was falling apart and new States have risen. The Supreme Court notes that nevertheless the prevailing doctrine, at least in relation to conflicts whose segment are practically discernible, remains the pairing theory, as more faithful to the terms of Geneva Conventions, more consistent theoretically and based in actual practice of the States and international organisations.[33]

The Supreme Court notes that it is understandable and in accordance with the purpose and the mandate of the ICTY that in the context of the pre-Dayton conflicts in former Yugoslavia efforts are made seek to such interpretations and functional adaptations of international humanitarian law as to encompass under the jurisdiction of the Tribunal a possibly wide range of human rights abuses. Yet, the Tribunal refused to adopt a quasi-legislative judicial process and never explicitly rejected the dichotomy between the international and internal armed conflict; rather it chose to deal with the tension between the established legal doctrine and evidentiary difficulties by resolving the relevant issues on a case-by case basis. By the same virtue, the Supreme Court considers that it would be illegitimate and inappropriate for a domestic court, which operates within a complete statutory system, and which is bound to uphold international standards of protection of individuals *inter alia* in criminal process, to accept a practice based in legal views that are not yet clearly articulated and firmly accepted under the international law. The Supreme Court considers that challenges of practical nature should not anyway lead to court practice that is not justified; the Court notes, however, that the Kosovo conflict, unlike the pre-Dayton conflicts in former Yugoslavia, appears to have distinct features of dichotomy, which from both theoretical and practical angles supports the application of the theory of pairings.

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[32] G.H. Aldrich "Comment: Jurisdiction of the International Criminal tribunal for the former Yugoslavia ", American Journal of International Law, Vol. 90, 1996, p.68

[33] See: Lindsay Moir, *Ibidem,* p. 47: "Given the reluctance of States to accept openly even the limited measure of protection contained in common Article 3, it seems unlikely that outside interference on behalf of the insurgents would persuade the authorities to be any more charitable and implement the entire *ius in bello* against enemies within the State". The author gives the example of the Iraqi invasion in Kuwait in 1991 where applicable legal regime between various parties of the conflict was dependent upon whether or not those particular states were parties to Additional Protocol I. Further, in the conflict in Afghanistan where the Soviet Union intervened on behalf of the Government against *mujahadin* groups, the IRC continued to treat the conflict as internal, which must be correct where two States are not actually in conflict with each other. Also, according to the declaration adopted by IRC following the NATO intervention, the conflict between FRY forces and the KLA remained internal, see: J-F. Oeguiner, " Dix ans après la creation du Tribunal penal international pour l'ex Yugoslavie […]" in International Review of the Red Cross, No 850, p.288. Ibidem, see: J.G. Stewart: "Although the global view is positive from a practical and humanitarian perspective, it is contradicted by the international community's rejection of the ICTR's attempts to adopt an explicit provision in Additional Protocol I making the whole body of international law applicable to a civil war if foreign troops intervened [in support of both sides]"; p.335.

In this case before the Supreme Court, in order to qualify the FRY–KLA conflict as internationalized in keeping with ICTY *Tadic* Appeal approach, it would be necessary to establish a link between KLA and NATO forces, specifically, it would have to be demonstrated that the KLA acted as an agent of the ten NATO countries involved in Operation *Allied Force* by being under the "overall control" of NATO, i.e., control going beyond financing, training and equipping or providing operational support to that group".[34]

Based on the information available to the Supreme Court upon the record before us and notorious facts known, there is no evidence that during the NATO intervention in the armed conflict in Kosovo there was such as a link between NATO and the KLA that would allow considering the KLA an agent of NATO, even applying the most lax "overall control" test. Hence the Supreme Court accepts that the armed conflict in Kosovo between March 24 1999 and June 1999 consisted of an international conflict [*i.e*., FRY-NATO] alongside an internal one [i.e., FRY-KLA]. Accordingly, the trial court's finding to this effect, albeit not explained as to its basis, was correct.

In conclusion, following the finding of a dual nature of the armed conflict the Supreme Court considers that relations between the parties to each of the conflicts fell under legal regimes applicable to these armed conflicts respectively. It results that in relation to the conflict between FRY and KLA applicable is the legal regime of an internal armed conflict.

The scope of protection of civilians

There was no dispute over the District Court's findings that the injured parties in this case were civilians and protected persons according to the international humanitarian law. The dubious question was the scope of this protection and how it affects the criminal responsibility under Article 142 CL FRY.

Before we proceed to analyze laws pertinent to specific charges it is important to make one remark of general nature. As the District Court correctly held, Article 142 CLY FRY requires that an act of war crime committed through one or more of underlying offences listed in this Article also be in violation of "regulations of international law effective during war, armed conflict or occupations….". Accordingly, this statement restricts the application of Article 142 to the extent that any of the acts proscribed are also in violation of regulations of international law. As such, any application of Article 142(1) must be made in connection with international law applicable to Kosovo in 1989, pursuant to UNMIK Regulation 1999/24. Such international law includes each of the Geneva Conventions and the applicable Protocols, including the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) (hereinafter the Geneva Convention), the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) (hereinafter Additional Protocol I to the Geneva Convention), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (1977) (hereinafter the Additional Protocol II to the Geneva Convention). The Socialist Federal Republic of Yugoslavia (hereinafter

[34] see: Sonja Boelaert-Suominen: *The International Criminal Tribunal for the Former Yugoslavia and the Kosovo conflict*, International Review of the Red Cross No 837, also:*Tadic* Appeal Judgment. para 137.

SFRY)[35] was a party to each of these Conventions in 1989, and thus these Conventions are applicable law in Kosovo and were applicable to the Federal Republic of Yugoslavia (FRY) in 1999 during the NATO bombing campaign.

The District Court went on to say:" *This Court would note that under 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. Many would also argue that the Geneva Conventions have become customary international law and applicable to FRY in that sense during the relevant time period".*

In this last sentence the District Court overlooked two aspects of the applicability of the legal regime as defined by UNMIK Regulation 1999/24. First, the applicability of the regime as of 22 March 1989 in Kosovo recognises 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. Second, 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 the 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.*

[35] In 1989, the Federal Republic of Yugoslavia, The Former Yugoslavian Republic of Macedonia, Croatia, Slovenia and Bosnia and Herzegovina comprised the Socialist Federal Republic of Yugoslavia (the SFRY). This Court notes that FRY, which came into existence in 1992, is now officially known as "Serbia and Montenegro," as of 4 February 2003.

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. Nevertheless, only in theory this could 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 [CL] 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 prosecution instead of prosecution for ordinary crimes cannot be considered applicable in domestic courts of Kosovo for the implementation of Article 142 CL FRY because 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 areas as defining prohibited conduct, defining basis of individual responsibility and the punishment.

The laws relevant to the protection of civilians in internal armed conflicts are in particular the conventional rules contained in common Article 3 and Additional Protocol II to the Geneva Conventions, both instruments ratified by, and indisputably binding for, the FRY Government. Accordingly, on the basis of common Article 3 the non-combatants have the basic right to humane treatment "in all circumstances", i.e., non-reciprocally and without adverse discrimination in humanitarian matters, specific behaviors constituting inhumane treatment are explicitly and unconditionally prohibited, the sick and wounded are protected and all non-combatants have the right to humanitarian relief. Additional Protocol II develops protections granted in common Article 3 and introduces new ones [in particular Articles 4 [3], Articles 14-17 of the Protocol].

Civilians are moreover protected by the customary international law and international human rights law. Regarding customary international law applicable to internal armed conflicts, most discussion in legal literature and international jurisprudence appears to concern the customary nature of common Article 3 and provisions of Additional Protocol II, and how they relate to each other. In the legal system of Kosovo the customary aspect can only be relevant for the interpretation of concrete prohibitions contained in both conventional instruments. As Georges Abi-Saab wrote in relation to Additional Protocol II:" Part III on the protection of civilian population […] can also be taken in the consideration in the interpretation of common article 3, which, being a part of a law-making multilateral treaty of humanitarian import, has to be interpreted

in the light of its unfolding object and purpose, and according to the principle of inter-temporal law of its evolving legal environment of which the Protocol is a part".[36]

We take notice that ICTY's Tadic Appeals Judgment, upon examining States' belligerent practice and statements of international humanitarian organizations, affirmed that Common Article 3 has acquired the status of customary international law, moreover, it held that customary rules governing internal conflicts went beyond common Article 3 and included "*protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities"* [37]. What must be emphasised, however, the Appeals Chambers was nevertheless careful to point out that the emergence of the above-mentioned general principles governing internal armed conflicts does not mean that they are regulated by general international law in all its aspects. Two limitations were particularly spelled out:

[I] only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal armed conflicts; and

[ii] this extension has not taken place in the form of a full and mechanical transplant of those rules to internal armed conflicts, rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[38]

Last, we note that the Rome Statute of the International Criminal Court [ICC] which now provides for jurisdiction over serious violations of the rules applicable in internal armed conflict, has derived these rules from a range of sources, including the Hague Regulations, the Geneva Conventions and Additional Protocol II. During preparatory conference in Rome it was accepted as a guiding principle that the definitions of war crimes should reflect customary international law and there was a vivid dispute over the customary status of certain war crimes.[39] Given that States are normally reticent to assume any additional obligations under customary international law - implied by their ratification of a new legal instrument, the final list of war crimes set out in Article 8(2)(c) and (e)[40] is likely to represent these serious violations of international humanitarian law committed in internal armed conflict, to which individual criminal responsibility can attach under customary international law. Accordingly, it is likely to set boundaries within which customary interpretation of prohibitions contained in Common Article 3 and Additional Protocol II can be considered.

Regarding Geneva Convention IV, Article 4 [1], the protection granted therein to non-combatants extends due to the requirement that protected persons must not be nationals of the adversary or occupying power in whose hands they find themselves. It is understood that nationals, similarly as non-combatant in internal armed conflicts,

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[36] G. Abi-Saab, "*Non-international Armed Conflicts*", UNESCO, International Dimensions of Humanitarian Law, 1988, p.237

[37] *Tadic* Jurisdiction Appeal, para 127

[38] *Tadic* Jurisdiction Appeal, para 126

[39] *See* Roberts, G., 'Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court' 17 American University International Law Review 2001, p. 35; Schabas, W.A., 'An Introduction to the International Criminal Court', Cambridge University Press, Cambridge, 2001; *see also* the International Law Commission's papers on the meeting in Rome and the *traveaux preparatoires* of the meeting in Rome.

[40] Article 8(2)(c) incorporates the provisions of common Article 3 of the Geneva Conventions into the Statute while Article 8(2)(e) gives the ICC jurisdiction over 12 other violations of the laws and customs of war applicable in internal armed conflict.

are entitled to the rights and guarantees owed to all nationals, including those deriving from human rights conventions. However, the Geneva Convention IV– save Common Article 3 - does not cover explicitly the category of protected persons afforded protection in the case before the trial court, i.e., Kosovo Albanians who were Yugoslav nationals and resided on the territory controlled by Yugoslav government.

In this respect, we note that the District Court accepted, after ICTY's jurisprudence[41], that "*in the complexity of present-day international armed conflicts that are inter-ethnic armed conflicts, like the one in former Yugoslavia, ethnicity rather than nationality may become determinative of national allegiance*"[42]. The District Court appears to derive from that statement that injured parties in their relation with FRY Government had protected status from Geneva Convention IV and both Additional Protocols, despite having been nationals of FRY. The Supreme Court finds that in the light of evidence adduced in the main trial such conclusion was neither factually supported nor sufficiently legally explained.

The Supreme Court wishes to stress that while it considers it legitimate and desirable that district courts examine ICTY's legal opinions and adopt them, when persuasive, as these courts' own views, it would however expect that this be done after establishing the relevance of each particular legal view to the facts of the case. Given especially the fact that there is yet no final ICTY jurisprudence relating specifically to the Kosovo conflict, it is particularly important that the courts verify whether ICTY's views and findings expressed on the ground of the conflict in Bosnia are of such universal applicability that they can be extrapolated on the circumstances of the cases in Kosovo. In the instant case, the Supreme Court finds that the trial court was not right to take the above-quoted ICTY's statement out of its context and use it as basis to automatically import the whole of Geneva Convention's protection of non-combatants to the facts of this case.

In the Supreme Court's opinion, in order to uphold the thesis about the applicability of Geneva Convention IV to Kosovo Albanians residing in the territory controlled by the Yugoslav government, a two-fold legal argument would be needed:

First, the trial court would need to establish that the issue was relevant to the international conflict. Only in an international conflict can the question of the realm of Geneva Convention IV be argued, including whether the scope of protection of non-combatants can be extended beyond the express language of the Convention, *i.e*., beyond strictly understood notion of non-nationals. The concept of ethnicity as a criterion relevant for the protected status irrespective of nationality is presently well established in ICTY jurisprudence; however, it was construed not in abstract terms, but in the context of international armed conflict and with the focus on reality of bonds linking protected persons with another party to this international conflict. For example, in the same *Tadic* Appeal case relied upon by the trial court, when the Tribunal held that ethnicity can be a better determinative of national allegiance and thus broadened the concept of protected persons, it did it only after it had revisited the threshold of agency control, overturned the Trial Chamber's finding of the internal character of the conflict and held that the conflict was international.

[41] *Tadic* Appeals Judgment, paras. 164-9; *Blaskic* paras. 145-6; *Celebici* Appeals Judgment paras. 54-59.
[42] Page 15 of the verdict

The context of international armed conflict is further stressed in the *Celebici* Appeal Judgment. The *Celebici* Appeal Judgment construed the broadened definition of protected persons through the teleological interpretation of the Geneva Convention IV in its protective goals and also relying on the emerging right under international law to the nationality of one's own choosing in cases of State succession. The Chamber was however was quite clear that "internationality of the armed conflict and protected persons status continue to provide the context in which alleged offences take place"[43]. The Appeals Chamber held: "*Article 4 of the Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalized, conflict to the maximum extent possible […]. In today's ethnic conflicts the victims may be [assimilated] to the external State involved in the conflict, even if they formally have the same nationality as their captors.*"[44] The same teleological argument does not apply to relations pertinent to internal conflict; hence it is not justified to transport unreservedly this interpretation of the category of protected persons from the regime of international relations to internal relations.

Second, the criterion of ethnicity adopted by ICTY was in any case applied with the understanding and to the effect that the victims enjoy the protected status when the *substance* of the relations indicate that they do not owe allegiance to, and do not receive diplomatic protection of, the party in whose hands they find themselves, instead, there is an effective connection to another adverse party.[45] ICTY's jurisprudence is duly considered innovative in this aspect, nevertheless, in the substance-based evaluation of the relations between the party to a conflict and the victims, it is also consistent with traditional concept of nationality expressed by the International Court of Justice in *Nottebom* case. Namely, nationality was defined by that Court as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments [to a State],…which assumes the defence of its citizens by means of protection against another States".[46]

From the above analysis it results that in deciding the question of protected status the court may not limit its findings to an assertion that the victims and their captors were of ethnicities representative for the opposing parties to an internal conflict - even one existing along an international one. Rather, the court would need to establish whether between the victims and the party who had control over that group the allegiance based on nationality did not effectively exist, and that, instead, there was an effective allegiance to an adverse party to the international conflict, ethnicity being a possible decisive for the issue of allegiance. Alternatively, it might be considered whether a lack of an effective bond with the party of whom the victims were formally nationals could result in such a situation that the victims who found themselves in the midst of an international conflict were *in substance* treated as stateless persons and therefore, for the purpose of protected status, should be regarded as such.

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[43] *Ibidem,* para 26

[44] *Celebici* Appeal Judgment para 83

[45] This approach taken in *Tadic* : "In granting its protection Article 4 intends to look to the substance of relations, not their legal characterization as such", para 168, was confirmed in *Aleksovsky*, Appeal Judgment para 151-152 and in the *Celebici* Appeal Judgment which stated that "formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds […]", para 83. Likewise, the Trial Chamber in more recent *Naletilic* Judgment held "The Chamber abides by the consistent jurisprudence on this issue and will review, on a case by case basis, the effective allegiance of the victims rather than their formal nationality", para 207.

[46] Nottebom case, ICJ Rep 1955, p.22-23

Accordingly, following the direction of ICTY jurisprudence, having accepted that as of March 24th 1999 in Kosovo there was (in addition to an internal one) an international conflict to which the body of Geneva Convention IV applied, in order to attribute the protected status from Geneva Convention IV to Kosovo Albanian non-combatants residing in the territory controlled by the Yugoslav government, the court would need to examine the substance of factual relations among the parties in the international conflict. An argument in favour of protected status could be made only when upon such examination it would be demonstrated that the group claiming protected status effectively did not owe allegiance to the FRY Government and did not receive protection thereof. In the determination of the effective allegiance following factual elements, subject to proof, could be relevant: [1] whether in the relevant period the Yugoslav government ceased offering protection to the Kosovo Albanian civilian population as a whole or to the specific group seeking protection, whereupon they acquired a status of *de facto* stateless persons [2] whether NATO intervened on behalf of Kosovo Albanian civilian population thus alienating them in their relations with the Government, whereupon members of this population gained a status of *de facto* stateless persons or aliens in the territory of the adverse party; [3] whether the specific group in question was denied protection and renounced allegiance to Yugoslav Government.

In the scenarios of internationalized armed conflicts it often can be found that the government offers protection to factions that abide by it whereas the insurgents are regarded as terrorists or otherwise outlawed. Therefore, in war crime proceedings a proof that in the course of the conflict a group of nationals was denied state's protection, based on, *e.g.*, ethnicity, would have to specifically include the injured parties. Government actions aimed at obtaining cooperation from the opposing group and seeking their involvement in government's or community undertakings would indicate that the protection continued to be extended on the condition that the allegiance was maintained. As long as the group or individuals in relation to the state act along the lines of the protection-allegiance pattern, the claim for protected status of aliens or stateless persons would likely be unfounded.

Command responsibility

The District Court in this case found Kolasinac guilty of committing the war crimes of looting and destruction of property, under Article 142 "under the doctrine of command responsibility."[47] The court cited the second amended indictment's allegation that:

> "Kolasinac failed to take any action or make any attempt to use his authority to halt the killing and deportation of Kosovar Albanians, as well as the plundering and looting and burning of their homes. Nor did he use his authority or attempt to use his authority to report such crimes to higher authorities, or to protest these illegal actions, or to discipline or report for discipline those involved"

and then stated "this allegation raises the issue of command responsibility."[48]

The trial court then assumed that Article 86[49] of the Additional Protocol I [APP I] of the Geneva Conventions was applicable because FRY had ratified that Protocol in

[47] Verdict, page two, and pages 41-43.
[48] Verdict page 42.
[49] Article 86:

1977.[50] The District Court then analyzed the facts based upon a three-prong test: whether "(1) there existed a superior-subordinate relationship between the defendant and the criminal perpetrators; (2) the defendant knew or should have known of the crimes that had been or were about to be committed; and (3) the defendant failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators."[51]

The trial court in its verdict then concluded that Kolasinac "knew or should have known that the property was being destroyed and looted by his subordinates."[52] By using the disjunctive "or," the trial court committed error; it found the defendant guilty of looting and destruction of property, and admitted it was not certain as to the *mens rea* of Kolasinac. As is addressed *infra,* Kosovo's criminal law does not allow a conviction for war crime, CL FRY Article 142, to be based upon circumstances that the defendant did not know, but "should have known." The trial court also refers to his failure to "punish the perpetrators,"[53] but does not explain his affirmative duty to do so nor how he would do so.

The Supreme Court finds it prudent to address this issue to give guidance to trial courts as to the differences in means of criminal liability for international humanitarian law violations between the Kosovo courts, and international tribunals whose general principles of criminal liability echo Article 86 APP I bases for liability. While international tribunals have found commanders liable based upon their omissions,[54] the Kosovo courts are much more limited by the strictures of CL FRY Article 142 as read with Article 30 on acts and omissions,[55] and Article 11 on criminal liability, and as read with UNMIK Regulation 1999/24,[56] and the FRY Constitutional protections.[57] As outlined briefly, that form of command responsibility resulting in a superior's criminal liability for either negligence ("should have known" that crimes were being

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(1) The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
(2) The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal *or disciplinary responsibility*, as the case may be, if *they knew, or had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." (emphasis supplied)

[50] Verdict, page 42. At footnote 23, the district court admits there is an issue as to whether the Additional Protocol applies to an internal conflict, but found the issue moot as it had found an international conflict existed. *See* the Supreme Court's discussion of that issue *infra.*

[51] *Ibidem.*

[52] Verdict, page 43.

[53] *Ibidem.*

[54] Such criminal liability for war crimes of one's subordinates may be found even if the commander's omission was not the cause of the war crime at issue, *e.g.,* where the commander fails to punish or discipline subordinates after their war crimes. *See* Antonio Cassese, International Criminal Law (Oxford University Press 2003), at pages 203-207, for an excellent exposition on command responsibility.

[55] (1) A criminal act may be committed by a positive act or by an omission.
(2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.

[56] Section 1.4: "In criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation." Note that Section 1.3 imposes the duty upon the government and public officials to "observe internationally recognized human rights standards," but does not impose international criminal laws upon the residents of Kosovo.

[57] The relevant provisions of the 1974 SFRY Constitution, Articles 181 and 210, and the 1992 FRY Constitution, Articles 16 and 27, are discussed *supra.*

committed), or for *post facto* failure to report, discipline or punish upon discovery after the fact of the war crime committed by subordinates, is not cognizable under the applicable Kosovo criminal law to the charges of war crime as in this case.[58]

The phrase "command responsibility" may be used broadly to also encompass a commander's ordering subordinates to commit a crime, but in the context of international humanitarian law it is customarily used to denote an omission to act by a commander that results in that commander's criminal liability for crimes committed by his subordinates. Under this doctrine, a commander may be found liable for a negligent as opposed to knowing omission; *e.g.,* if he had reason to know that the criminal act was about to be or was being committed by subordinates, but did not actually have such knowledge, thus could not be attributed a direct or indirect intent to allow the crime. In international humanitarian law, a commander's omission is not even required to be causally related to the war crime – when a commander does not learn of the war crime until after the fact, he may be found criminally liable for that war crime because of a failure to report or punish – even though the omission did not cause that crime.

The doctrine of 'command responsibility' was established by the Hague Conventions IV (1907)[59] and X (1907)[60] and applied for the first time in the aftermath of bloody World War I when it became apparent that those in military or civilian authority provided a cornerstone for the good conduct of those under their command, and hence should carry some liability for their actions. After the trial of *Emil Muller* by the German Supreme Court in Leipzig in the aftermath of World War I, the doctrine was invoked by the International Military Tribunals after World War II and developed further through international and domestic jurisprudence: *inter alia,* the *High Command*, in *Re Yamashita*, *Hostage* and *Abbaye Ardenne* cases.[61]

Despite the rich jurisprudence of the trials subsequent to World War II, no express provision on command responsibility was contained in the Geneva Convention of 1949. However, significant progress was made with the inclusion of Articles 86 and 87 of Additional Protocol I to the Geneva Conventions, relating to the International Armed Conflicts.

However, it was not until the Yugoslav and Rwanda civil conflicts that the doctrine was applied to modern warfare. The doctrine of command responsibility was included in Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia [ICTY] and in Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda [ICTR], as well as Article 28 of the Rome Statute for an International Criminal Court [ICC].

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[58] The current Provisional Criminal Code of Kosovo [PCCK], is not applicable to crimes alleged to have been committed in 1999 because Article 2 requires that the law in effect at the time of the offense be applied (para. 1), unless the newer law is more beneficial. PCCK Article 129, Command Responsibility, which tracks the ICC approach, is certainly less beneficial to the accused Kolasinac and thus cannot be applied.

[59] Hague Convention IV Respecting the Laws and Customs of War on Land, 18/10/1907, Art. 43 of the Annex of Regulations.

[60] Hague Convention V for the Adaptation of the Principles of the Geneva Convention to Maritime War, 18/10/1907, Art. 19.

[61] *11 Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1950)*; *The Tokyo War Crimes Trial*; John R. Pritchard et al. [eds] 1981.

The ICTY in the *Celebici*[62] case elaborated the threefold requirement for the existence of command responsibility, which has been confirmed by subsequent jurisprudence, and was followed by the district court in this case:

1. The existence of a superior-subordinate relationship;
2. That the superior knew or had reason to know that the criminal act was about to be or had been committed; and
3. That the superior failed to take the reasonable measures to prevent the criminal act or to punish the perpetrator thereof.

It can be stated that such command responsibility liability is part of international humanitarian customary law.[63]

The Geneva Conventions Common Protocol I and the customary international humanitarian law impose an obligation on States to either hold violators liable directly, under the language of the Protocol, or to enact domestic legislation to enable liability for the proscribed command responsibility behavior. The Supreme Court notes, however, that the mode of the implementation of the Protocol as well as the question whether it should be a criminal liability or disciplinary liability was left to the States. The FRY did meet its obligation in that regard through domesticl legislation, by providing for criminal liability as defined in article 142 CL FRY and also by providing for the system of disciplinary liability for proscribed command responsibility behavior.

Accordingly, in the domestic legal system into force in the Federal Republic of Yugoslavia at the beginning of the conflict in Kosovo, the obligation for a superior to prevent the commission of war crimes by his subordinates (command responsibility) was established on the basis of the followings instruments:

1) Articles 86 and 87 of the Additional Protocol I to Geneva Conventions, applicable in international armed conflicts and in the situations envisaged under Art. 1(4) of the same Protocol; and

2) the "*Regulation on the Application of International Laws of War in the Armed Forces of the SFRY*", issued in 1988 and comprising an "*Introduction*", the 1988 "*Order on the Application of the International Laws of War in the Armed Forces of the Socialist Federal Republic of*

[62] ICTY *Prosecutor v. Delalic*, Judgment No. IT-96-21-T (16/11/1998).

[63] The case-law before the ICTY influenced the inclusion of Article 28 of the Statute of the International Criminal Court making command responsibility a basis for criminal responsibility when international crimes are committed. The inclusion of the principle of command responsibility in the Statute of the International Criminal confirmed its status as part of the international humanitarian customary law. Furthermore, a clear trend can be seen in international humanitarian law towards the recognition of the principle of command responsibility as applicable in both international and internal armed conflict. Thus, the ICTR Statute explicitly provides for command responsibility, including for grave breaches of common Art. 3 of the Geneva Conventions, in the context of the conflict in Rwanda, which is by definition application of superior liability in a non-international armed conflict. ICTY case-law has pointed out that command responsibility in internal armed conflict is also a natural consequence of the principle of responsible command included in Article 1 of the 1977 Geneva Protocol II, as explained in the *Hadzihasanovic* Appeal decision on Jurisdiction, where the ICTY court succinctly states that, "the duties comprised in responsible command are generally enforced through command responsibility, the latter flows from the former" (*Prosecutor v Hadzihasanovic and others*, *Decision on joint challenge to jurisdiction*, 12th November 2002; and *Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility*, 16th July 2003, IT-01-47-AR72).

Yugoslavia," and the 1988 "*Instructions on the Application of the International Laws of War in the Armed Forces of the Socialist Republic of Yugoslavia* [SFRY Regulations]."

The SFRY Regulations[64] address both the substance of the FRY's international legal obligations and their implementation within the chain of command. Beyond stating the FRY's international legal obligations and outlining when and how those obligations apply, the Regulations also discuss command responsibility for violations of the laws of war. The "Order on the Application of the International Laws of War in the Armed forces of the FRY" outlines both superior and subordinate responsibility for compliance with the laws of war, including the commander's duty to start criminal proceedings against subordinates who violate international humanitarian law.[65] The Instructions further specify a commander's responsibility for the actions of subordinates, so implementing the provisions cited *supra* of the Additional Protocol I to Geneva Conventions on command responsibility:

> "An officer shall be personally liable for violations of the laws of war if he knew or could have known that units subordinate to him or other units or individuals were planning the commission of such violations, and, at a time when it was still possible to prevent their commission, failed to take measures to prevent such violations.
>
> That officer shall also be held personally liable who, aware that violations of the law of war have been committed, fails to institute disciplinary or criminal proceedings against the offender, or, if the instituting of proceedings does not fall within his jurisdiction, fails to report the violation to his superior officer.
>
> An officer shall be answerable as an accomplice or instigator if by failure to take action against his subordinates who violate the laws of war he contributes to repeated commission of such acts by units or individuals subordinated to him"
> [*Instructions,* para. 21].

Consistent with their liability for the acts of subordinates, officers are also required to report violations of the laws of war to a military prosecutor or to their superior officer, and to take "necessary measures" to prevent their recurrence.[66]

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[64] The "SFRY Regulations" remained in effect after the country's name changed from SFRY to the FRY - they are cited in 1998 and 1999 VJ (Yugoslav Army) orders provided in a book that reviewed the conduct of the VJ in 1998-99 war in Kosovo. Both the documents, the Regulations and the book, have been submitted as evidence before the ICTY in the Milosevic proceedings (respectively ERN 0080-7685-0080 and Exhibit 2277).

[65] "The commanders of units and every individual member of the armed forces shall be responsible for the application of the international laws of war. The officer in charge shall institute proceedings against persons who violate the international laws of war for the pronouncement of the penalties prescribed by law." Para. 31.

[66] "A Yugoslav officer who learns of violations of the laws of war shall order that the circumstances and facts surrounding the violation be investigated and the necessary evidence collected...It is established that a member of the armed forces of the FRY, a Yugoslav citizen or a person residing in the FRY has committed violations of the laws of war which are subject to criminal prosecution, the collected information and evidence shall be submitted to the military prosecutor directly or through the superior officer and the necessary measures taken to prevent further violations of the laws of war." *Instructions*, para. 36.

The Supreme Court accordingly concludes from its combined reading of Article 142 CL FRY, Art. 30 CL FRY, the provisions of Additional Protocol I (Articles 86 and 87 as promulgated through the Army Regulations, that commanders bear liability for the actions of their subordinates, and may themselves be held responsible for a failure to prevent or punish crimes that occur under their command, by either disciplinary measures or by criminal measures or by both, where the failure to abide by the regulations does constitute at the same time a disciplinary offence and a criminal act.[67]
The question then becomes to what extent the doctrine of command responsibility may be applied in relation to criminal liability in the legal regime of Kosovo.

The applicable law in Kosovo is *prima facie* set out in UNMIK Regulation 1999/24 of 12 December 1999,[68] according to which the applicable law is the UNMIK Regulations or the law that was in force in Kosovo before 23 March 1989, and if they conflict, the regulations prevail.[69] Moreover, in any individual criminal proceedings, the defendant was provided with 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.[70]

The reference to the UNMIK regulation concerning the applicable law has a decisive impact on the analyses of the constitutional doctrine, in whose framework the principle of legality in criminal matters must be applied. The obligation to enforce the applicable law in force on 22 March 1989 results in the *prima facie* reference to the constitutional principle of legality as established in the SFRY 1974 Constitution,

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[67] The FRY Constitution, laws, and relevant military regulations created a system of military discipline and military criminal justice. As the primary law governing the FRY armed forces, the Law on the Yugoslav Army [VJ] contains provisions relevant to the system of military discipline and justice. *Eg*. Art. 37, paras. 1 and 2, of the Law on VJ specifies the terms under which members of the armed forces must obey orders: "A service member must carry out the orders issued by superior officers regarding the service except if the carrying out of the order would be a criminal act."

Article 159 through 206 of the Law on the VJ deal specifically with the responsibility of service members, including the procedures for assessing and punishing disciplinary violations. Soldiers may be held responsible for disciplinary violations, which that law classifies as either disciplinary infractions or disciplinary offences.
A conduct by a member of the armed forces can be at the same time a disciplinary offence and a criminal act (offence against the military discipline or an offence against international law), see for instance Art. 166 concerning statutes of limitation. Accordingly, when the Instructions on the Application of International Laws of War in the Armed Forces of the SFRY specify a commander's responsibility for the actions of subordinates, and mention the circumstances within which personal liability of an officer for violations of the laws of war committed by a subordinate can be established, those instruments refer to the possibility of both criminal prosecution and disciplinary proceedings conducted contemporaneously (see especially paragraphs. 21 and 36).

However, crimes remain defined in the the Criminal Law of the FRY. With regard to military discipline, CL FRY defines as criminal acts both offences against military discipline and offences against international law (respectively chapter XX and Chapter XVI). The FRY Law on Military Court and the FRY Law on Military Prosecutor together create the legal infrastructure for prosecuting and adjudicating crimes committed by members of the Yugoslav Armed Forces. War crimes, crimes against humanity and other crimes under international law, when committed by members of the armed forces, all fall within the jurisdiction of the military courts.

[68] Regulation 1999/24 was amended by Regulation 2000/59, but the relevant provisions of Reg. 24, including Sections 1.3 ,1.4 and 1.1, remained the same.
[69] Regulation 1999/24 at Section 1.1.
[70] *Ibid.* at Section 1.4.

Articles 181[71] and 210, discussed *supra.* The Supreme Court's conclusion *supra* in our discussion of international humanitarian customary law protections for civilians apply as well to bases for individual criminal liability and responsibility – there can be no direct application of international humanitarian customary law, including criminal liability for command responsibility for omissions, that does not have a basis in the applicable Kosovo criminal law.[72] The constitutional principle of legality presupposes that criminal offences and applicable punishment must be provided for in specific domestic legislation.

The applicable law for this case is the CL FRY as of 1989, pursuant to UNMIK Regulation 1999/24. That criminal law does not include provisions defining criminal responsibility for failure to prevent war crimes (command responsibility). However, Article 30 of CL FRY does provide for a criminal act to be committed through an omission:

> (1) A criminal act may be committed by a positive act or by an omission.
> (2) A criminal act is committed by omission if the offender abstained from performing an act, which he was obligated to perform.

The question then becomes whether a superior's failure to act against subordinates could lead to the criminal liability of the superior for war crimes committed by his subordinates, on the basis of Article 30 in connection with Article 142 CL FRY.

It flows from the paragraph 2 of Article 30 that for each criminal act of omission it must be established that there is a positive obligation to undertake a particular action, and that the behavior of a perpetrator can be characterized as failure to act in a situation where his obligation to act has been activated. The obligation to act may be established by statutes or some other regulations, or by the moral and internal norms of behavior that are fully accepted in some instances when performing certain professional duties, for example, medical ethical codes or military disciplinary regulations.[73]

Accordingly, a superior's failure to report or discipline subordinates for committing war crimes may constitute an omission which is criminalized, but that crime of non-reporting or non-disciplining does not under domestic criminal law result in the superior's being guilty of those war crimes. A *mens rea* in case of negligence ("should have known") cannot result in criminal liability under Article 142 because Article 11 only allows negligence to be the basis for criminal liability if the crime explicitly allows liability due to negligence, and Article 142 does not refer to negligence.

Furthermore, for a criminal conviction because of an omission, it is indispensable that the causality due to that omission be established. In the case of Article 142, the evidence must prove that the failure of the superior to act resulted in the occurrence of the criminal act of war crimes as a consequence of that omission. Thus, the

[71] "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 offences and criminal sanctions may only be determined by statute."
[72] The Supreme Court notes that the PCCP Article 129 has now provided a Kosovo statutory basis for criminal liability based on omissions and command or superior liability, which can be applied to future crimes. The legislator however chose not to introduce this provision with a retroactive effect, although such retroactivity was not forbidden under art. 7 ECHR.
[73] Ljubisa Lazarevic, *Commentary on Art. 30 CC RFY*, Savremena Administracija, Belgrade, 1999.

conviction may be based on an omission only if the accused superior was not only in a *de jure* but also in a *de facto* position to prevent the commission of the war crime, and failed to act with direct or indirect intention [*dolus directus or dolus eventualis*].[74] If these elements are not met, the superior may have committed other crimes that are criminalized by the military justice system or other penal statutes [*e.g.,* failure to report a crime, CL FRY Art. 199(1), aiding the perpetrator after the commission of the crime, CL Kosovo Art. 174] but the superior would not have committed a war crime under domestic Kosovo law as tried in Kosovo courts.

It follows from this discussion that the concept of command responsibility liability under Additional Protocol I cannot entirely to be transferred to Kosovo domestic criminal law, as not every type of command responsibility that is encompassed by that term is cognizable under Kosovo's criminal law principles of liability. *E.g.*:

1) It would be erroneous for Kosovo courts to apply the criteria set out in the ICTR's *Akayesu*[75] case, which states that it is irrelevant if the commander could prevent the crimes or not, where he did not attempt to do so;[76]

2) It would be highly problematic for Kosovo courts to apply the "standards of knowledge" of the perpetrator that a war crime was about to be committed, as established by the UN *ad hoc* tribunals, especially with reference to the "had reason to know" requirement.[77] *See, e.g.,* the *Blaskic*[78] case, which held that ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of duties.[79] In contrast, to convict for a war crime under Article 30 CL FRY, causation in omission together with the requisite of *mens rea* presupposes specific knowledge by the alleged perpetrator that the failure to act would result in (completion of) war crimes.[80]

The foregoing analysis on the need for compatibility of the doctrine of command responsibility as laid down by international humanitarian customary law and UN tribunal statutes, with Kosovo's constitutional principle of legality and its domestic criminal law framework, is supported by the actions taken by the Republic of Croatia as to the same issue.

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[74] "If a general idea of a criminal act is accepted in its objective and subjective subject matter, the non-acting [omission] itself also represents a willful and conscious undertaking of a perpetrator. It can be manifested either in a totally passive attitude of the perpetrator towards a particular obligation, as a result of which a consequence of the criminal act occurred, or in undertaking of some other activity that is contrary to the actions that a person in question supposed to undertake as a result of an obligatory norm", in Ljubisa Lazarevic, Commentary of the CCY (art. 30), op. cit. Belgrade, 1999, (emphasis added)

[75] ICTR *Prosecutor v. Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4-T.

[76] While causation in omission is clearly not a required element of the crime in ICTR jurisprudence, it is a required element in Article 30 CL FRY.

[77] *I.e.,* "absence of knowledge is not a defence where the accused did not take reasonable steps to acquire such knowledge." Art. 7(3) of the ICTY Statute.

[78] ICTY *Prosecutor v. Blaskic*, Judgment of 3 March 2002, Case No. IT-95-14-T.

[79] *Cf.* "Considering the nature of incriminated activities, the criminal act of war crimes, as a rule, may be committed only with direct intention, but in some cases the possible intention shall be sufficient," Ljubisa Lazarevic, *Commentary on Art. 142 of the Yugoslav Criminal Law, op. cit.* Belgrade, 1995, 5th Edition]

[80] It may be possible to prove with concrete facts that a superior, by not disciplining for, or reporting, a war crime committed by subordinates, has the requisite *mens rea* or *dolus* if there are sufficient facts to show the superior did know that the subordinates would commit more war crimes due to the superior's failure to discipline or punish.

The Constitution of the Republic of Croatia[81] states the principle of legality in similar terms as the 1974 SFRY and 1992 FRY Constitutions, with one important differing element. Unlike in SFRY and FRY Constitutions, in Croatia international law is also applied directly as if it is a domestic statute, including in criminal matters, even if penalties can be determined only by domestic criminal law. Article 31[1] of Croatian Constitution states: " *No one shall be punished for an act which before its commission was not defined as a punishable offence by law or international law, nor he may be sentenced to a penalty which was not defined by law. If a less severe penalty is determined by law after the commission of an act, such penalty shall be imposed*". However, direct applicability of international criminal law is allowed with reference to ratified treaties only, with the exclusion of international customary law, pursuant to Article 140 of the Croat Constitution, in that similar to the 1974 SFRY Constitution.[82]

As with the applicable Kosovo criminal law provisions, the 1993 Criminal Code of Croatia also does not provide provisions imposing criminal liability for war crimes, for a superior's failure to prevent subordinates from committing or completing war crimes, or for failure to report or discipline the subordinates (*i.e.,* command responsibility liability). Accordingly, faced with the issue of the direct applicability of the international humanitarian customary law doctrine of command responsibility in domestic war crimes criminal proceedings, the Supreme Court of the Republic of Croatia, in its decision *the Republic of Croatia v. Milan Strunjas,*[83] held that criminal charges against commanders for their failure to prevent subordinates from committing war crimes were possible, but only when based upon general Croatian domestic legal theories of criminal liability for a failure to act,[84] in conjunction with Art. 86 and 87 of Protocol I to the 1949 Geneva Conventions. In other words, the Supreme Court of Croatia determined that a substantive definition of a crime – war crimes against civilians – together with the mode of criminal responsibility – the omission to do certain acts to prevent, report or punish – may together suffice for a basis to finding criminal liability, but Supreme Court did not allow customary international humanitarian law with its broad concept of command responsibility to be treated as an independent source for defining the modes of criminal responsibility in Croatia.

The ruling of the Supreme Court of Croatia thus supports this Supreme Court's conclusion that due to the constitutional principle of legality in criminal matters applicable in Kosovo, international humanitarian law cannot be directly applied in Kosovo, unless its provisions meet the elements of applicable Kosovo criminal law as to the elements of proof – obligation to act, failure to act and causality, which are necessary for a finding of liability for a superior's omission resulting in a conviction for war crimes under CL FRY Article 142.

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[81] The consolidated text of the Constitution of the Republic of Croatia is published in "*Narodne novine"* (the Official Gazette), No. 41/01 of May 7, 2001 together with its corrections published in "*Narodne novine*" No. 55 of June 15, 2001.

[82] Article 140 reads: "International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects.".

[83] I-Kz. 588/02-9, dated 17.10.2002.

[84] This would be committing a criminal act by omission, as stated in Article 25(2) of the Criminal Code of the Republic of Croatia.

Discussion and findings pertinent to specific charges

Specific charge of causing displacement of the civilian population

The District Court correctly identified the prohibition of displacing civilian population during the armed conflict. In the context of internal armed conflict, the Geneva Convention Additional Protocol II, Article 17 on the "Prohibition of forced movement of civilians" provides as follows:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

The District Court however did not sufficiently discern the notions of deportation and other displacement. Article 17 of the Geneva Convention Additional Protocol II covers both situations. As explained in the Commentary: "*This* [the first one] *paragraph covers displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict, within the meaning of Article 1 '(Area of application), ' is taking place. Forced movement beyond the national boundaries is dealt with in paragraph 2*."

The distinction between deportation and forcible transfer of population was emphasized by a Trial Chamber of the ICTY in *Krstic*'s case: "*Both deportation and forcible transfer related to involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer related to displacement within a State*"[85].

The crime of deportation or forcible transfer of population was defined in the ICC Statute to cover both situations as the '*forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'*

This distinction is of no relevance for the existence of the prohibition of forcible transfer in the international law, it is, however, factually relevant when it comes to attributing specific acts to the accused.

The District Court found Andjelko Kolasinac criminally liable as an accomplice in forced displacement and deportations, this conclusion reached pursuant to its determination that Kolasinac had been responsible for carrying out registration of the Kosovo Albanians in Rahovec, and that this registration had been an essential tool in the deportations. The verdict, taking into account the enacting clause together with the reasoning, is clear enough in its statement of actual actions and intent attributed to the accused[86] and hence, save the above reservation about the use of the term "deportation", we disagree with the Appellants that the enacting clause was

[85] *Krstic* Judgment, para 521
[86] Verdict, pages 47-48

incomprehensible. Rather, the gravamen of the appeals regarding this specific charge was whether necessary factual elements of the trial court's findings were sufficiently explained in its opinion and sufficiently supported by evidence.

In that respect we first note that the District Court was under an obligation to convincingly establish the fact of mass unlawful deportations. Under the LCP the means of proving this circumstance are broad; in addition to witness testimony a trial court may use other means of evidence, among them, obviously, a variety of documents, including reports by IGOs and NGOs, media reports, judgments and documents of ICTY. We note here that the content of documents may play a dual function in the evidence. First, documents prove that the author has made a statement contained in the document, the primary issue in this aspect being the authenticity of the document. Second, documents can serve to prove the truth of the matter asserted in these documents, the primary issue in this aspect being the reliability of information contained in the document. The reliability of documents is evaluated upon all relevant circumstances, such as those concerning the source and author of the document, the sources of information, the procedure in which the information was collected or delivered, quality of the text as to internal consistency and transparency, verifiability of the sources used etc., whereupon the persuasiveness of the documents inevitably varies on case by case basis[87]. While, given the plentitude of possible combinations of types of documents and information that they bear, it is impossible to exhaustively list the criteria of evaluation of the reliability of documents, two rules resulting from logic and common experience come to mind: [1] the usual superiority of primary sources of information over secondary and further sources, and [2] the usual greater reliability of plain statements of facts over value-judgments which combine elements of statements of facts and opinions.

Accordingly, while it is admissible and rational to accept as evidence different documents belonging to the historiography of the conflict in Kosovo, still each piece of information needs to be weighed for its reliability. Documents, which are based on primary sources, where the information was gathered and/or scrutinized in a formalized procedure, such as ICTY judgments or UN Secretary General reports, where the information is scrutinized internally and *ex post* in the political process, are usually of high reliability. On the other hand, the use of secondary and unverifiable sources usually causes the evidentiary value of such documents to be low, suitable to argue a *prima facie* case only or to provide background information. Such documents' persuasiveness is greatly dependent on consistency with other evidence.

Moreover, there is a possibility for the court to accept certain circumstances as generally notorious ["judicial notice"] thus not requiring formal proof. The Supreme Court realizes that until an objective research on the facts of the armed conflict in Kosovo is documented and confirmed, notoriety can apply only within a narrow range. Circumstances such as, *e.g.*, that there were NATO strikes against former Yugoslavia in March 1999, and was a mass outflow of Kosovo Albanian population during the armed conflict, are popularly acknowledged as historical facts. In evoking general notoriety, however, especially in cases involving conflicted ethnic groups - like the case subject to this proceedings – courts need to ascertain that a claimed notoriety is genuine, i.e., common to both groups concerned. The Supreme Court also appreciates the role of judicial proceedings in the process of a creation of such

[87] We intentionally refrain from discussing situations where the law itself determines the evidentiary value of documents, e.g., public documents, court decisions and administrative acts of constitutive character.

notoriety and therefore stresses the importance of thoroughness in establishing historical facts in landmark war crimes proceedings.

The persuasiveness of evidence and the legitimacy of the finding of notoriety are the issues for determination by the first instance court. Pursuant to Article 16 LCP the first instance court has wide discretion in free evaluation of evidence while the appellate control - when sought by the parties – is limited to reviewing the first instance court's reasoning for compliance with the rules of formal logic and common experience. What is, however, categorically required from the first instance court is that it base its findings within the scope of evidence adduced in the main trial [Art. 347 LCP] and state the grounds on which decisive facts have been found proven [Art.357 (7) LCP]. In the light of these requirements we find the District Court's verdict unsatisfactory.

First, there is a conspicuous ambiguity about the attitude adopted by the District Court in respect to the OSCE Report "Kosovo as Seen as Told", hereinafter "the Report". This Report, according to the District Court's verdict, was accepted as a "reference". The verdict is lacking a positive explanation as to what the term "reference" was intended to mean in this context; it however states that the report was not accepted as evidence. Further on, despite its explicit denial of attaching evidentiary value to the Report, the District Court goes on to copiously quoting the statements of facts contained in the Report and using it as basis for the findings, which indicates that the report indeed has been used as evidence. This internally contradictory approach renders the appellate control of the trial court findings impossible in respect to the whole area where the Report has been "referenced".

Moreover, we cannot fail to notice that in using the Report the first instance court is not entirely faithful to it. The Report discerned two categories of Kosovo Albanian refugees: those who were directly deported by Serb forces and those who fled Kosovo as a result of the persecution, fear of persecution or fear of being caught in the direct war zone or, to the same effect, for any other reason. The District Court indistinguishably encompasses these two categories under the notion of "deportation". As a consequence, the verdict is lacking clarity as to whether the trial court held Kolasinac liable for the result of mass displacement of Kosovo Albanian population, or specifically for the targeted deportations. If the trail court held the accused liable for this latter case specifically, the verdict then failed to explain what had been the basis for its findings about mass scale of the direct deportations and their unlawful character. Other legal implications of the distinction between deportations and displacement in general relate to the question of the purpose of the registration lists and to the question of identifying concrete acts for which the accused was found liable; these are discussed *infra*. In further analysis, however, when referring to relevant findings of the trial court, we will retain the term 'deportations'; it is done for the linguistic convenience only and should be understood with the above-stated reservation about the inaccuracy of the application of this term in the context of the first instance verdict.

Another reference to the factual foundation of the finding of mass deportations is the trial court's statement that Kolasinac acknowledged mass deportations. The Supreme Court finds that according to explanations furnished by the accused, his acknowledgment specifically referred to a "small group of persons" who had come to

protest about being deported by the police[88]. At all other times Kolasinac refers to Albanian population that "fled". He also mentions that in a meeting of 24 April 1999 the military appealed to the participants to help return Kosovo Albanians who had fled back to their villages[89]; that the army made efforts to bring some of the ethnic Albanians back to their homes is also described in the OSCE report. In addition, according to witness testimony accepted by the first instance court, Kolasinac claimed that "only those who had blood on their hands were being deported", which indicates that Kolasinac considered the deportations to be carried out on individual basis and to have a veneer of legality. Accordingly, we find that the District Court's attributed to the accused an admission of much broader ambit than it would have been substantiated upon evidence.

For these reasons, we find that the District Court's verdict contained errors as in Article 364 para 1 (11) LCP.

In relation to complaints that the trial court erred in the process of fact-finding, the Supreme Court agrees with the Appellants and the Office of the Public Prosecutor that the District Court failed to establish causality between the expulsions [including deportations] and the acts of the defendant.

We note that the District Court, not having before it any proof that the registration lists had been actually used in the deportations, found Andjelko Kolasinac liable as an accomplice in mass deportations pursuant to the conclusion that the registration records, which Kolasinac produced, could have been used only in order to further mass deportations, and that such use of them had been encompassed by the intent of the defendant[90]. Such attribution, given that the act of carrying out a registration is not *per se* criminal, required as a premise to establish other elements of complicity in deportations [as per Article 22 or 26 CL FRY], which all together would have amounted to the criminal character of the defendant's activity. In particular, the first instance court would have to first establish the presence of a common criminal design -including its major actors, at least by category, unity of their intent and agreement of acting in complicity - pursuant to which Kosovo Albanian were expelled, and to which Kolasinac would have contributed as a co-perpetrator. Second, the first instance court should have disproved the defendant's contention that the purpose of his own actions, *i.e.* the registrations, had been unrelated - in both subjective and objective aspect - to the expulsions and deportations. Either element could be argued upon explicit evidence or implicitly. However, to simply presume the existence of the common criminal design or criminal purpose of the registration, or both, without testing them against a more favorable version, constitute a violation of the principle of the presumption of innocence.

A finding of common criminal design does not appear in the District Court's decision, neither in the enacting clause nor in the reasoning. Moreover, the trial court did not establish what government or other body or bodies it held responsible for executing the displacement: it appears that it found that the police had been responsible for the

[88] Trial record, October 9, 2002: "This small group of people came to see me and expressed their protest that the police were deporting the people"

[89] Trial record, October 1, 2002: "Bordic […]asked the people to help him, if possible, to allow the return of the population that fled to the village of Turjak. The present citizens immediately refused and reasoned out that they had no influence and could not do so and he just accepted it as being normal. The persons present there then said that they are willing to do anything in Orahovac if there is a need".

[90] Verdict, page 47 *in fine*

direct deportations[91], further on, however, it refers in general to "Serb forces" who had "forced the Kosovar Albanian population out of their houses". This lack of precision in defining the collective perpetrator here reflects the trial court's ambiguity in respect to the scope of attributed acts: direct deportations or causing the mass displacement. However, the Supreme Court posits that there is no evidence in this trail record and no findings of the trial court that would connect Kolasinac, based merely on his position in the civil defence or the military, to any overall plan of expelling the Albanian population.

As concerns the civil defence, it is nowhere alleged that it have been involved in the deportations or expulsions at all. Regarding the military, the first instance court did not pursue the issue of what was the actual military rank of Kolasinac and, seemingly, found documents and testimony in this respect inconclusive. While it clearly was in the first instance's competence to so evaluate the evidence, it results from it that any conclusion about commanding and/or decisive power that might be derived from a military rank is *in dubio pro reo* inadmissible. As a consequence of accepting these premises, there are no factual grounds to infer that Kolasinac, due to his military rank or his function in the civil defence, might have ordered the deportations. The District Court seemed cognizant of this when it stated, *inter alia:* "This Court is not finding that Kolasinac had authority over the Serb forces that forced the Kosovar Albanian population out of their houses with all their earthly belongings to the main checkpoint in Malishevë, where they then forced the Kosovar Albanians to leave all their possessions, including their vehicles and household goods, and deported them to Albania and other surrounding States"[92], and further: "Based upon the facts adduced in the main trial on this issue, it is clear that Kolasinac was not responsible for ordering the mass deportations of Kosovar Albanians from Rahovec"[93] . By the same token, from merely the facts established by the first instance court pertaining to Kolasinac's position, it would be illegitimate to infer that he had designed, or accessed, an overall plan to expel the Kosovo Albanians from the area. Such equation would logically entail criminal liability based on the mere participation in the civil service or the military, and would also be irrespective of whether the defendant participated in the carrying out the registrations or not. The District Court was obviously not prepared to go that far in its findings, and indeed the evidence adduced in the trial would not support such conclusion with the necessary legal certainty.

Thus, in the absence of the finding of any common criminal design, the District Court was allowed to hold the accused criminally liable exclusively by linking the accused's own actions, i.e., the registrations, with the criminal result. The question of the alleged criminal purpose of the registration becomes therefore of the primary importance. Here again, the analysis is impeded by the lack of precision in the statement whether the criminal liability refers to targeted deportations or mass expulsions: the targeted deportations would have more likely utilized the registration lists than massive expulsions. Moreover, we consider that the District Court arrived at the conclusion of the criminal purpose of the registration having failed to sufficiently analyze factors relevant such as the scope of the registration, its time sequence in relation to the expulsions and its possibly legitimate goal.

[91] p.45
[92] p.43
[93] p.47

Concerning the scope of the registration, the District Court declined to evaluate evidence and make findings in relation to whether the registration concerned only the Kosovo Albanians or both Kosovo Serbs and Albanians, because it declared this factual element immaterial. In the Supreme Court's opinion this element was of importance and the trial court erred having ignored pertinent evidence evoked by the defence. The fact- if established – that the registration encompassed all persons in the municipality, irrespective of ethnicity, would, first, belie a discriminatory purpose of the registration, and second, would support the thesis that the registration had indeed been conducted for humanitarian or security reasons. The concept, implied in the District Court's opinion, that the registration of Kosovo Serbs was done to camouflage the criminal purpose of the registration of the Albanians, is not viable: in the time circumstances of the armed conflict, where the issue of time and resources is pressing, such a camouflage exercise would have been irrational.

Second, the trial court ignored the fact that in the time sequence, the registrations and the expulsions did not constitute any pattern that could substantiate the conclusion about the causality. As rightly pointed of by the Appellants, there was evidence, from Musa Raba and Muhedin Sharku, according to whom thousands of Kosovo Albanians had left Orahovac in the period before the first registration; the same is confirmed by the OSCE Report, actually quoted by the District court's verdict to that effect[94] as well as by reports of the UN Secretary General[95]. Further, there is no evidence that any expulsions occurred after the second registration. Altogether, the timeline of relevant events does not even conform to the postulate expressed as *post hoc ergo propter hoc* [after this therefore because of this], which anyway for the purpose of the criminal proceedings would not by itself suffice for the proof beyond a reasonable doubt.

The third area that has been neglected in the trial court's discussion of the purpose of the registrations is the defendant's claim that the registrations had been carried out for legitimate reasons.

In relation to the first registration drive, the trial court accepted that it could have been "ostensibly " ordered for the humanitarian aid and grants Kolasinac a benefit of doubt as to his awareness of the criminal purpose of this first registration[96]. This passage makes it readily unclear why, given this doubt about criminal intent, the trial court's enacting clause nevertheless declared Kolasinac guilty in respect to both of the registrations. Overall, however, the Supreme Court is not satisfied with the trial court's conclusion that the first registration must have been conducted for the purpose of the identification Kosovo Albanians for forcible deportations, because, according to the trial court, there is no other reason for the information sought in the registration. The trial court states: "Any registration for humanitarian aid would have only needed information regarding the number of persons remaining in Rahovec. Instead, the lists contained enough information to discern which members of the community were Albanian and the numbers in their families and where they were residing"[97]. The Supreme Court considers that the trial court's assessment of what is

[94] Page 20 of the verdict: "Between March and June 1999 forces of the FRY and Serbia forcibly expelled some 863 000 Kosovo Albanians from Kosovo"
[95] Report of the Secretary General prepared pursuant to Resolution 1160 (1998), dated 3 October 1998; Report of the Secretary General dated 17 March 1999.
[96] Page 47 of the verdict; "…it is arguable that Kolasinac believed that the first registration was to be used for humanitarian reason"
[97] *Ibidem*

needed for humanitarian aid was done arbitrarily, without seeking evidence from persons who would have knowledge about procedures applied in distribution of humanitarian aid, and without considering possible common sense reflection that, for example, more specific data can be required in order to keep track of the distribution, to prevent abuse and react to flows among the population. Further, when justifying the incrimination of the registrations the trial court relied heavily on the fact that no humanitarian aid had been eventually delivered. The Supreme Court considers that this does not preclude humanitarian intention of the registration. Moreover, as the trial court duly noted, there was evidence about a third registration drive, carried out by the Red Cross after the entry of NATO forces in Kosovo, after which no humanitarian aid followed either. This practically shows that the absence of effective humanitarian aid does not categorically mean the absence of humanitarian intention in the registration.

Regarding the second registration, the District Court established that Kolasinac had been ordered to undertake that registration by the Serb military and that he had been told under no uncertain terms that that time it was being done for security reasons. The trial court further stated "By this time Kolasinac was quite aware that of massive deportations and killings of Kosovar Albanians in Rahovec area". Eventually the trial court held Kolasinac an accomplice in systemic deportations because the second registration had been an essential tool in forced deportations. It needs to be stressed once again that the trial court was under the obligation to eliminate with certainty any possible non-criminal purpose of the registration; this point especially valid in the absence of any evidence that the registration lists had been actually utilized by anyone. As traditionally accepted in the Yugoslav jurisprudence and in the jurisprudence of the Supreme Court of Kosovo, standard of proof necessary for the conviction requires that circumstantial evidence exclude a possibility of any non-criminal scenario beyond a reasonable doubt[98].

Specifically, we consider that in the absence of finding of some common criminal design for which the accused would have intended to contribute, it would be fallacious to automatically identify listing inhabitants in the area for 'security reasons' with an unlawful undertaking. Even brief review of the Law on Defence[99] applicable at the time of the commission of the alleged acts, shows that the organs of the Ministry of Defence and entities obliged to follow the Ministry's instructions, such as *e.g.* civil defence, were under obligation to obtain any statistic research and records of relevance to the country's defence[100]; their obligations broadly encompassed planning, preparing, implementing and performing checks in the area of general mobilization, civil defence, training and equipping for the defence, work obligation material obligation and evacuation. In the circumstances of an armed conflict, where there is a significant displacement of the population, the administration of defence may have uncountable reasons to register the population on its territory; where such armed conflict has ethnic background and ethnic character, to register inhabitants of the same ethnicity as the opposite party is perfectly legitimate and justifiable by

[98] "…a convicting verdict may be based only on circumstantial evidence only if thus established series of facts has been established beyond reasonable doubt and are tightly and logically inter connected so that they represent a closed circle and point inexorably to the only possible conclusion, namely that it is the accused who committed the criminal act which is the subject of the charges, and that the evidence presented excludes any other possibility …", Supreme Court of Yugoslavia Kz. 38/70, dated 22 December 1970; Supreme Court of Kosovo, Kz 172-2002, dated 30 April 2004.
[99] FRY Official Gazette No 43/1994, see Chapters I-III
[100] Article 43 [11]

security necessities, even if only by the need to monitor and evaluate the potential danger of supporting the enemy.

In sum, we find that the District Court arbitrarily established that the actions of the accused in carrying out the registration had elements of crime whereas the evidence collected did not support such conclusion neither in relation to the intent nor to the character of the acts undertaken or to the results. While the Supreme Court is not in a position to determine whether the registration served a lawful or unlawful purpose, it holds, however, that doubts irremovable by evidence must not be interpreted to the disfavour of the accused; accordingly, the accused must not be held liable for the specific charge of furthering the deportations through the registrations.

Specific charge of forced labour

In establishing the legal standard applicable to the prohibition against forced labor during times of war the trial court relied on the provisions of the Geneva Conventions of August 1949 and their Additional Protocols. The trial placed considerable reliance on Geneva Convention IV and in particular Articles 40 and 51 thereof. While the trial court held that slavery which is prohibited under Article 4(2)(f) of Additional Protocol II had been interpreted to include forced labour; it did not discuss the relevance of the issue of slavery in so far as the instant case was concerned. For definitional purposes, the trial court referred to the following international legal instruments:

(i) The Forced Labour Convention (FLC), which was given force of law in 1932. This Convention was originally ratified by Yugoslavia in 1933 and pursuant to the 1974 Constitution was applicable law in the FRY during the conflict in 1999;
(ii) The Universal Declaration of Human Rights (UDHR);
(iii) The International Covenant on Civil and Political Rights (ICCPR);
(iv) The Slavery Convention;
(v) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

In relation to the ECHR the court noted that it was only given force of law in Kosovo as of 10 June 1999, pursuant to the provisions of UNMIK Regulation 1999/24 on the Law applicable in Kosovo and thus was not applicable in April and May 1999. However the court endorsed the prohibition of forced labour and its Article 4 definition thereon and held to be of persuasive authority on this subject matter. The trial court proceeded to hold that that elements of a charge of forced labour must include such elements as: [1] the labour is done involuntarily; [2] the labour is forced to be performed without remuneration.

In relation to the Geneva Convention IV, the District Court noted the following provisions 2 which address forced labour; Section II entitled “Aliens in the Terriroty of a Party to the Conflict” and in particular Article 40 thereof; Section III entitled “Occupied Territories” and in particular Article 51 and Section IV entitled “Regulations for the Treatment of Internees” and in particular Article 95. The Supreme Court finds that according to a strict reading and interpretation of the language of these Articles, they do not apply to the situation of Kosovo Albanian citizens in the instant case, while the reasons why the District Court nevertheless decided to apply the Convention’s provisions were not explained. It is also unclear why the trial court

decided to refer to Articles 40 and 51 concurrently as being "*the most relevant*"; on the contrary, the Supreme Court finds that these Articles do not apply concurrently as their territorial application makes them mutually exclusive.

The Supreme Court concludes that the District Court's findings with regard to the prohibition of forced labour were incorrect in both aspects referred to by Article 142 CL FRY, that of international law and that of domestic law.

Articles 40 and 51 of Geneva Convention IV are not applicable in the instant case as the injured parties were not aliens and were not under occupation; further there is an absence of any findings that would justify the attribution of the protected status to the injured parties, irrespective of their nationality. In relation to the question of the customary expansion of the norms of Geneva Convention IV and Additional Protocol I onto relations pertinent to internal armed conflicts, the District Court found as follows:

"*Many would also argue that the Geneva Conventions have become customary international law and applicable to FRYin that sense during the relevant time period* "

The Supreme Court reiterates that in the legal framework of Kosovo, the customary status of norms contained in the Geneva Conventions and their Additional Protocols are irrelevant in so far as they relate to the question of the applicability of these norms in the domestic legal system – their binding force results from treaties ratified by Yugoslavia. Customary status of these norms though can be relevant for their interpretation. However, the two referenced Articles of Geneva Convention IV belong to the category of specific provisions, which address specific relations pertinent to international armed conflict. As such, as discussed in the *Tadic* Appeals Judgment, quoted *supra,* none of these Articles can be literally transported into the context of internal relations.[101]

Having said this, the main question connected to this specific charge, which was insufficiently explored by the District Court, needs to be addressed, i.e., the question of defining the criminal prohibition of forced labour in order to establish whether the circumstances of the instant case could be subsumed.

The Supreme Court notes that forced labour is not defined as an international crime under either customary international or conventional law. Rather, it is being regarded as constituting one of modern forms of a crime against humanity, namely enslavement. Enslavement was identified as a crime against humanity by the Nuremberg Charter, Article 6[c], Control Council Law 10 Article II [1]c, Tokyo Charter, Article 5[c], ICTY Statute, Article 5[c] and ICC Statute Article 7.1c, and none of these provisions expressly included forced labour. Reportedly, also in the PCNICC the offence of enslavement was subject to extensive discussion with regard to whether it should encompass forced labour at all. Various delegations opposed its extension to cover forced labour on the basis that the ICC's jurisdiction was designed to extend over international criminal law and not international human rights law, while the issue of forced labour is in the competence of the International Labour Organization.[102] Ultimately, the ICC Statute in the context of crimes against humanity employed the term "enslavement", which, implicitly, can encompass forced labour. In turn, Article 8

[101] See also: H.P. Gasser in "Humanitarian Law in Armed Conflicts" edit. by D .Fleck, Oxford University Press, 1999, p.210
[102] Kriangsaak Kittichaisaree, "International Criminal Law", Oxford University Press, 2001, p.107

of the ICC Statute, which deals with violations of the rules and customs of war, speaks specifically of "sexual slavery", which implies a narrower scope of criminalized behaviour than general enslavement.

In relation to the law applicable in internal armed conflict, Additional Protocol II, Article 4 [2] f, contains an express prohibition of 'slavery and the slave trade in all its forms', thus confirming that slavery is prohibited also outside the context of crimes against humanity. The commentary to Additional Protocol II states as follows:

"This sub-paragraph reiterates the tenor of Article 8, paragraph 1, of the Covenant [ICCPR]. It is one of the "hard-core" fundamental guarantees, now reaffirmed in the Protocol. […] However, the question may arise what is meant by the phrase "slavery and the slave trade in all their forms". It was taken from the Slavery Convention […] adopted in 1926 (Article 1). A Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, was adopted in 1956, and supplements and reinforces the prohibition; certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour are prohibited. It may be useful to note this point in order to better understand the scope of prohibition of slavery in all forms".

We note that the language of ICCPR is used in relation to Article 8 para 1 and para 2, whereas paragraph 3 of this Article which prescribes that "*No one shall be required to perform forced or compulsory labour*" has not been incorporated into the Protocol nor has it been referred to in its commentary.

A consideration of the provisions of conventional and customary international law lend support to the conclusion that conventional and customary international law applicable during armed conflict do not outlaw forced labour as such; in this area protection of individuals should be derived from human rights law in general. In the area of international humanitarian law, forced labour is viewed as an element of prohibited conduct which amounts to enslavement/slavery or generally inhumane treatment. Thus a consideration of the notion of enslavement is necessary.

The notion of enslavement was developed in the context of a crime against humanity, first by the US Military Tribunal in Nuremberg in the case against Milch and against *Pohl and others.* It was refined by the ICTY in the case of *Kunarac.* Article 7[2]c of the ICC Statute which crystallizes a nascent notion, defines enslavement as follows 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. The ICTY *Kunarac* Judgment propounded a set of elements that clarify this definition. It stated the following:

"*Under this definition, indications of enslavement include elements of control of and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or the use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though*

not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service […] not all labour or service by protected persons, including civilians in armed conflict, is prohibited – strict conditions are, however, set for such labour or service. The acquisition or disposal of someone for monetary or other compensation is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on circumstances of a case, usually not constitute enslavement.

The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[103]

The passage from *Kunarac* which has been cited here at length provides a scheme and thus facilitates an analysis of the elements constituent for the unlawfulness of forced labour in applicable international and internal legal order. The Supreme Court also took into account the fact that the trial court referenced this ICTY decision in its discussion on the involuntariness of the labour rendered by the injured parties[104]. The Supreme Court notes though that in the case against Kolasinac the enslavement was not spelled out taking into account the requisite elements of the charges. Moreover, the facts of this case, as established by the trial court, would not amount to the complex environment *prima facie* required for the presence of enslavement as defined in *Kunarac*.

Involuntariness is the central issue for a charge based on forced labour.[105] The District Court accepted that the injured parties ultimately agreed to render work, with several of them agreeing to actually organize the community for this purpose, however it found that their agreement was obtained through intimidation. It held that "*those that went to the meetings, organized the labourers and those that performed the labour all did so involuntarily. Those summoned to the meetings did so out of fear that there may be severe repercussions. At the meeting, the Kosovar Albanians were confronted with a panel of high-ranking Serb military personnel and Serb police, which were the very groups that were terrorizing the Kosovar Albanians […] The very collection of these Serb police and military men in one room filled with only Kosovar Albanian citizens served as a source of intimidation.*

Those that organized the labour and those that agreed to perform the labour were very clear that they did so only out of fear about what might happen if they did

[103] *Kunarac* at al. Judgment of 22 February 2001, para 542-3, upheld by Appeals Chamber in the Judgment of 12 June 2002, paras 116-124. Relying on the same definition ICTY found enslavement proven in *Krnojelac* Judgment of 15 March 2002

[104] page 31 of the verdict; the fragment concerning absence of free will used in *Kunarac* and *Krnojelac* judgments originates from the Nuremberg Tribunal's decision in *Pohl*.

[105] *Involuntariness* is the fundamental definition feature of "forced or compulsory labour", whereas slavery and servitude are prohibited even in event of voluntariness, Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights,*1987, p 167).

not. […] Understandably, they felt it safer to comply, rather than risk the consequences"[106].

According to the record as well as to the trial court's account of witness evidence, the consequences were that the police would come to their houses and arbitrarily choose persons to perform the work.

The Supreme Court considers that the trial court erred in focusing on the aspect of unwillingness to render work and, implicitly, the lack of a contractual basis therefore. The trial court failed to consider that involuntariness does not equate with unlawfulness when the obligation to perform labour is mandated under the law. This aspect was entirely ignored by the trial court despite the Defence's submissions which were based on relevant arguments and legal texts, and in spite of that the trial court had properly identified internationally accepted definitions of forced labour. Analysis of the law applicable in Kosovo during the period concerned shows that it envisaged compulsory labour in specific situations:

The concept of civil defence in Kosovo in 1998/1999 was relatively complex because of the number of entities involved; moreover, there were modifications particular to Kosovo introduced in 1998/1999. However, the basic legal framework was prescribed in the 1994 Federal Law on Defence, and this law is of critical importance for the evaluation of the conduct of the accused.[107] According to its provisions, citizens who are not required to serve in the Yugoslav Army (VJ) or in the Police (MUP) still have defence obligations during proclaimed states of emergency. Art. 22 and 24 of the Law on Defence defines such obligations:

Art. 22: "Participation in civilian defence and protection shall consist of the obligation to carry out specific duties in units and organs formed for the protection and rescue of the civilian population and material resources from wartime destruction and natural and other disasters and threats.

All citizens aged from 15 to 60 (for men) and to 55 (for women), except for persons serving in the Army of Yugoslavia and organs of the Interior, shall be subject to the obligation under Paragraph 1 of this Article.

Art. 24:"Work duty of the citizens consists of carry out certain jobs and tasks in times of the state of war, the state of immediate danger of war or the state of emergency. Work duty applies to all citizens over 15 years of age who are fit to work, who are not deployed to serve in the Army of Yugoslavia. Members of the bodies of internal affairs meet their work in those bodies".

The same law provides for the system of penalties for violations of the obligations defined by the law:

Art. 84: "A citizen shall be fined in the amount of 10,000 to 1000,000 dinars or shall be punished with up to 60 days of imprisonment for a minor offense:

[106] Page 31 of the verdict. We note that the trial court erroneously stated on the same page that the consequences of non compliance would have been the police coming to individual homes and taking persons forcibly. This is inaccurate; in the light of the record and the summary on page 27, the sanction would have been that the police would go and pick persons themselves.
[107] Official Gazette of FRY, No. 43, 27th May 1994

1) if he does not honor the summons or does not act in accordance with orders of a competent body in relation with participation in civil defence and protection or in some other way evades to execute his obligations to participate (Article 22); […]
2) If he does not honor the summons or does not act in accordance with orders of the competent body, or a competent military officer in charge of the execution of the work obligation or if he evades executing that obligation (articles 24 and 25);

The Federal Law on Defense also defines the roles and responsibilities of Civilian Protection Units:

Art. 59: ”Civilian Protection Units shall be formed by state organs, companies and other legal entities pursuant to the Plan for the Defense of the Country and may be formed by citizens on a voluntary basis. Civilian Protection Units are intended for the protection and rescue of the population and material and other resources from wartime destruction, natural and other disasters, and other threats in times of peace or war in the territory for which they were formed […]. According to the Plan for the Defence of the Country, Civilian Protection units, teams and other forms of organization established in order to protect and rescue the population and material and other resources, including public utility and construction companies and other legal entities, shall be involved in operations of protection and rescue from war destruction, natural and other disasters and threats in time of peace or war and shall act according to the instructions issued by the organs competent for these affairs”.

Further provisions and more detailed instructions concerning the duties and purposes of the civil defence units were prescribed in the 1994 Federal Regulation “On the organization and training of the civil defence units”. With reference to work obligations, the 1994 Federal Regulation “foresees that in broad terms that work obligation units may be formed either for urgent needs of carrying out combat activities by the Yugoslav Army (Article 9) or for the urgent needs of protection of civilian population and material and other goods from war destruction” (Article 10).

Resulting from the mosaic system established by the 1992 Federal Constitution, civilian defence tasks and activities fell under the competence of both federal and republican bodies and authorities, with the related overlapping duties and responsibilities.[108] Accordingly, the 1992 Law on Defence of the Republic of Serbia specified that “Civil defence as an aspect of defence is organized, prepared and carried out as a system of protection and rescue of people, material and cultural goods assets from wartime devastation, natural disasters, technical-technological and other major threats in war and peace” (Article 68). Actions to be performed with the purpose of the achievement of the overall goal are exemplified in Article 73, these are: sheltering of people, material and cultural goods, evacuation, caring for vulnerable people, protection from demolition and rescuing from ruins and first medical aid. The accompanying Decree on the Set-up and Functioning of Civil Defence from 1992 foresees the organization and equipment of civil defence units with the related purposes (Art. 28, 29).

[108] The ultimate authority to establish units of the civilian defence and to organize and carry out work obligations rested with the Ministry of Defense [Article 10 of the 1994 Regulation of the organization and carrying out of the work and material obligation], with the ultimate responsibility of the Ministry to determine war deployment under work obligation [Art. 8 of the 1992 Regulation of the organization and carrying out of the work obligation].

The 1992 Republican Regulation “On the organization and carrying out of the work obligations” states in Art. 9 that apart from the units, for the purpose of carrying out the work obligationd which are being formed in accordance with federal laws, the Serbian Ministry of Defence may form other units of work obligations for the purpose of carrying out the tasks of sanitation to deal with natural, technical and other major hazards in times of war and peace.

The general purposes of the Civilian Protection Units are once more summarized in the Instructions issued on 28 July 1998 by the Pristina Military District (Instructions for the defence of inhabited areas*): “1.General purpose CZ Civilian Protection Unit: Administer first aid, rescue people from ruins, extinguish initial and smaller fires, clear barricades, organize the washing of streets, etc. They are formed in apartment buildings, residential blocks, streets, settlements, local communes, enterprise, etc.”*

Responsibility for the establishment and regulation of the civilian protection or civilian defense units was shared between the local self-government bodies [municipalities] and the competent territorial bodies of the Federal and Republican Ministry of Defence. For example, Article 73 of the 1988 Decision on the Total National Defence adopted by the Municipality of Orahovac stipulates: ”*Municipal headquarters of the Civil Defense organizes and directs the protection and rescuing of population and material goods from ruins, floods, fires and explosions, and undertakes measures for the elimination of these threats*”. This is consistent with Article 86 of the Serbian Law on Defence stipulating that the municipal civil defence staff in particular ”*orders the mobilization of citizens and their assets, mobilization of personnel and assets of enterprises and other organization and bodies [… order to implement the security and rescue measures […]*”.

It stems from the above review of contemporaneous legal instruments that [1]the ordering of the labour, [2] the character of the labour and [3]sanctioning compliance with labour orders, fell squarely under the statutory based regime of civil defence. Moreover, the actions of the accused were undertaken within his legally defined competence; even the presence of military and police in the meetings was justified according to legally defined procedures. These legal instruments were not discriminatory in their language or effect; they had been passed several years before the outbreak of the armed conflict in Kosovo and foresaw identical obligations for all citizens irrespective of ethnicity.

Further, the scope of compulsory labour permitted in these laws was in compliance with international standards. The Forced Labour Convention of 1930, ratified by Yugoslavia in 1933, in Article 2 defines forced labour as *'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*.' The term forced or compulsory labour however does not include certain categories of work such as military service, normal civic obligations, work exacted as a consequence of a conviction in a court of law, and significantly 'any work or service exacted in cases of emergency, that is to say, *'in the event of war or of a calamity or threatened calamity, such as fire, flood, famine etc....and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population.'* Article 2 (2)(e) elaborates on this and prescribes that *'minor communal services of a kind which, being performed by the members of the community in he direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the*

community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services'. Pursuant to Article 12, the maximum period for which a person can be taken for forced labour of all kinds in any one period of 12 months is 60 days, including the time spent in going to and from the place of work/ Further, a person who is obliged to do perform such labour must furnished with a certificate indicating the periods of time which he has spent performing such labour. Article13 discusses the normal working hours of a person which should be the same as those for voluntary labour - and hours in excess of normal working hours must be remunerated as for voluntary work.

The ICCPR prohibits forced labour but specifically excludes from the definition of forced labour certain situations such as: (8) (a) No one shall be required to perform forced or compulsory labour; [...] (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: [...] (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community [...]."

Along the same lines the ECHR, prescribes in Article 4 that "(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. Again, however, certain situations are not encompassed by the conventional definition of forced labour: (3) For the purposes of this Article the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention [...] or during conditional release from such detention; (b) any service of a military character [...]; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations."

In the case before us, the District Court found the situation a "catastrophe", not just a calamity, and opined that "the area had to be cleaned". While it is true that the Court did not define with precision the nature of the catastrophe, it is commonly synonymous with "disaster, devastation, cataclysm, tragedy ". As such it seems that cleaning the roads can just as easily be considered a public safety measure and its use for military purpose is far from substantiated. Similarly, the use of the population to prune the vineyards had obviously no military value and could easily have been seen as necessary to maintain the economic base of the community. The trial court rather peremptorily dismissed that this work would ensure the feeding of human beings.

The trial court found that the purpose of the cleaning of the roads was to clean traces of deportations, which, it opined, was for military and not humanitarian purposes. This trial court's finding appears to have been based on a presumption of criminal purpose, which is unacceptable. According to the record before us we cannot find any basis for the conclusion that the work was done to hide evidence of the deportations; moreover, such purpose is logically improbable. The testimonies of those expelled –obtainable, for example, on the basis of the OSCE Report – could provide by far the most irrefutable evidence of what had happened, considerably more compelling than abandoned property. The trial court's verdict further indicates that the world, through massive publicity, was aware of the expulsions long before Kolasinac's incriminated activity. Thus not only had the deportations been documented, what more compelling proof could there be than tens or hundreds of thousands of refugees right over the border. However, in such circumstances bringing additional Kosovo Albanian eye-witnesses to the area where the property

had been abandoned cannot be reconciled with an idea of “concealing the traces of crime”.

Accordingly, the Supreme Court finds that the element of involuntariness in rendering the kind of work which was required from the injured parties does not suffice to support the District Court’s finding of forced labour due to the fact that the exaction of this kind of labour was legitimate according to both international and domestic laws.

The next question to be examined is whether the laws authorizing compulsory labour were in the circumstances of the case abused to a criminal degree. With regard to the District Court’s implicit finding of the discriminatory application of the compulsory labour, i.e., that it exclusively concerned Kosovo Albanians, we first note that the trial court’s verdict does not address and disprove the evidence to the contrary. Kolasinac states that he saw Serbs working, mentions their names and alleges that 'they had been involved in that work long before the Albanians became involved with that work.' Also other Serb witnesses attest to Serbs having been involved in the work, e*.g*., the witness Trajko Milicevic stated that ‘*the Albanian workers were mainly in the Albanian quarters whereas the Serbs worked in the Serb quarters’*. The first instance court did not establish whether there were Serbs in the area who would potentially have been available for the same labour. The trial court accepted upon the testimony of the Kosovo Albanian witnesses that several Serbs were also involved in the work, however they only acted as drivers or supervised the work. The trial court concluded that these persons however were not performing forced labour in the same sense as the Kosovo Albanian workers. While this finding can be correct in the sense that the freedom of movement, sense of security and willingness to work on the part of Serb workers was advantageous, as they belonged to this ethnic group who at the time had control over the territory, there still was no support for the inference that the Serbs, as opposed to Kosovo Albanians, rendered their work in a contractual, non-compulsory regime. Such a conclusion is particularly groundless in the face of the lack of any findings as to whether any of the workers, regardless of ethnicity, had received remuneration. The undisputedly established fact that Kosovo Albanians owned most or a large part of the pruned vineyards further belies the discriminatory purpose of the labour and the concept of exploitation.

The Supreme Court concludes that amount of time spent and the conditions under which the work was performed do not qualify it as enslavement or inhumane treatment. The testimonies of almost all the witnesses suggest that both in connection with the cleaning of the roads and the pruning of the vineyards, almost all individuals worked for the period of two days. The work lasted 8 hours, during which meals were provided. After work each day the workers went home. On the first day of the work in Malishevo the work was interrupted because it was raining.

The issue of not working without reprisal occurred with reference to the vineyards, where the Kosovo Albanians refused to work in protest against the killing of a family. There was no suggestion in the evidence that anyone suffered any adverse consequences as a result. Similarly, there is evidence of Kosovo Albanians refusing to participate in meetings called by Kolasinac, also without any adverse consequences. Further, there was no suggestion in the evidence of any kind of brutal treatment of the workers. Threats, which reportedly Colonel Bozic made during the community meeting, according to the prevailing witness testimony related a scenario of possible interactions with the KLA at the work site, and not to refusal to work. Isolated statements about threats of violence in relation to the work were not

analyzed by the trial court for discrepancies with the remaining material and their internal consistency.

In relation to the question of the purpose of armed guards, it was not sufficiently examined by the trial court. The defence's argument that the presence of the guards was to secure the work site in case of armed incident from the KLA, based in OSCE report in addition to witness evidence, was not considered. Further, it was undisputed that the Albanians assembled by themselves at some central point, where they were then driven to the work area. Armed guards were not sent to round them up to bring them to the assembly point. Since the workers assembled without armed intervention, it seems there is logic to the defense argument that it would not be necessary to employ armed guards in order to keep them at the work site.

Therefore, taking into account all the aforementioned elements and considerations, there is no support for the finding that the situation of that particular group amounted to enslavement and that the requirement that the injured parties render labour in the circumstances as established, amounted to inhumane treatment. While the Supreme Court appreciates that the injured parties during the whole period covered by the charges may have experienced fear and anxiety resulting from the armed conflict, including witnessing persecution of their countrymen, as reported, and that their decision on whether or not to render the work may have been motivated by amorphous fears and uncertainty as to the outcome of the war, however, in the record before us, there is no grounds for the finding that the conduct of the accused fulfilled the elements of the war crime of forced labour under Article 142 CLFRY.

Specific charge of failure to prevent the looting, pillaging and destruction of the abandoned property of Kosovar Albanians

Concerns pertinent to specific act attributed (d), *i.e.*, that during the "cleaning" of the roads in Malishevo in April/May 1999, the accused as Commander of the Headquarters of the Civil Defense, failed to prevent the looting, pillaging and destruction of the abandoned property of Kosovar Albanians who had been forcefully displaced and deported, required that the verdict be overturned. The Supreme Court holds that the verdict in this respect was internally contradictory; moreover, the facts have not been sufficiently established as concerns objective and subjective elements of crime.

Supreme Court concludes that the first instance court found the accused an accomplice in the overall enterprise to expel the Albanian population only in relation to carrying out the registration - the fact, which in the end has not been found related to the deportations. Otherwise the trial court did not hold the accused liable for expelling the members of Kosovo Albanian and thus causing them to discard these items; specifically the trial court stated*:* "*This Court is not finding that Kolasinac had authority over the Serb forces that forced the Kosovar Albanian population out of their houses with all their earthly belongings to the main checkpoint in Malishevë, where they then forced the Kosovar Albanians to leave all their possessions, including their vehicles and household goods*"[109]. Consistently with this finding, from the trial court's decision it results that the accused was only held liable for the property from the moment when he was ordered to clean the area. With this in view,

[109] p.43

a substantive issue that the trial court should have clarified was whether the looting and destruction had taken place during the cleaning or whether the destruction had already taken place before the cleaning, thus giving rise to the order for cleaning of the area. In case the trial court decided to hold the accused liable for destruction and looting that allegedly had occurred during or after the cleaning, it had to be stated precisely if this had taken place during or after the cleaning or both.

The first instance court appears to have comprised three groups of property, distinguishable according to criteria of what happened to it: (a) non-usable, which included blankets, clothes and household goods that had been destroyed in the course of the cleaning: put in a ditch and burned; (b) unspecified goods which had been taken away from the site by unspecified persons; these unspecified goods, according to the trial court, should have been stored and inventoried; (c) tractors and cars which actually became stored and inventoried. The verdict is unclear as to whether the trial court held the accused liable for all three categories of the destroyed and stolen property, specifically the tractors.

In relation to category (a) the non-usable items, the Supreme Court finds that the first instance court is inconsistent in its attribution of responsibility for destroying these items while at the same time it holds that these items were anyway unusable and accepts that leaving them on the side amounted to 'a catastrophe'.[110]

As concerns category (b), the trial court findings lack specificity as to the nature of the objects, their -at least approximate - quantity and value. Therefore, irrespective of the truthfulness of averments, the findings pertaining to this category alone would not substantiate attributing liability for looting on a large scale.

As concerns category (c), seemingly the most important in the aspect of the value of the objects, the first instance court did not make it clear whether it held the accused liable for appropriation of the tractors. If this was the trial court's intention, the verdict is again contradictory. The District Court postulated that the accused, being responsible for the cleaning of the area, should have storied and inventoried the property. Upon the evidence accepted by the trial court, the accused indeed had ordered the taking and storing of the tractors and cars as part of the cleaning. Accordingly, the requirement for affirmative action to prevent looting by storing and making the inventory would have been met.

It is not clear whether the first instance court deemed the accused responsible for what ever happened with the vehicles after the storing. In any case the first instance decision is lacking findings about whether what happened to the tractors after they were stored, whether there was a permanent expropriation from the owners, if so - to whose benefit and whether the accused at this time still had the custody of the tractors and was responsible for their unlawful distribution.

The Supreme Court further considers that there is a certain disparity between the charge and the findings. The averment, however sweepingly drafted, alleges primarily complicity in aiding and/or direct perpetration of the prohibited acts[111]

[110] p. 41

[111] "[The accused] used the forced labour of Kosovar Albanians to assist in and aid and facilitate the pillaging, looting, theft and destruction of the valuable personal property of other Kosovar Albanians who had been deported from Kosovo", Second Amended Indictment, p. 2 ;

whereas the findings reject direct participation and aiding in a criminal confiscation of property[112] and the looting or ordering of the looting by the accused [113]. Criminal omissions on the other hand, on which the District Court focused, were in the indictment mentioned only *en passant*[114] and it is not quite clear upon the language of this averment whether it actually alleged looting of the abandoned homes or looting in general. This issue will need to be clarified in the re-trial for the sake of the proper focus of the proceedings as well as the right of the accused to know precisely the ambit of the charges. Having obtained a clarification as to precise nature of factual allegations here, the first instance court will bear in mind that – as discussed *supra* -assigning criminal responsibility for a war crime under Article 142 requires that the finding of responsibility satisfy both national and international legal tests. Whereupon, if the Court is not satisfied that the accused acted [or refrained from acting contrary to his legal obligation] with direct or indirect intention to cause the looting and/or destroying of the property, the qualification under Article 142 CCY must be ruled out. Depending on the factual findings, in case the District Court establishes that the accused negligently allowed looting and destroying of the property for which he was responsible, the trial court may consider another legal qualification, for example from Article 148 of the Criminal Law of Kosovo - providing, of course, that the identity of the act alleged and act attributed is maintained.

In making these determinations the District Court will bear in mind its duty to evaluate each piece of evidence individually and in the context of the remaining evidence. A presence of contradictions or inconsistencies does not automatically and *a limine* disqualify the witness testimony, however, 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 explainable or not and whether they point to a deliberate untruthfulness of the witness. Particular scrutiny should be applied in case a pattern of increasing inculpation is detected in the witness testimony. 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.

Conclusion

In the light of the state of facts established by the District Court, in relation to the specific charge of causing the displacement of persons and forced labour, the Supreme Court finds that there are no grounds to maintain that actions of the accused constituted a crime. Indivisibility of the war crime charges does not allow the Supreme Court to modify the verdict accordingly. Concerning the specific charge of

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"In assisting in the pillaging, looting, stealing and destroying of this property by having it dumped and burned on a mountainside, Kolasinac covered up the traces of war crimes, including theft, pillaging, and looting, as well as the crime of deportation and made himself complicit in these crimes*", ibid p. 3;* "Andjelko Kolasinac is also guilty of ordering and committing, aiding, *assisting and complicity* in the crime of… the confiscation of property, the pillaging and looting of the property of the population, the illegal and self-willing destroying and taking possession of the property in great scale", ibid p. 4.

[112] p.50

[113] "[T]here is absolutely no evidence to indicate that Kolasinac actually ordered the looting and destruction of property in Malishevë. Moreover, there is no evidence to indicate that Kolasinac either aided or was complicit in the activities of looting and destruction of the property", p. 41

[114] "At the same time Kolasinac failed to take any action or make any attempt to use his authority to halt the killing and deportation of Kosovar Albanians, as well as the plundering and looting and burning of their homes. Nor did he use his authority or attempt to use his authority to report such crimes to higher authorities, or to protest these illegal actions, or to discipline or report for discipline those involved", Second Amended Indictment p. 4

failure to prevent looting and destroying of property, the Supreme Court found that the state of facts was not sufficiently established.

Based on the foregoing, in conformity with Article 385, paragraph 1 of the LCP, the Supreme Court decided as in the enacting clause of this Decision.

SUPREME COURT OF KOSOVO IN PRISTINA
AP–KZ 139/2003, 5 AUGUST 2004

Recording Clerk	Presiding Judge
_____	_____
Eriona Brading	Agnieszka Klonowiecka-Milart