INTRODUCTION

This review presents an outline of the jurisprudence of the Supreme Court, in cases where the appellate proceedings were conducted before a panel of judges pursuant to UNMIK Regulation No. 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors or 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue. The review takes in those cases in which the Supreme Court rendered a decision between January 2002 and December 2003. Decisions rendered after December 2003 will be included in the 2004 Review which will be published in early 2005.

The Supreme Court decisions are considered under various subject matter headings, in two parts. Part I reviews those cases which involved the court in a consideration of issues of criminal procedural law. Part II reviews those criminal cases which raised substantive legal issues. Each chapter commences with a summary of the principal findings of the Supreme Court on the subject matter under consideration and the cases referred to in each chapter are set out under the following main headings, namely the background facts, the grounds of appeal and the actual decision of the Supreme Court. Citations from the jurisprudence of the European Court of Human Rights are also highlighted.

At the end of each chapter amendments to the legal provisions considered in each chapter are highlighted and practitioners are referred to the relevant provisions as contained in the Provisional Criminal Procedure Code of Kosovo.

The review represents the first step towards achieving greater accessibility to the jurisprudence of the Supreme Court. It is intended to meet the need for a reliable guide to both procedural and substantive legal issues which have arisen regarding the application and interpretation of the criminal law in Kosovo. It is hoped that this publication will contribute to a more consistent application and interpretation of the legal provisions of the applicable law.

GLOSSARY OF TERMS

AKSH	Albanian National Army
DOJ	Department of Justice
COMKFOR	Commander of Nato-led Kosovo Force
CPU	Close Protection Unit
PCPCK	Provisional Criminal Procedure Code of Kosovo
PKCC	Provisional Criminal Code of Kosovo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
fYROM	Former Yugoslav Republic of Macedonia
KCC	Kosovo Criminal Code
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KPC	Kosovo Penal Code
KPS	Kosovo Police Service
LCP	Law on Criminal Procedure of the Federal Republic of Yugoslavia

TABLE OF CASES

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2. Andjelko Kolasinac, 10 December 2002 – PN. 307/2002
3. Arsim Istrefi, 9 January 2003 – Ca. No. 264/2002
4. Artan Hasani, 10 April 2003 – AP-KZ 220/2002
5. Bajram Morina, Gazmend Mazreku and Xhavit Morina, 11 December 2003 - PN. No. 318/2003
6. Blagoje Stankovic, 16 February 2004, Ap - KZ 141/2003
7. Boban Momcilovic, Mirolub Momcilovic and Jugoslav Momcilovic, 25 February 2003, AP. 84/2001
8. Darko Radovanovic, Marko Radovanovic, Dragomir Radovanovic, Srdjan Lomigora and Bojan Hamzagic, 22 August 2002, AP/KTZ-75/2002
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22. Muharrem Xhemajli et al., 3 April 2003 – PN. 94/03

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24. Negovan Filipovic, 20 January 2003 – PKR 10/2002

25. Nenad Pavicevic and Lazar Gligirovski, 27 February 2003 – AP. 154/2001

26. Case against Nicic Predrag, 3 March 2003 – AP. 227/2001

27. Radojica Lazic, 6 March 2003, AP-KZ 248/2001

28. Roland Bartetzko, 12 October 2002 – AP-KZ 181/2002

29. Ruzhdi Saramati, 9 October 2002, AP-KZ 76/2002

30. Case against Sadete Ajdini, Zerije Asani, Xhevaire Osmani, Mazafer Hamdiu, Xhemajl Hasani and Naxmi Jashari8 May 2002 – AP. 272/2001

31. Sami Rexhepi, Besim Shabani and Ragmi Rexhepi, 17 December 2002, AP. 234/2002

32. Sherif Abd Elaziz, 8 May 2003 – AP-KZ No. 93/2003

33. Vyrtyt Miftari, 4 September 2002 – AP-KZ 91/2002

34. Xhavit Hasani, 16 September 2003 - Ap. Nr. 209/2002

PART I

THE LAW ON CRIMINAL PROCEDURE

THE DEFENDANT'S RIGHT TO CALL WITNESSES

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

The right of a defendant to call witnesses is enshrined in the applicable law. It is not an absolute right and the court of first instance is competent to refuse to allow certain witnesses to be called if it appears that their evidence will not be relevant;

Any refusal to call or to secure the attendance of an important defense witness should be taken with great care in the light of Article 6(3)(e) of the ECHR;

A decision on the legal and factual grounds for refusing to call all or some witnesses proposed by the defense must be grounded in a properly motivated decision of the first instance court, i.e. reasoned on the basis of the admissibility of evidence and its relevance to the case;

In the absence of a decision on the motion, the appellate court has no choice but to deem that the first instance court has improperly dealt with the defense's right to call witnesses which constitutes an essential violation of the law on criminal procedure and potentially affects the rendering of a lawful and proper judgment;

Note: See further the case outlined below.

Case against Dragan Milovic

17 January 2003, AP. 206/2002

Background facts

The accused was charged with rape pursuant to Article 74(1) KCC and illegal possession of weapons pursuant to Section 8(6) KCC in conjunction with paragraph 2 of UNMIK Regulation 2001/7 On the authorization of possession of weapons in Kosovo. On 7 June 2002 the accused was convicted as charged and was sentenced to six years and six months imprisonment in respect of the rape charge and to one year and six months imprisonment in respect of the charge of unauthorized possession of weapons. He was sentenced to an aggregate sentence of seven years imprisonment.

Grounds of Appeal

The defense lodged an appeal against the verdict alleging a violation of the Law on Criminal Procedure. It submitted that there had been a wrongful and incomplete establishment of the facts of the case because the first instance court had rejected the defense's motion brought during the main trial seeking leave to call five further defense witnesses.

DECISION OF THE SUPREME COURT

- ***The right of the defense to call witnesses***

  The Supreme Court engaged in an assessment and consideration of the law governing the right of the defense to call witnesses. It cited Article 322(4) LCP which affords the parties equal rights to "propose that new facts be investigated and new evidence obtained up until the end of the main trial…". It held that this Article establishes the principle of "equality of arms" which constitutes an important part of the concept of a "fair trial" envisaged in Article 6 of the ECHR (and directly applicable in Kosovo). It also cited Article 6(3)(d) of the ECHR which prescribes that the accused has the right to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

- ***Limitations on the right of the defense to call witnesses***

  While recognizing the right of the defense to call witnesses, the Supreme Court acknowledged that this was not an absolute right and that the court of first instance was entitled to refuse to allow certain witnesses to be called if it appeared that their evidence would not be relevant. However it did note that any refusal to call or to secure the attendance of an important defense witness should be taken with great care in the light of Article 6(3)(e) of the ECHR. It also endorsed the reasoning of the European Court in *Vidal v. Belgium*[1]in which the Belgian court's refusal to compel an important witness for the defense was held to constitute a violation of the accused's right to a fair trial.

- ***The first instance court's obligation to issue a properly reasoned decision***

  The Supreme Court considered that the first instance court could have had enough legal and factual grounds to refuse calling all or some of the witnesses proposed by the defense, but that "*in the absence of a properly motivated decision on the matter,* [it] *could not speculate over the possible outcome of the proceedings, if the defense counsel's motion were to be satisfied*." It held that first instance court's failure to address in its delivered verdict the motivation for its rejection of the defense's motion without a properly reasoned decision constituted an essential violation of the law on criminal procedure and violated the defense's right to call witnesses.

  The Supreme Court sent the case back for retrial to an entirely new panel with a direction as to the procedure to be followed by the court in the event of a future

[1] ECHR, 22 April 1992.

refusal to allow new evidence/new witnesses on behalf of the parties. It directed that such a decision "should be reasoned on the basis of the admissibility of evidence and its relevance to the case."

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

- Article 322(4) LCP governing the parties' right to propose that new evidence be investigated or new evidence introduced at the trial is now governed by Article 322, paragraph 1 PCPCK which contains similar provisions.
- Article 364 LCP setting down what constitutes an essential violation of the provisions of criminal procedure was amended by Article 403, paragraph 2 PCPCK which contains similar provisions.

THE RIGHT OF THE ACCUSED TO EXAMINE OR HAVE EXAMINED WITNESSES AGAINST HIM/HER

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

All evidence must normally be produced at a public hearing in the presence of the accused with a view to the adversarial argument. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him/her. The court has an obligation to ensure that proceedings as a whole, including the manner in which evidence is taken, is fair. In acting otherwise the court must ensure that the rights of the defense have been respected;

The failure of the first instance court to take effective steps towards respecting these rights results in a breach of Article 168(4) LCP and the right of the accused to examine or have examined witnesses against him/her as enshrined in Article 6(3)(d) of the European Convention on Human Rights;

In criminal proceedings where the only piece of evidence to be used in determining the criminal liability of the accused is to be provided through the interrogation of an injured party/witness, it is imperative that the court conclude that the presence of the accused or of his/her defense counsel is appropriate;

See further the cases outlined below.

Case against Ruzhdi Saramati
9 October 2002, AP-KZ 76/2002

Background facts
The accused was indicted for the criminal acts of murder pursuant to Article 30, paragraph 2, item 6 KCC in conjunction with Article 19 FRY CC; grave bodily injury pursuant to Article 38, paragraph 2 KCC, unlawful possession of weapons and explosive substances pursuant to Article 199, paragraph 1, item 3 KCC, light bodily injury pursuant to Article 39, paragraph 2 KCC and violent behavior pursuant to Article 190, paragraph 2

KCC. On 23 January 2002, the first instance court found the defendant guilty of attempted murder. He was acquitted of the charge of grave bodily injury and the court rejected the other charges.

The only evidence upon which the first instance court relied in pronouncing the accused guilty of attempted murder was the testimony of the injured party/witness, Muamer Alija given before the investigating judge[2] in the absence of the accused or his defense counsel and the public prosecutor and a statement given before the international presiding judge of the trial panel and the district public prosecutor at a trial session held in Belgrade[3] in the absence of the accused and his defense counsel.

Grounds of Appeal

The defense appealed the verdict alleging a violation of the Law on Criminal Procedure.

DECISION OF THE SUPREME COURT

The Supreme Court in assessing the procedural validity of the main evidence taken in the absence of the accused or his defense counsel engaged in a comprehensive assessment of the applicable law on the entitlement of the defense to attend and cross examine witnesses for the prosecution at the trial. It also considered the court's role in ensuring that the proceedings as a whole, including the way in which the evidence is taken, is fair.

- ***Entitlement of the accused or his defense counsel to attend the examination of a witness***

  The Supreme Court held that pursuant to the applicable law, namely Article 168, paragraph 4 LCP, an accused and his/her defense counsel has the right to attend the examination of the witness and that the participation of the defense counsel and/or accused is "*necessary*" when one of the three conditions exist, namely "*it is likely that the witnesses will not attend the main trial; the judge finds that the participation is important; the accused or his defense counsel request to do so.*"

  The Supreme Court also cited Article 327 LCP, which prescribes that "*the accused, defense counsel…may put directly questions to witnesses and experts…*".

- ***International standards of fair trial applicable in Kosovo***

[2] At the hearing before the investigating Judge on 25 October 1996, the injured party/witness stated the following, "*That person had characteristic features. He had light hair and very particular features, so that I immediately recognized him [i]n the photograph from the criminal records and than it was established that the person in question was Saramati Ruzhdi who had been previously arrested by the police.*"

[3] "*The second statement was given on December 17, 2001 and the witness stated that: "I cannot describe any characteristics of that person although I have seen his face only over the barrel of my gun when I turned to shoot at him and him at me. I see 8 colored photographs after this long period of time. I cannot say for sure whom it was but I can exclude the person as 5th in this collection definitely and probably No 3 could be but I am not sure – certain. …… With Ruzhdi Saramati, I had no contact before and after the event. The only contact with him was during the shooting. The person who wounded me I did not know his name. At the moment of shooting I did not know anything about his name or ethnicity.*"

The Supreme Court considered the international standards of fair trial that are applicable in Kosovo and held as follows:

"Because the European Convention for the Protection of Human Rights and Fundamental Freedoms constitute an integral part of the Kosovo legal system, Articles 168 and 327 LCP must be applied in the light of Article 6 of the Convention. … The concept of a fair trial allows participation of all the parties involved in the proceedings at any stage of these proceedings and at any action taken in order to ensure that they can ask questions to the witness and require certain explanations. … It is clear that condition (b) requires that the judge determines whether it is necessary to have participation of the parties."

The Supreme Court found that condition (b) requires that the judge determines whether it is necessary to have participation of the parties. It concluded that "*In this case, where the only piece of evidence to be used in determining the criminal liability of the accused were to be provided through the interrogation of the injured party/witness it was imperatively indicated to conclude that the presence of the accused or of his defense counsels would be appropriate. This conclusion is also required in light of Article 327 LCP".*

- ***The Court's obligation to ensure that the proceedings as a whole are fair***
  The Supreme Court held that apart from the issue of the proper admission of the evidence, the court also has a responsibility to ensure that the proceedings as a whole, including the manner in which this evidence is taken, is fair. It held that *"All evidence must normally be produced at a public hearing in the presence of the accused with a view to the adversarial argument. In acting otherwise the court should make sure that the rights of the defense have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him. The defense counsels' request to participate was grounded on this reasoning and an expectation of fair proceedings. The failure of the first instance court to take effective steps towards respecting these rights, results in a breach of Article 168 paragraph 4 of the Law on Criminal Procedure and also of Article 6 paragraph 3 (d) of the European Convention on Human Rights (ECHR) which affords the accused the right to examine or have examined in adversarial proceedings any material evidence against him."*

  The Supreme Court endorsed the reasoning of the European Court in the case of *Luca v Italy*[4] which held that *"… where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defense are restricted to an extent that is incompatible with the guarantees provided by Article 6 of the Convention."*

The Supreme Court found that in this case the first instance court had convicted the accused solely on the basis of statements made by the injured party/witness at the

[4] 27 February 2001, paragraph 40.

investigating stage and before the presiding judge (in accordance with Article 330 LCP). It concluded that as neither the accused nor his defense counsels were given the opportunity at any stage of the proceedings to question the witness (in addition to this, the acceptance of legally questionable evidence from the first investigation proceedings together with other shortcomings) this procedure had rendered the whole proceedings unfair and that the rights of the accused under Article 168(4) LCP, Article 327 LCP and Article 6(3)(d) of the European Convention on Human Rights were violated.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

- Article 168, paragraph 4 LCP governing the circumstances when the prosecutor, the accused or his/her defense counsel may attend the examination of a witness is now governed by Article 237, paragraph 4 PCPCK which contains a similar provision.
- The procedure governing the questioning of witnesses or expert witnesses during the trial contained in Article 327 LCP is now governed by Article 372, paragraph 1 PCPCK which sets down a similar procedure.
- Article 364 LCP setting down what constitutes an essential violation of the provisions of criminal procedure was amended by Article 403, paragraph 2 PCPCK which contains similar provisions.

CONFESSIONS AND ADMISSIONS

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

A confession by an accused during the main trial, which is not corroborated by other evidence, however complete and unambiguous it might be, has no probative force by itself and does not relieve the court of the duty to gather, present and assess other evidence;

To accept confession evidence without discharging the obligation to gather, present and assess other evidence before reaching a decision on the verdict amounts to a grave violation of the law on criminal procedure and thus necessitates the dismissal of the verdict.

Note: See further the case outlined below and note the amendment to the Law on Criminal Procedure by the PCPCK.

Case against Darko Radovanovic, Marko Radovanovic, Dragomir Radovanovic, Srdjan Lomigora and Bojan Hamzagic

22 August 2002, AP/KTZ-75/2002

Background facts

On 27 December 2002, the District Court of Mitrovicë/Mitrovica pronounced the first, second, third and fourth named accused guilty of aggravated theft pursuant to Article 135, paragraph 1, item 1 KCC in conjunction with Article 22 FRY CC. The first accused Darko Radovanovic was also convicted of illegal possession of firearms and ammunition pursuant to Article 199, paragraph 3 KCC in conjunction with paragraph 1 KCC, as well as committing, in complicity with the second and fifth named accused the criminal act of aggravated theft pursuant to Article 135, paragraph 1, item 1 KCC in conjunction with Article 22 FRY CC. The accused were sentenced as follows: Darko Radovanovic to an aggregate sentence of two years and five months imprisonment; Marko Radovanovic to an aggregate sentence of ten months imprisonment; Dragomir Radovanovic to an aggregate sentence of six months imprisonment; Srdjan Lomigora to eight months imprisonment; and Bojan Hamzagic received a suspended sentence of six months imprisonment. The court rejected charges against the fifth named accused in relation to illegal possession of firearms and ammunition.

Grounds of Appeal

The defense in their appeal alleged essential violations of the provisions of the law on criminal procedure. In relation to the second charge of aggravated theft against the first, second and fifth accused, the defense contended that the first instance court had based its verdict exclusively on the confession of the fifth accused, without seeking other evidence to corroborate or refute his confession contrary to Article 323 LCP. It thereby submitted that the court had convicted the accused mainly on assumptions and not on the basis of direct and reliable evidence.

DECISION OF THE SUPREME COURT

- ***The procedure to be invoked by the court when dealing with confession evidence***
  The Supreme Court considered the applicable law on confession evidence as set out in Article 323 LCP which prescribes that "*A confession by the accused during the main trial, however complete it might be, does not relieve the court of the duty to present other evidence as well*". It re-affirmed this as the procedure to be adopted by the court where it was necessary to assess confession evidence. It found that instead of acting in accordance with this procedure and verifying the truthfulness of the accused's confession, the first instance court had unacceptably assessed the confession as "*help… in establishing the state of facts"*.

  The Supreme Court concluded that the procedure invoked by first instance court amounted to a grave violation of the law on criminal procedure warranting the dismissal of that part of the verdict. It sent the case back to the first instance court with a direction that it gather where possible, new evidence to corroborate or refute the confession evidence in the case and then decide in accordance with the applicable law.

Case against Igor Stanimirovic
20 February 2004 - AP.249/2001

Background facts
On 21 April 2004, the accused was charged with the criminal acts of grave theft and robbery pursuant to Article 138, paragraph 1 KCC. During the investigative hearing the accused appeared before the investigative judge and was informed of his right to engage a defense counsel and about his general rights, including his right not to respond to questions or to present a defense. The accused elected to engage a defense counsel and was given 24 hours to so do. However he was unable to engage defense counsel in that time period and proceeded on 5 May 2000 to give his statement to the investigating judge in the absence of a defense counsel. In his statement the accused confessed to his involvement, agreement and participation in the commission of the offences charged.

Subsequently, at the main trial, the accused retracted his confession and stated that he had been forced to admit the charges in his earlier statement by his co-accused, Brank Stanojevic, who had threatened him whilst they were both in prison. In his statement given during the main trial, the accused claimed that he had only been present during the commission of the crime, that he had tried to stop his companions from committing the crime and had not participated in the actual robbery. His co-accused had absconded and could not be interrogated by the trial panel. Neither of the injured parties could positively identify the accused and one of them claimed there were more than two perpetrators, which corroborated the accused's statement at the main trial. Nevertheless, in reaching its determination on the facts of the case, the first instance court accepted completely the confession evidence of the accused given before the investigating judge, pronounced him guilty as charged and sentenced him to one year and six months of imprisonment.

Grounds of Appeal

The defense appealed both the conviction and sentence. The primary grounds for the appeal related to the question of whether there was sufficient evidence before the court at the main trial on which to convict the accused.

DECISION OF THE SUPREME COURT

- ***Whether the court was entitled to rely on the retracted confession of the accused***

  The Supreme Court considered the quality of the evidence before the first instance court at the main trial and the issue of whether the court was entitled to rely on the retracted confession of the accused, which could not be corroborated with the testimony of the co-accused who had absconded. The Supreme Court cited and relied on the provisions of Article 323 LCP which prescribes that *"A confession by the accused during the main trial, however complete it might be does not relieve the court of the duty to present other evidence as well."*

  The Supreme Court found that the only corroborative evidence of the retracted confession was the statement of the co-accused given at the investigative hearing which could not be tested at the main trial and which was cast into doubt by the statement of the accused and the injured parties at the trial. In such circumstances the Supreme Court held that the first instance court should have sought additional evidence to either refute the confession or to corroborate and verify its truthfulness. It found however that the first instance court had failed to comply with the law on criminal procedure in that it had assessed the confession as "*help to the court in establishing the state of facts*."

- ***The weight to be attributed to confession evidence***

  The Supreme Court in laying down the detail and weight to be attributed to confession evidence adopted similar reasoning to that adopted in the case against Darko Radovanovic et al. and held as follows:

"*The confession of the accused should be viewed as being on an equal to that of other evidence and should therefore be subject to free critical assessment, regarding its internal essence and contents as well as regarding its complex connection with all other heard evidence and established facts, just as any other evidence. It does not appear from the reasoning, that the court gave the confession of the accused during the investigation, free critical assessment. The court cannot be satisfied with anyone's confession that has not been corroborated and a confession which is not corroborated by other evidence has not probative force by itself and the accused can easily deny it. Exactly this has happened in this particular case.*"

The Supreme Court also cited Article 223 LCP which prescribes that "*Even after the confession of the accused, the body conducting the proceedings is obliged to gather other evidence*". It concluded that this provision further reinforced the obligation of the court to gather other evidence so as to test the probative value of the confession of the defendant. Holding that the verdict against accused was based solely on his retracted confession which was not supported by any other evidence, the Supreme Court dismissed the verdict and sent the case back to the court of first instance for retrial.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

- Article 323 LCP and Article 223 LCP set down the law governing the admissibility of confession evidence. The PCPCK has amended the law on confession evidence. Article 209-318 PCPCK governing the conduct of the confirmation hearing by which a judge renders a ruling on the indictment affords an opportunity to a defendant to plead guilty to the charges against him/her, see Articles 314, paragraph 4 and Article 315 PCPCK. Note also Article 358, paragraph 1 PCPCK which affords the defendant the opportunity to plead guilty to the charges at the commencement of the main trial.

AMENDMENT OF THE LEGAL QUALIFICATION OF A CRIMINAL ACT

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

The court may disagree with the recommendations of the prosecutor concerning the legal evaluation of a criminal act in the indictment. However such a disagreement is possible only if it is beneficial to the accused.

See further the case outlined below.

Case against Enver Sekiraca

21 January 2003 – AP 168/2002

Background facts

The accused was charged with starting a brawl with a KPS Police Officer and two civilians on 20 October 2002 in Pristina. It was alleged that he hit one of these persons with the butt of his handgun and shot with other about fifteen (15) times in their direction. The accused was indicted for having committed the following criminal acts; causing general danger pursuant to Article 157, paragraph 1 and 3 KCC, causing light bodily injury pursuant to Article 39, paragraph 2 KCC, participating in a brawl pursuant to Article 40 KCC, attempting, through the use of force, to escape a lawful arrest pursuant to Article 180 KCC in conjunction with Article 19 FRY CC and committing the criminal act of disturbing a public official in the performance of his official duties pursuant to Article 183, paragraph 1 and 3 KCC.

On 6 September 2001 the first instance court pronounced the accused guilty as charged and he was sentenced to two periods of three months of imprisonment for the two criminal acts of causing light bodily injury and light damage of health; three months of imprisonment for the use of a dangerous tool capable of gravely injuring the body; six months of imprisonment for the criminal act of attempting, through the use of force, to prevent an official person performing tasks of public security (i.e. the apprehension of a suspected criminal offender) and eight months for the criminal act of attempting, by the use of force, to escape a lawful arrest.

Grounds of Appeal

On 10 May 2002 the defense appealed against the verdict alleging an essential violation of the law on criminal procedure, an incorrectly and incompletely established state of facts and a violation of material law. It was contended that the verdict violated the law on

criminal procedure (Article 364, paragraph 1 item 9) because the first instance court had overstepped the limits of the indictment by pronouncing the accused guilty of two, instead of one criminal act of causing light bodily injuries pursuant to Article 39, Paragraph 2 KCC and also by applying two punishments instead of one.

DECISION OF THE SUPREME COURT

In relation to the legal qualification in the indictment, the Supreme Court held that from a reading of the part of the indictment describing the commission by the accused of the criminal act of light bodily injury in respect of two persons, it was clear that both acts of causing light bodily injury were considered by the prosecutor to constitute one crime and were, respectively, qualified only once under Article 39, paragraph 2 KCC. The Supreme Court found that this was also evident from the prosecutor's closing speech at the main trial, as well as from his reply to the appeal of the defense wherein the prosecutor sustained the legal qualification given in the indictment.

The Supreme Court found that contrary to Article 346 paragraph 1 of LCP, the first instance court had found it possible to give an extensive interpretation to the legal qualification of the crime of light bodily injury from the indictment and to qualify separately each of the two acts. It held however that this interpretation went to the detriment of the accused because instead of being punished for the commission of one criminal act under Article 39 paragraph 2 of KCC (for which he was indicted), he was in fact punished twice due to the "*new double legal qualification of his acts, made by the court*." The Supreme Court concluded that while Article 346 paragraph 2 allowed the court to disagree with the recommendations of the prosecutor concerning the legal evaluation of the act, such a disagreement was only possible if it was beneficial to the accused.

The Supreme Court held that although the error committed by the first instance court constituted an essential violation of the law on criminal procedure [see Article 364 paragraph 1 item 9 of LCP], it was possible to remedy this error. It thus rejected one conviction of the accused pursuant to Article 39 paragraph 2 KCC and respectively excluded from the sentencing part of the enacting clause, one three (3) month term of imprisonment.

Case against Blagoje Stankovic

16 February 2004, Ap - KZ 141/2003

Background facts

The accused was indicted on 17 January 2002 for the criminal act of murder pursuant to Article 30, paragraph 2, item 3 KCC and unlawful possession of a weapon contrary to Sections 8.2 and 8.3 of UNMIK Regulation 2001/7 On the Authorization of Possession of

Weapons in Kosovo and Article 199, paragraph 1 KCC. During the main trial, before the presentation of evidence was concluded, the Panel proposed that the charge be re-qualified from Article 30, paragraph 2, item 3 KCC to Article 33 KCC (i.e. provoked homicide/murder of the moment).

On 22 November 2002, the District Court of Gjilan/Gnjilane rendered a verdict, finding the accused guilty of committing the criminal offence of provoked homicide pursuant to Article 33 KCC together with the crime of unlawful possession of a weapon. The accused was sentenced to three (3) years of imprisonment.

Grounds of Appeal

On 13 January 2003, defense counsel of the accused filed an appeal against the first instance courts verdict alleging an essential violation of the provisions of the law on criminal procedure, wrongful verification of the factual situation and an erroneous application of the provisions of criminal law.

On 3 December 2003, the Office of the Public Prosecutor of Kosovo (OPPK) submitted its opinion on all the appeals against the conviction of the accused. It opined that the evidence did not support the conviction for the criminal act of murder of the moment and that in relation to the criminal act of illegal possession and use of a weapon, the panel failed to determine a separate sentence. Further, it supported the contention of the district public prosecutor that the crime of murder was distinct from the crime of unauthorized possession of a weapon and that both should have been sentenced separately and an aggregated sentence pronounced pursuant to Article 48, paragraph 2 of the FRY CC.

DECISION OF THE SUPREME COURT

The Supreme Court disagreed with the submission of both the prosecution and the defense and held that the verdict of the District Court of Gjilan/Gnjilane correctly established the facts of the case and correctly concluded that the deeds committed by the defendant should be qualified under Article 33 of the KCC, as provoked homicide. On this basis it found no violation of Article 364, paragraph 1, item 11 of the LCP and therefore that the proposal to send the case back for retrial were unfounded.

The Supreme Court then considered the prosecutions submission that the District Court incorrectly applied the rule of consumption of criminal acts and consequently, incorrectly pronounced only one sentence for the two criminal acts without sentencing him for each criminal act separately. It found that while in the reasoning part of its verdict, the District Court of Gjilan/Gnjilane had stated that "…*the accused has to be convicted only for one deed and there is only one punishment to be pronounced*.", this statement could be considered as indeed contradicting Article 48 of the FRY CC. However, in the enacting clause of the verdict, the defendant was found guilty of the commission of two criminal acts: provoked homicide according to Article 33 of the KCC and the possession of a weapon without authorization according to sections 8.2 and 8.3 of UNMIK Regulation 2001/7 and Article 199, paragraph 1 KCC. It held that in accordance with Article 363, paragraph 2 LCP, a verdict may be contested because of a violation of the criminal law.

Also, in accordance with Article 376, paragraph 1, item 2 LCP, the second instance court shall review the verdict contested by the appeal or *ex officio* "*as to whether the Criminal Law (Article 365) has been violated to the detriment of the accused*." However, the Supreme Court concluded as follows:

"In the instant case, although the criminal law was violated, it is not alleged that the violation of the law could have affected in any way the interests of the accused. The district public prosecutor does not contest the final punishment appointed by the District Court as such. It alleges only the violation of general principles on the combination of criminal acts and punishments. The international public prosecutor of the OPPK, while proposing in its Opinion to send the case for retrial in the part "…regarding establishment of the facts of murder of a moment…" does not present his view of which criminal act the defendant committed and remains silent about the rendered sentence. In its oral submission before the Panel of the Supreme Court, the public prosecutor of the OPPK suggested that the defendant committed a murder and not a provoked homicide but also remained silent about the rendered sentence."

The Supreme Court therefore held that bearing in mind the (legally binding) enacting clause of the verdict which correctly found the defendant guilty in the commission of two criminal acts, it was therefore possible to modify the enacting clause of the verdict by appointing separate sentences for each criminal act and a final aggregated punishment. It held that *"although the legal approach of the District Court regarding the principles of combination of criminal acts and of punishments was incorrect, taking into consideration that the reasoning part of the verdict is not legally binding and cannot affect the rights of the accused, the Supreme Court concluded that it [sic] was unnecessary to operate changes in this part of the verdict."*

It also held that the finding by the District Court of guilt pursuant to Article 199, paragraph 1 of the KCC must be excluded from the enacting clause as illegal and unnecessary as the accused was indicted only under sections 8.2 and 8.3 of UNMIK Regulation 2001/7, because the crime was committed after the entering into force of this Regulation, which substituted Article 199 of the KCC. Therefore, it was wrong to consider the accused guilty also under a non-existing law.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

- The provisions governing the pronouncement and contents of the verdict as contained in Article 346, paragraphs 1 and 2 are now contained in Article 386 PCPCK.

- Article 364, paragraph 1, item 11 setting down what constitutes an essential violation of the provisions of criminal procedure law; similar provisions are now contained in Article 403, paragraph 1, item 12 PCPCK.

CONSUMPTION OF CRIMINAL ACTS

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

Where an accused person is pronounced guilty of a criminal act, this consumes all other offences, elements of which are included in that act and he cannot be pronounced guilty for the other criminal acts.

Note: See further the case outlined below.

Case against Roland Bartetzko

12 October 2002 – AP-KZ 181/2002

Background facts

On 18 April 2001 an explosive device was placed and activated near the Center for Peace and Tolerance in Pristina which resulted in the death of one person and serious bodily injury to four (4) other persons. Shortly after the explosion, the accused was arrested some 250-300 meters away from the crime scene. He was covered with soot from the abandoned, burned out house where the firing point of the bomb had been and his finger print was found on part the devise which had not exploded (on a milk carton wrapped with brown packaging tape and connected to several TNT blocks).

The accused was charged with the criminal offence of murder pursuant to Article 30, paragraphs 1 and 2, items 1, 3 and 6 and paragraph 3 KCC; four counts of attempted murder pursuant to Article 30, paragraphs 1 and 2, items 1, 3 and 6 and paragraph 3 KCC in relation to Article 19 FRY CC; inflicting grave bodily injury pursuant to Article 38, paragraph 1 and 2 KCC, several counts of attempting to inflict grave bodily injury pursuant to Article 38, paragraphs 1 and 2 KCC in relation to Article 19 FRY CC and terrorism pursuant to Section 2.2 of UNMIK Regulation 2001/22.

On 10 May 2002 the court of first instance found the accused guilty of one criminal act of attempted murder, four counts of the criminal act of attempted murder and one act of terrorism. He was sentenced to eighteen years of imprisonment for the offence of murder, twelve years of imprisonment for each of the four counts of attempted murder and twenty years of imprisonment for the criminal act of terrorism. The court pronounced an aggregate sentence of twenty three years of imprisonment.

Grounds of Appeal

The defense appealed the verdict on a number of grounds pleading an essential violation of the criminal procedure law in relation to the question of the punishment of the accused and a wrongful and incomplete establishment of the facts. With respect to the legal qualification of the criminal acts as interpreted by the first instance court, the defense argued that the court erred because *"according to the applicable law, if an accused person is pronounced guilty for the criminal act of terrorism, as foreseen by article 125 of the FRY CC, this criminal act consumes all other criminal acts and he cannot be pronounced guilty for other criminal acts, elements of which, are included in that act."*

DECISION OF THE SUPREME COURT

The Supreme Court found that the contested verdict of the first instance court concluded as follows:

"Articles 125, 139 paragraph 1 of the FRY CC do not consume the acts of murder and attempted murder…Therefore, the panel believes that the aim of Article 139 is to provide punishment for the mere fact that a person died as a result of the action as such. A case of premeditated murder committed together with an act of terrorism therefore should be punished separately".

- ***Did either of these articles consume the materially distinct element of the mens rea requirement for murder***

  The Supreme Court found that on the basis of the facts of the case, the act of terrorism committed by the accused was committed for the purpose of causing the death of specified persons. It held that the accused's intention was to cause death and that by using a bomb to achieve this intention the accused committed an act of terrorism because the method used created a feeling of personal insecurity among the citizens. The Supreme Court further held that this feeling of personal insecurity was the result of the deliberately chosen method by the accused and in choosing this method the accused rendered himself punishable under Article 125 of the FRY CC. It concluded that because that method caused the death of one person and endangered the lives of others, Article 139 became applicable and it identified a threshold of punishment that must be imposed upon an accused who commits a qualified terrorist act which *"brought about the death of a person or caused danger to human lives…"*.

  The Supreme Court found that neither Article139 (in the version used by the first instance court), nor Article 125, made any reference to a premeditated killing and it concluded that neither of these articles consumed the materially distinct element of the *mens rea* requirement for murder, and as such the defense argument that murder was consumed by Article 125 is unsubstantiated.

- ***Consideration of the consumption issue in light of the amended version of Article 139***

  Although the Supreme Court was satisfied that the first instance court in its interpretation of Article 125 and Article 139 had made no error, it was not satisfied that the first instance court was correct in applying the version of Article 139 that it

applied. It found that this version of Article 139 applied by the first instance court was that which had been officially supplied to it, and accordingly, there could be no criticism of its decision to apply that version. However, the Supreme Court found that unknown to the court of first instance, Article 139 had been subjected to two important amendments on 6 July 1990 (Off. Gazette 38/90) and on 16 July 1993 (Off. Gazette 37/93). It noted that the amended version of Article 139 contained three paragraphs of which paragraph two was relevant to the issue of law raised in the instant case. This paragraph prescribed as follows:

"The perpetrator shall be punished by imprisonment for not less than ten years or by imprisonment of twenty years if in committing the act as under paragraph 1 of this Article the perpetrator premeditatedly took the life of one or several persons"

The Supreme Court held that the amended version set a threshold punishment for an accused person who committed a terrorist act with a premeditated intention to cause the death of one or several persons by that act. It held that it encompassed within its terms the distinct *mens rea* requirement of murder, i.e. that an accused intended by his acts to cause death. In applying this version of Article 139 the Supreme Court concluded that a court would be prohibited from additionally punishing an accused for any intended death caused by the act of terrorism as that element is identified within the threshold punishment set by Article 139.

- ***Did the amended version of the law apply in this case***

The Supreme Court then proceeded to consider UNMIK Regulation 2000/59, Section 1, Article 1.4 which prescribes that:

"In criminal proceedings, the defendant shall have the benefit of the most favorable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation"

It concluded that the accused was entitled to have the third amended version of Article 139 applied to him as the most favorable among the three versions of this law between 22 March 1989 and 27 October 2000.

In applying the amended version of Article 139, the Supreme Court held that the accused's intention to cause the death of all five occupants of the vehicle by his terrorist act, and the resultant one murder and four attempted murders of which the first instance court entered separate convictions was consumed within the application of Article 139 paragraph 2 read with paragraph 1 of this Article. The Supreme Court therefore acquitted him of the criminal act of murder and the four counts of attempted murder and it pronounced him guilty of terrorism pursuant to Article 125 in conjunction with amended Article 139 paragraph (2) and paragraph (1) of the FRY CC.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

Article 125 FRY CC on the criminal act of terrorism was amended by Articles 109-115 PKCC which contains provisions which criminalize terrorism and prescribes punishment for the criminal act.

CRIMINAL PROCEEDINGS GENERALLY

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

The term "criminal proceedings pending" has been given an extensive interpretation and applies to all criminal proceedings pending in any case before the courts of Kosovo, including investigations and appeals.

See the case outlined below.

Case against Lulzim Ademi

9 December 2002, Ap. 155/2001

Background facts

On 23 November 1999, the accused was indicted for war crimes against the civilian population pursuant to Article 142(1) FRY CC in conjunction with Article 22 FRY CC and murder pursuant to Article 30(2)(5) KCC in conjunction with Article 22 FRY CC and of illegal possession of weapons and ammunition pursuant to Article 199(3) KCC. After the indictment was filed, the accused escaped from custody. The accused was tried *in absentia* and was pronounced guilty of the offence of war crimes and illegal possession of weapons but was acquitted of the charge of murder. He was sentenced to an aggregate period of 20 years imprisonment.

Grounds of Appeal

Both the prosecution and the defense appealed the verdict on similar grounds. At the time the appeals against the contested verdict were pending at the Supreme Court of Kosovo, UNMIK Regulation 2001/1 on the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law as defined the FRY CC[5] and the Rome Statute of the International Criminal Court, was promulgated.[6] Section 4 prescribes that this Regulation "*shall enter into force on 12 January 2001 and shall apply also to criminal proceedings pending as of that date*."

The second Opinion of the Public Prosecutor's Office of Kosovo stated as follows:

"There is no question that our procedure here was "pending" on this date. That an appeal rather than trial or investigation was pending is significant, since the Regulation's use of the phrase "criminal proceedings" rather than "trials" must be given meaning, which is obviously to broaden the scope of the regulation's proscription;

[5] See Chapter XVI, Article 142 FRY CC.

[6] 8(2)(c)(i)1 of the Rome Statute of the International Criminal Court, 17 July 1998.

otherwise Section 4 would have had only the entry into force date. The fact that the drafters added the phrase, "and shall apply also to criminal proceedings pending" as of 12 January 2001, can only mean that the definition of "criminal proceedings" includes both appeals and investigations, which are not trials, but are therefore also" included.
Once this Regulation is applied to an appeal the only reasonable interpretation of the protection is that the Courts cannot allow a trial verdict of guilt done in absentia to be affirmed and stand, if it has jurisdiction over such a verdict while it is on appeal and thus not final. There is no other reasonable interpretation of the Section 4 requirement that it "shall apply also to criminal proceedings pending."

DECISION OF THE SUPREME COURT

The Supreme Court cited and endorsed the Prosecutor's interpretation of the words "*criminal proceedings pending*" as set out in section 4 of the UNMIK Regulation 2001/1 and held as follows.

The Supreme Court also held that as the offences of murder and illegal possession of weapons for which the accused was also tried, were intrinsically linked to war crimes charges and that the proscription under Regulation 2001/1 applied therefore to "*the entire factual gravaman"* under appeal. The verdict was cancelled and the case sent back for retrial with a direction that any determination as to the allegations and facts pleaded in the indictment must be postponed until such time as the accused was captured or voluntarily appeared before the trial court in connection with the indictment.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

UNMIK Regulation 2001/1 on the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law, Sections 1 and 4: It should be noted that the PCPCK does not make provision for trials in *absentia* for any criminal act.

THE VERDICT

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

A verdict must correspond to the requirements of Article 351, Paragraph 1, Item 1, of the Law on Criminal Procedure in that in a verdict declaring a defendant guilty the court must set out the following:

- ***pronounce the criminal act of which the defendant is found guilty;***
- ***cite the facts and circumstances which constitute the features of the criminal act; and***
- ***cite the facts and circumstances on which the application of the particular provision of the criminal law is relied on.***

The Court shall base its verdict solely on the facts and evidence presented in the trial;

The Court shall pronounce a verdict acquitting the accused of the charge if it has not been proved that the accused committed the criminal act for which he is charged;

See further the cases outlined below.

Case against Boban Momcilovic,
Mirolub Momcilovic and Jugoslav Momcilovic
25 February 2003, AP. 84/2001

Background facts
In January 2000, the three accused were indicted for murder in complicity pursuant to Article 30, paragraph 3 KCC and illegal possession of weapons pursuant to Article 199, paragraph 1 KCC. It was alleged in the Indictment that on 10 July 1999, the three Kosovo Serb accused, shot at three Kosovo Albanians, killing one of them and that they were illegally in possession of a quantity of weapons. All three accused were acquitted of murder but found guilty of illegal possession of weapons and were sentenced to one year of imprisonment.

Grounds of Appeal
The defense and the prosecution appealed the verdict on a number of grounds. They alleged a violation of the law on criminal procedure pursuant to Article 364, paragraph 1,

item 11 of LCP and a wrongful and incomplete establishment of the facts of the case. It was submitted that the accused had entered into lawful possession of the weapons in circumstances where they had been called up as reserve military troops, and had been issued with their weapons by the authorities in accordance with the Law on Army of Yugoslavia.

DECISION OF THE SUPREME COURT
The Supreme Court found that the verdict did not correspond to the requirements of Article 351, Paragraph 1, item 1 of the Law on Criminal Procedure and held as follows:

"in a verdict declaring a defendant guilty, the court must pronounce the criminal act of which the defendant is found guilty, along with a citation of the facts and circumstances which constitute the features of the criminal act and those on which the application of the particular provision of the criminal law depends."

In this regard the Supreme Court stated that while the court based its determination on the fact that weapons were found in the defendant's home and that the defendants did not have authorizations for the weapons, it failed to address the undisputed fact that the defendants were called up as reserve military troops during the armed conflict and that they had been issued with the weapons by the Serbian authorities in conjunction with their military service. It further held that the first instance court had failed to consider the law applicable on 10 July 1999 regarding weapons possession.

Case against Darko Radovanovic, Marko Radovanovic, Dragomir Radovanovic, Srdjan Lomigora and Bojan Hamzagic
22 August 2002, AP/KTZ-75/2002

Background facts
On 27 December 2002, the District Court of Mitrovicë/Mitrovica pronounced the first, second, third and fourth named accused guilty of aggravated theft pursuant to Article 135, Paragraph 1, item 1 KCC in conjunction with Article 22 FRY CC. The first accused Darko Radovanovic was also convicted of the criminal act of illegal possession of firearms and ammunition pursuant to Article 199, paragraph 3 KCC in conjunction with paragraph 1 KCC, as well as committing, in complicity with the second and fifth named accused the criminal act of aggravated theft pursuant to Article 135, paragraph 1, item 1 KCC in conjunction with Article 22 FRY CC. The accused were sentenced as follows: Darko Radovanovic to an aggregate sentence of two years and five months imprisonment; Marko Radovanovic to an aggregate sentence of ten months imprisonment; Dragomir Radovanovic to an aggregate sentence of six months imprisonment; Srdjan Lomigora to eight months imprisonment; and Bojan Hamzagic received a suspended sentence of six months imprisonment. The court rejected charges against the fifth named accused in relation to illegal possession of firearms and ammunition.

Grounds of Appeal
The defense and the prosecution appealed the verdict on a number of grounds. They alleged among other grounds of appeal, a violation of the law on criminal procedure and a wrongful and incomplete establishment of the facts of the case.

DECISION OF THE SUPREME COURT
In considering the grounds of appeal and analyzing the part of the verdict of the first instance court regarding the conviction of Darko Radovanovic pursuant to Article 199, paragraph 3 KCC, the Supreme Court found that the verdict did not correspond to the requirements of Article 351, paragraph 1 LCP, namely that in a verdict declaring a defendant guilty, the court must pronounce the criminal act of which the defendant is found guilty, along with a citation of the facts and circumstances which constitute the features of the criminal act and those on which the application of the particular provision of the criminal law depends.

The Supreme Court also held that *"the first instance court was obliged to show in its verdict the legal argumentation qualifying each of the objects found in possession of Darko Radovanovic as "weapons" that are prohibited without an authorization."* It held that in the instant case, in qualifying the criminal act under Article 199, paragraph 3 KCC, the first instance court failed to indicate, in both the enacting clause and the reasoning part of the verdict, the legal elements constituting the criminal act of illegal possession of weapons and ammunition and the circumstances under which paragraph 3 of Article 199 was applied. It further held that if the court considered that the accused had in his possession a large quantity of ammunition and that paragraph 3 of Article 199 applied, then it was necessary for it to assess the legal element of 'large quantity' by considering the number of illegally possessed weapons and ammunition, their fire power, their destruction potential and other features.

Case against Vyrtyt Miftari
4 September 2002 – AP-KZ 91/2002

Background facts
The accused was indicted for criminal acts of endangering general security pursuant to Article 157, paragraph 1 in conjunction with paragraph 3 KCC; Illegal Possession of Weapons and Explosive Material pursuant to Article 199 paragraph 3 KCC and terrorism pursuant to Article 125 FRY CC.

On 28 December 2001, the District Court of Gjilan pronounced the accused guilty of the criminal offence of illegal possession of weapons and endangering general security. He

was acquitted of the terrorism charges and was sentenced to an aggregate sentence of eight years imprisonment.

Grounds of Appeal
The defense appealed alleging an essential violation of the provisions of the criminal procedure law and violations of material criminal law.

DECISION OF THE SUPREME COURT
The Supreme Court in its reasoning made two references to the legal requirements in relation to the verdict. It held that *"The Court shall base its verdict solely on the facts and evidence presented in the trial"* pursuant to Article 347(1) of LCP and that "*The Court shall pronounce a verdict acquitting the accused of the charge … if it has not been proven that the accused committed the act he is charged with"* pursuant to Article 350 paragraph 3 of LCP.

The application of Article 350, paragraph 3 LCP is considered further on pages 35-36 which contains an analyses of the court of first instance's verdict.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

Similar provisions to those contained in Articles 347 and 351 LCP governing the verdict are contained in Chapter XXV, Articles 387 and 391 PCPCK.

EVIDENCE

THE STANDARD OF PROOF
In criminal proceedings the standard of proof, widely accepted by majority of jurisdictions, is to prove allegations beyond a reasonable doubt. The test for "proof beyond a reasonable doubt" is that the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from evidence, except that of guilt.

THE BURDEN OF PROOF
The burden of bringing evidence and proving the liability of the accused clearly lies with the prosecution and it arises from the principle of the presumption of innocence of the accused. Where the manner in which the first instance conducts criminal proceedings such that the burden of proof is placed on the defense, this violates the principle of the presumption of innocence and constitutes a grave infringement of the law on criminal procedure.

See further the cases outlined below.

Case against Vyrtyt Miftari
4 September 2002 – AP-KZ 91/2002

Background facts
On 1 March 2001, two TMA-3 anti-tank landmines were found in a store in Gjilan. The blast range of the explosives was 100 meters approximately but a team of KFOR defused the explosives just before they were supposed to detonate. The mines were allegedly placed in such a way that the explosion would bring not only massive destruction to the surroundings but also a general feeling of insecurity amount the population of the town.

Subsequent forensic evidence conducted on the mines identified the index fingerprints of the accused on the sticky part of the tape placed on the surface of the landmines. The accused was indicted for the criminal act of endangering general security pursuant to Article 157 KCC, illegal possession of weapons and explosive material pursuant to Article 199, paragraph 3 KCC and terrorism pursuant to Article 125 FRY CC.

On 28 December 2001, the District Court of Gjilan pronounced the accused guilty of the criminal offence of illegal possession of weapons and endangering general security because he had placed the bomb in the building. It held that although the accused did not succeed in provoking an explosion, his substantial attempt of placing the bomb in the building, constituted a dangerous act or dangerous means and fell within the ambit of endangering security as described in Article 157 KCC. However the court did not establish that the accused had in fact placed the bomb in the building, nor was there any evidence or reasoning which supported this charge.

The accused was acquitted of the charge of terrorism and was sentenced to an aggregated sentence of eight years imprisonment.

Grounds of Appeal

The defense appealed alleging an essential violation of the provisions of the law on criminal procedure and violations of material criminal law.

DECISION OF THE SUPREME COURT

- ***The Standard of Proof***

The Supreme Court analyzed the enacting clause and the reasoning part of the contested verdict and concluded that the first instance court had found the accused guilty of the criminal offence of endangering general security because he placed the bomb in a building. It found that the first instance court considered the "*substantial attempt*" of the accused to cause the explosion as falling under the ambit of "*any other general dangerous act or general dangerous means*" contemplated in Article 157 (1) of KCC and that this was clear from the enacting clause of the contested verdict, the district public prosecutor (in the filed indictment) as well as the opinion of the OPPK.

The Supreme Court held that in order for the first instance court to find the accused guilty of the criminal act of causing general danger, it should have established firstly that the accused did actually place the bomb in the critical building and that it had failed to do so. It found that there was no evidence advanced by the court to support charges under Article 157, paragraph 1 and that in its' reasoning the lower court had made clear that it had obvious doubts that the accused placed the bomb in the building in that it stated, *"So, it is obvious that the person who manufactured the bomb, as well as the person who placed the bomb, if different, have endangered the general security, caused a risk to human life or body or for a large volume of property."*

The Supreme Court concluded that legal practice has established that the court may not refer only to its' subjective conviction but is obliged to present and reason the established facts and to assess them, as a conviction may be based only on facts. It further held that the conclusions on important circumstances on which a verdict is based may not be the result of certain assumptions, but must ensue from clearly and undoubtedly established facts.

The Supreme Court concluded that the lower court had failed to prove with certainty that the accused was in fact the builder of the bomb. It held that in criminal proceedings the standard of proof widely accepted by a majority of jurisdictions was that allegations had to be proved beyond a reasonable doubt and that the test for proof beyond a reasonable doubt was that the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt.

The Supreme Court found that the only material evidence that the lower court had considered in finding the accused criminally liable for building the bomb was the A 3a fingerprint. It held that the rest of the conclusions rendered by the first instance court were based simply on deductions, which had no proving value in the face of the above-mentioned standard of proof.

- ***The Burden of Proof***

The Supreme Court therefore held that the *"wording of the contested verdict, clearly points out that the principle of the burden of proof resting with the prosecution …… was violated. Instead of proving the guilt of the accused with reliable evidence the court tried to place the burden of proof on him and inferred negative consequences for the accused because he did not prove his innocence, violating the principle of the presumption of innocence."*

The Supreme Court concluded that in applying the principle *in dubio pro reo,* the decisive fact in the case, namely the placing of the bomb, had not been established by the lower court, and therefore grounds for the acquittal of the accused from this charge, based on Article 350(3), applied.

It concluded that the first instance court had established beyond reasonable doubt only the fact that the accused was in possession of the two land mines at some point and that no other conclusions could be drawn from this finding.

Case against Radojica Lazic

6 March 2003, AP-KZ 248/2001

Background facts

On 22 November 2000, the accused was indicted for the criminal act of appropriation of a motor vehicle pursuant to Article 143 KCC and unlawful possession of weapons pursuant to Article 199 paragraph 3 KCC. At the main trial, which was held *in absentia,* on 1 June 2001, the Public Prosecutor withdrew the charges of unlawful possession of weapons. In relation to the charge of appropriation of a motor vehicle, it was alleged that during the war the accused had illegally taken a motor vehicle belonging to another person for the

purpose of driving it. After the war, the owner of the vehicle recognized the car in front of the accused's house and reported it to KFOR, who investigated the matter and determined that the ownership of the car belonged to the injured party. The accused in his defense claimed that he bought the body of the car for 150DM from a person named Dragan Stankovic, who allegedly was resident in Zeleznika Kolonia and that the latter had promised to provide the accused with the traffic license within seven days. The accused claimed that in the interim he installed an engine and tiers to the car to make it functional.

The accused was found guilty of the appropriation of the motor vehicle and was sentenced to one year of imprisonment.

Grounds of Appeal

The defense appealed the verdict contending that the District Court had not established completely and accurately the circumstances of the case and as a result had failed to properly and correctly apply the law.

DECISION OF THE SUPREME COURT

The Supreme Court found that the first instance court had not established completely and accurately the circumstances of the case and as a result had failed to properly and correctly apply the law. It held that while evidence has been adduced in the course of the main trial proceedings which had not refuted the testimony of the accused the first instance court had taken different standpoints, without giving persuasive explanations in support of its conclusion and falling short in clarifying the circumstance of the case, thus constituting a violation of the rules of criminal procedure. In this regard, the Supreme Court held that the first instance court had failed to consider the manner by which the accused had come into possession of the car. It further held that, while the contested verdict concluded that the accused had unlawfully appropriated the car, it did not provide any evidence to indicate that the defendant, on his own or in complicity with others had removed the car from the courtyard of the injured party, or knew that the car that he had come to possess had been illegally taken from the owner. Further, the Supreme Court found that the first instance court had made no attempt to summon Dragan Stankovic as a witness or to solicit his testimony in order to confront him with the claims of the accused.

The court concluded "*the manner in which the first instance court dealt with the allegations of the defense, violates the principle of presumption of innocence of the accused and places the burden of proof to the latter and this fact in itself constitutes a grave infringement of the rules of criminal procedure. The District Court has overlooked the status of the car in the moment when it came into possession of the accused The contested verdict endorses the claims that the accused has installed a new engine and tiers to the car. However, the District Court has given no merits to the claims of the accused that he bought only the car body, which [sic] he latter restored and made functional.*"

The Supreme Court found that the above facts were not only relevant in the context of the entire factual situation of the case, but also bore significant importance in the determination of the legal qualification of the criminal act.

Case against Milorad Blagojevic

2 April 2003 - AP-KZ 263/2002

Background facts

On 11 February 2002, the defendants were indicted with the criminal act of unlawful detention in violation of Article 63 paragraphs 4 and 5 of the Criminal Law of the Republic of Serbia (Count I), illegal detention in violation of Article 63 paragraph 1 of the Criminal Law of the Republic of Serbia (Count V), Robbery in violation of Article 137 of the Criminal Law of Kosovo (Count II, III, IV), causing general danger in violation of Article 157 paragraph 1 KCC (Count IV). On 18 October 2002, the trial panel issued its verdict and acquitted the accused of all charges on the basis that it found that there remained a reasonable doubt as to whether the accused committed the crime for which he was charged and ordered his immediate release.

Grounds of Appeal

The Prosecution appealed the decision on a number of grounds alleging a violation of the law on criminal procedure and an incomplete evaluation of the evidence.

DECISION OF THE SUPREME COURT

This Supreme Court founds that content of the evidence presented in the main trial by the prosecution was correctly reflected in the general evaluation of the evidence made by the first instance court and that the court was right in concluding that the evidence could not compromise the line of defense presented by the accused.

It held that the examination of the testimony of the four witnesses presented by the prosecutor allowed it to conclude that the assertion of the first instance court regarding the inexistence of sufficient credible evidence to compromise the line of defense and, sequentially, the application of the principle *in dubio pro reo*, was correct.

The Supreme Court held that any tendency to alleviate the burden of proof from the prosecutor and to shift it onto the court would lead to wrongful conclusions and violations of the adversarial principle of criminal proceedings. The court cited several recent judgments of the ECHR which held that the right to a "fair trial" entailed *inter alia* the right to adversarial proceedings.[7] It also held that this principle, contrary to the Opinion of the IPP of Kosovo, constitutes an integral part of the local criminal procedure legislation, is applicable throughout the criminal proceedings from the moment of the examination by the investigating judge of the prosecutor's request to start the

[7] *Mantovanelli v. France*, ECHR, 1997, Paragraph 33.

investigation till the end of the main trial and accordingly, must be observed by the courts (see in this sense Articles 67-1 and 2 LCP; 73-1 LCP; 166, 167-1, 2 LCP; 168-1, 2, 3, 4, 6, 8, 9 LCP; Article 218 LCP, article 327-1 LCP and other Articles).

The Supreme Court concluded as follows:

"The burden of bringing evidence and proving the liability of the accused clearly lies with the prosecutor (see Article 45-1 LCP) and it arises from the principle of the presumption of innocence of the accused (see Article 3 LCP and Article 6-2 of the European Convention of Human Rights). The obligation of the court to ensure the proper administration of justice during the criminal proceedings (Article 15 LCP) and its right (not obligation!) to call for new evidence (Article 322-5 LCP) in order to observe the same principle of proper administration of justice, has nothing to do with the rights and obligations of the parties in the proceedings. The court must be independent –"…notably of the executive and of the parties to the case"(see the Le Compte, Van Leuven and de Meyere judgment of the ECHR of 23 June 1981, paragraph55) and shall not undertake the obligations of the prosecutor (which is part of the executive authority) or of the defense, representing the accused."

Case against Ruzhdi Saramati
9 October 2002

In this case the Supreme Court also held that that the principle *in dubio pro reo* should be applied in full in criminal proceedings.

The facts of this case are discussed in full on page 13 of this Review.

THE COURT'S OBLIGATION TO ANALYSE THE EVIDENCE

The first instance court is obliged to analyze each piece of evidence individually and in connection with other evidence and, on the basis of that assessment, to frame a conclusion as to whether the facts have been proven. Failure to do so would amount to an essential violation of the law on criminal procedure.

Case against Milorad Blagojevic

2 April 2003 - AP-KZ 263/2002

Background facts

On 11 February 2002, the defendants were indicted with the criminal act of unlawful detention in violation of Article 63 paragraphs 4 and 5 of the Criminal Law of the Republic of Serbia (Count I), illegal detention in violation of Article 63 paragraph 1 of the Criminal Law of the Republic of Serbia (Count V), Robbery in violation of Article 137 of the Criminal Law of Kosovo (Count II, III, IV), causing general danger in violation of Article 157 paragraph 1 KCC (Count IV). On 18 October 2002, the trial panel issued its verdict and acquitted the accused of all charges on the basis that it found that there remained a reasonable doubt as to whether the accused committed the crime for which he was charged and ordered his immediate release.

Grounds of Appeal

The Prosecution appealed the decision on a number of grounds alleging a violation of the law on criminal procedure and an incomplete evaluation of the evidence.

DECISION OF THE SUPREME COURT

The Supreme Court held that in relation to the analyses of evidence "*The first instance court is obliged to analyze [all the] evidence individually and in connection with other evidence and, on the basis of that assessment, to frame a conclusion as to whether the fact has been proven (Article 347-2, LCP). Failure to do so would amount to an essential violation of the rules of criminal procedure "… if there is a considerable discrepancy concerning the decisive fact between what is cited in the grounds of the verdict concerning the content of documents or records, regarding testimony given in proceedings and those documents or records themselves."*

The Supreme Court founds that content of the evidence presented in the main trial by the prosecution was correctly reflected in the general evaluation of the evidence made by the first instance court and that the court was right in concluding that the evidence could not compromise the line of defense presented by the accused.

It held that the examination of the testimony of the four witnesses presented by the prosecutor allowed it to conclude that the assertion of the first instance court regarding the inexistence of sufficient credible evidence to compromise the line of defense and, sequentially, the application of the principle *in dubio pro reo*, was correct.

Case against Darko Radovanovic, Marko Radovanovic, Dragomir Radovanovic, Srdjan Lomigora and Bojan Hamzagic

22 August 2002, AP/KTZ-75/2002

Background facts

On 27 December 2002, the District Court of Mitrovicë/Mitrovica pronounced the first, second, third and fourth named accused guilty of aggravated theft pursuant to Article 135(1)(1) KCC in conjunction with Article 22 FRY CC. The first accused Darko Radovanovic was also convicted of the criminal act of illegal possession of firearms and ammunition pursuant to Article 199(3) KCC in conjunction with paragraph 1 KCC, as well as committing, in complicity with the second and fifth named accused the criminal act of aggravated theft pursuant to Article 135(1)(1) KCC in conjunction with Article 22 FRY CC. The accused were sentenced as follows: Darko Radovanovic to an aggregate sentence of two years and five months imprisonment; Marko Radovanovic to an aggregate sentence of ten months imprisonment; Dragomir Radovanovic to an aggregate sentence of six months imprisonment; Srdjan Lomigora to eight months imprisonment; and Bojan Hamzagic received a suspended sentence of six months imprisonment. The court rejected charges against the fifth named accused in relation to illegal possession of firearms and ammunition.

Grounds of Appeal

The defense in their appeal alleged essential violations of the provisions of the law on criminal procedure. In relation to the second charge of aggravated theft against the first, second and fifth accused, the defense contended that the first instance court had based its verdict exclusively on the confession of the fifth accused, without seeking other evidence to corroborate or refute his confession contrary to Article 323 LCP. It thereby submitted that the court had convicted the accused mainly on assumptions and not on the basis of direct and reliable evidence.

DECISION OF THE SUPREME COURT

The Supreme Court reaffirmed the obligation of the court to follow the procedure set down in Article 347, paragraph 2 LCP and to conscientiously evaluate each piece of evidence individually and in connection with the other evidence and on the basis of that assessment to frame conclusions as to whether the facts had been proved. It held that analyses of the testimony in the instant case did not support the first instance court's

conclusion of guilt. It further held that the verdict of the first instance court regarding the participation of the defendants in the theft of the car was based on doubtful deductions lacking well corroborated evidence that proved the guilt of the first three defendants beyond a reasonable doubt.

In conclusion, the Supreme Court considered that the verdict of the first instance court regarding the participation of the defendants Marko Radovanovic, Dragomir Radovanovic and Srdjan Lomigora along with Darko Radovanovic in the theft of the car was based on doubtful deductions lacking well corroborated evidence that proved the guilt of the first three defendants beyond a reasonable doubt and that accordingly, the verdict must be quashed. It highlighted the obligation on the first instance court in assessing the evidence that all doubts are required to be interpreted in conformity with the principle "*in dubio pro reo*" in favor of the defendants.

Case against Negovan Filipovic

20 January 2003 – PKR 10/2002

Background facts

The accused was indicted for the criminal act of trafficking in persons contrary to Section 2.1 of UNMIK Regulation 2001/4. On 11 April 2001 he was pronounced guilty as charged and sentenced to a term of two and a half years imprisonment.

Grounds of Appeal

The defense filed an appeal and one of the grounds on which it based its appeal was that at the main trial, the testimony of the victim witnesses, Danijela Mladenovic did not support a finding of trafficking in persons against the accused pursuant to Section 2.1 of UNMIK Regulation 2001/4. It also submitted that her statement was not corroborated and that her testimony and the testimony of the other witnesses was not credible because they admitted to being prostitutes and were therefore women of immoral character.

DECISION OF THE SUPREME COURT

The Supreme Court considered the documents on the court file and in particular the statement of Danijela Mladenovic on February 20, 2002 in which she stated:

"… I was working with him until February 2001. We lived in his cellar and split earnings into two halves. We used to work in vehicles and he used to take 25 DM to cover costs for the condoms. I was beaten quite a lot but it was because of love."

It held that it was clear that the defendant harbored the injured party because she lived in his basement, exploited her because he took half of her earnings, and that the defendant used to beat her, as she stated further in her testimony, on several occasions. On this basis

the Supreme Court found that the statement of Danijela Mladenovic contained all the elements of trafficking in persons as defined by Section 2.1 of UNMIK Regulation 2001/4.

The Supreme Court rejected the defense's contention that the specific testimony of Danijela Mladenovic was not corroborated. It found that her testimony was corroborated by the testimony of witnesses Zlatka and Suncica who gave an identical account of events to hers in their evidence.[8]

The Supreme Court dismissed the defense's contention that the injured parties' testimony was not credible because they had admitted to being prostitutes and were thus according to the defense women of immoral character. It held found such an argument to be of no merit and concluded that the fact that the three witnesses were prostitutes and had admitted this in Court did not affect negatively the credibility of their testimonies which, were well corroborated with each other.

Photo Line up Evidence

The taking of photo-line-up evidence must be carried out in compliance with the law on criminal procedure.

See the case outlined below.

Case against Ruzhdi Saramati
9 October 2002

Background facts

The accused was indicted for the criminal act of murder pursuant to Article 30, paragraph 2, item 6 KCC in conjunction with Article 19 FRY CC, grave bodily injury pursuant to Article 38, paragraph 2 KCC, unlawful possession of weapons and explosive substances pursuant to Article 199, paragraph 1, item 3 KCC, light bodily injury pursuant to Article 39, paragraph 2 KCC and violent behaviour pursuant to Article 190, paragraph 2 KCC. On 23 January 2002, the first instance court found the defendant guilty of attempted

[8] The Supreme Court held that "*Their statements corroborate in respect to the split of the earnings and the reason for it, to the description of the cellar, the names of other people involved in the prostitution, of the arrangement of the prostitution activities etc. It is true that no witness corroborates the specific day or date from 12th of January to early February, but that is not necessary because Zlatka and Suncica corroborated Danijela's testimony as to the specifics, and that the criminal activity took place within this period, which is appropriately used by the first instance court to establish the guilt of the defendant*."

murder. He was acquitted of the charge of grave bodily injury and the court rejected the other charges.

The only evidence upon which the first instance court relied in pronouncing the accused guilty of attempted murder was the testimony of the injured party/witness, Muamer Alija given before the investigating judge[9] in the absence of the accused or his defense counsel and the public prosecutor and a statement given before the international presiding judge of the trial panel and the district public prosecutor at a trial session held in Belgrade[10] in the absence of the accused and his defense counsel.

Additionally, there had been two photo-line-ups during the course of the proceedings. The first photo-line-up took place in 1996 and the witness stated thereafter that "*that person had characteristic features*" and that he recognized the accused on photo No. 3 because "*he had light hair"*. However the photos used during the line-up were in black and white, thus rendering it is impossible to distinguish the color of the hair. The second photo-line-up was held on 17 December 2001 at which the witness stated that he could not describe any characteristics of the person but the presiding judge, notwithstanding this went ahead with the procedure. In its verdict the first instance court tried to explain the negative results of the second identification procedure by lack of interest of the witness in the case and by the passage of a long time from the events in 1992.

Grounds of Appeal

The defense appealed the verdict alleging a violation of the Law on Criminal Procedure.

DECISION OF THE SUPREME COURT

The Supreme Court held that in organizing of the second photo-line-up during the interrogation and using afterwards the results of this action as evidence, the court of first instance did not proceed in strict conformity with the requirements of Article 233 LCP. It noted that before the photo-line-up on 17 December 2001, the witness clearly stated that he "*…cannot describe any characteristics of that person…*". The Supreme Court held that in such a situation, according to the law, it is not permitted to proceed further with the identification procedure but that nevertheless, the presiding judge went on with this procedure (and this lead to a foreseeable result: the witness was not able to identify categorically the alleged perpetrator). The Supreme Court deemed it necessary to note the fact that before the first photo-line-up in 1996, the witness stated that "*that person had*

[9] At the hearing before the investigating Judge on 25 October 1996, the injured party/witness stated the following, *"That person had characteristic features. He had light hair and very particular features, so that I immediately recognized him on the photograph from the criminal records and than it was established that the person in question was Saramati Ruzhdi who had been previously arrested by the police."*

[10] *"The second statement was given on December 17, 2001 and the witness stated that: "I cannot describe any characteristics of that person although I have seen his face only over the barrel of my gun when I turned to shoot at him and him at me. I see 8 colored photographs after this long period of time. I cannot say for sure whom it was but I can exclude the person as 5th in this collection definitely and probably No 3 could be but I am not sure – certain. …… With Ruzhdi Saramati, I had no any contact before and after the event. The only contact with him was during the shooting. The person who wounded me I did not know his name. At the moment of shooting I did not know anything about his name or ethnicity."*

characteristic features" and recognized the accused on photo No. 3 because "*he had light hair"*. However it noted that because the photos used during the line-up were in black and white, it is impossible to distinguish the color of the hair and that instead of clarifying the existing contradictions and uncertainty of the results of this important procedure, the first instance court tried to explain the negative results of the identification process from 17 December 2001 by lack of interest of the witness in the case and by the passage of a long time from the events in 1992.

The Supreme Court held that this explanation of the first instance court could not in any way deny the fact that the witness did not identify the accused with certainty and that the result of the identification procedure is in contradiction with the results of the same procedure back in 1996.

The Supreme Court concluded that the acceptance of legally questionable evidence from the first investigation proceedings as well as the questionable results of the identification procedure together with other shortcomings (considered under the heading 'The right of the accused to examine or have examined witnesses against him') rendered the whole proceedings as unfair. It had no difficulty in holding that the rights of the accused under Article 168 paragraph 4, Article 327, LCP and Article 6 paragraphs 1 and 3(d) of the European Convention on Human Rights were violated and that in conformity with Article 364 paragraph 1, item 8 and paragraph 2 LCP, it held that the verdict could not stand and that the case must be retried.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

The right and duty of the prosecutor to prosecute as contained in Article 45, paragraph 1 LCP is now contained in Article 46 PCPCK.

The duty on the court to analyze each piece of evidence pursuant to Article 347, paragraph 2 LCP is now set down in Article 387, paragraph 2 PCPCK.

The Article 233 LCP governing the procedure to be followed when taking photo line up evidence is now prescribed in Article 255 PCPCK which sets down the procedure for governing the identification of persons and objects.

TRIALS IN ABSENTIA

The extent of the application of UNMIK Regulation 2001/1 on the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law

See further the case outlined below.

Case against Lulzim Ademi

9 December 2002, Ap. 155/2001

Background facts

On 23 November 1999, the accused was indicted for war crimes against the civilian population pursuant to Article 142, paragraph 1 FRY CC in conjunction with Article 22 FRY CC and murder pursuant to Article 30, paragraph 2, item 5 KCC in conjunction with Article 22 FRY CC and of illegal possession of weapons and ammunition pursuant to Article 199, paragraph 3 KCC. After the indictment was filed, the accused escaped from custody. The accused was tried *in absentia* and was pronounced guilty of the offence of war crimes and illegal possession of weapons but was acquitted of the charge of murder. He was sentenced to an aggregate term of 20 years imprisonment.

Grounds of Appeal

Both the prosecution and the defense appealed the verdict on similar grounds. At the time the appeals against the contested verdict were pending at the Supreme Court of Kosovo, UNMIK Regulation 2001/1 on the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law as defined the FRY CC[11] and the Rome Statute of the International Criminal Court, was promulgated.[12] Section 4 prescribes that the Regulation "*shall enter into force on 12 January 2001 and shall apply also to criminal proceedings pending as of that date*." The second Opinion of the Public Prosecutor's Office of Kosovo stated that the definition of "criminal proceedings" in the UNMIK Regulation included appeals and that the accused should have benefited during the main trial from the protection afforded by UNMIK Regulation 2001/1 and should not have been tried for war crimes *in absentia*:

"There is no question that our procedure here was "pending" on this date. That an appeal rather than trial or investigation was pending is significant, since the Regulation's use of the phrase "criminal proceedings" rather than "trials" must be given meaning, which is obviously to broaden the scope of the regulation's proscription; otherwise Section 4 would have had only the entry into force date. The fact that the

[11] See Chapter XVI, Article 142 FRY CC.
[12] 8(2)(c)(i)1 of the Rome Statute of the International Criminal Court, 17 July 1998.

drafters added the phrase," and shall apply also to criminal proceedings pending" as of 12 January 2001, can only mean that the definition of "criminal proceedings" includes both appeals and investigations, which are not trials, but are therefore also" included. Once this Regulation is applied to an appeal the only reasonable interpretation of the protection is that the Courts cannot allow a trial verdict of guilt done in absentia to be affirmed and stand, if it has jurisdiction over such a verdict while it is on appeal and thus not final. There is no other reasonable interpretation of the Section 4 requirement that it "shall apply also to criminal proceedings pending."

DECISION OF THE SUPREME COURT

The Supreme Court cited and endorsed the Prosecutor's interpretation of the words "*criminal proceedings pending*" as set out in section 4 of the UNMIK Regulation 2001/1 in relation to the trial of the accused for war crimes. The Supreme Court also held that as the offences of murder and illegal possession of weapons for which the accused was also tried, were intrinsically linked to the war crimes charges, and that the proscription under Regulation 2001/1 therefore applied to the "*entire factual gravaman"* under appeal.

The verdict was cancelled and the case sent back for retrial with a direction that any determination as to the allegations and facts pleaded in the indictment must be postponed until such time as the accused was captured or voluntarily appeared before the trial court in connection with the indictment.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

UNMIK Regulation 2001/1 on the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law, Sections 1 and 4; It should be noted that the PCPCK does not contain provisions permitting trials in *absentia* for any criminal act.

CITATION OF FOREIGN JURISDICTIONS

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

While citations from foreign jurisdictions, other than from the jurisdiction of the European Court of Human Rights, is not in the line with the principles of the Kosovo Civil Law system, where the principles set out in these foreign citations are applicable in Kosovo by virtue of their having been enshrined into the domestic procedural law, as well as by virtue of the application of the European Convention of Human Rights, they may be relied upon.

See the case outlined below.

Case against Milorad Blagojevic
2 April 2003 - AP-KZ 263/2002

Background facts

On 11 February 2002, the accused were indicted for the criminal act of unlawful detention in violation of Article 63 paragraphs four and five of the Criminal Law of the Republic of Serbia; illegal detention in violation of Article 63 paragraph 1 of the Criminal Law of the Republic of Serbia; Robbery in violation of Article 137 of the Criminal Law of the Socialist Autonomous Province of Kosovo; causing general danger in violation of Article 157 paragraph 1 KCC. On 18 October 2002, the trial panel issued its verdict and acquitted the accused of all charges. The trial panel cited a quotation from the jurisprudence of the Canadian courts in the verdict, namely that *"the rules issued by Mr. Justice Brian Dickson from the Supreme Court of Canada should be respected and followed in … sequential order."*

Grounds of appeal

The prosecution drew the attention of the court during the appellate proceedings to the fact that the verdict contained a quotation from Canadian case law. It was submitted that *"The entire verdict contains standards, burdens and criteria that simply do not apply in Kosovo. This is an absolute misstatement and misunderstanding of the applicable law in Kosovo."* It was contended that the contested verdict amounted to a wrongful application of the criminal law and to an essential violation of the law on criminal procedure pursuant to Article 365, paragraph 4 and Article 364, paragraph 2 LCP.

DECISION OF THE SUPREME COURT

While the Supreme Court considered that the citation of cases from foreign jurisdictions, other than from the jurisdiction of the European Court of Human Rights, was not in line with the principles of the Kosovo Civil Law system, it considered nonetheless, that the quotation from the Canadian jurisprudence related to values incorporated into the applicable law and which were well-known principles of law i.e. "*in dubio pro reo*" that the burden of proof lies with the Prosecutor.

It held that these principles were applicable in Kosovo due to their having been enshrined into the domestic procedural law, as well as by virtue of the application of the European Convention of Human Rights.

SENTENCING

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

Where a defendant is sentenced to a punishment, the verdict shall cite the circumstances the court took into consideration in determining the punishment. Further the court is required to specifically present the reasons which guided it when it found that the punishment should be mitigated.

See the cases outlined below.

Case against Mirsad Jashari and Syle Jashari

18 November 2003 – AP-KZ 139/2003

Background facts

On 5 November 2001, the two accused were indicted for the criminal act of murder in complicity pursuant to Article 30, paragraph 2, item 3 KCC. It was alleged that they shot and seriously injured Hajro Kozhar on 3 October 2001 as revenge for his having shot and seriously injured their brother. Subsequently an order was granted separating the case of Mirsad Jashari from Syle Jashari's pursuant to Article 33, items 1 and 2 LCP as the latter was undergoing neuro-psychiatric treatment. The first named accused, Mirsad Jashari was convicted pursuant to Article 30, paragraph 2, item 3 KCC and sentenced to five years and seven months imprisonment.

Grounds of Appeal

The defense appealed the decision of the first instance court on a number of grounds, including that the sentence imposed on the accused was erroneous. They argued that the first instance court had failed to take into account the extenuating circumstances, which existed in the case.

DECISION OF THE SUPREME COURT

The Supreme Court considered the extenuating circumstances which were as follows:

- the age of the accused at the time of the commission of the criminal act;
- the fact that the accused was the sole breadwinner in the family;
- that fact that the accused's brother was undergoing treatment in a neuro-psychiatric clinic;
- the fact that the accused's older brother was paralyzed; and

- the accused had obviously committed the criminal act under the influence of his older brother.

On the basis of this consideration the Supreme Court conceded that that a penalty of four years of imprisonment was sufficient to achieve justice in the case.

Case against Vyrtyt Miftari

4 September 2002 – AP-KZ 91/2002

Background facts

The accused was indicted for criminal acts of endangering general security pursuant to Article 157, paragraph 1 in relation to paragraph 3 KCC, Illegal Possession of Weapons and Explosive Material pursuant to Article 199, paragraph 3 KCC and Terrorism pursuant to Article 125 FRY CC.

On 28 December 2001, the District Court of Gjilan pronounced the accused guilty of the criminal offence of illegal possession of weapons and endangering general security. He was acquitted of the terrorism charge and was sentenced to an aggregated sentence of eight years imprisonment.

Grounds of Appeal

The defense appealed alleging an essential violation of the provisions of criminal procedure and violations of material criminal law.

DECISION OF THE SUPREME COURT

The Supreme Court referred to the provisions of Article 357, paragraph 8 LCP and held that where a defendant is sentenced to a punishment, the verdict should cite the circumstances which the court took into consideration in determining punishment and that it should "*specifically present the reasons which guided it when it has found that … punishment should be mitigated…*" .

The Supreme Court found that the first instance court had justified its decision on the sentence imposed on the basis of "……*the dangerous character of a person being able to make bombs, but also the young age of the defendant*" and that this was the only reasoning that it had provided in rendering an aggregated punishment of eight years of imprisonment. It held that in light of the new findings (the acquittal of the accused from charges of the criminal offence of Endangering General Safety, the fact that the accused was held liable pursuant to Article 199, paragraph 3 KCC in relation to paragraph 1 only with regard to the two TMA 3 anti – tank landmines, the finding that the first instance court had not been able to establish that the accused was indeed the constructor of the bomb and the one who placed the bomb in the critical building, as well as in light of the mitigating circumstances that the accused is of a young age and that he had no previous

criminal convictions) a lessened sentence of 4 (four) years of imprisonment instead of the 6 (six) years pronounced by the district court, would meet the requirements of the law set out in Articles 5 and 33 of the Criminal Code of SFRY.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

Similar provisions to that contained in Article 357, paragraph 8 LCP governing the contents of the verdict where an accused is sentenced to a punishment are to be found in Article 396, paragraph 8 PCPCK.

CAPITAL PUNISHMENT

PRINCIPAL FINDINGS OF THE SUPREME COURT OF KOSOVO

For each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty is a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years.

Note: see further the case outlined below.

Case against Roland Bartetzko

12 October 2002 – AP-KZ 181/2002

Background facts

The accused was charged with the criminal offence of murder pursuant to Article 30, paragraphs 1 and 2, items 1, 3 and 6 and paragraph 3 KCC; four counts of attempted murder pursuant to Article 30, paragraphs 1 and 2, items 1, 3 and 6 and paragraph 3 KCC in relation to Article 19 FRY CC; inflicting grave bodily injury pursuant to Article 38, paragraph 1 and 2 KCC, several counts of attempting to inflict grave bodily injury pursuant to Article 38, paragraphs 1 and 2 KCC in relation to Article 19 YCC and terrorism pursuant to Section 2.2 of UNMIK Regulation 2001/22.

On 10 May 2002 the court of first instance found the accused guilty of one criminal offence of attempted murder, four counts of attempted murder and one act of terrorism. He was sentenced to eighteen years of imprisonment for the offence of murder, twelve years of imprisonment for each of the four counts of attempted murder and twenty years of imprisonment for the criminal act of terrorism. The court pronounced an aggregate sentence of twenty three years of imprisonment.

Grounds of Appeal

The defense appealed the verdict on a number of grounds pleading an essential violation of the criminal procedure law in relation to the question of the punishment of the accused, a violation of the criminal law and a wrongful and incomplete establishment of the facts.

DECISION OF THE SUPREME COURT

- ***Application of Section 1.6 of UNMIK Regulation 2000/59 to the facts of the instant case***

Regarding the question of punishment the Supreme Court noted that the first instance court sentenced the accused to eighteen years for murder, twelve years for each of the four attempted murders, and twenty years for the act of terrorism and that it then imposed an aggregated sentence of twenty-three years imprisonment. It found that the first instance court had correctly interpreted the provisions of UNMIK Regulation 2000/59, Section 1.6 which prescribed that "*for each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years"*.

The Supreme Court held that the court of first instance had correctly determined that this provision was applicable and that an act of terrorism pursuant to Articles 125, and 139 FRY CC could be punished with a term of up to forty years. It held that this determination was correct because on 22 March 1989 the offence of terrorism was punishable by death penalty and the act of terrorism in this case was committed after the date upon which Article 1.6 of Regulation 2000/59 became applicable.

- ***A special penalty of up to 40 years imprisonment replaced the death penalty abolished by Article 1.5 of UNMIK Regulation 1999/24.***
  The Supreme Court held that prior to the enactment of UNMIK Regulation 2000/59 UNMIK Regulation 1999/24, Article 1.5 abolished the death penalty but that that Regulation did not identify any other special penalty as a replacement for the death penalty. It considered that Article 1.6 of UNMIK Regulation 2000/59, which was the only amendment introduced to the text of UNMIK Regulation 1999/24 was intended to eliminate this shortcoming by the introduction of a special penalty of up to 40 years imprisonment as a replacement for the death penalty. It also noted that Section 4 of UNMIK Regulation 2000/59 stipulated that Article 1.6 applied only to crimes committed after 27 October 2000. The Supreme Court concluded that as the act of terrorism in this case was committed on 18 April 2001, Article 1.6 was applicable in the instant case.

  It also found that such an interpretation had the benefit of being consistent with UNMIK Regulation 2000/12 "On The Prohibition of Terrorism and Related Offences" which came into effect on 14 June 2001. Section 2.2 of that Regulation prescribes that *"Any person who commits an act of terrorism resulting in death shall be liable upon conviction to imprisonment for ten (10) to forty (40) years."*

  The Supreme Court concluded that to allow the intention of the legislature it must be made clear that Article 1.6 of Regulation 2000/59 is applicable to all types of offences which were committed after the enactment of this Regulation on 27 October 2000 and where the capital punishment was available on 22 March 1989, and that the maximum penalty for those offences is now forty years.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

The new Provisional Criminal Codes of Kosovo do not prescribe capital punishment for any offence. Note also that Article 109-115 PKCC now contain provisions which criminalize terrorism and prescribes punishment for the commission of this criminal act.

EXECUTION OF FOREIGN JUDGMENTS/ VERDICTS

There are three principle conditions that should be established by a court before it can rule on the enforcement of a foreign verdict pursuant to Article 520(2):

- ***the Court must be satisfied that the original verdict is an "effective verdict" which was rendered in accordance with Article 6 ECHR governing international fair trial standards;***
- ***the execution of judgments must be "envisaged by an international treaty" in that there is an agreement in writing between the two entities or nations and governed by international law; and***
- ***that the sanction contained in the judgment may also be pronounced by the domestic court according to the applicable criminal legislation of the Socialist Federal Republic of Yugoslavia.***

Where a foreign judgment is being recognized or executed there cannot, as a general rule, be a re-opening of the proceedings in merito.

See the case outlined below.

Case against Xhavit Hasani

16 September 2003 - Ap. Nr. 209/2002

Background facts

The accused, Xhavit Hasani (also known as Asan Xavid) was charged in Macedonia with the attempted murder and unlawful possession of firearms. In a subsequent case, he was charged with the criminal offence of falsifying a document. In relation to the first case, he was pronounced guilty in April 2001 and sentenced to a total sentence of 13 years imprisonment and in the second case he was convicted in October 2001 and sentenced to 2 years imprisonment. The accused was present only during the investigative hearings in both cases and failed to attend the main trial. He was tried *in absentia* but was represented at all times by defense counsel.

Subsequently, on 20 March 2002, the accused was detained in Kosovo by American KFOR and was held in COMKFOR custody at Camp Bondsteel. By letter dated the 6 June 2002 the Director of the Public Security Bureau of Macedonia requested that the

UNMIK Administration in Kosovo, through its Director of the Department of Justice, "… *undertake appropriate and urgent legal proceedings against the individual Xavid Asan"* in respect of the outstanding convictions and sentences referred to above.[13]

In a letter dated the 14 June 2002, the Special Representative of the Secretary General (SRSG) in Kosovo, indicated that proceedings for the execution of the outstanding convictions and sentences in Kosovo might be possible, but that an international agreement between the UNMIK Administration in Kosovo and the Republic of Macedonia was necessary prior to the issue being considered by a competent Court in Kosovo, pursuant to Article 520 LCP. The SRSG invited the Republic of Macedonia to indicate its agreement to his proposals by letter, and thereby to establish an appropriate international agreement, in order that the matter could be placed in the hands of an international prosecutor in Kosovo with a view to a decision being made by the court. In his letter of reply dated 17 June 2002, the Minister of Foreign Affairs of the Republic of Macedonia confirmed that he was in agreement with the proposals contained in SRSG's letter of 14 June 2002.

On the 19 June 2002 the Special Representative of the Secretary General in Kosovo, pursuant to UNMIK Regulation 2000/64, directed that a panel of judges should be authorized to hear the matter of the execution in Kosovo of the verdicts passed on by the foreign Court, and to determine any related matters, including any related appeals. On the 20 June 2002, the Director of the Department of Justice appointed international judges to hear this case.

The panel of judges ruling upon a petition of the International Public Prosecutor of the District Court of Gjilan, dated the 18 June 2002, and acting upon a request of the Republic of Macedonia, for the execution in Kosovo of the two foreign judgments, enforced the Judgments of the Court of Macedonia by convicting the defendant in accordance with those judgments. The court in passing the sentence as contained in the judgments, of 13 years in respect of the first trial and 2 years in respect of the second trial, combined the sentences pursuant to Articles 48 Para 2 item 3 and 49, paragraph 1 FRY CC.

Grounds of Appeal

On 13 August 2002 the defense filed an appeal against the decision of the District Court of Gjilan dated 20 June 2002 on the grounds that the decision violated the provisions of the applicable Criminal Procedure, that there was a wrongful and incomplete assessment of the facts and that the Court erred in making a decision on the sentence.

In relation to the defenses contention that there had been a violation of the Provisions of the Criminal Procedure in deciding on the sentence, it was alleged that the decision ordering that the defendant serve his sentence in Kosovo amounted to the Court in effect,

[13] The relevant Court files were enclosed with the request, and were available in both Macedonian and English. By a declaration dated the 14 June 2002, made by the Under-secretary of the Criminal Police of the Ministry of the Interior, Republic of Macedonia, it was formally confirmed that Xhavit Hasani and Asan Xavid were one and the same person and this fact was never contested or disputed.

enforcing a judgment of a foreign court pursuant to Article 520 LCP, and that the Court had no competence to implement the request of the Macedonia Court pursuant to this Article.

The defense contended that the court of first instance could not, pursuant to Article 520 LCP, modify the sentence imposed by the court in Macedonia, in that the application of Art. 520 required that the Court either accept the foreign judgment in its entirety and thereby transpose it into the Court's legal judgment or completely reject the judgment. It was submitted that by computing the sentence to a unified term of 14 years, the Court was in violation of the provisions of Article 520 LCP as the Court in Macedonia had imposed a thirteen (13) year sentence in the first trial and a two-year sentence in the second trial. The defense also argued that the Court had erred in applying Yugoslav law to determine the issues in the case, in that FYR of Macedonia was a sovereign independent state which had broken away from Yugoslavia, that Kosovo was administered by UNMIK, and that Yugoslav law was no longer applicable to the case.

DECISION OF THE SUPREME COURT

- ***There are three principle conditions that should be established before the Court could rule on a foreign verdict***

  The Supreme Court held that there were three principle conditions that should be established before the Court could rule on a foreign verdict according to Article 520(2).

  The Court must be satisfied that the original verdict is an "effective verdict"

  In this regard the Supreme Court had no hesitation in concluding that both verdicts were "effective verdicts" due to the fact that there was nothing further for the Macedonian Court to do in either case in order to complete the trials and it noted that the verdicts bore evidence of the dates on which they became effective.

  The Court must also satisfy itself that the original decision was rendered in accordance with Article 6 ECHR.

  In this regard, the Supreme Court noted that while such rights under the ECHR include the right to be present at his trial, the accused waived those rights by his willful conduct in absconding after having initially appeared in both proceedings. It found that as the District Court noted the defendant was present for all evidentiary proceedings in his first trial and while this was not the case for the second trial, the Supreme Court noted that the defendant had notice of the proceeding, that he initially appeared and gave his statement to the Court, was permitted to be at liberty and deliberately and willfully refused to attend the proceeding. The Supreme Court held that the Court in Macedonia made an appropriate inquiry regarding the defendant's absence and was justified in concluding that the whereabouts of the defendant could not be established and that he was 'inaccessible to justice'. It also noted that the defendant was represented by counsel throughout this proceeding. It concluded that under similar circumstances the LCP permitted trial in absentia. [LCP Art. 300(3)]

and that while the better practice would have been to warn a defendant at the start of proceedings that the proceedings may go ahead in his absence should he fail to attend, there is no requirement in the law that such warnings be given.

The execution of the convictions and sentences must be "envisaged by an international treaty".
The Supreme Court noted that there was no definition of an "*international agreement*" in the domestic legislation of Kosovo but that Article 2.1(a) of the Vienna Convention on the Law of Treaties of May 23, 1969 envisaged the term "international agreement" as relating to an agreement contained in a single instrument or two or more related instruments "*and whatever its particular designation*". The Supreme Court considered an international agreement in this context as akin to a treaty, in the sense that it was an agreement in writing between two entities or nations and governed by international law.

In this regard the Supreme Court held that UN Security Council Resolution 1244 (UNSC 1244) prescribed for the administration of Kosovo and vested authority to do so on the Secretary General or his representative. It held that the threshold question was whether, under the terms of UNSCR 1244, the SRSG was authorized to enter into a treaty to permit the courts of Kosovo to execute an outstanding conviction of a foreign court. The Supreme Court noted that the ultimate status of Kosovo had yet to be resolved and that the status of Kosovo was unique in the international community. It noted that "*the entire of Kosovo is being administered and governed by the United Nations through the SRSG, who has without question has been granted sweeping powers by the Security Council*" and it found that these powers had been granted with the express directive that the SRSG maintain civil law and order. It noted that the particular treaty involved here was one for mutual assistance in the area of transnational criminal law and that such agreements for mutual assistance were recognized as being necessary to maintain and preserve international legal order in accordance with the general principle of international law embodied in the UN Charter. The Supreme Court concluded that the exercise of this power by the SRSG was clearly within the mandate given to him in '*maintaining civil law and order'*. For these reasons the Supreme Court held that in connection with this particular agreement, the SRSG was authorized to enter into this undertaking and the exchange of letters between UNMIK and FYROM thus constituted a valid international agreement.

The verdict may only be executed "if the sanction is also pronounced by the domestic Court according to the criminal legislation of the Socialist Federative Republic of Yugoslavia".
In pursuance of this limb the Supreme Court noted that the District Court of Gjilan pronounced the sentence. The Supreme Court then proceeded to deal with the defense's contention that the court of first instance had erred in applying Yugoslav law to determine the issues in this case, arguing that the FYR of Macedonia is a sovereign independent state, which had broken away from Yugoslavia; and also that Kosovo is administered by UNMIK and that Yugoslav law was no longer applicable.

The Supreme Court found this argument to be without foundation and held that it flew in the face of UNMIK/REG/1999/24 as amended by UNMIK/REG/2000/59, which effectively made the laws in force in Kosovo on 22 March 1989 still applicable in Kosovo in so far as the same was not discriminatory. It concluded that *"there is no doubt that in 1989 Yugoslav law was the operative law in Kosovo and therefore can still be invoked in the Kosovo Courts today."*

- ***Whether the first instance court was entitled to decided on the issue of the sentence independent of the sentence imposed by the foreign Court***

  The defense submitted that the first instance court could not, pursuant to Article 520 LCP, decide on the issue of the sentence independent of the sentence imposed by the foreign Court. The Supreme Court considered that the import of this argument was that in relation to the application of Article 520, the first instance court should either have accepted the foreign judgment in its entirety, including the sentence imposed and thereby transposed it into the Court's judgment, or otherwise it should have rejected the judgment entirely and that by computing the sentence to a unified term of 14 years, the Court was in violation of the provisions of Article 520 LCP.

  The Supreme Court concluded that in a situation where a foreign judgment is being recognized or executed there cannot, as a general rule, be a re-opening of the proceedings *in merito* and that the panel of the District Court of Gjilan, had affirmed this principle in the verdict in its consideration of the scope of proceedings under Article 520 LCP.

  The Supreme court noted that even though the enforcement of a foreign judgment is a relatively strict regime whether under the civil or common law system, this does not necessarily mean that this is an all or nothing issue and that the defense's presumed contention that you must either accept the foreign judgment in its entirety or reject it in its entirety was not the case. It noted the defense's contention that the computations of a unified term of sentence by the District Court of Gjilan went further than is provided for or permitted by the Article 520 LCP and concluded that the panel of Judges of the District Court of Gjilan had not violated the principle that foreign proceedings may not be re-opened on merits. It held that they had not re-opened the proceedings nor had they altered the verdict of the foreign proceedings in the case. Rather, the panel simply pronounced a unified term of sentence so as to comply with the local law and thereby ensure that the sentence could become effective in the jurisdiction of Kosovo. The Supreme Court noted that by substituting a unified term as required by Articles 48, paragraph 2, item 3 and Article 49, paragraph 1 of the FRY CC they had not aggravated the penal situation of the defendant or violated the law on criminal procedure.

  The Supreme Court noted that support for this view was to be found in the clear language of Article 520 LCP and in international documents such as the European Convention on the International Validity of Criminal Judgments (which opened for signatures on 28 May 1970and entered into force on 26 July 1974) and the Convention between the Member States of the European Communities on the

enforcement of Foreign Criminal Sentences (which opened for signatures on 13 November 1991). The Supreme Court pointed out that as neither of the state entities involved in this matter, or their forerunners were signatories to these conventions, reference was made to their provisions only as persuasive evidence of international community rather than as a binding authority.

The Supreme Court held that these principles were also reflected in the language of Article 520 of LCP in that Art. 520(2) directs a domestic Court to execute an effective foreign verdict, but requires that the sanction pronounced by the domestic Court must be in accordance with the criminal legislation of the SFRY. It concluded as follows:

"*Thus, it is clear that in imposing a sanction the domestic court must be guided by domestic law. This proposition is self-evident from the further requirements of Art. 520 (6). That section provides that the domestic Court is required, in pronouncing the sanction, to present the grounds that guided the domestic Court in pronouncing the sanction. Clearly no recitation of grounds would be required if the domestic court was merely obliged, without independent consideration, to simply impose whatever sanction was contained in the foreign judgment. The law's requirement that the domestic court present the grounds that guided it in imposing the sanction clearly requires the domestic court to make an independent determination of the sanction, guided and limited by domestic law and the further limitation that any sanction imposed cannot aggravate the penal situation of the person sentenced."* [14]

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

The provisions of Article 520 LCP setting down the prerequisites before a court may act on the request of a foreign authority to execute a criminal judgment of a foreign court were amended by Articles 509-511 PCPCK.

[14] An example may illustrate the obviousness of this proposition. Under UNMIK Regulation, capital punishment has been abolished as a penal sanction in Kosovo. In a circumstance where a person is apprehended in Kosovo and has been lawfully sentenced to execution under the laws of a foreign state, Counsel's argument, if meritorious, would mean the Courts in Kosovo would be required to impose a capital sentence, which it could not under Art. 520, paragraph 2 and the appropriate UNMIK regulation, or alternatively be without power to exercise jurisdiction over the defendant, an absurd result that the law would and could and does not sanction.

BIAS

The ECHR grants not only the defense but also the prosecution the right to be heard by an impartial tribunal. The principle of equality of arms requires that fairness of procedures be afforded to both parties;

The existence of impartiality for the purpose of Article 6(1) ECHR must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect;

Bias on the part of the court can affect the correct establishment of the facts of the case and thus requires the proceedings to be rendered unfair in their totality.

See the case outlined below.

Case against Dragan Nikolic
5 May 2003 - AP-KZ 194/2002

Background facts
The accused Dragan Nikolic was charged with the criminal act of murder pursuant to Article 30, paragraph 2, item 3 KCC as read with Article 22 FRY CC. At the first trial which was held before a panel of local judges before the District Court of Gjilan/Gnjilane on 3 July 2000, the accused was convicted and sentenced to 12 (twelve) years and 6 (six) months of imprisonment. He was found guilty of premeditated killing during the NATO bombing based on motives of ethnic hatred.

The District Public Prosecutor filed an appeal against the verdict of the District Court of Gjilan/Gnjilane proposing a more severe prison sentence be imposed and this was endorsed by the Opinion of the Public Prosecutor of Kosovo. The defense appealed contending that there had been essential violations of the law on criminal procedure and an erroneous and incomplete establishment of facts in the case. The defense sought to have the case returned for re-trial or to have a lesser sentence imposed on the accused.

At the panel session held on 9 April 2001 the Supreme Court of Kosovo reviewed the case file and examined the contested verdict pursuant to Article 385 LCP. It found that the court of first instance had violated the law on criminal procedure by convicting the

accused based on evidence, which demonstrated substantial discrepancies between the statements of certain witnesses given during the investigation and the main trial. Additionally, certain witnesses proposed by the defense were not heard. It accepted the appeals filed by the defense and gave specific instructions for the retrial.

At the re-trial the panel consisted of two international judges and one local judge. On 19 April 2002, after nineteen (19) sessions, the court announced its verdict by which the accused was acquitted because of lack of evidence pursuant to Article 350 LCP.

Grounds of Appeal

The Public Prosecutor of Gjilan/Gnjilane filed an appeal on 17 June 2002 which was supported by the Public Prosecutor of Kosovo in his Opinion. It was submitted that the verdict demonstrated a perceived bias in violation of the law on criminal procedure and Article 6(1) ECHR because the first instance court discarded all the testimonies of witnesses for the prosecution and stated the following:

"The argument brought forward by the defense, that it relates to the mentality of Kosovar Albanians to rather live up to the expectations of their peers than to the expectations of justice, is understandable as well as the fear of the accused confronted with a trial and investigation experienced as totally hostile…. Although this behavior is understandable, it is not possible to ground a verdict on such evidence."

DECISION OF THE SUPREME COURT

The Supreme Court considered the appeal of the prosecution wherein it was alleged that the first instance court *"was biased and its bias affected the outcome of the case…that because of its bias the court did not evaluate the evidence correctly, referring first of all to the assessment of the credibility of the witnesses"* thus constituting a violation of Article 6(1) ECHR because the court was biased and this bias affected the fairness of the proceedings at the stage of rendering the verdict.

- ***Whether the prosecution has a right to be heard by an impartial tribunal***

  The Supreme Court examined the case in the light of Article 6(1) ECHR. Before it considered the issue of whether the first instance court was biased, it found it necessary to address the issue of whether Article 6(1), which grants everyone who is charged with a criminal offense, the right to be heard by an impartial tribunal, grants also this right to the prosecution. The Supreme Court held that this question could be affirmatively answered on the basis of the jurisprudence of the European Court of Human Rights and held as follows:

  "First and foremost, it would be against the common sense and the principle of equality of arms to state differently. The principle of equality of arms obviously requires that the fairness of the criminal proceedings should be shown to both parties. Furthermore, in the present case, involving the murder of 19-year-old Xhemajil Ademi, attention must be paid to the case law concerning the fundamental human right to life, according to Art. 2 European Convention on Human Rights

(ECHR). The obligation to protect the right to life under Article 2 ECHR, read in conjunction with the states' general duty under Article 1 of the ECHR to "secure to everyone within its jurisdiction the rights and freedoms defined in the Convention", implicitly requires that there should be some form of effective official investigation when individuals have been killed as a result of force by, inter alia, agents of the State. [1] *In sum, the case law on Art 2 of the ECHR has imposed the positive duty of the State to protect the right to life, by ensuring also the right for the injured parties and its representatives to an effective enforcement of the law, through an impartial and independent investigation in the circumstances of death arising out of operations conducted by security forces".* [2]

- ***The test for determining bias***

  The Supreme Court endorsed and applied the subjective and objective test adopted by the ECHR in assessing whether the first instance court was biased and held as follows:

  "The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect". [3] *As to the subjective test, the question is whether it can be shown on the facts that a member of the court acted with personal bias.* [4] *In this connection, there is a presumption that a judge is impartial, until there is proof to the contrary".* [5]

  The Supreme Court noted that the court of first instance did not express a direct view as to the merit of the argument concerning the mentality of Kosovar Albanians, i.e. "*to rather live up to the expectations of theirs peers than to the expectation of justice*" but that it only considered this argument of the Serbian defense to be "*understandable*". It held however that the first instance court had indirectly stated in its verdict that it did consider the Albanian witnesses and injured parties not credible because of their alleged mentality but that it had to be noted that the court had made its observation immediately after it made a general finding on the lack of the credibility of the Albanian witnesses. The Supreme Court found that the first instance court seemed to have embraced the defense's argument as a kind of additional justification and explanation for its general finding on the lack of credibility of the Albanian witnesses. It noted that "*exactly at the point where the court should have started to discuss the reasons for the contradictions laid out in the preceding part of the verdict, the court closes the file and comes up with these general remarks on the alleged lying attitudes of all Albanian witnesses"* and that it must be emphasized that the court concluded with the sentence *" Although this behavior* (relating also to the

[1] *Mc. Cann and others v. The United Kingdom*, Judgment of 27 September 1995, paragraph 169, and Kaya v. Turkey, Judgment 19 February 1998, paragraph 86.
[2] *Gulec v. Turkey* Judgment 27 July 1998, par. 88-90).
[3] *Hauschildt v Denmark* A 154 para 46 1989.
[4] *De Cubber v Belgium* A53 para. 25.
[5] *Le Compte, Van Leuven and De Meyere v Belgium* A 43 para. 58 (1981); *Debled v Belgium* A 292 B para. 37 1994, and *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30.

lying attitude of the Albanian witnesses) *is understandable, it is not possible to ground a verdict on such evidence".*

The Supreme Court considered that this statement indicated that the first instance court appeared to adopt the prejudicial opinion of the defense as its own and as an indirect explanation for the lack of credibility of the Albanian witnesses.

The Supreme Court took into account the very high threshold required to impeach a judge as subjectively biased as set down in the jurisprudence of the ECHR case law[6]and held that it did not agree with the interpretation of the prosecution, that this statement constituted enough evidence of subjective bias on the part of the trial panel. It did hold however that Art. 6(1) ECHR was nonetheless violated because of the objective bias showed by the Court.

The Supreme Court held that the objective test of impartiality is comparable to the English law doctrine that "*justice must not only be done: it must also be seen to be done*" and it proceeded to consider the European Court's assessment of objective bias holding as follows:

"In this context, the European Court emphasizes the importance of "appearances". As the Court has stated: 'what is at stake is the confidence which the courts in a democratic society must inspire in the public"…. What is crucial is whether the doubt as to impartiality can be objectively justified, that is, whether there is a "legitimate doubt" as to the impartiality of the judge.[7] In other words, the tribunal is impartial from an objective point of view when "it offers sufficient guarantees to exclude any legitimate doubt in this respect".[8] This is to be considered as a basic and fundamental rule of conduct for any judicial system throughout Europe, but especially for a judicial system established within a UN peacekeeping operation in a region recently torn apart by war and still strongly affected by reciprocal distrust between ethnic groups."

In this context, the panel of the Supreme Court noted that an independent monitor of judicial proceedings (OSCE), in its report concerning the monitoring of war crimes trials in Kosovo had perceived the comment made by the first instance court in the sense that "*court drew adverse inferences concerning prosecution witnesses based only on their ethnicity"*.[9]

The Supreme Court concluded that from an objective point of view, it could not be denied that the Court of first instance had taken into account the particular defense submission regarding the mentality of the Albanian witnesses. By doing so, it had exposed itself to a reasonable suspicion of partiality and, for that reasons, the argument of the prosecution could be considered objectively justified.

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[6] *Sander v. The United Kingdom*, Judgment of 9 May 2000, Paragraph 26.
[7] *Haushildt v Denmark* A 154 para 48 1989.
[8] *Fey v. Austria*, Judgment of 24 February 1993, Series A, No. 255, p. 12, 28, and also *Academy Trading Ltd and others v. Greece*, Judgment of 4 April 2000, paragraph 43.
[9] *LSMS OSCE Mission in Kosovo, Kosovo's war crimes trials. A review, September 2002, page 41.*

- ***The effect of bias on the evaluation of the evidence***

  The Supreme Court held that the signs of objective bias and prejudice against the prosecution witnesses found in the verdict handed down by the court of first instance may have affected the process of evaluation of the evidence, thus resulting in an incorrect establishment of the facts.

  The Supreme Court recognized that an assessment of the credibility of the witnesses should depart from the simple analyses of their consistency. It held that this called for a comparison of all the statements of a witness, which pertained to the same fact(s), whether they were contained in the same testimony or in previous ones and that this analysis should be comprehensive. It further held that where this comparison between the different statements of a witness lead to the detection of contradictions, the court was then obliged to carefully record and match the conflicting statements. In the case at hand, the Supreme Court found that the court of first instance fulfilled this criterion by summarizing in the verdict all the contradictions and discrepancies found in the witnesses statements during the course of the criminal proceedings. However, the Supreme Court held that the mere existence of some contradictions in witnesses' statements cannot be always a decisive criterion for rendering the whole testimony as not credible. It further held that the determination of the credibility of a testimony required also a comprehensive, exhaustive and objective evaluation of the existing contradictions and elaborated as follows:

  "..before drawing negative conclusions regarding the credibility of the oral evidence, the court of first instance should have properly addressed and discussed all possible factors potentially affecting the consistency of the witnesses' statements, like the lapse of time, fallibility of the human brain, the effect of trauma and terror suffered, educational and cultural background of the witnesses, problems related to the translations of the different records and disparity in the accuracy and insight in the examination of the witnesses during the different stages of the criminal proceedings. Appropriate guidance in this regard can be found in the case-law of international UN' tribunals, like in the case of The Prosecutor vs Jean-Paul Akayesu before the International Criminal Tribunal of Rwanda (ICTR) (Decision of 2 September 1998, paragraph 140, 142, 155, 156) and in the ICTY case The Prosecutor v. Tadic (Trial Chamber Judgment of 7 may 1997, paragraph 54). In sum, before reaching the conclusion that the prosecution witnesses were not telling the truth, the court of first instance should have examined whether the contradictions and discrepancies found in the statements could be explained by other factors, if these contradictions amounted to simple errors or they were deliberate and if they affected the core of the testimonies, namely the identification of the accused and his actions, or their peripheral part."

  The Supreme Court found that the court of first instance had agreed with the defense's line that the prosecution witnesses were lying in order to enable them to claim compensation because of the wealth of the accused. In this regard it stressed

that injured parties cannot be disadvantaged only because they exercise a right which the law recognizes and affords to them.

In relation to the other argument brought forward by the defense that the witnesses were lying because of ulterior motives connected to ethnicity, the Supreme Court held that this explanation was too generic to be upheld. While it recognized that witnesses for the defense, who are close to the accused, are prone to help the accused, while the witnesses of the prosecution, who are affiliated to the victim of the crime, often display a tendency to fortify the basically true case of the victim and that such a phenomenon may be even more expected in a society heavily polarized along ethnic lines, due to the circumstances of a violent armed conflict that strongly divided ethnic groups, it was never acceptable to adopt a general pattern and thus to approve or dismiss the credibility of witnesses solely because they belong to the same ethnic group.[10] The Supreme Court concluded as follows:

"taking into account all the mentioned shortcomings in the verdict of the first instance court in the assessment of the credibility of the oral evidence, …… the first instance court allowed sufficient evidence of objective bias, that the bias of the court could have affected the correct establishment of the facts of the case and, because of this, rendered the proceedings as unfair in their totality."

[10] ICTY, *Prosecutor. v. Tadic*, Trial Chamber Judgment of 7 May 1997, paragraph 54.

RES JUDICATA

A matter is considered res judicata only if the case has been concluded with a final verdict or if proceedings were dismissed with an effective ruling from the competent court.

See the case outlined below.

Case against Mentor Krasniqi and Halit Guri

15 July 2003 – AP – "KZ" 173/2002

Background facts

The two accused were charged with the criminal act of premeditated murder in complicity and aiding each other pursuant to Article 30, paragraph 2, items 1 and 2 KCC in conjunction with Articles 13, 22 and 24 of the FRY CC, premeditated grave bodily injury in complicity pursuant to Article 38, paragraph 2 KCC in conjunction with Articles 13, 22 and 24 FRY CC and illegal possession of weapons, explosives and ammunition pursuant to Article 199, paragraph1 KCC.

On 29 March 2002, the two accused were convicted of the criminal acts of premeditated murder and two counts of the criminal act of premeditated grave bodily injury. The accused Mentor Krasniqi was sentenced to an aggregate sentence of eighteen (18) years of imprisonment and Halit Guri was sentenced to fifteen (15) years of imprisonment.

Grounds of Appeal

The defense appealed and submitted that there had been a number of violations of the law on criminal procedure, among them that the court had violated the principle of *res judicata*. It was submitted that the first instance court had conducted trial proceedings pursuant to an indictment filed by the Public Prosecutor twice against the accused Guri for the same criminal acts in that the indictment had already been filed and subsequently withdrawn on the basis that the accused was found to be in a state of mental incapacity, pursuant to Article 494(4) LCP. The defense further submitted that in the same bill of indictment the prosecutor had asked the court to lift the security measures imposed on the accused and to adopt criminal proceedings against him in accordance with the indictment, contrary to the provisions of Article 494(5) LCP, which allowed for an appeal of the court's ruling imposing such measures.

DECISION OF THE SUPREME COURT

The Supreme Court found that in this case the prosecutor had filed an indictment based on the facts, which indicated that Halit Guri was criminally liable for the criminal events associated with the case. It noted that taking into consideration that trial proceeding were

in course to determine the security measures (i.e. the mental incapacity of the perpetrator) the prosecutor acknowledged to the court that this indictment had no effect with respect to Guri. The Supreme Court stressed that a subject matter is considered *res judicata* only "*if the case has been concluded with a final verdict, or if proceedings were dismissed with an effective ruling from the competent court, which has not occurred under the circumstances of this case*." It held that the indictment filed by the public prosecutor had no effect for as long as the perpetrator was under security measures, therefore, the issue of his criminal responsibility was held pending a resolution from the court as to his mental state. In this regard, the public prosecutor had re-submitted the bill of indictment to the court, together with a request to solicit an expert examination for abnegating the security measure of the accused, and allowing his criminal prosecution at trial. The Supreme Court found that this was not a new indictment, but a re-instatement of the existing indictment which came into force when the circumstances that impeded its effectiveness, namely the security measures, ceased to exist.

While the Supreme Court acknowledged that the first instance court did not follow the requirements of Article 494 and that this constituted a procedural violation, it found that the legal consequences of this procedural violation could not be held to have influenced the fairness of the proceedings in their totality and thus did not substantiate the overruling of the first instance court's verdict and the remand of the case for re-trial.

ACCOMPLICES

The significance of the task carried out by an accused and his role as compared to the other accomplices are elements that bear an impact on the court's decision on the punishment of the accused, but not on the legal qualification of complicity.

See the case outlined below.

Case against Mustafe Sejdiu and Harun Aliji

10 July 2003-AP – KZ 221/2002

Background facts

The first accused was indicted for the criminal offence of aiding in kidnapping pursuant to Article 64(1) CCS in conjunction with Article 24 FRY CC and the second accused was indicted for the criminal act of kidnapping in complicity pursuant to Article 64(1) CCS and Article 22 FRY CC. On 12 June 2002 both accused were convicted as charged and sentenced to one year and four years of imprisonment respectively.

Grounds for appeal

The defense appealed submitting that the verdict presented a factual description that was over extensive and from which one could not understand the incriminating actions of the second named accused. The defense argued that sometimes the verdict stated that the accused was aiding in committing the criminal act for which he was pronounced guilty while on the other hand he was pronounced guilty of committing and completing the criminal act and therefore it remained unclear for which criminal act he was actually pronounced guilty.

DECISION OF THE SUPREME COURT

The Supreme Court held that the enacting clause of the first instance court's verdict was clear and meticulous in that it offered a detailed description of the accused's actions, which were constituent elements of the criminal act for which he was charged. It also held that the first instance trial panel has established correctly the role of the accused, as an accomplice to the act of kidnapping, and had analyzed the circumstances and facts in the case in view of the elements of the perpetration in complicity and the criminal liability that ensued. It concluded that

"The first instance court has established beyond any doubt that the accused Aliji shared the same intention as his accomplices and acted pursuant to it. In this scenario, the

accused has acted according to a distribution of roles and a common intention, which altogether made possible the completion of the criminal act. Hence, the significance of the task carried out by the accused, and his role as compared to the other accomplices are elements that bear an impact on the court's decision on punishment of the accused, but not on the legal qualification of complicity, as foreseen by Article 22 of YCL.

The Supreme Court therefore upheld the first instance court's finding that the accused Aliji had acted as an accomplice in perpetration of the criminal act of kidnapping.

DETENTION

KFOR DETENTION

The detention of a suspect by the military authorities contradicts local applicable laws as well as Article 5(1) ECHR and constitutes an extra-judicial illegal detention;

The computation of the period spent in KFOR detention can only be decided at the end of criminal proceedings, after the conditions stipulated in Article 50(1) FRY CC are verified and only in the event that the accused is found guilty and sentenced to a punishment of imprisonment. KFOR detention cannot be taken into account at the pre-trial detention stage of proceedings because in such cases:

- ***The suspect is not in pre-trial detention awaiting trial;***
- ***it cannot be established that his detention relates to the commission of the criminal acts for which he is being investigated for; and***
- ***the suspect is not being detained on the grounds stipulated in Article 191 LCP, but on the assumption that he constitutes a threat to KFOR or a safe and secure environment in Kosovo.***

An accused person has the right to seek moral and material compensation for time spent in illegal detention pursuant to Article 5(5) ECHR.

See further the cases outlined below.

Case against Bajram Morina, Gazmend Mazreku and Xhavit Morina

11 December 2003 - PN. No. 318/2003

Background facts

All three suspects were alleged to have committed the criminal acts of terrorism, transferring explosives, arms and ammunition and providing support to and actively participating in the Albanian National Army which had been declared a terrorist organization (pursuant to UNMIK Regulation 2001/12) and of unauthorized possession

of weapons contrary to Article 8.2 of UNMIK Regulation 2001/7. The third named suspect was also suspected of having committed the criminal act of organizing and directing a terrorist organization contrary to Article 5.1 of UNMIK Regulation 2001/12.

On 25 April 2003 the Investigating Judge issued a decision to conduct an investigation against Bajram Morina, and on 8 May 2003 a decision was made expanding the investigation against Xhavit Morina and Gazmend Mazreku. The investigating judge ordered the custody of Xhavit Morina for 30 days, to expire on 5 June 2003 pursuant to Article 197, paragraph 1 LCP. This suspect had already spent some forty seven (47) days in KFOR detention. The legal and factual basis of the previous KFOR detention was not examined by the investigating judge.

Grounds of Appeal

The defense lodged an appeal against the decision to order custody against Xhavit Morina on a number of grounds. It was contended that the participation of the suspect in the commission of criminal acts was not sufficiently proved and that as he had been detained from 21 March 2003 by KFOR, the duration of his detention therefore exceeded the maximum time limits prescribed by law in Article 197, paragraph 2 LCP.

The panel of the District Court of Pristina partially accepted the defense's appeal against the order for the suspect's detention and his pre-trial custody was extended only until 21 June 2003.[15]

On 16 May 2003 the District Public Prosecutor filed an appeal against the decision of the panel of the District Court arguing that the extra-judicial custody ordered by KFOR pursuant to its mandate under Security Council Resolution No. 1244/99 should not be considered in the computation of the period of pre-trial detention. The District Public Prosecutor submitted that the investigating judge had acted within the bounds of Article 197, paragraph 1 LCP when ordering the detention of the suspect for 30 days and that his decision should therefore be upheld. The Office of the Public Prosecutor of Kosovo also submitted a similar argument in favour of upholding the decision of the investigating judge.

DECISION OF THE SUPREME COURT

The Supreme Court held that the detention of a suspect can be extended by a panel of the District Court pursuant to Article 197, paragraph 2, LCP only on the basis of a "*justified recommendation from the investigating judge or public prosecutor*". In the instant case, the Supreme Court found that the District Court panel was called to rule on the appeal of the defense counsel against the decision of the investigating judge to impose detention and that therefore, the only option open to the District Court panel was to either uphold or

[15] The panel of the District Court grounded its decision on the fact that the investigating judge may order detention only for a period of 30 days from the day of deprivation of liberty, whereas the suspect had been deprived of liberty since 21 March 2003, that is 47 days, counting also the time spent in KFOR extra-judicial detention.

overrule the decision of the investigating judge; it had no authority, in the absence of the recommendation of the investigating judge or public prosecutor to extend detention.

The Supreme Court then considered the application of Article 50, paragraph 1 FRY CC which prescribes that *"…each deprivation of liberty relating to a criminal act, shall be counted as part of the sentence of imprisonment*." It noted that the panel of the district court had held in its decision that the investigating judge "*may order detention only for a period of 30 days from the day of the suspect's deprivation of liberty*" and that "*as the suspect had been deprived of liberty since 21 March 2003, that is 47 days, at the time he was brought before the investigating judge, the latter should have declared himself not competent to order detention, referring the issue to a panel of judges."* The Supreme court also noted that part of the panel's decision which held that Article 50 FRY CC clearly stipulated that "*The period of time spent in custody awaiting trial, as well as each deprivation of liberty relating to a criminal act, shall be counted as part of the sentence of imprisonment… .*"

The Supreme Court held that in the instant case the suspect was not in pretrial detention awaiting trial and that it had not been established that his detention was related to the commission of the criminal acts for which he was being investigated. It found that the only clear fact was that the suspect was detained for forty seven (47) days by KFOR, contrary to Article 195, paragraph 1 LCP (he was not brought without delay before the investigating judge). It also found that the suspect was not being detained on the grounds stipulated in Article 191 LCP, but on the assumption that he *"…constitute(s) a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter"* (pursuant to paragraph 4(a) of the COMKFOR Detention Directive No. 42 dated 9.10.2001).

- ***Detention by the military authorities***

The Supreme Court held that the detention of the suspect by the military authorities contravened both the local applicable laws as well as Article 5(1) ECHR and thereby qualified it as an extra-judicial illegal detention.

In relation to the computation of a period spent in KFOR detention, the Supreme Court held that this could only be decided at the end of criminal proceedings, after the conditions stipulated in Article 50, paragraph 1 FRY CC were verified and only in the event that the accused was found guilty and sentenced to a punishment of imprisonment.

- ***Entitlement to compensation***

The Supreme Court held that the simple inclusion (one single time) of the term of illegal detention in the general terms of the appointed punishment did not constitute a proper compensation in the sense of Article 5(5) ECHR and that the accused person still had the right to seek moral and material compensation for the illegal detention. In this context, it held that a period of extra-judicial detention cannot be computed automatically into a judicial detention term because it can have the effect of legalizing the illegal detention and also might impede the future realization of a defendant's right to compensation under Article 545, paragraph 2 LCP, read in the light of Article 5(5) ECHR."

EXISTENCE OF A GROUNDED SUSPICION

The trial court should terminate detention if new circumstances prove a change in the state of facts to such a degree that the evidence which initially constituted the grounds for detention had been so challenged and depreciated that a grounded suspicion no longer existed. Such may result from any element of novelty in the evidence, be it newly discovered facts, new means of evidence or any newly introduced factual element that reasonably entails the re-evaluation of the evidence thus far gathered.

In practice however it rarely happens that during an advanced stage of the trial process, but before the rendering of the judgment, the termination of detention occurs on the basis that the level of proof required by Article 191 LCP to constitute a grounded suspicion of guilt suddenly ceases to exist.

See further the case outlined below.

Case against Miroslav Vuckovic

16 July 2002 – PN 172/2002

Background facts

The accused was being investigated for the criminal act of war crimes pursuant to Article 142 YCL. On 27 June 2002, the trial panel of the District Court of Mitrovica acting pursuant to Article 199 LCP decided to extend the detention of the suspect until 27 August 2002. The detention was based on the grounds set down in Article 191, paragraph 2, items 1 and 2 LCP.

Grounds of Appeal

The defense appealed the District Court's findings on the existence of a grounded suspicion against the accused, thus justifying his further detention pursuant to Article 191, paragraph 1 LCP. It was argued that this finding was based on witness testimony that lacked credibility.

DECISION OF THE SUPREME COURT

The Supreme Court held that the trial court should terminate detention if new circumstances proved a change in the state of facts to such a degree that the evidence which initially constituted the grounds for detention had been so challenged and depreciated that a grounded suspicion not longer existed.

- ***What might constitute a change of circumstances***

  The Supreme Court gave detailed consideration as to what might constitute a change of circumstances. It held that such may result from *"any element of novelty in the evidence, be it newly discovered facts, new means of evidence or any newly introduced factual element that reasonably entails the re-evaluation of the evidence thus far gathered."* It noted however that a change of circumstances to that effect, would have to be significant enough to compensate for the gravity of the incriminating evidence, (i.e. the new evidentiary element must be highly persuasive in order to allow such adjudication even before final deliberation) in that it would have to imply that evidence yet to be obtained can *a priori* be considered irrelevant or insignificant for the overall outcome of the proceedings.

- ***The likelihood of the court reaching such a finding***

  The Supreme Court noted that it could be seen from the above stated conditions that it would rarely be possible for the trial court to so pre-adjudicate the effect of new evidentiary elements before the completion of evidentiary proceedings. The Court held that in practice it rarely happens that during an advanced stage of the trial process, but before the rendering of the judgment, the termination of detention occurs on the basis that the level of proof required by Article 191 LCP to constitute a grounded suspicion of guilt suddenly ceases to exist. It held that rather detention is normally terminated because specific grounds for detention listed under Article 191, paragraph 2 cease to apply.

  It concluded that there will be no change in the degree of grounded suspicion, and, consequently, grounds to terminate the detention when [1] there is no new element introduced or [2] when the rejection of incriminating evidence could be determined only through deliberation and voting on all factual and legal matters concerned or [3] when the rejection of incriminating evidence could be determined only after exhausting all sources of evidence which may be available to the court.

  In applying the law to the circumstances of this case the Supreme Court rejected as unfounded the arguments of the defense regarding the lack of a grounded suspicion of guilt to justify the suspect's detention.

RISK OF FLIGHT

In order to rely on and apply this provision a court should establish the unconditional assumption that there is a grounded suspicion that the person has committed the crime and in addition to this, the court should establish the existence of circumstances which indicate the risk of flight.

While the severity of the sentence that the accused could expect if convicted was a relevant circumstance to assessing the risk of flight, were the accused to be released, it cannot of itself warrant detention on remand on grounds of the danger of the accused absconding. In applying the standard of the ECHR and the judicial practice of the Supreme Court of Kosovo, the courts when applying the above mentioned grounds for detention must also take into account the particular circumstances of the case and the other relevant factors such as those relating to the character of the person involved, his/her previous actions, morals, home, occupation, assets, family ties and all kind of links with the country in which he is being prosecuted.

See further the cases outlined below.

Case against Miroslav Vuckovic

16 July 2002 – PN 172/2002

Background facts

The accused was being investigated for the criminal act of war crimes pursuant to Article 142 YCL. On 27 June 2002 the trial panel of the District Court of Mitrovica acting pursuant to Article 199 LCP decided to extend the detention of the suspect until 27 August 2002. The detention was based on the grounds of Article 191, paragraph 2, items 1 and 2 LCP.

Grounds of Appeal

The defense appealed the District Court's ruling that the gravity of the charges against the accused substantiated a finding that there existed a justified risk of flight. It was also argued that the court had insufficiently explained how the situation in Mitrovica amounted to a risk of flight.

DECISION OF THE SUPREME COURT
The Supreme Court held that if taken in isolation the gravity of charges might not justify the findings of the risk of flight but it was certainly a serious contributing factor when evaluating the concrete circumstances of the instant case.

In relation to particular background circumstances of the instant case, the Supreme Court concurred with the District Court's finding that the administrative boundary line between Serbia and Kosovo could not be considered tight enough to prevent uncontrolled movement of persons and that this was confirmed by the fact that several detainees had successfully escaped from Mitrovica and were never re-apprehended. It further held that *"given the – again – notorious ethnic animosities within Mitrovica it is likely that a person accused of war crimes can reasonably count on support and assistance from the local population of the same ethnicity in organizing his escape."*

The Supreme Court also averred to the defense's admission in their appeal that "*The city of K. Mitrovica […] is divided in two parts; each part in the area of division has its own control, as well as the control of the armed forces of KFOR. Another factor, generally known, which should be taken into consideration, is that every settlement has its own separate control, composed of its own citizens". Thus, the Defense itself recognizes the fact that in Mitrovica self-appointed and self-organized ethnic groups exercise a de facto control over parts of the territory, notwithstanding UNMIK and KFOR presence in the area. In the territory adjacent to Serbia, where neither effective public administration nor stable civil society guarantees the support for law enforcement, the possibilities for the accused to cross the border are present and real."*

The Supreme Court concluded that the particular circumstances of the case taken together with the gravity of the potential punishment for war crimes, indicated an irresistible temptation to flee the jurisdiction of Kosovo on the part of the accused, if he were set free. It held that the District Court was therefore correct when it established the presence of a ground for detention pursuant to Article 191, paragraph 2, item 1 LCP.

Case against Idriz Zeqiri
3 October 2002 – PN. KR. 262/2002

Background facts
The suspect was charged with the criminal act of murder pursuant to Article 47, paragraph 1 CCS. On 6 September 2002 a panel of the District Court of Pristina extended his detention for one month on grounds that their existed a risk of flight if the suspect was set free.

Grounds of Appeal
The defense lodged an appeal on a number of grounds, among which they contended that the decision violated the law on criminal procedure.

DECISION OF THE SUPREME COURT
The Supreme Court recognized and affirmed that the law on criminal procedure provided for the optional ordering of detention on the grounds that there existed a risk that an accused might flee the jurisdiction. However it held that in order to rely on and apply this provision a court *"should establish the unconditional assumption that there is a founded suspicion that the person has committed the crime and in addition to this, the court should establish the existence of circumstances which indicate the risk of flight."*

The Supreme Court found that the documents on the court file clearly supported the existence of a reasonable suspicion that the accused might have committed the criminal offence for which he was charged and that there was evidence which indicated that he might have fled Germany for that reason. It also noted that the law provided for a heavy sentence if the accused were to be found guilty as charged. It concluded that consequently, the application of Article 191, paragraph 2, item 1 was grounded as "*the possibility of fleeing is rightly evaluated based on the previous actions of the accused as well as on the harshness of the punishment provided by law in case the accused is found guilty."*

Case against Muharrem Xhemajli et al.
3 April 2003 – PN. 94/03

Background facts
The accused was indicted on 5 February 2003 for the criminal act of aiding a perpetrator after the commission of a criminal act pursuant to Article 174, paragraph 3 KCC. Pursuant to Article 256 LCP the panel of the District Court of Pristina examined the issue of post-indictment detention in relation to the accused and decided to approve the proposal of the international public prosecutor for the extension of his detention for a further two months on the basis of Article 191, paragraph 2, items 1 to 3 LCP.

Grounds of Appeal
The defense appealed alleging that there had not been sufficient reasoning regarding the application of items 1, 2 and 3 of Article 191 LCP.

DECISION OF THE SUPREME COURT
In relation to assessing the risk of flight the Supreme Court held that while the severity of the sentence that the accused could expect if convicted was a relevant circumstance to assessing this risk, were the accused to be released, "*it did not constitute a separate ground for refusing a less severe alternative to detention and cannot of itself warrant detention on remand on the grounds of the danger of the accused absconding*." The

Supreme Court relied on the jurisprudence of the European Court in *Latellier v. France*[16] and *Neumeister v. Austria*[17] and held that "*as pointed out in the law of the ECHR and in the judicial practice of the Supreme Court of Kosovo, the courts, while applying the above mentioned grounds for detention of a person, must also take into account other relevant factors as "those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kind of links with the country he is being prosecuted*".

The Supreme Court held that it had no reason to doubt the arguments proposed by the defense that the accused had a permanent living place, that he was married and lived with his family, facts it held suggested that he had some important ties to the place where he lived. However it found that the first instance court was right to consider also the information in the file presented by the international prosecutor which evidenced that the accused had close relations to influential people in Kosovo who could help him to abscond. The Supreme Court concluded that the accused, if released might rely on the influence of these persons over the local community in Kosovo to go into hiding in order to avoid prosecution.

Idriz Balaj

14 February 2003 – PN. 351/2002

Background facts

On 20 June 2002, the Investigating Judge decided to conduct a criminal investigation against Daut Haradinaj, Idriz Balaj, Bekim Zekaj, Ahmet Elshani and Ramush Ahmetaj for the criminal acts of unlawful detention, in complicity and pursuant to joint criminal enterprise, contrary to Article 63 paragraphs 1 and 4 CCS as read with Articles 22 and 26 FRY CC; causing serious bodily injury, in complicity and pursuant to a joint criminal enterprise, contrary to Article 38 paragraph 1 KCC, as read with Articles 22 and 26 FRY CC; and unlawful detention resulting in death, in complicity and pursuant to a joint criminal enterprise, contrary to Article 63, paragraphs 1 and 5 CCS, as read with Articles 22 and 26 FRY CC). The suspects' detention was also ordered for one month. On 8 August 2002 the District Public Prosecutor of Peja filed an indictment which was amended by a Bill of Indictment filed on 1 October 2002. In the indictment the Public Prosecutor requested that the accused be remanded in custody on a number of grounds, including that there existed a risk that they might flee if their release was ordered prior to the trial. The District Court of Peja extended the detention of the five accused for a period of 2 (two) months expiring on 12 October 2002.

Grounds of Appeal

[16] ECHR, 1991, para. 43.
[17] ECHR, 1968, para. 39.

The defense lodged five appeals against the decision of the District Court. The Supreme Court of Kosovo, with its decision PN. 222/2002 dated September 13, 2002 decided that the appeals were unfounded and that the District Court of Peja had rightly applied Article 191, paragraph 2, items 1, 2, 3 LCP as a basis to continue the detention of the five accused. Thereafter Peja District Court further extended detention in its decision dated 9 October 2002 for a period of two (2) months from 12 October 2002 until 12 December 2002 on the basis of Article 191 paragraph 2 items 1, 2, 3 LCP. On December 3, 2002 the Supreme Court of Kosovo rejected the appeals of the defense against the District Court's decision to extend detention. On December 17, 2003 and after the main trial had been concluded, the District Court of Peja/Pec decided to extend the detention of all five accused until the verdict became final.

The defense appealed. The defense counsel for the accused Ramush Ahmetaj contended as follows: *"…the grounds and elements of Article 191, par. 2 items 1 and 3 of LCP do not stand because … the accused has no reason to flee… and that he has defended himself with an alibi … and has not admitted guilt…"* The defense counsel also alleged a violation of Article 364, paragraph 1, item 11 LCP on the basis that the decision lacked reasoning.

Defense Counsel for the accused Bekim Zekaj, Ahmet Elshani and Daut Haradinaj appealed the decision and contended that it was unfounded on the basis that grounds from paragraph 2 of Article 191, items 1 and 3 did not exist.

DECISION OF THE SUPREME COURT

The panel of the Supreme Court rejected the appeals filed by the defense on behalf of Ahmet Elshani and Ramush Ahmetaj as unfounded. It held that the decision of the first instance court was taken after the verdict pronouncing both of these accused guilty of the criminal offences for which they were charged and that the first instance court had given sufficient reasoning regarding the application of items 1 and 3 of paragraph 2 of Article 191 LCP.

The Supreme Court held that Article 191, paragraph 2 item 1 of the Law on Criminal Procedure provides for the optional ordering of detention on the grounds of the risk of flight and that "*In order to apply this item, the court, just like always in dealing with custody, should establish the unconditional assumption that there is a founded suspicion that the person has committed the crime and in addition to this criteria the court should establish the existence of circumstances which indicate the risk of flight*."

The Supreme Court found that in addition to the fact that the accused were pronounced guilty and sentenced to an unconditional period of imprisonment, the file documents clearly pointed to the existence of a reasonable suspicion that the accused might have committed the criminal offences for which they were charged and that they might have contacts outside of Kosovo which would make it easier for them to flee if released from detention. It held that the application of Article 191, paragraph 2, item 1 was grounded as

the possibility of fleeing was correctly evaluated by the first instant court based on the punishment pronounced, the previous actions of the accused and the existing real risks.

INTERFERING WITH WITNESSES/EVIDENCE

The grounds for detention as set down in Article 191, paragraph 2, item 2 apply until the evidence is secured; the deadline for the application of this ground is the moment when the first instance court's verdict is delivered. The term "investigation" in Article 191, paragraph 2, item 2 must be understood as the "process of collecting evidence which starts with the decision to initiate the investigation and ends with the verdict.

In ordering detention on the basis of Article 191, paragraph 2, item 2 a court must be satisfied that there is a genuine risk of pressure being brought to bear on witnesses; abstract grounds are insufficient to justify detention on this basis.

See the cases outlined below.

Case against Miroslav Vuckovic

16 July 2002 – PN 172/2002

Background facts

The accused was being investigated for the criminal act of war crimes pursuant to Article 142 YCL. On 27 June 2002 the trial panel of the District Court of Mitrovica acting pursuant to Article 199 LCP decided to extend the detention of the suspect until 27 August 2002. The detention was based on the grounds of Article 191, paragraph 2, items 1 and 2 LCP.

Grounds of Appeal

The defense appealed the District Court's findings wherein it held that there existed circumstances which indicated that the accused might influence witnesses pursuant to Article 191, paragraph 2, item 2. The defense argued that upon a literary reading of this provision the word "investigation" contained therein meant that this ground applied only during the initial stages of the proceedings, and not in trial or re-trial stages. The defense further submitted that the District Court did not substantiate the existence of particular circumstances that would indicate the risk of the accused influencing witnesses.

DECISION OF THE SUPREME COURT

- ***The applicability of Article 191, paragraph 2, item 2 to the trial phase of proceedings***

The Supreme Court dismissed the defense's submission wherein it contended that Article 191, paragraph 2, item 2 LCP did not apply to the trial phase of the proceedings. It held that the grounds for detention as set down in Article 191, paragraph 2, item 2 are maintained after the filing of the indictment and during the time period in which the trial is pending. It stated that the deadline for the application of this ground is the moment when the first instance verdict is delivered. In relation to the use of the word "investigation" in Article 191, paragraph 2, item 2 the Supreme Court held that this must be understood as "*the process of collecting evidence*" and that such an understanding was merited from both the systemic and the teleological interpretation. It further held that had the legislature intended to eliminate the application of Article 19, paragraph 2, item 2 at any earlier stage, it would have been explicitly provided in Article 199 or in another provision pertaining to detention pending trial.

The Supreme Court concluded that it stemmed from the rationale of Article 191, paragraph 2, item 2 that its application could not be limited to the phase of investigation only as the protection of evidence from inappropriate influences was necessary as long as the process of taking evidence continued i.e., until the reaching of the judgment and held as follows:

"*Accepting the Defense's understanding of "investigation" would mean that the application of Art. 191 para 2 item 2 is at all not possible in cases of direct indictment [Art. 160 LCP], which is an unacceptable conclusion, as in these cases potential witness evidence, not secured through investigative hearing, can be particularly vulnerable. Further, according to the Defense's view it would be not possible to use Art. 191 par 2 item 2 to protect evidence which is to be for the first time introduced in trial."*

While the Supreme Court recognized and accepted that in situations in which all essential evidence was collected during the judicial investigation, the risk of distorting evidence during trial was usually less, it could not be excluded that pressure would not be brought to bear upon witnesses [*e.g*., persuading them to recant their testimony deposited before the investigating judge] or that there would be collusion among accomplices during the trial. It held that it would be incorrect to assume that the trial court should be exposed [even when avoidable] to any contaminated evidence and that such an assumption would actually shift the essential evaluation and weight of evidence from the main trial to the investigation which would clearly be against the principles of the LCP.

- ***Did the District Court evoke any specific circumstances on which it concluded that there was a risk of pressure being brought to bear on witnesses?***
  The Supreme Court held that whenever the risk of tampering with the evidence actually arose, even in re-trial, that detention based on Article 191, paragraph 2, item 2 should be ordered. However it held that the critical issue in relation to ordering such detention was that it must be lawfully based on item 2. In this regard it held that it

was not sufficient to indicate only an abstract possibility of evidence tampering, but that such an order should be firmly based on the special and specific circumstances actually present in a case which confirmed the existence of such danger.

Having established the general applicability of Article 191, paragraph 2, item 2 LCP the Supreme Court found that under the circumstances of the particular case, the defense's appeal was well founded as regards the contention that the District Court did not evoke any specific circumstances from which it concluded that there existed a risk of pressure being brought to bear on the witnesses in this case.

Upon reviewing the case file the Supreme Court found that Article 191, paragraph 2, item 2 was applied in the absence of any analysis of the individual qualities of the accused, the witnesses and the relationships among them that would justify such a risk. Further, it held that it was applied in the absence of any indication, throughout the case file, that the accused ever intended to influence witnesses. It found that the district court's reasoning in the contested decision was based on the mere fact that there remained witnesses to be heard and that some of these witnesses had yet to be proposed by the parties. In these circumstances the Supreme Court concluded that this constituted an indication that the District Court only relied upon an abstract, and not a genuine risk of pressure being brought to bear on witnesses and that such abstract grounds were insufficient to justify detention.

The Supreme Court concluded that in these circumstances the conditions of Article 191, paragraph 2, item 2 LCP had not been proven.

Case against Idriz Zeqiri

3 October 2002 – PN. KR. 262/2002

Background facts

The suspect was charged with the criminal act of murder pursuant to Article 47, paragraph 1 CCS. On 6 September 2002 a panel of the District Court of Pristina extended his detention for one month pursuant to Article 191, paragraph 2, item 2 LCP.

Grounds of Appeal

The defense lodged an appeal contending that the decision violated the law on criminal procedure as Article 191, paragraph 2, item 2 could not be applied after the finalization of the investigation phase.

DECISION OF THE SUPREME COURT

The Supreme Court opined that under this provision of the law on criminal procedure two grounds for ordering custody were envisaged, namely:

"the risk of destruction of evidence of the crime (material and personal" and the *"risk that certain subjects of the proceedings could be influenced."*

In dealing with the defense's argument that Article 191, paragraph 2, item 2 could be applied after the finalization of the investigation phase, the Supreme Court upheld its earlier reasoning in the *Vuckovic case* and held that the reference to the commentary on the LCP clearly indicated the invalidity of the defense's contention. It held that "*the ground for detention defined by Art. 191 paragraph 2 item 2, i.e., the risk of tampering with the evidence, applies until the evidence is secured, and that the deadline for application of this ground can be established at the moment when first instance verdict is delivered. In the sense of Article 191 paragraph 2 item 2 the term "investigation" must be understood as "process of collecting evidence," which starts with the decision to initiate the investigation and ends with the verdict."*

The Supreme Court concluded that in the instant case, the file documents contained evidence of threats used against witnesses who might talk about seeing or knowing the accused and that such evidence gave sufficient grounds upon which to apply item 2 of Article 191, paragraph 2.

Case against Muharrem Xhemajli et al.

3 April 2003 – PN 94/03

Background facts

The accused was indicted on 5 February 2003 for the criminal act of aiding a perpetrator after the commission of a criminal act pursuant to Article 174(3) KCC. Pursuant to Article 256 LCP the panel of the District Court of Pristina examined the issue of post-indictment detention in relation to the accused and decided to approve the proposal of the international public prosecutor for the extension of his detention for a further two months on the basis of Article 191, paragraph 2, items 1 to 3 LCP.

Grounds of Appeal

The defense appealed alleging that there had not been sufficient reasoning regarding the application of items 1, 2 and 3 of Article 191 LCP, paragraph 2 and that item 2 of paragraph 2 applied only during the investigative stage of criminal proceedings.

DECISION OF THE SUPREME COURT

The Supreme Court again adopted similar reasoning to that adopted in the earlier two cases. It rejected the defense's argument as unfounded and held that the fact that a court could base its verdict solely on the facts and evidence presented in the trial (art. 347(1) LCP) implied that the pre-trial detention of an accused as a measure to prevent him influencing key witnesses could be extended throughout the preparation and the conduct of the main trial proceedings. It pointed out that the legal practice of the domestic courts

was consistent with this interpretation as established by a series of court decisions in the Former Yugoslavia and that it did not violate international legal standards.

APPLICATION OF ARTICLE 5(3) ECHR

Article 5(3) ECHR prescribes that "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

In determining what constitutes a "reasonable time" the European Court has never accepted the idea that there is a maximum length of pre-trial detention which must never be exceeded, since it found that this must be evaluated upon taking into account all the special features of each case.

The period of detention considered by the European Court to fall under Art. 5(3) runs from the moment of the arrest until the moment the person is released. If the person is not released during the trial, the period to be considered ends when the first instance court issues a judgment of acquittal or conviction. The period of detention following the conviction by the trial court – for example during the appeal proceedings – is not taken into account for the purpose of Art. 5(3); such detention falls under Article 5(1) ECHR. However, if an appellate court quashes the first judgment and a new trial is ordered, the detention during the period between the quashing of the judgment and the new judgment is also considered to fall under Article 5(3) ECHR.

The provisions of the applicable criminal law in Kosovo are to be read in conformity with the requirements of the ECHR.

See the cases outlined below.

Case against Miroslav Vuckovic

16 July 2002 – PN 172/2002

Background facts

The accused was being investigated for the criminal act of war crimes pursuant to Article 142 YCL. On 27 June 2002 the trial panel of the District Court of Mitrovica acting

pursuant to Article 199 LCP decided to extend the detention of the suspect until 27 August 2002. The detention was based on the grounds set down in Article 191, paragraph 2, items 1 and 2 LCP.

Grounds of Appeal

The defense appealed the District Court's findings on a number of grounds including a violation of Article 5(3) ECHR. The defense argued that the level of proof against the accused remained unchanged for a considerable period of time and therefore it became insufficient to justify ordering further custody. In support for this claim the defense relied on the judgment of European Court in the case of *Tomasi v. France* and cited the following paragraph:

"The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed special diligence' in the conduct of the proceedings."

DECISION OF THE SUPREME COURT

The Supreme Court endorsed and applied the reasoning of the European Court in the following cases *Tomasi v. France*[18], *Stogmuller v. Austria*,[19] *Letellier v. France*,[20] *W v. Switzerland*,[21] *Jagci and Sargin v. Turkey*,[22] *Assenov v. Bulgaria*,[23] *Punzelt v. the Chech Republic.*[24] In these cases the European Court applied a three-step test in order to determine the lawfulness of continuing detention, namely whether [1] there existed a grounded suspicion, [2] the persistence and relevance of specific grounds for detention and [3] whether the detention did not exceed a reasonable time.

- ***The extent of the application of Article 5(3) ECHR***

The Supreme Court held that the period of detention considered by the European Court as falling under Article 5(3) ECHR runs from the moment of the arrest until the moment the person is released. If the person is not released during the trial, the period to be considered ends when the first instance court issues a judgment of acquittal or conviction. It held that the period of detention following the conviction by the trial court – for example during the appeal proceedings – is not taken into account for the purpose of Article 5(3) ECHR. The Supreme Court endorsed the reasoning of the European Court in

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19 [1969] ECHR.
20 [1991] ECHR.
21 [1993] ECHR.
22 [1995] ECHR.
23 [1998] ECHR.
24 [2000] ECHR.

Wemhof v. FRG[25] and *B. v. Austria*[26] wherein it held that Article 5(3) ECHR ceases to apply to detention following conviction by the trial court; after which such detention is grounded on the basis of Article 5(1)(a). However it held that if an appellate court quashes the first judgment and a new trial is ordered, the detention during the period between the quashing of the judgment and the new judgment is also considered to fall under Article 5(3) ECHR.

- ***Determining a "reasonable period" of detention***

The Supreme Court noted that in determining what constitutes a "*reasonable time*" the European Court had never accepted the idea that there was a maximum length of pre-trial detention which must never be exceeded and it held that this must be evaluated upon taking into account all the special features of each case.

The Supreme Court noted that one of the circumstances which the European Court had considered as justifying longer periods of pre-trial detention was the complexity of the case as a result of the nature of the offence but that such factors, which make the case particularly complex can only justify the prolongation of the deprivation of liberty where the relevant authorities have actually shown "*special diligence*" in conducting the proceedings.

In the case in question, the Supreme Court noted that the accused has been in detention since 23 August 1999. He was indicted on 29 November 1999. The main trial took place in the period between 6 June 2000 and 18 January 2001, as a result of which the District Court of Mitrovica had convicted him for the crime of genocide and sentenced him to 14 years of imprisonment. This verdict was quashed following the appeals made by Mr. Vuckovic and the District Public Prosecutor by a DECISION OF THE SUPREME COURT of Kosovo on 31 August 2001, and the case was sent back to Mitrovica District Court for re-trial. The first session of the re-trial took place on 4 January 2002, and 18 hearings took place since then. Nine scheduled hearings had to be cancelled for various reasons including the security situation in Mitrovica.

From the above account the Supreme Court concluded that the time spent in detention which fell under the provisions of Article 5(3) ECHR was 2 years 3 months and approximately 19 days, after removing the time period from 18 January to 31 August 2002, the latter being the time period between the appellate proceedings until the decision of the Supreme Court

- ***The complexity of the case***

The Supreme Court held that the complexity of the case must be considered as a factor which might justify the lengthiness of the detention. It noted that the charges in the investigation and in the indictment, including the first trial, initially pertained to genocide and that the indictment was amended during the retrial to war crimes, which contained different elements to be proven. The new expanded charges alleged differently-specified events over a period of 9 months and included the territories of around five or more

[25] [1968] ECHR.
[26] [1995] ECHR.

villages. Over 50 witnesses had been proposed by both parties for this trial and the parties had changed their proposals on witnesses made in the previous trial, with the defense already having proposed in the previous trial 27 witnesses, which were not heard then, and which may be proposed and heard again. It therefore held that the scope and complexity of the case was in an order of magnitude greater than most cases heard by the Kosovo courts, and therefore the length of the proceedings could not properly be compared to other cases.

The Supreme Court held that the most questionable time period which concerned the court in light of Article 5(3) ECHR was the period of approximately seven months between the filing of the first indictment and the commencement of the main trial. However it noted that during this time, the local judiciary were in the process of being organized, that there was a boycott by appointed ethnic Serbian judges who refused to participate in what was a homogenous ethnic Albanian judiciary, a hunger strike by Serb prisoners charged with genocide and war crimes, violent demonstrations and clashes in Mitrovica, and the closure of the Mitrovica District Court on numerous occasions due to violence and threats to security. It noted that the UNMIK administration during this time acted diligently through both existing legal procedures, and by promulgating UNMIK Regulations 2000/6, 2000/34 and 2000/64 to support the appointment and work of international judges and prosecutors.

While the Supreme Court noted that normally a shortage of judicial personnel is not accepted by ECHR jurisprudence as an excuse for overly long detention, the circumstances stated above were not normal or taken into account by most ECHR decisions on the length of detention, since those decisions related to detention issues which arose in states with established judicial systems, unlike Kosovo. It found that the applicable state authorities, namely the District Court of Mitrovicia, UNMIK and the then Department of Judicial Affairs took all possible efforts to expedite this case. It cited the Council of Europe's commentary on Article 5(3) ECHR in which it stated that "*in such cases [of delay] it can be particularly significant that a special unit has been created to deal with the case or that additional resources have been provided for existing ones expected to handle a case of an exceptional character…*".

The Supreme Court concluded that overall, the length of delay in light of all the circumstances was not so manifest as to require it to order the immediate release of the accused. However, it did express concern about the lengthiness of the proceedings and required the trial panel to seriously consider the matter of offering bail to the accused in light of the delay.

Case against Andjelko Kolasinac

10 December 2002 – PN. 307/2002

Background facts

The accused was indicted for the criminal act of war crimes pursuant to Article 142, paragraph 1 FRY CC and Article 174, paragraphs 1 and 3 KCC. The accused was convicted before the District Court of Prizren of giving help to the offender after the commission of the criminal act pursuant to Article 174, paragraph 1 and 3 KCC and was sentenced to 5 years of imprisonment. On 2 November 2001 the Supreme Court of Kosovo decided on the appeals of the defense against the verdict of the District Court of Prizren. It over-ruled the verdict by approving the appeal of the defense regarding Kolasinac.

On 1 October 2002 at the main retrial hearing the district public prosecutor presented an amended indictment charging the accused with war crimes pursuant to Article 142, paragraph 1 FRY CC and Article 174, paragraphs 1 and 3 KCC. On 1 November 2002 the detention of the accused was further extended pursuant to Article 191, paragraph 2, items 1 and 4 LCP.

Grounds of Appeal

The defense appealed the District Court's decision to extend detention on a number of grounds alleging a violation of the law on criminal procedure and a violation of Articles 5(3) ECHR. It contended that between 2 November 2001 and 1 October 2002 there were no actions taken to consider the accused's case and that a term of more than three years of custody could not be considered reasonable in light of the provisions of Article 5(3) ECHR.

DECISION OF THE SUPREME COURT

The Supreme Court found that the court of first instance had not considered in rendering its decision the question of a reasonable period spent by the accused in detention. It held that while Article 191 itself did not expressly require the panel to do so, by virtue of UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59, the provisions of the applicable criminal law in Kosovo were to be read in conformity with the requirements of the ECHR.

- ***The complexity of the case***

The Supreme Court found that the case against the accused was of particular complexity, involving difficult factual and legal issues relating to war crimes. It found that the delays in the completion of the proceedings against the accused were attributable, partly, to the fact that the decision of the first instance court was overruled by the Supreme Court and the case sent back to the District Court for retrial. It noted that the re-trial of the accused was unable to commence for a period of eleven months, because of the lack of international judges, and that in the post war situation of the domestic judicial system in Kosovo, such delays although undesirable, could not be avoided. Furthermore the court considered that the efficiency of the Kosovo legal system could not be expected to be the same as the efficiency of a normally functioning judicial system under the jurisdiction of the ECHR.

The Supreme Court concluded that all the facts of the case, including that of the reasonableness of time under Article 5(3) ECHR must be assessed in the context of the existing situation in Kosovo, without prejudicing the rights of the accused and the proper administration of justice. In these circumstances the Supreme Court held that the period of detention could be considered reasonable, but that the first instance court should examine in detail the question of reasonableness when considering whether to further extend the detention of the accused in this case.

Case against Hamze Sokoli

7 March 2003 – AP. 120/2002

Background facts

The accused was charged with the criminal act of kidnapping pursuant to Article 64, paragraph 4 CCS. On 18 March 2002 the first instance court pronounced the accused guilty of the criminal act of kidnapping and he was sentenced to 6 (six) years of imprisonment

DECISION OF THE SUPREME COURT

Both the defence and prosecution appealed the verdict of the first instance court. On appeal, the Supreme Court pursuant to Article 385, paragraph 4 LCP undertook an *ex officio* review of the detention issue against the accused. In analysing whether grounds for the detention of the accused still existed, the Supreme Court first noted that he had been in detention since 13 February 2001. The Court further found that the accused had no previous criminal record and that he had a family consisting of his spouse and three children.

From a substantive point of view, the Supreme Court considers that a determination on whether to keep the accused in detention pending retrial should be carried out not solely by reference to Article 191 LCP, but also by assessing the applicability of Article 5 ECHR.

From the perspective of Article 191 LCP, the Supreme Court noted that the accused was detained on suspicions that he would flee and/or that he would destroy clues or hamper evidence. It held that at this stage of the proceedings, when most of the available evidence had already been administered, the only ground that would still justify his detention pending retrial would be the risk of flight. It concluded that in light of his family situation there was no reason to believe that the accused, if released, would abandon his family or would not attend the retrial proceedings which he himself had requested as an opportunity to re-evaluate the facts of the case and prove his innocence.

- ***Did the accused's detention fall within the scope of Article 5(1)(a) or 5(3) ECHR?***

When evaluating the grounds for detention under Article 5 of ECHR, the Supreme Court held that it had first to be established whether the detention of the accused pending retrial proceedings fell within the scope of paragraph 1(a) or paragraph 3 of that Article, in other words whether the said detention could be considered as lawful detention after conviction (paragraph1 (a)) or custody prior to a final conviction, which is then scrutinised by the system of guarantees under paragraph 3 of Article 5.

The Supreme noted the jurisprudence of the ECHR and held that this jurisprudence was confronted with various domestic legislations providing for different systems of calculating when detention is to be considered as following from a "*conviction*" and when it was not. It noted that the European Court had stressed in *B. v. Austria*[27]that the guarantees conferred by Article 5, paragraph 3 should not be dependent upon the specific and differing provisions of national legal systems. It further noted that the formal provisions of domestic legislation regulating whether detention pending finalisation of a verdict is considered as detention "after conviction" matters less than the substantive realities of the case. It noted that in designing a test for assessing whether the particular circumstances of a case bring detention pending appeal or retrial within the scope of paragraph 3 of Article 5, the European Court had in the case of *Wemhoff*[28] adopted several criteria that it considered had to be taken into account. Among them, an essential part in the consideration process is the actual length of detention, the material, moral or other effects of the detainee, the difficulties in the case and its complexity, and notably, the conduct of the judicial authorities in dealing with pre-trial release requests and with completing the trial.

Applying these criteria in the instant case, the Supreme Court noted that the accused had spent more than two years in detention. However it noted that taking into account the complexity of the case and the backlog of cases in the district court's of Kosovo, scheduling a retrial and finalising realistically took a long time. In these particular conditions, the Supreme Court found that an extension of detention pending further proceedings of an uncertain and highly possible prolonged duration may amount to a violation of the accused's rights under Article 5(3) ECHR, namely his right to be tried within a reasonable time or to be released pending the finalisation of the proceedings.

THE IMPACT OF THE PCPCK ON THE PROVISIONS OF LAW CONSIDERED

The provisions contained in Articles 190-200 LCP governing pre-trial detentionwere amended by Articles 268-287 PCPCK.

[27] ECHR, 28 March 1990, paragraphs 34-40.
[28] ECHR, 27 June 1968, paragraphs 11 and 15-16.

PART II

CRIMINAL SUBSTANTIVE LAW

MURDER

MURDER AS A WAR CRIME

The criminal offence of murder simpliciter pursuant to Article 30 KCC may in some cases be held to constitute murder as a war crime and thus a 'serious violation of international humanitarian law' as defined in Article 142 FRY CC and the Rome Statute of the International Criminal Court. The court may only reach such a determination in the following limited circumstances:

Where the substance of the charges made in the indictment contains facts and legal elements which would allow a court to conclude that the accused was charged with a criminal act which in substance constituted a war crime;

the relevant findings of the court against the accused, based on the facts and evidence presented before the court, satisfy those required for a finding of the war crime of murder pursuant to Article 142 of FRY CC and Article 8(2) of the Rome Statute of the International Criminal Court and the court is satisfied that the murder was committed with premeditation and as a result of basic motives fuelled by ethnic intolerance and related to ethnic conflict.

See the cases outlined below.

Case against Nenad Pavicevic and Lazar Gligirovski

27 February 2003 – AP. 154/2001

Background facts

In December 1999, the two accused were charged with murder pursuant to Article 30 CKL in conjunction with Article 22 FRY CC. It was alleged that they had shot and killed three members of the Hajrizi family in March 1999 as a result of ethnic intolerance. The indictment against both accused alleged that they had acted with "*premeditation and out of basic motives"* and "*as the result of ethnic intolerance-deprived of life three persons"*. It further alleged that the murders had been committed by the accused during the armed conflict in Kosovo and that their commission was related to that conflict. The second accused was also indicted for illegal possession of weapons, ammunition and explosive substances.

The first accused was tried *in absentia* and was pronounced guilty on 11 November 2000 as charged. He was sentenced to 20 years of imprisonment. The second accused was acquitted of the criminal act of murder but was convicted of illegal possession of weapons, ammunition and exploding substances.

Grounds of Appeal

The defense counsel appealed the verdict against the first accused. The defense argued that although the legal qualification of the criminal act for which the first accused had been charged was murder, taking into account the indictment as pleaded by the public prosecutor and the relevant findings of the District Court in its verdict, the first accused was actually charged and convicted of a criminal act which contained legal elements of the war crime of murder, as opposed to murder *simpliciter*. The defense argued that it was therefore axiomatic that the first accused should have benefited during the main trial from the protection afforded by the provisions of *UNMIK Regulation 2001/1 On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law*. This UNMIK Regulation prescribes that no person may be tried *in absentia* for serious violations of international humanitarian law, as defined in the FRY CC[29] and in the Rome Statute of the International Criminal Court.[30]

DECISION OF THE SUPREME COURT

The Supreme Court on the basis of the indictment as pleaded by the public prosecutor and the relevant findings of the District Court in its verdict, held that it was satisfied that although the legal qualification of the criminal act was formally based on Article 30 KCC, in fact the accused was charged and convicted for a criminal act which contained legal elements of a war crime of murder[31] and that "*the accused should have benefited during the main trial from the level of protection afforded by Regulation 1/2001, which has the aim to protect "…the rights of the accused and in particular, the right to a fair trial….to persons tried for serious violations of international humanitarian law."*

In reaching this determination, the Supreme Court considered that for the correct application of UNMIK Regulation 2001/1, it was important to take into account the substance of the charge and not only the external legal qualification.[32]

[29] See Chapter XVI, Article 142 FRY CC.
[30] 8(2)(c)(i)1 of the Rome Statute of the International Criminal Court, 17 July 1998.
[31] See page 5, para. 5.
[32] See page 6, para. 2.

MURDER MOTIVATED BY ETHNIC INTOLERANCE

A murder motivated by ethnical intolerance must always be qualified as based on low motives, and must therefore be qualified pursuant to Article 30, paragraph 2, item 3 KCC.

See the case outlined below.

Case against Milos Skulic

19 February 2003-A.P. 251/2001

Background facts

On 11 November 1999, the accused was indicted for murder pursuant to Article 30, paragraph 2, item 3 KCC and unlawful possession of weapons and explosive substances pursuant to article 199 KCC. The indictment alleged that on 23 June 1999, the accused intentionally, based on low motives deprived his Albanian neighbor, Ajet Podvorica of life, when he went to the victim's flat and inflicted heavily bodily injuries on him by firing gun shots from which the latter died on the spot.

Grounds of Appeal

The accused escaped while in pre-trial custody and the court of first instance issued a decision ordering the accused to be tried *in absentia*. On 29 June 2001, the accused was tried *in absentia* and convicted as charged.

The defense appealed the conviction and argued that while the behavior of the accused did not exonerate him from culpability for the commission of the criminal act of murder, the criminal act was not motivated by ethnic hatred or intolerance on his part, as had been concluded by the first instance court. The defense argued that the court had relied on presumptions and not facts in ruling on the existence of low motives and that the actions of the accused should therefore have been qualified under Article 30 paragraph 1 KCC and not under paragraph 2, item 3 of this Article.

DECISION OF THE SUPREME COURT

This panel of the Supreme Court assessed all the evidence presented during the main trial, and concluded that the qualification of the actions of the accused by the first instance court under Article 30, paragraph 2, item 3 KCC in the circumstances of the case was correct and that it was based on established facts and law. It considered that it was not disputed that actions of the accused, which resulted in the murder of his neighbor, were actions that a reasonable person would never carry out without any motives. The Supreme Court considered the circumstances in which the events occurred namely that the murder had been committed after the withdrawal of the Serbian forces from Kosovo,

which it considered was a time characterized by high tension between Albanians and Serbs. The court also considered that the weapons discovered in the accused's apartment (one of which was used in committing the murder) which he had received from the Serbian authorities during the war in Kosovo, amounted to evidence, which suggested that he was prepared to fight the Albanians.

Thus the Supreme Court found that it was a matter of common sense to conclude that the murder of an Albanian neighbor committed by the accused at a time of high tension between the two ethnic groups, by using the firearm received previously for fighting the Albanians was based on ethnic intolerance. It concluded that *"murder committed out of ethnical intolerance must be always qualified as based on low motives, as the first instance court correctly did."*

MURDER OF THE MOMENT

In order to qualify a murder as murder of the moment (committed in a heat of passion), the existence of a certain commensuration between the cause of the psychological exasperation and its degree must be established. Furthermore, this causal link must be evaluated objectively and not according to the subjective criteria of the perpetrator, which could be the consequence of his hypersensitivity due to psychological and cultural factors.

Murder in a heat of passion cannot exist if the reason was minimal or insignificant for provoking a serious exasperation in a perpetrator who is emotionally stable. The insult from the victim should be so relevant to justifiably bring the perpetrator into a state of extreme exasperation. Further the perpetrator should be brought to a state of exasperation by an assault or a serious insult from the victim, without fault of his own.

Murder of the moment is normally preceded by an insult of high intensity or an attack that would cause a strong psychic shock to an accused and would give him/her reasons to take the victim's life.

Note: See the cases outlined below.

Case against Sherif Abd Elaziz

8 May 2003 – AP-KZ No. 93/2003

Background facts

On 19 March 2002 the District Public Prosecutor filed an indictment charging the accused, a former UNMIK police officer from Egypt, with the criminal act of aggravated murder pursuant to Article 30, paragraph 2, item 5 KCC and grand larceny pursuant to Article 134, paragraph 1 in conjunction with Article 135, paragraph 2 KCC. During the main trial on 31 October 2002 the Public Prosecutor filed an amended indictment charging the accused with the criminal act of larceny pursuant to Article 134, paragraph 1 KCC and with murder pursuant to Article 30, paragraph 1 KCC.

On 12 November 2002 the accused was convicted of the criminal acts of murder pursuant to Article 30, Paragraph 1 KCC and larceny pursuant to Article 134(1) KCC. He was

sentenced to twelve years imprisonment for the criminal act of murder and to two years for the larceny offence and the court imposed an aggregated sentence of thirteen years.

Grounds of appeal

The defense appealed against the verdict contending that the court of first instance had incorrectly and incompletely established the factual situation of the scenario conducive to the murder thus resulting in an incorrect legal assessment of the criminal act. It was submitted that the defendant should have been convicted of the crime of "*provoked homicide*" pursuant to Article 33 KCC, and not of murder pursuant to Article 30, paragraph 1 KCC. The defense further contended that the district court had contradicted itself by rejecting the argument which it had presented in relation to the legal qualification of the crime as a "provoked murder", while at the same time mentioning in the verdict that "*it must be considered possible that passion played a role in the course of the event as described in the statement of facts"* and *"it should be assumed in his favor [of the accused] that the decision to kill her only arose during the argument they had"*.

DECISION OF THE SUPREME COURT

In relation to the murder the Supreme Court found that *"the murder was not a planned one, and that passion and a disturbed emotional condition may have played a certain role in it, but that in order to qualify a murder as committed in a heat of passion (provoked murder), the existence of a certain commensuration between the cause of the psychological exasperation and its degree must be established. Furthermore, this causal link must be evaluated objectively and not according to the subjective criteria of the perpetrator, which could be the consequence of his hypersensitivity due to psychological and cultural factors. Thus, the murder in a heat of passion cannot exist if the reason was minimal or insignificant for provoking a serious exasperation in a perpetrator who is emotionally stable. The insult from the victim should be so relevant to justifiably bring the perpetrator into a state of extreme exasperation."*

The Supreme Court considers that even admitting the existence of a kind of provocation by Vlora Berbati, an emotionally stable person could not have been brought to such a state of extreme exasperation and agitation as to resort to the taking of her life. In fact, the state of agitation of the accused was more the result of his special sensitivity, which made inconceivable the possibility of being defied by a woman.

The Supreme Court also found that the court of first instance had rightfully assessed that another legal element, essential to define the murder as provoked, was not fulfilled in the present case, specifically the fact that the perpetrator should be brought to a state of exasperation by an assault or a serious insult from the victim, without fault of his own. This it held meant that "*the perpetrator of the homicide must not give cause for the attack or insult to the victim. On the contrary, the existence of the crime of passion (provoked murder) as in Article 33 of the KCC is excluded if it is established that the defendant has forced a conflicting situation on the victim, and the attack or insult by the victim was partly caused by the perpetrator."*

Arsim Istrefi

9 January 2003 – Ca. No. 264/2002

Background facts

On 31 July 2002, the accused was convicted of murder pursuant to Article 30, paragraph 2, items 1 and 5 KCC and sentenced to a term of twelve years of imprisonment.

Grounds of Appeal

The defense appealed and one of the grounds on which the appeal was based was that the incriminating acts of the accused should have been qualified as a criminal act of murder of the moment, pursuant to article 33 KCC, as opposed to murder pursuant to Article 30, paragraph 2, item 1.

DECISION OF THE SUPREME COURT

The Supreme Court rejected the appeal of the defense and held it was not murder of the moment on the grounds that neuropsychiatry reports and other evidence had proved that the accused did not undertake his incriminating acts as a result of mental pathology or pathologic effect. The Supreme Court found that *"He was not suffering from a permanent mental disease, he had no temporary mental disorder and no mental disturbance and therefore he could control his own acts and understand their importance. The accused was not suffering from hallucinations. He took the life of the deceased since for a long time he was suspicious and jealous because of marital disloyalty. The argue that started between him and the victim on the critical day, before the accused took her life, was not an insult of high intensity or attack that would cause a strong psychic shock to the accused and would give him reasons to take victim's life. Victim's life was not taken instantly because there were other reasons, which preceded the murder, like the jealousy and the accumulated anger because of the suspicion that she was cheating him*".

The Supreme Court concluded that "*the court of first instance had acted correctly when it found that the acts of the accused contained all objective and subjective elements of the criminal act of murder pursuant to Article 30, para. 2, item 1 KCC*".

The Supreme Court did however find that the verdict contained essential violations of the criminal law, because the evidence presented did not support a finding that he deprived the late Heidi of life because of ruthless behavior. The appealed verdict was varied regarding the legal qualification of the criminal act, from Article 30, paragraph 2, items 1 and 5 to Article 30, paragraph 2, item 1 KCC.

BRUTAL OR CRUEL MURDER

There is an objective and a subjective element in every criminal act, which should also be established in an alleged case of a brutal or cruel murder. In order for a murder to be qualified as cruel it is necessary that the act be committed in a manner that would exceed the cruelty or brutality that is inherent in every act of taking of someone's life. Furthermore, with regard to the subjective element, the competent court should take into consideration the attitude of the perpetrator and establish whether there is proof of an intention to cause severe or long-lasting pain to the victim.

See the case outlined below.

Case against Artan Hasani

10 April 2003 – AP-KZ 220/2002

Background facts

The accused was indicted and convicted for the criminal act of murder of a Serbian woman aged about 70 years, in a cruel and brutal manner and also for base motives namely personal profit pursuant to Article 30, paragraph 2, item 3 KCC. The evidence from the autopsy report demonstrated that she had sustained a severe fracture to her head following an assault by a blunt tool on 28 March 2000 and died as a result of her injuries on 6 April 2000. The accused was sentenced to fifteen years of imprisonment.

Grounds of Appeal

The defense appealed on a number of grounds including that the enacting clause of the verdict was contradictory and failed to set out critical facts upon which the verdict was based, that it failed to identify the accused as the perpetrator and that it failed to specify the precise criminal act.

DECISION OF THE SUPREME COURT

The Supreme Court had to consider whether the evidence supported a qualification of the criminal act as constituting murder committed in a cruel and brutal manner. In considering this question the Supreme Court held that there was an objective and a subjective element in every criminal act, which should also be established in an alleged case of a brutal murder. It found that in order for a murder to be qualified as cruel it is necessary that the act be committed in a manner that would exceed the cruelty or brutality that is inherent in every act of taking someone's life.

The Supreme Court held that a murder committed by one or several hard blows on the head may, but does not necessarily generate particularly severe pain, torment or distress so as to qualify the act as a cruel or brutal murder. In the present case, it held that the evidence before the trial panel did not establish the necessary additional level of severe suffering in order to satisfy the objective requirement under item 3. It further held that with regard to the subjective element, the competent court should take into consideration the attitude of the perpetrator and establish whether there is proof of an intention to cause severe or long-lasting pain to the victim and that in this case, there was no evidence that would indicate that the accused, motivated by whatever reasons, intended to inflict such depth of suffering on the victim.

THE IMPACT OF THE PKCC ON THE PROVISIONS OF LAW CONSIDERED

- UNMIK Regulation 2001/1 on the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law, Sections 1 and 4; It should be noted that the provisional criminal codes of Kosovo do not make provision for trials in *ab sentia* for any criminal act.
- Chapter XVI, Article 142 FRY CC which defines a war crime; Article 118 PKCC now codifies the criminal act of "War Crimes in Grave Breach of the Geneva Conventions."
- Article 30, paragraph 3 KCC together with Article 22 FRY CC on the criminal act of murder: Article 147 PKCC contains provisions which criminalize aggravated murder.
- Article 33 KCC on the criminal act of murder of the moment: Article 148 PKCC contains a provision entitled "Murder committed in a State of Mental Distress".
- Article 30, paragraph 2, item 3 defining brutal or cruel murder: Article 147, paragraph 5 contains a similar provision.

UNAUTHORISED PRODUCTION AND SALE OF NARCOTICS

The criminal offence of unauthorized production and sale of narcotics pursuant to Article 245, paragraph 1 FRY CC may be proved on the basis of merely having in ones possession narcotics and transferring them to another person. The exchange of money or consideration in return for the transfer is not a necessary element of the crime.

See the case outlined below.

Case against Nicic Predrag
3 March 2003 – AP. 227/2001

Background facts
On 9 March 2001 the accused was indicted for the criminal offence of unauthorized production and sale of narcotics pursuant to Article 245, paragraph 1 FRY CC.

The indictment alleged that he had kept and offered for sale substances that had been classified as narcotics and that he was caught in the act of selling the narcotics to his co-accused. During a subsequent search of the accused house, the police found and confiscated two boxes of cannabis weighing 886 grams and cash in the sum of 1,300DM. At both the investigative hearing and the main trial, the accused maintained that the drugs found at his house were for his private use and he denied that he was in fact trying to sell drugs to his co-accused. On 1 June 2001 the accused was pronounced guilty as charged and sentenced to one year and six months of imprisonment.

Grounds of Appeal
The defense filed an appeal against the verdict and the sentence. The primary issue raised on the appeal of the verdict was whether the money and the quantity of narcotics found in his home and the transfer of the narcotics to the co-accused represented sufficient evidence on which to establish unauthorized production and sale of narcotics, rather then merely the offence of purchasing and possessing drugs for his own use. The defense in support of this argument submitted that the accused had a medical history of substance abuse, a fact that had been accepted by the court of first instance. It was also submitted that the testimony of the co-accused corroborated the accused's statement that no money had changed hands and there was no evidence of any other sales of narcotics or drug dealing.

The Prosecution argued that it was sufficient to prove the elements of the crime charged in the indictment that the accused admitted to giving the drugs to his co-accused and in addition, that a quantity of narcotics and money were found at his home; it was irrelevant whether the drugs were being transferred for sale or as a gift.

DECISION OF THE SUPREME COURT

In considering whether the evidence before the court regarding the acts of the accused brought him within the ambit of Article 245, paragraph 1 FRY CC, the court engaged in a consideration of the wording of this article and held as follows:

"The ambit of the Article is extremely broad, particularly with respect to the wording,- "puts into circulation"- which would indicate that the exchange of money or receipt of profit is not a necessary element of the crime under this Article. Thus, both the confession of the accused and the statement of the co-accused indicate that Predrag Nicic had put the marijuana "into circulation" by providing it to Keriq Sead for further transfer to another person."

The Supreme Court in rejecting the appeal of the defense, concluded that the evidence that the accused gave his friend a certain quantity of narcotics was sufficient to allow the first instance court to establish, assess and qualify the offence as a criminal act falling under Article 245, paragraph 1 FRY CC.[33]

THE IMPACT OF THE PKCC ON THE PROVISIONS OF LAW CONSIDERED

Article 245(1) FRY CC on unauthorized production and sale of narcotics; The following articles of the PKCC deal with drug related offences:

- Irresponsible Preparation and Dispensing of Drugs, Article 222;
- Production and Distribution of Tainted Medical Products, Article 223;
- Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, Article 229;
- Unauthorized Production and Processing of Dangerous Narcotic Drugs and Psychotropic Substances, Article 230;
- Facilitating Acquisition or Use of Dangerous Narcotic Drugs, Psychotropic Substances or Analogues, Article 231.

[33] In relation to the defence's appeal of the sentence imposed by the first instance court, the Supreme Court reduced the period of imprisonment to the minimum penalty of six months.

UNLAWFULL POSSESSION OF WEAPONS

The possession of weapons, where those weapons have fallen into the possession of the person as a result of their distribution by the Serbian army and at a time when that army represented the legal Serbian authorities cannot be held to amount to an unlawful possession of weapons.

See the case outlined below.

Case against Milos Skulic

19 February 2003 – AP. 251/2001

Background facts

On 11 November 1999 the accused was indicted for murder pursuant to Article 30, paragraph 2, item 3 and unlawful possession of weapons and explosive substances pursuant to article 199 KCC. In relation to the charge of unlawful possession of weapons and explosive substances, it was alleged in the indictment that the accused had been found in unlawful possession of a quantity of weapons and explosive substances. The accused escaped while in pre-trial custody and on 18 June 2001 the court of first instance issued a decision ordering the accused to be tried *in absentia*. He was subsequently tried *in absentia* on 19 June 2001 and convicted as charged.

Grounds of Appeal

In the appeal filed by the defense it was argued that a violation of the criminal law regarding the illegal possession of weapons had occurred because the accused had entered legally into the possession of the weapons. They had been distributed to the citizens, including the accused by the legal Serbian authorities and they were ordered to return the weapons only on 23 September 1999. The possession of weapons by the accused prior to that date therefore could not be qualified as a criminal act and the accused should not have been criminally prosecuted.

DECISION OF THE SUPREME COURT

The Supreme Court examined the defense's submissions and held that the first instance court had simply disregarded the arguments of the defense and left them without a response in its verdict. It failed to evaluate the legal element of "unlawful possession" of weapons by the accused, which, according to the defense, were distributed by the Army, representing at that time, the legal Serbian authorities. It found that "*the first instance court, in violation of Article 366 paragraph 1 of LCP, has failed to establish the factual*

status of the alleged criminal offence of Illegal Possession of Weapons by not addressing the issue of the proper authorization of the seized fire weapons and ammunitions as well as by not assessing the second legal element of this criminal offence, that of the "large quantity".

The Supreme Court overruled the second part of the enacting clause of the contested verdict regarding the criminal act of Illegal Possession of Weapons as per Article 199, paragraph 3 in connection with paragraph 1, and sent the case back with a direction for a retrial on these charges.[34]

Case against Boban Momcilovic, Mirolub Momcilovic and Jugoslav Momcilovic

25 February 2003 – AP. 84/2001

Background facts

On 7 January 2000, the three accused were indicted for murder in complicity pursuant to Article 30, paragraph 3 in conjunction with paragraphs 2 and 1 KCC and illegal possession of weapons pursuant to Article 199, paragraph 1 KCC. It was alleged in the Indictment that on 10 July 1999, the three Kosovo Serb accused shot at three Kosovo Albanians, killing one of them and that they were illegally in possession of a quantity of weapons. All three accused were acquitted of murder but found guilty of illegal possession of weapons and were sentenced to one year of imprisonment.

Grounds of Appeal

The defense appealed the conviction of the accused for unlawful possession of weapons, on the basis that the trial panel had incorrectly evaluated the established facts as constituting a criminal act. It was argued that the accused had entered into lawful possession of the weapons in circumstances where they had been called up as reserve military troops, and had been issued with their weapons by the authorities in accordance with the Law on Army of Yugoslavia.

[34] The Supreme Court directed "the lower court to thoroughly consider, during the retrial proceedings, the existence or non-existence of the basic legal element of the criminal act of illegal possession of weapons,- the "unlawful possession" of weapons, and the legal element of a "large quantity," if the deeds are to be qualified under paragraph 3 of Article 199 KCC. It stated that this assessment of the first instance court should be done by making relevant references to the applicable law, at the time of the alleged crime, laws and regulations on the matter. It must not be forgotten the uncertain legal situation in Kosovo in June 1999 and other circumstances under which the person entered into the possession of firearms, ammunition or explosive substances. For example, it is a well-known fact that the Serbian authorities armed a part of Kosovo population during the conflict. Logically, the court must evaluate if the persons who received the weapons from the Serbian authorities at that time can be hold criminally responsible for accepting the weapons."

DECISION OF THE SUPREME COURT

The Supreme Court found that the court of first instance had based its determination on the fact that that the weapons were found in the home of the accused, and that they did not have authorizations for the weapons. It considered that while it was undisputed that the weapons were in the possession of the defendants, the defendants were called up as reserve military troops during the armed conflict and that the Serbian authorities gave the defendants the weapons to be used in conjunction with their military service.

The Supreme Court found that the first instance court "*did not consider laws applicable on 10 July 1999 in regard to weapons possession, specifically, the Law on the Army of Yugoslavia (FRY Official Gazette 43/1994) and the Law on Weapons and Ammunition (SRS Official Gazette 9/92). Article 31 of the Law on the Army of Yugoslavia (FRY Official Gazette 43/1994) authorizes military personnel to carry and use firearms "in accordance with the rules of the service." Documentation provided by the defense during the main trial proves that the SUP Gjilan/Gnjilane issued the defendants weapons permits, and that the Serb authorities distributed the weapons to the defendants on 16 June 1998 and 15 January 1999. The court did not consider whether possession of such weapons violated directives or regulations issued at the time of the defendants' arrest*."

The Supreme Court concluded that based on the correctly established facts (namely that the defendants lawfully received the weapons from the Serbian military authorities, that the Serbian military authorities were acting in accordance with the existing laws and that new laws were not in force at the time the weapons were seized) the first instance court had reached the wrong legal conclusion regarding the lawfulness of the possession of weapons. It further held that the correct legal evaluation of the established facts excluded categorically the existence of a criminal act of illegal possession of weapons on the part of the accused, and that defendants had to be acquitted.

MENS REA NECESSARY TO PROVE THE OFFENCE

The mens rea necessary to prove the offence of illegal possession of weapons is established at the moment the accused comes into the illegal possession of such weapons. The element of social danger mentioned in Article 8(2) is achieved in the mere fact of the illegal possession of weapons which is considered dangerous to the general public and the destination of such weapons is of no relevance to the performance of the criminal offence as such.

See the case outlined below.

Case against Sadete Ajdini, Zerije Asani, Xhevaire Osmani, Mazafer Hamdiu, Xhemajl Hasani and Naxmi Jashari

8 May 2002 – AP. 272/2001

Background facts

The six accused were indicted for the unlawful possession of weapons pursuant to Section 8.2 of UNMIK Regulation 2001/7 On the Authorization of Possession of Weapons in Kosovo. On 6 December 2001 they were pronounced guilty as charged and sentenced to four years and six months of imprisonment.

Grounds of Appeal

The defense appealed the verdict alleging that there have been essential violations of the criminal procedure law to the detriment of the accused, an erroneous and incomplete establishment of the facts of the criminal law and an improper decision on the sentencing of the accused persons. The defense submitted that there had been a breach of Article 8.2 of UNMIK Regulation 2001/7 and thereby a violation of the applicable criminal law in that the element contemplated in this Article, namely the existence of the social danger, did not exist due to the fact that the weapons were destined for FYROM and not for Kosovo. The defense counsel further asserted that the District Court had no jurisdiction over the territory of FYROM.

DECISION OF THE SUPREME COURT

The Supreme Court held that the existence of all the elements of the criminal offence had been established by the court of first instance and that the argument of the defense counsel had no grounds and could not be justified with the weak reasoning that the destination of the confiscated weapons was FYROM. In engaging in a detailed consideration of the *mens rea* required to prove the offence of illegal possession of weapons the Supreme Court held as follows:

"The mens rea of the illegal possession of weapons is established at the moment the accused ones come into possession of such weapons. The element of the social danger mentioned in Article 8 (2) is achieved in the mere fact of the illegal possession of weapons considered dangerous to the general public. The destination of such weapons is of no relevance to the performance of the criminal offence as such. Also, the fact that one of the accused persons, namely Nazmi Jashari, would voluntarily hand over the unauthorized pistol he was carrying, does not exclude him from the criminal responsibility of being illegally in possession of that weapon. The court of first instance has also clearly dealt with the issue of jurisdiction over the case and it has rightly concluded that the territorial jurisdiction is proper with the court in the district where the crime was committed as contemplated by Article 26, paragraph 1 of the Law on Criminal Procedure. The court has concluded so based on the testimonies of the KFOR soldiers as the witnesses, which were not disputed by the defense. During the trial it was proven that the accused ones were arrested in the territory of Kosovo, near the village of Debelde (municipality of Vitina,) in the proximity of the Kosovar/Macedonian border.

The court also considered the argument brought forth by the defense counsel during the panel session on the amnesty law issued by the FYROM authorities which the defense submitted would cover all the accused. It held that this argument had no relevance to the instant case as no law of FYROM would be applicable in respect of criminal offences committed within the territory of UNMIK Administered Kosovo and furthermore that the conditions for this amnesty were not met by the accused.

THE IMPACT OF THE PKCC ON THE PROVISIONS OF LAW CONSIDERED

Article 199 KCC on the unlawful possession of weapons or exploding substances: Note that Articles 327-330 PCPCK contain provisions criminalizing the unauthorized supply, transport, production, exchange, sale, ownership, control and possession of weapons.

APPROPRIATION OF A MOTOR VEHICLE

Case against Radojica Lazic

6 March 2003, AP-KZ 248/2001

Background facts

On 22 November 2000, the accused was indicted for the criminal act of appropriation of a motor vehicle pursuant to Article 143 KCC and unlawful possession of weapons pursuant to Article 199 paragraph 3 KCC. At the main trial, which was held *in absentia*, on 1 June 2001, the Public Prosecutor withdrew the charges of unlawful possession of weapons. In relation to the charge of appropriation of a motor vehicle, it was alleged that during the war the accused had illegally taken a motor vehicle belonging to another person for the purpose of driving it. After the war, the owner of the vehicle recognized the car in front of the accused's house and reported it to KFOR, who investigated the matter and determined that the ownership of the car belonged to the injured party. The accused in his defense claimed that he bought the body of the car for 150DM from a person named Dragan Stankovic, who allegedly was resident in Zeleznika Kolonia and that the latter had promised to provide the accused with a traffic license within seven days. The accused claimed that in the interim he installed an engine and tiers to the car to make it functional.

The accused was found guilty of the appropriation of the motor vehicle and was sentenced to one year of imprisonment.

Grounds of Appeal

The defense appealed the verdict contending that the District Court had not established completely and accurately the circumstances of the case and as a result had failed to properly and correctly apply the law.

DECISION OF THE SUPREME COURT

The Supreme Court held that the first instance court had failed to engage in an analyses of the criminal act alleged for the purposes of establishing the elements of the criminal act of appropriation of a motor vehicle; it had reached the conclusion that the accused had appropriated the vehicle with the intention of using it for driving without adducing evidence proving this intention.

It found that a key element of the offence of appropriation of a motor vehicle is the intention of the perpetrator to use the vehicle temporarily, for driving purposes. Taking possession of a motor vehicle for the purpose of using it permanently demonstrates the intention of acquiring material gain and, thus, falls outside the scope of the application of Article 143 KCC.

The Supreme Court also held that the first instance court should have examined the accused's statement that he bought only the car body, because Article 143 refers to appropriation of vehicles, as engine-powered means of transport. Therefore appropriation

of a car body without an engine cannot constitute a violation of Article 143 KCC because the vehicle could not be used for driving.

The Supreme Court concluded that the manner in which the accused had come into possession of the vehicle deserved a meticulous examination by the first instance court, because it is important in determining the existence of the criminal act and for its correct legal qualification, if it exists. The first instance court should also establish the role of the accused in unlawful appropriation of the vehicle from the injured party, if any at all. This is necessary because a person who receives another person's motor vehicle to use it for driving from a third person, who had unlawfully appropriated the vehicle from the owner, does not commit the criminal act under Article 143 KCC if he is not aware of the fact of unlawful appropriation.

THE IMPACT OF THE PKCC ON THE PROVISIONS OF LAW CONSIDERED

Article 143 KCC which criminalizes the unlawful taking of a motor vehicle: Article 258 PKCC now criminalizes the taking possession of moveable property generally and paragraph 2 thereof criminalizes the attempt of this offence if it involves the taking of a motor vehicle of another person.

ENDANGERING HUMAN LIFE

Case against Roland Bartetzko

12 October 2002 – AP-KZ 181/2002

Background facts

On 18 April 2001 an explosive device was placed and activated near the Center for Peace and Tolerance in Pristina which resulted in the death of one person and serious bodily injury to four (4) other persons. Shortly after the explosion, the accused was arrested some 250-300 meters away from the crime scene. He was covered with soot from the abandoned, burned out house where the firing point of the bomb had been and his finger print was found on part of the devise which had not exploded (on a milk carton wrapped with brown packaging tape and connected to several TNT blocks).

The accused was charged with the criminal offence of murder pursuant to Article 30, paragraphs 1 and 2, items 1, 3 and 6 and paragraph 3 KCC; four counts of attempted murder pursuant to Article 30, paragraphs 1 and 2, items 1, 3 and 6 and paragraph 3 KCC in relation to Article 19 FRY CC; inflicting grave bodily injury pursuant to Article 38, paragraph 1 and 2 KCC, several counts of attempting to inflict grave bodily injury pursuant to Article 38, paragraphs 1 and 2 KCC in relation to Article 19 YCC and terrorism pursuant to Section 2.2 of UNMIK Regulation 2001/22.

On 10 May 2002 the court of first instance found the accused guilty of one criminal act of attempted murder, four counts of the criminal act of attempted murder and one act of terrorism. He was sentenced to eighteen years of imprisonment for the offence of murder, twelve years of imprisonment for each of the four counts of attempted murder and twenty years of imprisonment for the criminal act of terrorism. The court pronounced an aggregate sentence of twenty three years of imprisonment.

Grounds of Appeal

The defense appealed the verdict on a number of grounds pleading an essential violation of the criminal procedure law in relation to the question of the punishment of the accused, a violation of the criminal law and a wrongful and incomplete establishment of the facts.

DECISION OF THE SUPREME COURT

The Supreme Court held that in order for the criminal offence under Article 157, paragraph 1 to exist, the court should first establish a direct causal link between the forbidden act (in this case the construction of the bomb) and the harmful consequence (endangering of the human life, or body or sizeable property.) It found that in the instant case it was not possible to establish in the accused's actions, the direct causal link and that no evidence had been heard by the first instance court which would have allowed it to establish the location in which the construction of the bomb took place, whether in the middle of a field, or on top of a mountain where the only person/s in danger would have been the constructor/s of it or in the middle of an inhabited area in a sizable property

belonging to someone different from the perpetrator/s. The Supreme Court further held that the first instance court had not been able to prove that this bomb, constructed *in arguendo* by the accused, was placed by the accused in the critical building, this being the only other action of the accused which would have endangered general security. It rejected the argument put forward by the OPPK in which it had argued as follows:

"…But when one manufactures a bomb, it is fair to conclude that s/he has at least the dolus eventualis *that it will be used to cause general danger; a bomb as this can only be used to kill or destroy on a large scale."*

The Supreme Court held that in relation to a criminal act pursuant to paragraph 1 of Article 157 of KCC, establishing the *mens rea* of the accused is mandatory. It found that the premeditation of the accused in this case would have been manifested in his awareness of the nature of the act that he was conducting (an explosion through the use of the bomb build *in arguendo* by him) and the consequences of this action of his (i.e. that in that manner he is endangering the life or body of people or sizeable property). In addition, it held that the motive as to why the accused would have committed such acts had also to be established before holding him liable.

The Supreme Court concluded that the first instance court had failed to establish the *mens rea* of the accused, thus a mandatory requirement of the law for the commission of the criminal offence under Article 157, paragraph 1 KCC was not established.

THE IMPACT OF THE PKCC ON THE PROVISIONS OF LAW CONSIDERED

Article 157 KCC which defines and criminalizes the act of causing general danger is now contained in Article 291 PKCC.