UNITED NATIONS
United Nations Interim Administration Mission in Kosovo

UNMIK

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

DISTRICT COURT OF PEC/PEJA
C/P 136/2001
26 June 2003

I

IN THE NAME OF THE PEOPLE

1. District Court of Pec/Peja, with the panel composed of International Judge Vinod Boolell as Presiding Judge and International Judge Marilyn Kaman and Professional Judge Halil Muhovic as panel members, assisted by Court Recorders Robina Struthers, Cecilia Takoff and Rose Marie Hall and in the presence of Legal Officer Emmanuel Cole, in the criminal case against the accused Veselin Besovic from the village of Gorazdevac charged with the criminal acts of insults defined and penalised by Article 65 Paragraph. 2 of the Criminal Code of Kosovo [CCK], endangering the safety of other persons defined and penalised by Article 48 Paragraph 2 of the CCK and war crimes defined and penalised by Article 142 of the Criminal Code of Yugoslavia [CCY] read with Article 22 of the CCY which defines and penalises complicity and Article 26 of the CCY which defines the crime of criminal association, defended by Mr. Zivojin Jokanovic and Mr. Miodrag Brklac, according to the indictment No. P.197/2000 filed by the Public Prosecutor of Pec/Peja as represented by the International Prosecutor, Mr. Kamudoni Nyasulu, which indictment was amended, the initial trial session taking place on 28 January 2003 and further trial sessions being held on 10, 17, 18, 19, 25 February; 3, 5, 10, 11, 12, 17, 18, 19, 31 March; 8, 9, 14, 15, 22, 29 April; 6, 7, 13, 29 May; 2, 3, 4, 6, 9, 10 11 12, 20 21, 23 June and after completing the main trial on 26 June 2003 in the presence of the parties, and after deliberating and voting pronounced the following

II

A. VERDICT

2. The accused Veselin Besovic nicknamed Vesko, father Dimitrije and mother Stana, born on 22 March 1952 in the village of Gorazdevac in the Municipality of Pec/Peja, where he resided until his arrest on 6 October 2000, of Montenegrin nationality, citizen of the Federal Republic of Yugoslavia, married, father of four

children, having completed secondary education and military service in Zare, Croatia in 1975, of medium economic status, with no previous criminal record, in custody since 6 October 2000 and released on 13 December 2002 and taken back in custody on 8 April 2003 is

B. ACQUITTED

3. Pursuant to Article 350 Paragraph 3 of the Law on Criminal Procedure of Kosovo [LCP] of the criminal acts of insults and endangering the safety of other persons as charged in counts 1 and 2 of the indictment and of war crimes as charged in counts 3 to 19 inclusive.

C. AND

4. Pursuant to Article 351 of the LCP the accused is found

GUILTY

5. Of the war crimes of torture and displacemnt of civilian population and pillaging committed on 14 May in Zahaq village in the Municipality of Pec/Peja and in Qyshk village in the Municipalityof Pec/Peja in violation of Article 142 of the CCY read with Article 26 of the CCY and charged in counts 20 and 21 and 22 to 26 of the indictment, the court considered the criminal acts charged in counts 20 and 21 as one single transaction and counts 22 to 26 as one transaction.

6. Therefore, pursuant to Article 351 [LCP] the accused is sentenced to a term of 5 years of imprisonment for the criminal acts of war crimes committed in Zahaq and 6 years of imprisonment for the criminal acts of war crimes committed in Qyshk in violation of Article 142 of the CCY read together with Article 22 and Article 26 of the CCY.

7. The accused will serve an aggregate of seven years' imprisonment.

8. The sentence includes the time that the accused has spent in custody from 6 October 2000 to 13 December 2002 and from 8 April to 26 June 2003.

9. The accused will pay one half of the costs of these criminal proceedings.

10. The injured parties may present their claims to the civil jurisdictions.

11. Pursuant to Article 353 Paragraph1 LCP custody is ordered as envisaged by Article 191 Paragraph 2 LCP.

III

REASONING

A. INTRODUCTION

1. Trial of Accused for Robbery

12. The accused was tried and convicted on a charge of robbery pursuant to Article 137 of the CCK and unlawful possession of weapons pursuant to Article 199(1) of the CCK. By a verdict dated 12 December the accused was found guilty and sentenced to a global punishment of imprisonment for a period of three years and six months. On 20 April 2001 the Supreme Court of Kosovo accepted the appeal of the accused, overruled the verdict of the first instance panel and returned the case for retrial. At the retrial the accused was acquitted of the charges pursuant to Article 350 of the LCP.

13. The charges arose out of circumstances in which the accused had claimed that he had come across two men cutting wood from his land. The men had loaded their trailers with his wood. The accused detained the men and made them accompany him with one of the tractors and trailers. At the trial the accused said that he had intended to take the two men and the one tractor and trailer to UNMIK in Gorazdevac to report the event. On the way there the two men fled and he then drove the tractor with the trailer to the village square and parked the vehicles next to the village presidency and the UNMIK office. The other tractor and trailer and the chain saw were left at the scene. He claimed that he reported the event to the village presidency and the next day to KFOR. UNMIK went with him to the scene the next day. The other tractor, trailer and chain saw were not there. Later he claimed he went alone to the scene and found the other trailer further in the forest, but the tractor and chain saw were gone. He then borrowed a tractor and took the trailer to the village square as well. About ten days later the tractor and the two trailers were moved to Milic Kastratovic's yard and the wood off loaded. He then went back to Montenegro. He said that it was his intention to retain the vehicles until the two men had made a settlement with him regarding compensation. This is customary in Kosovo. However, he learned that UNMIK had ordered that the tractor and the two trailers be returned to the men.

14. The original trial panel did not accept the accused's explanation of the incident and he was convicted of the offences alleged. At the re-trial Milic Kastratovic, a member of the village presidency, confirmed the accused's story and the re-trial panel accepted it. The court also found that trunks in Milic Kastratovic's yard matched the stumps in the accused's forest but concluded that this fact could not in itself prove that the trunks had been cut by the two men on the day in question. As no weapons had been found in the possession of the accused, or on his premises, the court found that there was insufficient proof that the accused had been armed with an illegal weapon during the event.

2. Indictment for War Crimes

15. The accused was detained pursuant to the decision of the investigating judge in the District Court of Pec/Peja dated 19 July 2001, following the request made by the International Prosecutor, Pec/Peja District Prosecutor's Office**.**

16. On 12 November 2001, the International District Prosecutor issued an indictment dated 5 November 2001. It was amended on 23 August and 15 October 2002. It was also amended by the panel to delete one count which had been repeated twice. At the end the indictment contained 26 counts instead of 27. The accused is charged with the criminal acts of insulting pursuant to Article 65 paragraph 2 of the CCK; endangering the safety of other persons pursuant to Article 48 paragraph 2 of the CCK; unlawful detention pursuant to Article 63 paragraph 4 of the Criminal Law of Serbia (CLS); causing serious bodily injury pursuant to Article 38 paragraph 1 of the CCK; damaging another person's object pursuant to Article 45 paragraph 2 of the CCK; obscene behaviour pursuant to Article 75 as read with Article 79 of the CCK; violent behaviour pursuant to Article 190 of the CCK; and war crimes against the Kosovar Albanian population pursuant to Article 142 paragraph 1 of the CCY.

3. First Trial of the Accused

17, The trial started on 20 May 2002 before a panel presided by International Judge, Tudor Pantiru and having as members International Judges, Timothy Clayson and Jean Pierre Lortie. The trial of the accused could not be terminated. In the meantime a member of the panel had to leave the mission.

18. That panel explained the reasons for not ending the trial as follows:

> "A major reason for failure of the panel to complete the trial of the accused prior to the departure of the panel member resulted from the complexity of the case alleged against him. The amended indictment charges the accused with 26 counts, 23 of which are charged as war crimes. The factual allegations underpinning those counts are highly complex and to date the panel has heard thirty-nine witnesses, six of whom were defense witnesses, which required the panel to organize to travel to Belgrade in order to receive their evidence. Delays in being able to complete the trial prior to the departure of one of the panel members resulted from difficulties associated with collecting evidence alleged to be relevant to the defense of the accused, including documents from the Zastava factory, medical records from the Belgrade hospital, and information regarding the mobilization or otherwise of the accused from the Ministry of the Interior. To date the panel still has not received any of the requested materials and the causes of the delay are currently being investigated by the Department of Justice."

4. Decision on the Detention of the Accused by the First Panel

19. District Court panels, in sessions held on 11 January, 7 March, 29 April, 21 June 2002 and 7 August 2002, 26 October respectively extended the detention of the accused until 11 March, 7 May, 29 June, 29 August, 29 October 2002 and 29 December 2002 respectively, based on article 191 paragraph 2 items 1 and 2, LCP.

20. The first trial panel, by a decision dated 13 December 2002 terminated the detention of the accused and ordered his release. The reasoning of that panel was the following:

21. "In considering whether the detention of the accused should be continued the panel must satisfy itself that the continued custody of the accused may be ordered pursuant Article 191 of the LCP. Further, by virtue of UNMIK Regulations 1999/24 as amended by Regulation 2000/59, the panel must also ensure that any decision it renders on the continued detention of the accused is not in violation of Article 5(3) of the ECHR. Article 5(3) read as follows:

"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."

22. With respect to the application of Article 191(2) the panel may order the continued custody of the accused only if it is satisfied that there "are grounds for suspicion" that the accused committed a criminal act. The criteria of "grounds for suspicion must be understood as "reasonable" in the sense of Article 5-1(c) of the ECHR. Once this is satisfied, before custody may be ordered the panel must satisfy itself that there is "the strong possibility of flight" on the part of the accused (para. 2(1)); or a "founded fear" that the accused if released would interfere with the evidence or witnesses (para. 2(2)); or a "fear" of further criminal activity on the part of the accused (para. 2(3)); or the criminal act for which the accused is charged is one which attaches a penalty of ten years or more and release of the accused may cause "disturbances of the citizens".

23. With respect to the application of Article 5(3) the jurisprudence of the European Court of Human Rights establishes three criteria to be considered in determining the lawfulness of a continued detention: (1) the existence of a grounded (reasonable) suspicion, (2) the persistence and relevance of specific grounds for detention and (3) whether the detention did not exceed a reasonable time. With respect to this last issue of reasonableness of the time of detention three factors are of importance: (1) the complexity of the case, (2) the conduct of the detainee and (3) the conduct of the authorities.

24. Turning first to the pre-requisite requirement of Article 191(2) the panel is satisfied, having considered the minutes of the interrogation of the witnesses who have given evidence in this case, that there are grounds for a reasonable suspicion that the accused may have committed one or more of the criminal acts alleged against him. On this basis the first consideration of Article 5-1 (c), the existence of a persisting grounded (reasonable) suspicion, is also satisfied.

25. As stated above, Article 191 (2) provides that if there are grounds for suspicion that a person could have committed a criminal act, custody may be ordered in four enumerated circumstances. Having considered those circumstances the panel is satisfied that Article 191-2 (1) is the only relevant circumstance applicable to this accused.

26. In previous decisions justifying the continued detention of the accused the panel has considered that the fact that the accused faces a maximum punishment of 40 years of imprisonment suggests a strong possibility that he will abscond if released. In addition, due to the nature of the crime he is charged with and his known connections with the Republic of Montenegro, it has considered that he would have no difficulty to flee either to Montenegro or to Serbia and thus render very unlikely his presence at the main trial.

27. However, in this decision the panel must also consider the effect of a Guarantee the accused has secured on his behalf. This Guarantee consists of an undertaking from the Government of Serbia and the Federal Government of Yugoslavia that if the accused is released he "will spend his temporary release on the territory of the Federal Republic of Yugoslavia" and they guarantee to ensure that the accused will appear for trial if released, by undertaking:

    (i) an obligation to secure that the accused reports daily to the police station and to keep records and deliver monthly reports confirming that the defendant has complied with this obligation; and

    (ii) to immediately arrest the accused is he tries to flee or to violate any of the conditions for temporary release and to notify the UNMIK authorities in order to prepare for the hand-over of the defendant back to them.

28. The Guarantee is dated 5 August 2002 but it had not been delivered to the panel for consideration at earlier hearings on continuation of the detention of the accused.

29. Having considered the Guarantee, and particularly the undertaking that if released the accused will remain on the territory of the Federal Republic of Yugoslavia, the panel is satisfied that the strong possibility of flight on the part of the accused is greatly nullified by the Guarantee and that as such the accused should be provisionally released on the basis of the Guarantee. In making this decision the panel is aware that it is placing full reliance upon the good faith of the Serbian

and Yugoslav authorities who have already proved to be committed to the rule of law and their obligations in other similar cases. The panel is satisfied that the Guarantee would not have been given lightly, or without careful consideration on the part of the Government of Serbia and the Federal Government of Yugoslavia of the possible consequences of a failure on their part to uphold the obligations undertaken.

30. In conjunction with the Guarantee the accused has pledged, in accordance with Article 185 of the LCP, that he will not conceal himself nor leave the place where ordered to reside without the court's permission.

31. In accepting the Guarantee and the pledge of the accused as ensuring that the accused will appear for trial the panel is acutely aware that the accused has been in detention since his initial arrest on 6/10/2000 in relation to other matters and that the first decision to detain the accused in relation to this case was made by the investigating judge on 19 July 2001. Effectively, the accused has been in detention for a period of over two years and two months. The panel is also acutely aware that the trial of the accused will have to be re-started in accordance with the requirements of Article 305 and it cannot reasonably be expected to be completed prior to March 2003. The panel accepts that this last circumstance is due to the fact that one of the original panel members left the mission prior to the completion of the trial and that adjournment of the hearing has exceeded the thirty-day limit set by Article 305. As such that Article prohibits this panel from continuing with the trial and requires that the proceedings be re-started.

32. The panel concluded as follows: "Accordingly, as the panel has been provided with Guarantees that it has accepted as ensuring the presence of the accused at trial the panel is required to release the defendant to avoid violating Article 5(3) of the ECHR."

5. Decision on Detention of the Accused by the Present Trial Panel

33. The trial of the accused before the present panel started on 28 January 2003. It was adjourned to 10 February 2003. On that day the indictment was read and the interrogation of the accused by the Presiding Judge started and ended on 18 February. After interrogation by the other members of the panel, the International Prosecutor started examining the accused on 19 February. The hearing was then adjourned to 24 February.

34. On that day the accused did not turn up. Nor did any of his defence attorneys. The court was vaguely informed that one of the attorneys was ill and that the other one would not attend. On Friday 21 February, however, information was received that the accused had been admitted to a hospital in Belgrade for medical treatment. A communication, dated 21 February 2003 and signed by the three defence attorneys, Zivojin Jokanovic, Miodrag Brkljac and Nikaola Vujosevic, was sent to

the Presiding Judge. The defence attorneys requested that the sittings of 24, 25 and 26 February be adjourned on the ground that they themselves were unable to attend the trial and because the defendant's health did not enable him to be present in court. The panel noted that on the very first day of the trial on 28 January one of the defence attorneys stated that it would be better that the trial did not start at all on account of the state of health of the accused. When questioned by the Presiding Judge, the accused stated that he was well enough to stand trial and the trial proceeded.

35. On 24 February the panel noted the absence of the accused and his defence attorneys as well as the absence of any written medical certificate to justify the absence of the accused. In the afternoon of the same day the Presiding Judge received by fax a medical certificate, which had been forwarded to Legal Officer, Emmanuel Cole. Briefly, that report, which is dated 24 February 2003, stated that the defendant was suffering from a cardiac malfunction and needed "relaxation and rest". There was no indication on the length of time that the defendant would require for such relaxation and rest.

36. On Friday 28 February the Presiding Judge received a communication from Legal Officer Emmanuel Cole that the defendant was still under medical treatment. A medical certificate from the Cardiology Clinic of the Military Medical Academy dated 28 February was sent to the panel. The defendant was suffering from acute coronary syndrome and hypertension. The last paragraph of the certificate read: "The certificate is to serve the purpose of settling patient VESELIN BESOVIC's official obligations and it cannot be used for any other purposes." No request for an adjournment of the hearings scheduled for 3, 4 and 5 March 2003 was requested by the defence attorneys, none of whom was present in court on 3 March.

37. At the sitting of 3 March, the International Prosecutor submitted that the absence of the defendant had not been satisfactorily justified. This resulted therefore in a breach of the conditions under which he was released. He accordingly proposed that the release order be terminated, that the defendant should be examined by an independent panel and that the defence should be heard. The panel considered these proposals and ruled that, as the situation related to the liberty of an individual, the defence should be given an opportunity of replying to the proposals of the prosecution. The matter was then adjourned to 5 March.

38. On 5 March defence attorney, Mr. Zivojin Jokanovic submitted that there had been no breach of the release conditions by the defendant. His absence has been explained and it was due to ill health. He agreed with the proposal that the defendant be examined by a medical panel in Kosovo. In reply the International Prosecutor stated that he was no longer insisting on the termination of the release order. He added however that the defendant should enter into a new pledge about his residence and that he should furnish bail.

39. The panel took note that in addition to the guarantee given by the Federal Government of Yugoslavia and the Government of the Republic of Serbia under the hands of Prime Minister Dradisac and Prime Minister Dr. Zoran Djindjic, respectively, on 5 August, the defendant gave a personal pledge pursuant to Art. 185 of the LCP that he would not conceal himself nor leave the place where he would be ordered to reside without the permission of the court. Whilst fully paying due regard and total respect for the guarantee signed by the Federal Government of Yugoslavia and the Government of the Republic of Serbia, the panel took the view that this guarantee was not binding on it. At best this guarantee would bind the two governments and UNMIK as to the obligation taken by the two governments in case the defendant would abscond and fail to appear at his trial. The panel observed that it could only use this guarantee to inform the SRSG as chief of UNMIK that the defendant had absconded and leave it to the UNMIK administration to deal with the matter at a diplomatic or political level. The court was not in a position to compel the two foreign governments to comply with the agreement, as this would be a breach of the principles of state sovereignty and jurisdictional matters.

40. The panel therefore considered only the pledge given by the defendant on 13 December 2002, which reads:

> "I, BESOVIC VESELIN solemnly pledge that I will not hide nor leave the place of my residence without the court's permission until the final conclusion of all criminal proceedings in case number C Nr. 136/01, Pec/Peje District Court. I have been warned that if I violate this pledge I will be taken in custody. Further, I undertake to respect the guarantees of the Federal Republic of Yugoslavia and the Republic of Serbia dated 5th August 2002. [Signature of Besovic Veselin follows].
>
> The above pledge has been translated to me in Serbian. I understand and accept the pledge and undertake to honor its terms.
>
> Signed: Besovic Veselin.
> 13th December 2002.
>
> Residence either 1) Kralja Petra St L.4 Stan 11;
> Or 2) Martovskih Zrtava 14, Krusevac, Serbia, FRY.
> Telephone: 1) 028/423115 or 432115 or 422115 (2) 037/36804."

41. According to the panel, it was abundantly clear from the pledge given that the defendant was given the choice and latitude to stay either in Kralja Petra, Mitrovica (north) or in Belgrade. He was not asked to elect one place of residence. When the defendant went to Belgrade, admittedly to a hospital, he could not be in breach of the pledge he had entered into about his residence. In the view of the panel, such an uncertainty could not be allowed to prevail and that the defendant should be ordered to reside at a place where the court could have control over him for the purposes of the present proceedings.

42. In reaching its decision to amend the conditions of release and to impose bail the panel considered the reasons for the absence of the defendant on six occasions. The panel considered that the defendant had put forward health reasons and had supported this fact by medical documents. Whilst not in any way suggesting that these medical documents did not reflect the reality of the defendant's health, the panel, at the same time, noted that the medical certificates did not explain in very clear terms in what manner the defendant was incapacitated to attend the trial or for how long the alleged incapacity would last. The panel also observed that "It is a fact that the defendant, though he is facing serious charges, is presumed to be innocent and that his detention was terminated as it was believed by the previous panel, that the time of two years that the defendant had spent in detention was long, the more so as it could not be determined then when the trial of the defendant could be started again. Now that trial has started since 28 January 2003, the panel considers that the defendant should not invoke his health reasons as an impediment for the smooth running of the trial. If the defendant has rights these rights are to be balanced against the rights of the victims and with the public interest of seeing a trial through in the least possible delay."

43. The panel then imposed new conditions for the release of the defendant and they were the following.

(i) The defendant shall at the place of his sister in Mitrovica (north) at Kralja St L.4 Stan;
(ii) The defendant shall not move from that address for any reason whatsoever including health reasons without seeking the prior authorisation of the court;
(iii) In the event that the defendant needs to move to Serbia for health reasons he will do so under the supervision of the court;
(iv) The defendant shall be examined by a medical panel to be designated by the court as and when ordered by the court if the necessity for such examination arises;
(v) The defendant shall furnish bail in the amount of 10,000 euros either in his own name or through a surety to secure his attendance in court;
(vi) The defendant promises not to hide or conceal himself.

44. With regard to conditions (i) and (ii) the panel decided that the defendant should sign a new pledge which would replace the one he signed on 13 December 2002.

45. The defendant signed that new pledge and subsequently provided the court with title deeds to his property in Kosovo. The defendant was also examined by a doctor at the German KFOR in Prizren. The panel examined the report from the KFOR hospital and, after a close reading of the results of the examination carried out in Belgrade and those carried out by Dr. A. Zimmermann of the German Field Hospital in Prizren, concluded that that the doctors in Belgrade limited themselves to the subjective symptoms that were transmitted to them by the defendant, and it

was on that basis that he was granted medical certificates to justify his absence from the hearing scheduled on 24 February. None of the subjective symptoms were objectively ascertainable, according to Dr. Zimmermann, who carried out extensive tests on the defendant. In light of these medical findings, the panel concluded that the defendant had used his alleged health condition to mislead the doctors in Belgrade who, unfortunately, allowed themselves to be swayed by what the defendant was telling them without any attempt to support these subjective findings by any independent thorough examination.

46. The panel considered that this fact was an attempt by the defendant to try and flee this jurisdiction. It was agreed that following his absence from the hearing on 24 February the defendant did turn up in court. But the panel was of the view that this fact by itself could not lead the court to overlook the conduct of the defendant as he used his health reasons not to appear when it was clear that these reasons were not justified medically.

47. The panel concluded that the risk of flight was very much present in this case. The panel considered that if released the defendant would flee to avoid the sentence provided for the offence. The panel then proceeded to analyse the legal principles of detention in the case of the risk of flight.

48. The panel referred to the commentaries on Art. 191 Para. 2 Item 1 LCP by Momcillo Grubac and Tihomir Vasilejvic[1] who write the following: *As an example of that risk the law lists that the accused is hiding or his identity cannot be established. Those may be all sorts of circumstances that can create such an impression on the part of the judge: an attempt to obtain travel documents to go abroad, or to cross the border illegally, the lack of permanent residence or employment, non-existence of obligations or some other interest that would bind the accused to stay in the area, etc. The reason to impose custody on these grounds cannot be the severity alone of the punishment prescribed for the criminal act in question, if other circumstances have not been established too which make the accused suspect of flight.*

49. The court also referred to the commentaries on the same article by Branko Petric:[2] *"the gravity of a criminal act by itself is not an indication for risk of flight; the term 'other circumstances' that indicate the risk of flight does not include the type and gravity of sentence but stresses personal qualities of a person in question, his life prior to the accusation, his behaviour, family and personal circumstances that could be pertinent it is established whether there is a risk of flight or not."*

50. In addition the other circumstances that should be considered are *the personal qualities of a person in question, his life prior to the accusation, his behaviour,*

[1] Commentaries on the Law of Criminal Procedure, 1982.
[2] Commentaries on the Law of Criminal Procedure, 1986.

family and personal circumstances that could be pertinent [Branko Petric, supra] to establish the risk of flight.

51. The court also quoted the principles laid down by the Human Rights jurisprudence of the European Court of Human Rights[3] as summarized in the book Human rights Law and Practice, edited by Lord Lester [Butterworths, 1999] where the following appears: *"Refusal of bail on this ground requires 'a whole set of circumstances which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment'. Relevant considerations are those 'relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties, and all kinds of links with the country in which he is being prosecuted."*

52. The panel concluded that from the facts, namely the alleged ill health of the defendant, his residence in Serbia, the ease with which he could obtain medical certificates to absent himself from the court hearings, the detention of the defendant was justified.

53. That decision was upheld by the Supreme Court on 18 April 2003.[4]

6. Stand of Accused Following Detention

54. Following the decision of the panel to detain him the accused went on a hunger strike and chose to "defend himself in silence". He decided on his own volition not to question certain witnesses who testified on or to make any observations on their testimony as he was entitled to. However following the Supreme Court decision on he broke his silence and put an end to his hunger strike.

7. Letter from Coordination Center

55. The court also received the following letter after the decision to detain the accused from the Coordination center for Kosovo and Metohija.

Federal Government and Government of Republic of Serbia
Belgrade-Gracanica
Department of Justice and Human Rights
71 No.04-25/2
10/03/2003
Gracanica

District Court in Peja,
To: Presiding Judge, Mr. Vinod Boolell

[3] Human Rights Law and Practice, ed. Lord Lester (Butterworths), 1999.
[4] Case PN. 106/203.

In capacity of Head of Department for Justice and Human Rights in Co-ordination center for Kosovo and Metohija, which cooperates directly with UNMIK/DOJ, concerning communication, cooperation, organization of the trials providing Defense Counsels, witnesses, and the other duties of high importance for normal functioning of system of justice at Kosovo and Metohija. In this capacity I confirm correctness and validity of medical reports and certificates from Ministry medical academy in Belgrade regarding accused Veselin Besovic.

After termination of detention Veselin Besovic appeared at the Court each time when he was summoned and was present at the main trial. When his health conditions worsened, which was especially damaged due to a long time spent in detention, due to serious and complex health problems, he went to seek help at the military academy, about what you were officially informed on time by our Department. This was done by Request for postponement of the trial, submitted by Defense Counsel on 21 February 2003.

I want to mention that Guarantees already given by our Governments are still valid and are more than sufficient base for guarantee of his presence during criminal procedure. The information, passed to us by Defense Counsel, that detention for Veselin Besovic is ordered again is more than alarming and disconcerting. This is why I am sending this letter to you asking you kindly to take into consideration and allow Veselin Besovic to continue his defense while released on bail as it was till now. His appearance and presence today is more than sufficient proof for our request.

Otherwise our relations and further co-operation might be seriously jeopardized.

With respect,

In Belgrade, 10 March 2003.

Head of Department
(stamp) Lawyer Vladimir Bozovic
signature

8. Stand of Defence Attorneys

56. Defence attorney Zivodin Jokanovic dissociated himself from that letter and expressed apologies to the court.

57. The attention of the court was drawn to a comment that appeared in a newspaper *VEJERNE NOVOSTI* dated 12 April 2003. The comment is reproduced.

After annulment of medical findings of the Military Medical Academy (MMA)

HE IS SICK AND GOES ON STRIKE

Kosovska Mitrovicae - Three days ago, detained Serb, Veselin Besovic went on a hunger strike against decision of the international trial panel from Peja/Pec on extension of detention until 10 June 2003, stated his defense counsel Mr. Miodrag Brkljac.

"Besovic is charged with the criminal act of terrorism against civilian population pursuant to Art. 142 of the Criminal Code of Yugoslavia. He was under treatment for 36 days at MMA in Belgrade, but when he returned to Peja/Pec a German doctor from KFOR annulled medical findings from Belgrade and stated that Besovic's health is satisfactory and that he can attend court proceedings against him" - stated Brkljac and expressed his dissatisfaction with the work of the international three-member trial panel whose Presiding Judge is Vinod Boolell.

"We are not unhappy with the work of all the panels but it is a fact that this panel has buckled under the pressure of Pristine/Pristina media in Albanian that, through feuilletons that are being published in instalments, openly ask for Besovic's head from the court" - states Brkljac.

58. When this matter was mentioned in court defence attorney Brkljac denied having made such a statement. Matters rested there.

B. APPROACH TO EVIDENCE

59. In assessing the credibility of witnesses the panel bore in mind the severe and sustained strain to which they were exposed. The panel was also of the view that it is a fallacy that evidence should be treated as a monolithic structure which must be either accepted or rejected *en bloc*. On the contrary, it is the function of a tribunal of fact to weigh and to criticize testimony so as to distinguish what may safely be accepted from what is tainted or doubtful. The panel considered a number of matters in relation to the evidence.

1. The Circumstances of the Events

60. The court was fully conscious of the circumstances in which the witnesses were placed and the complexity and chaotic nature of events unfolding around them. By their very nature the experiences were traumatic for them at the time, and they could not reasonably be expected to recall the minutiae of the particular events charged, such as the precise sequence, or the exact dates and times of the events, which they had described witnesses. In the case of Prosecutor v Akayesu[5] the International Tribunal for Rwanda [ICTR] made the following observations on the impact of trauma on the testimony of witnesses

[5] International Tribunal for Rwanda (ICTR), Judgment of Trial Chamber, 2 September 1998.

61. *Many of the eyewitnesses who testified before the Chamber in this case have seen atrocities committed against their family members or close friends, and/or have themselves been the victims of such atrocities. The possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern to the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light.* [Para. 142]

62. *The Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from post traumatic or extreme stress disorders, and has therefore carefully perused the testimonies of these witnesses, those of the Prosecutor as well as those of the Defence, on the assumption that this might possibly have been the case. Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to. Much as the Witness Protection Programme and the orders for protection of witnesses issued by the Chamber during this trial were designed primarily to reduce the danger for witnesses in coming to the Tribunal to testify, these measures may also have provided for some alleviation of stress. Reducing the physical danger to the witnesses in Rwanda, and ordering the non-disclosure of their identities to the media and the public, as well as accommodating them during their presence at the seat of the Tribunal in safe houses where medical and psychiatric assistance was available, are, in any event, measures conducive to easing the level of stress.* [Para. 143]

63. The panel stood guided by these observations.

2. Discrepancies in the Testimony

64. The panel was fully alive to the fact that there was bound to be discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness. The panel did not treat minor discrepancies to discredit the evidence given by one or more witnesses where the witnesses had nevertheless recounted the essence of the incidents in acceptable detail. The panel took into account that these events had occurred some two or more years before the witnesses gave evidence on more than one occasion. Indeed, in these circumstances the panel was more cautious when assessing the testimony of a witness who was able to give a precise account of events. On this issue the panel also considered the following passage in the Akayesu case.[6]

[6] See footnote 5.

65. *The majority of the witnesses who appeared before the Chamber were eyewitnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony. Indeed, an often-levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human characteristics, which often deceive the individual, this criticism is to be expected. Hence, testimony is rarely exact at to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony would be akin to criminalizing frailties in human perceptions.* [Para. 140]

66. The panel realized that a witness could depart from an earlier testimony for a variety of legitimate reasons and not because of a propensity to lie. The panel analysed each discrepancy in the light of the explanations given and the circumstances in which each statement was made during the investigating proceedings and at the first trial. Many witnesses made statements to persons or institutions for extra-judicial purposes but they were in the first trial asked why they had departed from these earlier statements or why they had not said in these earlier statements what they had said in that trial. Indeed in some instances the witnesses were asked why they had not mentioned the name of the accused or why they had not identified him in these earlier statements. The court considered the following observations also.

67. *The court's priority is not to maintain the earlier testimony unchanged, or for the testimony to be changed. The court's priority is obtaining a truthful testimony. Thus, if the previous testimony is not in accordance with the testimony given before the court, it will seek reasons for the discrepancy. Discrepancy in several statements of the same person on one matter does not necessarily mean that one of these statements is untruthful (even though that could be the case as well as that all given statements can be truthful or only partially true). From these statements and explanations given by the witness on the discrepancies, and from linking the statements and explanations with other evidence and circumstances of the case, the court will, on (sic) its discretion, draw conclusions on what can be deemed as truthful in the testimony and to what extent. The court may accept the earlier testimony, the later testimony or parts of these testimonies, or disbelieve both.*[7]

3. Time Factor

68. The panel endorsed the following views in the Akayesu case:[8]

[7] Commentaries on the Law of Criminal Procedure, 1982, Art. 328, eds. Grubac and Vasiljevic.
[8] See footnote 5.

69. *inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony. Moreover, false testimony requires the necessary mens rea and not a mere wrongful statement.*

70. The events in this case occurred in 1998 and 1999 and it would be a denial of justice not to take this key factor into account when assessing the testimony of the witnesses.

4. Interpretation Issues

71. The difficulties of translation and the proper rendering of testimony in. the languages used, Albanian, Serbian and English, were highlighted in a report of the Organization for Security [OSCE].[9]

72. *The war crimes trials in Kosovo presided over by international judges are conducted in more than one language. Witnesses testify in Albanian or Serbian, and that is then translated into English in order for the international judges to understand it and for the presiding judge to summarize it for the court record. The quality of the language translation and interpretation in Kosovo courts is uneven and often flawed because of interpreters' failures to understand local dialects (Albanian-English interpreters in Kosovo courts are from Albania and not from Kosovo). Moreover, many of the court interpreters are not professionally trained as interpreters, and do not have previous experience working in courtroom and trial settings.*

73. *The problem of inadequate language interpretation in war crimes further complicates the issue of deciding whether a witness has testified inconsistently. It is of concern that because an interpreter may translate at best, with a different nuance, and at worse, inaccurately or incompletely, judges may consider that witness to be inconsistent and therefore not credible.*

74. The panel recalled that during the trial several times the Defence complained of the translation either between what a witness said and what was interpreted by the interpreter or between statements in Serb, which they had been given, and the English originals on the record.[10] The prosecution too pointed out anomalies in the translation.[11] And so did several witnesses.[12] Indeed in one impassioned

[9] War Crimes Trials, A Review, September 2002.
[10] See record of Haki Gashi in Second Main Trial, Record First Main Trial, 2 July 2002.
[11] Minutes First Main Trial of witness Arben Ahmet Bajraktari. p. 11 what was entered in the record was not the correct law, and obviously while the witness may have cited the Articles, the Code (LPS or LPJ) was wrong.

show of frustration Defence Counsel said: *I would like my objection to enter the minutes which is about the interpretation from Serbian, Albanian and English … this atmosphere of translation is frustrating for all involved in this case. I suggested the same 15 days ago in Prishtina … I have nothing against the young lady who is very charming, I think she is from Albania and not from Kosovo, the dialect here is different. I was born in Kosovo and I speak Albanian. These witnesses may not be able to understand the translation.*

5. Ethnicity Factor

75. The panel also addressed the fact that it was to be expected that there is still a level of animosity between Serbs and Albanians and that this factor should be taken into account in the assessment of the credibility of a witness. The panel was fully conscious that such a factor cuts both ways and is as applicable to defence witnesses as it is to prosecution witnesses. In the case of Dragan Nikolic charged with murder, in the verdict of the second trial in 2002 the following appears:

76. *The argument brought forward by the defence, 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 behaviour is understandable it is not possible to base a verdict on such evidence.*

77. The OSCE report had the following comment to make on this:

78. *It is not clear what the trial judge meant when she deemed "understandable" the defence argument about "the mentality of Kosovar Albanians to rather live up to the expectations of their peers than to the expectations of justice". It suggests that, in the absence of any expert testimony concerning Kosovar Albanian social organisation or communication patterns, the court drew adverse inferences concerning prosecution witnesses based solely on their ethnicity.*[13]

79. Whatever interpretation should be put on that passage in the Nikolic verdict the present panel forcefully rejected any suggestion that undue emphasis should be laid on the ethnic factor, to the exclusion of other relevant factors, in assessing the reliability and credibility of a witness. The panel chose to adopt the reasoning of the Trial Chamber in the Tadic case.[14]

80. *The reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual*

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[12] Isa Gashi, Hazir Berisha, Muje Gashi, Haki Gashi in the Second Main Trial made several corrections to the translation or explained how it had affected prior record. Nezir Kelmendi, First Main Trial, p. 10, Brahim Sadri Kastrati, First Main Trial, p. 9.

[13] See footnote 9.

[14] ICTY, Trial Chamber, Judgment 7 May 1997.

witness. It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person of the same creed, ethnic group, armed force or any other characteristic of the accused. That is not to say that ethnic hatred, even without the exacerbating influences of violent conflict between ethnic groups, can never be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made, however, in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in-chief [Para. 541]

6. Identification Evidence

81. One main line of defence of the accused was mistaken identity. He constantly referred to another person called Veselin Besovic who allegedly resembled him as a twin, lived in his house for a period of time, drove a similar car to his until May 1999, a Red Lada, and worked as a policeman. In view of this defence, the panel was alive to the need to make a careful evaluation of the evidence of identification adduced during the hearing.

82. Identification evidence involves inherent uncertainties. The manner in which mistakes regarding evidence of identification can arise, the scrutiny to which such evidence must be subjected and the precautions which must be taken to ensure that an identification affords a fair and reliable method of preventing a miscarriage of justice, are very crucial. Numerous cases are known where accused parties convicted on mistaken, though honest, evidence of identification, have subsequently been proved to be innocent. Evidence as to identity based on personal impressions, however *bona fide* is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for a verdict of guilty.

83. There are many difficulties inherent in the identification process, resulting from the vagaries of human perception and recollection. It is insufficient that the evidence of identification given by the witnesses has been honestly given; the true issue is relation to identification evidence is not whether it has honestly been given but rather whether it is reliable.

84. The identification evidence in this case has been made more complex by the existence of the other Veselin Besovic, who never appeared at the trial and whose photograph was unavailable. The panel was very careful to ensure that the witnesses identified the accused and not this other Veselin Besovic, given the similarities between the two. In this exercise the panel considered the evidence of both those witnesses who knew that there were two Veselin Besovic's and purported to recognize the accused, given the asserted similarities between the two, and those who did not know that there were two Veselin Besovic's and purported to identify the accused. In the turbulent and often traumatizing

circumstances in which these witnesses found themselves the panel was acutely aware of the possibility of error in the identification of a person previously unknown to the witness. The panel placed considerable weight upon the descriptions, which the witnesses gave of the accused and tried to find corroboration of these descriptions from other witnesses.

7. Uniforms

85. From the evidence it was clear that there was an assortment of uniforms used by the various Serb forces. Witnesses stated how Serb forces would frequently change uniforms, sometimes on the same day. They would be in one kind of uniform in one instance and then change for another activity the same day. The accused himself in his testimony indicated that they initially had blue plain uniform but later they also had blue camouflage police uniform. He could not remember exactly when this happened. It might have been in 1995. Witnesses got mixed up over uniforms or their colour. The panel was alive that this would be an expected occurrence and such a mix up without other adverse factors should not automatically render the evidence of a witness suspicious or unreliable.

8. Alibi

86. Though an alibi is commonly called a defence it is still for the prosecution to negate it, provided that the accused has laid a foundation by adducing sufficient evidence to make the defence a live issue. This is not done casually. It requires particularized characterization of the place and activities undertaken by the accused at the time the offence was being committed. It is not enough for an accused to merely assert he was not at the scene of the crime; he must present evidence that would effectively exclude his presence at the scene of the crime.

87. The panel followed a decision of the Supreme Court of Nigeria[15] quoted by the International Prosecutor where the Court said

88. *We must hasten to state quite clearly that the defence of alibi is not readily conceded with levity to the accused person seeing that when properly established it has far reaching finality of exculpating the accused person from complete criminal responsibility. To take advantage of this defence, the accused person must give detail particularization of his whereabouts on the crucial day of the offence which will include not just the specific place(s) where he was, but additionally, the people in whose company he was and what, if any, transpired at the said time and place(s). Obviously, such comprehensive information furnished by the accused person must, unquestionably, be capable of investigation by the police should they wish to do so. Furthermore, such defence must be timeously brought to the attention of the police by the accused person, preferably in his*

[15] Supreme Court of Nigeria, SC. 59/2000, Judgment of 1 June 2001 found at http://www.thisdayonline.com.

extra-judicial statement to afford the police an ample time to carry out its investigation. For the accused person to raise the defence while testifying at his trial is to deliberately deny the prosecution's right and duty to investigate the defence. Such a ploy cannot avail the accused.

89. The panel also followed the submissions of the Prosecutor where after referring to the case of R v Herbert[16] he stated

90. *It must also be noted that an assertion of an alibi has a risk attached to it. The general principle is that an alibi that is disbelieved has no evidential value at all; it cannot be used against the accused. However, an alibi that has been disbelieved because of evidence that it was concocted (fabricated) with the knowledge of the accused can be used against the accused person.*

9. Burden and Standard of Proof

91. Whilst being fully alive to the approach to be taken in the assessment of the credibility of witnesses as discussed above the court nevertheless had to balance these factors with the burden of proof in criminal matters. Under no circumstances should a rule be devised that would suggest that different degrees of proof apply in a case whatever the complexities of proof may be. There are admittedly cases when it is difficult for the prosecution to prove the guilt of an accused beyond reasonable doubt, but a Court would never be justified to hold the view that as it is impossible to obtain better evidence. A conviction should not be based on evidence which is considered insufficient or unsatisfactory. In the more majestic as in the humbler courts exercising criminal jurisdiction the same principles of law must apply, and the same rules of evidence must be followed. The proof of guilt must be made beyond reasonable doubt and there should not be different degrees of proof for different types of offences or for offences committed in different circumstances.

IV

THE SUBMISSIONS OF THE PARTIES

1. The International Prosecutor

92. Mr. Kamudoni Nyasulu in a very thorough analysis of the facts and legal principles submitted that the case for the prosecution had been made out beyond reasonable doubt. He emphasized that great care should be taken in assessing the credibility of the witnesses and analyzed how the alibi of the accused should be approached. He made an analysis of the facts relating to each count in a detailed way and pointed both to the strength and weaknesses in the evidence of the

[16] 2002 SCC 39, Judgment of April 2002, Supreme Court of British Columbia, Canada, found at http://collectionnlc-bnc.ca.

witnesses and finally submitted that overall the witnesses were reliable and had no motive to lie

93. He dwelt at great length on the events leading to the conflict in Kosovo and quoted extensively from the Human Rights Watch Report. He also dealt in a very clear manner with the legal principles relating to armed conflicts, and more particularly to the law governing internal armed conflicts. He was very careful to pinpoint that the Serbian forces involved were a mixture of different groups and wearing different uniforms. He submitted that this was an important issue as many witnesses gave different descriptions of these uniforms and their colours. This fact, in the view of Mr. Nyasulu, should be carefully evaluated by the panel and should not be a means of just dismissing the evidence as being reliable.

94. Mr. Nyasulu also explained in detail the issues that confronted the panel on the credibility and reliability of the witnesses. He referred extensively to the commentaries on different articles of the LCP to support the view that discrepancies should be carefully analyzed and weighed before being a ground to reject the evidence of a witness.

95. On the defence of alibi, Mr. Nyasulu referred to a decision of the Supreme Court of Nigeria and one of the Supreme Court of British Columbia to submit that it was enough that an alibi be raised. There should also be concrete evidence of such a defence. He also discussed the issue of alibi in relation to the lies of an accused and to the evidence in the case where the accused spoke of work obligation that prevented him to leave his place of work.

96. On the issue of criminal responsibility Mr. Nyasulu discussed the provisions of articles 22 and 26 CFRY and submitted that if the evidence were to be accepted by the panel the individual responsibility of the accused would have been established under these articles.

2. The Submissions of the Defence

97. The defence attorneys focused their submissions mainly on the factual aspects of the case. They both submitted that as the case unfolded from the stage of the investigation to the first trial and the present trial, the witnesses kept changing their version either by additions or omissions as they went along. They dwelt at length on the discrepancies of the witnesses and the ethnic motive they had to concoct a false story against the accused. They ended by sating that the evidence did not establish conclusively that the accused had perpetrated the criminal acts averred in the indictment.

V

FACTUAL ISSUES

A. STAND OF ACCUSED

1. General Denial

98. The accused started his testimony by stating that he was not in good health and that his brain was disturbed on account of his health and his detention which had lasted 27 months. He denied the charges and qualified them as lies. He described the statements of the witnesses as controversial and contradictory.

2. Fabrication of Charges

99. In the course of the first trial the accused stated that the case against him had been fabricated. When he was asked in the present proceedings whether he had any proof of the allegation, he again emphasised that the charges had been fabricated by Haxhi Kastrati, a witness in the case, with the aim of expelling him and other inhabitants from the village of Gorazdevac.

100. He knew Haxhi Kastrati only by sight and only saw him once in 1996. The accused claimed that he had made up these allegations because he wanted an ethnically pure Kosovo. He added that the people who made allegations about him in his first trial for armed robbery and illegal possession of weapons had been sent by Kastrati. When he caught the men cutting down his trees they told him that Kastrati had sent them. He went on to say that Haxhi Kastrati and two other persons Brahim and Zuke had robbed his house between 28 June and 3 or 4 July 1998 when he was in Montenegro. He got that information from two of his friends, Ljubo and David Bogivesic who were then residing in Doberdol village, the same village where Haxhi Kastrati resided.

101. Defence witness Bogoljub Ljubo corroborated that version of the accused. That witness stated that he knows accused well. He saw the house of the accused being robbed by Haxhi Kastrati, Brahim Kastrati and Zuke Kastrati. He watched the scene for about 30 or 40 minutes. He reported the incident to the accused when he came back from Montenegro in the beginning of July. The alleged robbers came in two tractors and were loading them. Haxhi Kastrati and the two others were wearing green camouflage uniforms. There were other people in civilian clothes.

102. On 21 November 1999, the accused asked the KFOR commander who was at a checkpoint close to his property to pay more attention to his house so that nobody would burn it. When he came back from Montenegro his house was still there but the KFOR officers told him that the Albanians had sent a message that he should leave the village or run the risk of being killed or caught alive. One of the KFOR soldiers who gave him this information was called Vecenzo, the other was called

Florindo. The accused was in the company of one Dragan Knezevic and his own brother, Milovan Besovic. The KFOR repeated the same messages to these two who confirmed the version of accused in court. On the insistence of the accused the KFOR officers gave him the names of Brahim and Haxhi Kastrati as those who had sent the message.

103. The accused reported the robbery to the village president, Bozidar Krstic. It was in July but he could not remember the date. The accused and the other two then went to Gorazhdevac village to the mayor of the village. At the time those present were Milic Katratovic, Portic Bogoljub, Manojlovic, Dusko and Brank Stevanovic. Both Milovan Besovic and Dragan Knezevic corroborated that version of the accused. Defence witness Bozidar Krstic also known as Bogo confirmed this testimony.

104. The accused also stated that when he was in detention in Peja, Haxhi Kastrati came to the police station in Peja, leaned his head against the bars and cursed him by saying, "fuck your Serbian mother. You'll never get out of this place as long as I am alive". The accused said he did not answer him. The next day Haxhi Kastrati made a complaint against him and asked that an investigation in war crimes be initiated against the accused.

105. The accused was asked in court why he never mentioned, in the course of the investigative proceedings that he was framed. He answered that when he was summoned for the investigation in Pristina, he was not aware that it was in relation to war crimes as he thought it was in relation to a robbery case. When he learnt from the investigating judge that he would be interrogated for war crimes he was shocked and he could not think of details.

3. Incidents Involving the Accused and Albanians

106. The accused stated that Haxi Kastrati was a KLA commander of the whole region and his purpose was to expel them. He heard that Kastrati was a KLA commander from Serbian neighbours who lived in the same village. The accused said that he had two houses, one in the village and one in the city and that both of them were burned. First his house in Peja was burned and then the whole of the village was evicted. That was between 14 and 28 June. He then left Peja for Gorazdevac.

107. The accused had complained to the investigating judge that the Kastrati's had looted his house but had not alleged that Kastrati had created a false case against him. He was asked in the first trial why he had not stated this to the investigating judge. The accused said that it was obvious that the case had been fabricated and that it was done for ethnic motives. He was asked by the panel to explain why it was only today he was saying that Haxhi Kastrati had orchestrated the false case against him. The accused didn't answer the question.

108. The accused stated that Haxhi Kastrati attempted to kill him on 21 November 1999 between 22:00 and 23:00 hours. As he had been previously warned to leave his house, his brother Milovan and a friend, Dragan Knezevic wanted accused to leave with them. The two had to catch a convoy and the accused saw them off at 22:00 hours. On his way back, to his house in Gorazdevac which was surrounded by oak trees, he saw his house in flames. At the edge of the woods when proceeding towards his house, he saw a fat man in a black uniform. He could see, as there was moonlight. He recognised Haxhi Kastrati who was about 120 meters from his house. He had an automatic weapon. Shots were fired on him that day. When asked why he did not mention those incidents before the investigating judge and in the course of the first trial, he could not give any explanations.

109. When he was asked how many times people had attempted to burn his house, the accused said there had been a first attempt on 21 November 1999 between 22:00 and 23:00 hours but he managed to repair the damage. On another occasion the house was completely burnt. When he was asked to explain the date of 21 November compared to June 1999, a date mentioned in the record, the accused stated that at the end of June 1999, the house was looted and mined but that there been no attempt to burn it. He did make a report on this. He left the village in December and when he came back the house had completely been burnt down.

110. On his return from Montenegro, when he went to his property he saw signs with the words “land mines KFOR” all round. He did meet Brahim and Zuke or Meke Krasniqi and asked them to return to him that they had stolen from him. He never got back anything and he reported the matter to a KFOR patrol in Doderdol five or six days after his meeting with Brahim.

111. Bozidar Krstic gave evidence that he knew the accused as both of them were born in the village of Gorazdevac. He did not socialize with him but he knew him well. He was the Mayor of Gorazdevac until March 2000. He was asked if he remembered a time when the accused had troubles and came to him. He stated that the accused had complained to him that somebody was cutting down his wood and there were attempts to set fire to his house. He was reporting to the president of the village and at the same time he was reporting to KFOR.

112. The witness said that he could state honestly that the accused was complaining about somebody who was cutting and stealing his wood and setting his house on fire. He said that KFOR told the accused that they could not take care of him and that he should move out and that accused did so. He said he was told this by the representative of KFOR who was a Marshall called Fabio Toleni. Fabio told him that they could not protect the house of the accused, they were not able to provide protection for one house and that it was better for the accused to move out. The witness claimed that the accused was complaining all the time. He said that there was a shooting against him and that they had set his house on fire and that he and his son were trying to extinguish it.

113. Bozdar Krstic said that he could only guess that it was because they did not like to have him as the only Serbian in the area. They wanted to scare him off and to expel him from his house. His house was closer to the Albanian village, somewhere between Poqest and Gorazdevac. He could not recall the accused mentioning any specific name when he made complaints to him and he did not know Haxhi Kastrati. The witness claimed that the accused's house was set on fire and that he went to the spot to see it. He said that there were two attempts to set the house on fire. The first time the accused succeeded to extinguish it but the second time the house was burnt down. He could not remember the time between the two attempted arsons. Both of the attempts happened at the time he was Mayor. At the time of the first attempt to set the house on fire the accused came to his office and told him what had happened. The second time he had the opportunity to go with KFOR and see for himself.

4. Analysis of the Fabrication Claim

114. It was the view of the panel that there were no obvious similarities between the evidence given by the witnesses that the evidence was concocted. The witnesses were careful to identify that which they had seen with their own eyes and admitted to those things, which they had not themselves observed but had been told by others, or inferred from their initial observations. When challenged with inconsistencies in prior statements given to the investigating judge many witnesses were quite frank in correcting their earlier statements. Other witnesses alleged problems in translations, or that they had not been asked to elaborate at the time they were interrogated by the investigating judge. While inconsistencies in witnesses' evidence before the investigating judge and the main trial might suggest unreliability they didn't establish the allegation that facts had been fabricated.

5. The Work Obligation

115. Dr. Jokic Slobodan stated that when the war started all workers were subject to a work obligation, in order to keep the minimum production going. This was necessitated by the fact that during the war every healthy male adult under 50 years of age had to report to the military authorities. The witness intervened to have accused relieved of his military obligation because "his post was the post of the person in charge of the warehouse, which meant he was the only person who could issue spare parts". The evidence on work obligation was corroborated by defence witness Vuko Lekic.

116. The law used in the declaration of the state of war was a separate law and work obligations were treated by statutory and regulation rules of each company. He was applying the law and he knew that law. He submitted the request for all persons at the same time as there had to be a minimum number of workers that would keep the factory going. He submitted the list of persons to the Ministry of Defense. He had an employee whose task was to collaborate with the territorial

defense and deal with the list of people. This body was a local structure of the Ministry of Defense. The witness was asked whether the Ministry of Defense would therefore logically have these lists. He stated that he believed that such lists existed in the factory. The territorial defense was not about the army but concerned the citizens. In cases of disasters and crisis like the war, the people engaged in the territorial defence were organized in order to give a hand to the civilians in case of fire, floods etc, and the man who was dealing with the territorial defense was not a military man but some civilian in charge. The people belonged to the Ministry of Defense.

117. The work obligation required full respect for duty at the factory, wearing working uniforms but not anything which was not familiar to the duty in the factory, not weapons and no other sort of clothes. The workers who would not obey the working obligations and would not show up for duty would not be allowed to enter the factory premises any longer and a decision of dismissal would be issued to them.

118. Dojcin Kostic also gave evidence on how the work obligation operated at the factory where he worked, at the Electrokosmet, an electric company. The director of the company would issue an order to apply or implement a work obligation. His responsibility was to ensure that the work obligation was implemented. During the time the work obligation was in force no worker was entitled to take any annual leave nor authorized to go away from their place of residence without special permission. They were not allowed to be absent from work for more than two days. The work plan of the company had to be approved by the military authorities. However the militaries did not always adhere to the work plan and they would enrol the workers in military duties. When this happened the company would write to the military authorities requesting that the workers be released from their military obligations. There was no time limit on the length of notice within which a worker would be mobilized. The witness produced a number of documents to prove how the rules worked with regard to workers who were mobilised and those whose presence at the factory was deemed vital. These documents written by Dojcin Kostic that were before the panel show that names would be presented to the Department of Defence in order for that Department to exempt people from military duty (mobilization).

6. Employment of the Accused and Work Obligation

119. Both before and after the war in Kosovo the accused was working at the Zastava factory in Peja. He took employment there in 1972 and worked continuously there until the arrival of KFOR in 1999. He had to comply with work obligations that were in force during the war. He stated he always used to go to work in civilian clothes. At the factory he was in charge of the central warehouse of the spare parts for vehicles. At the factory he had two assistants, one Tahir Arifaj and one Islam between 1982 and 1990. Between 1990 and 1997 he did not have any assistant

and it was Cedomir Buric, a defence witness in the case who replaced him whenever he was away.

120. The accused stated he became familiar with the working obligation on 24 March 1999 when it came into force in Kosovo at the start of the war. Copies of the work obligation were posted in the factory. It was the responsibility of the director of the factory to prepare the list of workers who had to comply with the work obligation. Those on the list were considered to be indispensable for the proper running of the factory. Such workers would not be mobilised for military service and even they were the director would intervene on their behalf. He could not say whether the director prepared lists of workers in 1998 or whether there were any written lists. In 1999 he was on the list only once. Once the lists were drawn up there was no need to inform each worker individually. The accused confirmed that the same rules that were in force at the Electrokosmet were also in force at the Zastava.

121. On whether the work obligation applied to the Albanians the accused stated that the Albanians stopped coming to work from October 1998 up to January 1999 on account of the war and because production at the factory had decreased and there was not enough work for everybody. He could not say whether Albanian workers were on unpaid leave. He added that the employees who had not reported for work had left or were leaving Kosovo with their families. According to him most of them left Kosovo. He believed they had left because they were afraid of NATO bombardment and "afraid of everything else". When he was told that there was no NATO bombardment in December 1998 and January 1999, he answered that there was no need for the Albanians to work. He added that, "nobody was sent by force from the factory".

122. At the end of his employment he was among the team who handed the factory to KFOR. Those workers that stayed behind, the director of the factory, the head of security and himself as head of supply section and others, were responsible for handing over the factory. At the factory the accused was the supervisor and the Chief of Section issuing spare parts for the entire factory. The investigating judge had requested KFOR to look into the factory but they had not found the documents or the archives. The accused claimed at the first trial that if he were taken there he would be able to find the documents.

123. The accused stated that he was not mobilised during the war as he had to comply with the working obligations. He added however that he was mobilised at one time and that he was later demobilised on account of his ill health. In 1996 the director of the company intervened on his behalf to get him demobilised. In addition to his work at the factory the accused was also a police reservist between 1993 and 1996. This was a part time job. The rule was to recruit people who had served in the army. He himself had served in the army in 1975. As a police reservist his duties consisted in keeping watch as a security guard over police vehicles and control the entry of vehicles on the police compound. He wore a

police uniform during these duties. The uniform was blue in the beginning and then it was changed to camouflage blue in 1995. On the uniform there was a patch on which there was written the word *policia*. When he was asked whether a member of the public would know he was a police officer he answered that half the residents of the town knew him and they would know he was a police reservist.

124. As a police reservist he carried an automatic rifle and a pistol. He knew how to handle weapons. He would always hand over the weapons after his duties. He denied walking in the villages with a weapon except when he went hunting. The hunting season depended on what he called the hunter's calendar. He always hunted in a group in compliance with the hunting code.

125. Witness Slobodan Jokic stated he was aware that the accused was a police reservist but he could not say whether he was in the police force. All the witnesses called by the defence knew the accused well and most of them knew that he was employed in Zastava factory and that he was a police reservist. Defence witness Vladimir Besovic stated that the accused was a member of the police between 1992 and 1996 until he started having thyroid problems and he was released from police duties. Whenever he was mobilized the director of Zastava would intervene on his behalf.

7. Ill Health of Accused

126. With regard to his health the accused stated that he had been under treatment in a military hospital in Belgrade. The then director of the factory provided him with transport to go there and take him back. He was treated there between 2 and 9 December 1998. Dr. Slobodan Jokic was aware of the health problems of the accused and stated that he knew that the accused had undergone surgery in Belgrade in 1998. He himself provided a car and a driver for the accused to go to Belgrade. He could not give any details on the illness of the accused. Defence witness Vuko Lekic confirmed that he was aware of the illness of the accused and his treatment in Belgrade. Defence witness Bagas Djordjije stated he was aware that he accused had a thyroid problem. Defence witness Buric Cedomir was aware that the accused had undergone surgery in Belgrade. He could not remember how the accused went to Belgrade. He was unable also to say in what month this happened.

8. Knowledge of Events in Kosovo by Accused and the Defence Witnesses

127. When the accused was asked whether he had heard of any abuses or atrocities being or having been committed by the police and the military forces on the Albanians in the region, he said he could only speak of his own street and that nobody was killed or harassed. No house was burnt until the arrival of KFOR. Though he had heard of the killing of civilians he was not familiar with the

response from the government to these killings. He knew that in 1996 several youngsters were kidnapped and that in 1999 two persons had been killed in Doberdol as such news travels fast. The accused was asked a number of questions on whether he was aware of movements of troops and the expulsion of people in the region where he lived or close by in 1998 and 1999. In respect of Doberdol village, he stated that his only source of information was the radio. He heard that people of Albanian ethnicity were being captured but he could not say who was capturing them.

128. With regard to Poqest, though he had to through that village to reach his property, he was rarely going there at the time as "the situation was worsening. There were attacks more often. It was dangerous to move around the night." He could not say who was attacking whom. He never heard of Albanians being maltreated, or of any atrocities being perpetrated. When asked whether he had heard of Serbs being attacked by the Kosovo Liberation Army [KLA or UCK] members, he gave a quick answer in the affirmative. But when he was asked whether he had heard of Albanians being attacked by Serbs and expelling them towards Albania, he answered in the negative. He could not explain how he could have heard of the attacks on Serbs but not those on Albanians. Though he had seen convoys of people he did not know where they were heading to or where they were coming from. He did have Albanian friends but he did not dare go and see them during these troubled times.

129. Most of the defence witnesses were questioned on the events in Kosovo at the relevant time in the context of the present case. Slobodan Jokic said that he had never heard of people being forced to leave their homes or of property being destroyed. Though he heard of expulsion of people he did not believe it. Stevamn Ivanovic did not see nor hear about the departure of people or the burning of property. To a question from the defence attorney he stated that he had heard about the migration of Albanians in May 1999. According to him they were leaving because NATO had started the bombardment. Vladimir Vidic confirmed this. Vuko Lekic gave the same reason for the departure of Albanians though he had never seen any convoys of people leaving. Bagas Djordjije did not hear about the forceful expulsion of people when he worked as a police officer. He remembered that Albanians were leaving the police force of their own. According to him no Serbian forces were involved in any expulsion. If such events had happened he would definitely have heard about them. If people did leave they were doing so on account of the NATO bombardment. He added that the justification for having police reservists was the rise of Albanian nationalist feelings in the nineties. Vladimir Besovic said that Serbs were leaving because they were under pressure to do so and Albanians were leaving because of the NATO bombardment. According to him, the departure of the Albanians was planned by themselves. Miodrag Vidic stated that the Serbs were not terrorists and that the real terrorists were the Albanians. The Serbs were only defending themselves and the Albanians were leaving because of the bombardment. Buric Cedomir said that no houses were burnt in 1999. The Albanians had organized

their departure “to create an impression as if there was a disaster.” Alexander Milosav also said that the Albanians “were organized in a way or another to leave in order to make it look like a catastrophe”. He was of the view that this was done in order to bring NATO to the region. Dragan Knevic was also of the same view. He stated that he had heard of the movements of population but that there were no expulsions. According to him “it was not expulsion as they claimed. What they did was they organized themselves in such a way as to make it look like they were being expelled. It was the time of the NATO bombardment and they did it to bring down Serbia and Montenegro. That was the most conceited thing one can ever do. They got organized on their own and they did it in a very cunning way. They left Kosovo so we are the ones who actually got bombarded. And they left the place in order to create the image of humanitarian catastrophe with the help of America and the others.” Milic Kastratovic, though he had heard that Albanians were leaving, he was not aware of the presence of any Serbian forces in or around Gorazdevac. Ivo Bogisevic stated that nowhere around the villages was there any massacre.

9. Alibi of Accused

130. In respect of many of the charges the accused has put up the defence of alibi. The defence will be dealt with under each respective charge.

10. The Other Veselin Besovic and Mistaken Identity

131. The accused stated that Miljan Besovic had a son with the same name. He was born in Krushevac village which is about 3 kilometers from his own place. He also had the same pseudonym as the accused, Vesko. He is three years younger than him and they have known each other since their childhood. They used to meet each other when the parents of the other Veselin visited the parents of the accused in Gorazdevac. Later the other Veselin Besovic used to visit him once or twice a month and he too would visit him. Between 1998 and 1999 he was in the police department at Peja and he lived in Krushevac and was expelled in 1998, just like the other citizens. From May 1998 to June 1999 the other Veselin Besovic had lived in his house until he left Kosovo.

132. They drove the same make of car and had the same hobbies one of which was hunting. They looked so much alike that people would confuse one for the other He did not know what the other Veselin Besovic did during the war or where he was now. The parents of his relative were living in Gorazdevac until they were expelled in May 1998. His relative had been with the police for about ten years or more prior to the war. He did not know whether the parents were still alive. His relative did not have a house in Peja city and he had never worked in Zastava. His responsibilities were in the police. The accused claimed that there were several individuals with the same nickname Vesko in his village.

133. In the course of the first trial the defence proposed to call the other Veselin Besovic to give evidence that he resided in the house of the accused for a time and any other circumstances deemed relevant to the case. However, the defence failed to call him as a witness. It claimed that this other Veselin Besovic was in Serbia but that they had been unable to contact him. The defence made no further attempts to adduce other evidence, which would allow the panel to determine for itself if it was reasonably possible for witnesses to have wrongly identified the accused as the other Veselin Besovic. The first panel tried to obtain a photograph from the Peja police station where the other Veselin Besovic had allegedly been stationed as a police officer to enable this assessment to be made by it. A letter of request was sent but no answer was obtained.

134. Brahim Sadri Kastrati gave evidence that he knew of another Veselin Besovic apart from the accused. His evidence was that between 1998 and 1999 this other Veselin "Vesko" Besovic was working at the Qallapek police station and that he lived in Krushevac, but for the rest of the time he had been living with the accused who was his cousin. He said that he knew him well and that he looked very much like the accused. "If someone sees them they would think that they were twins". The witness said he could distinguish between them because he had known them since he was a kid. The other Veselin Besovic was from Krushevac whereas the accused was from Gorazdevac. The accused lived closer to him; the other Veselin Besovic lived five to six kilometers away. The witness was asked whether he had heard of the other Veselin Besovic being involved in any other crimes and the witness said that he had. He was asked whether he knew where this other Veselin Besovic was now. He claimed that he was in Gorazdevac but might now be in Montenegro as they were Montenegrins by origin.

135. Xheladin Shala gave evidence that he had known the other Veselin Besovic, the son of Milan. He claimed that the two did not look alike, the son of Milan "wore a moustache non-stop" and was from Gorazdevac whereas he and the accused were from Rashiq.

136. Neke Ramush Bytqi gave evidence that he had heard that there was another Vesko from Krushevac. He did not know him but heard that he served in the police forces. He did not know if his last name was Besovic. He also knew a policeman by the name of Ristovic Besovic who lived 100 meters from where he lived when he lived in Gorazdevac. He did not know if anybody was living in Besovic's house during 1998 or 1999 prior to his departure from Kosovo.

137. Rrustem Shala had seen a person named Vesko who lived in the village of Krushevac. He had seen him once or twice. According to him that Vesko did not resemble the accused.

138. Haxhi Kaqstrati had heard about the other Veselin Besovic. His full name was Veselin Milan Besovic and he was from Krushevac village. He used to be a police officer in Qallapek. He is related to the accused. Haxhi Kastrati added that he was

20 years old when he came to know the other Veselin Besovic. When he was asked to describe the other Veselin Besovic the witness stated: “Veselin Milan Besovic is as tall as this Veselin Besovic. He looks different. He is younger than this man, the defendant. He has a kind of reddish complexion and he has red hair.” The last time he saw the other Veselin Besovic was on 29 May 1998. He participated in actions in Lugu i Daranit. He personally could confuse between the accused and the other Veselin Besovic.

139. Isa Gashi said that the other Veselin Besovic “is shorter and thinner than the accused.”

140. Defence witness Slobodan Jokic stated that he knew the other Veselin Besovic. When he was asked to describe the other Veselin Besovic he said, “He was shorter than this one [accused]. He had a moustache. He had a lot of grey hair, he was greying fast.” He was 50 years of age. The accused was of a stronger build than the other Veselin and his moustache was bigger. The other Veselin had a darker complexion. He was asked the following question by the defence attorney “If I said that during the proceedings a witness who happened to be Albanian said the first and second Veselin Besovic were to look alike as twins, would you agree with that?” The witness answered “ I know them both, the one who lived closer to my village, the second one is closer to me than the defendant, they are similar. There are a lot of physical similarities but I know them very well, they look alike and they have some similar physical features, but as I know both of them very well, I have no problems distinguishing them, when I see one or the other. I know it’s the first or the second.”

141. Defence witness Miladin Dasic knew the other Veselin Besovic and he described him as having greying hair, with a moustache. He was of similar height as the accused and resembled the accused “to some extent.”

142. Defence witness Stevan Ivanovic knew the other Veselin Besovic. He has seen a number of times in 1999. He described him as being of average height with a moustache and greying hair and medium size. When he was asked whether he was taller or shorter than the accused he answered that, “they looked alike, quite similar.”

143. Defence witness Bagas Djordjije stated he knew the other Veselin Besovic. He was of average height, had a fuller figure but was not fat. He had a thick moustache and his hair was greying. When asked whether the two looked alike, he answered that “since I know them very well if I was standing close to them, I’d have no problems figuring out who’s who but if I was standing further away or if one had his back to me, I would encounter problems figuring out who was who. They are similar. They are like brothers.” He went on to say that the other Veselin Besovic had moved to the house of the accused in the second half of 1998.

144. Defence witness Vladimir Besovic also knew the other Veselin Besovic. He knew that he had a moustache, was of strong build and was related to the accused. He was a police officer.

145. Defence witness Miodrag Vidic described the other Veselin Besovic as follows: "I would not say they resembled one another as if they were brothers but as I sad they are of similar age, height and weight and they had a similar moustache."

146. Defence witness Buric Cedomir who used to work at Zastava with the accused said the other Veselin Besovic did resemble the accused but that the latter "is a bit darker and has a different moustache."

147. Defence witness Vladimir Vidic stated that did not know the other Veselin Besovic very well. He gave the following description of the other Veselin: "I'd say that they look alike to quite a great extent, they have the same first and last name, also the same moustache, so I'd say they look alike." He could not describe the colour of his hair as he is colour blind but ended up saying that the hair of the other Veselin was not jet black but lighter. He added that the other Veselin Besovic came to live in Gorazdevac at the end of May or beginning of June.

148. Defence witness Alexander Milosav said he knew the other Veselin Besovic. He did not see him during the bombardment. He had a moustache, dark hair "but not really black." He went to add that "they are very similar, it's interesting because a person who did not know them well could mix them up and could have problems distinguishing between the two. But I knew both of them quite well and I never had any problems figuring out who was who." He could not know when was the last time he had seen the other Veselin Besovic.

149. Defence witness Milovan Besovic said that the other Veselin had a moustache and resembled the accused. He was a police officer.

150. Defence witness Dragan Knezevic started by sating that his own height was 1.82 meters and that the other Veselin Besovic was shorter than himself. He was of strong build. Both the accused and the other Veselin Besovic had the same colour of hair and the same build. He added "I believe they look alike, if you knew them both well, you would know who's who, but you could say that they looked like another because of the similar features." He added that in 1998 he helped the other Veselin Besovic and his father to move to the house of the accused and then he corrected himself and said that he had helped only the father.

151. Defence witness Milic Kastratovic said that he had seen the other Veselin Besovic in 1998 or in the beginning of 1999. He added "he was a big man, had brown hair, with a hairstyle parting somewhere on the left side; he had a healthy look with a strong moustache which was brownish". On the resemblance of the two he said "there were similarities, both were well built men, with healthy look on the face,

moustache. I can say there were similarities". He could not say whether both men shared the same house at one time.

152. Ivan Bogicevic who gave evidence at the first trial stated that he knew the other Veselin Besovic who was a police officer. He used in Gorazdevac and from there he took refuge in Krushevac.

153. Bozidar Krstic also testified at the first trial. He knew the other Veselin Besovic who was a police officer working in Qallapek. He came from Krushevac. He did know whether he was related to the accused. When describing the other Veselin Besovic he said the other one had a big grey moustache and was as big as the accused. He was quite similar to the accused. He could not say if the other Veselin Besovic had lived in Gorazdevac.

VI

THE CHARGES

A. Count 1 of the Indictment

1. The Averments

154. It is alleged that between 1997 and 1998 at Gorazdevac in the Municipality of Peja in the Administrative Province of Kosovo the accused insulted Shaban Misin Shala. This was done in a clear act of intimidation since the witness was in the presence of a majority of Serbs and Shaban Shala an Albanian at a time when there were hostilities between Serbs and Albanians. Veselin 'Vesko' Besovic is charged with insulting Shaban Misin Shala at a public gathering contrary to Article 65 paragraph 2 of the Criminal Law of Kosovo (LPK).

2. The Evidence

155. Shaban Shala stated that he had gone to the place of the accused to deliver some cabbage at his request. The accused tried to assault him. He added that the accused abused and insulted him in the presence of visitors at his place. In the view of the witness the accused "was trying to show himself as patriotic in front of his guests". When he was asked to be more precise on the nature of the insults he stated that it was an insult to his mother. One of the neighbours prevented the accused from assaulting him. At the time hostilities had already started between the Serbs and the Albanians. He personally felt that this insult was an act of hostility towards him. Though the indictment avers an unknown date between 1997 and 1998 on the date of the offence, the witness stated that the year was 1996 as in 1997 and 1998 the Albanians had no relationship with the Serbs. He added that there were no hostilities in 1996.

3. The Defence Case

156. The accused claimed that the witness was not telling the truth. He admitted that he knew him. He denied having insulted him and said that he always had a good relationship with the villagers. He claimed that others influenced the witness and that he reported this case after he himself had been taken to prison. He added that there was absolutely no reason for him to buy cabbage from the witness as he himself had a large property and that the green market was about 300 meters from his place.

4. Findings of the Court

157. The evidence shows the witness merely asserted that he was insulted by the accused without giving any details as to the specific conduct of the accused upon which he based his assertion that he had been insulted, other than it was about his mother. In these circumstances, even accepting the evidence of the witness as true, the panel is unable to assess whether the alleged conduct of the accused was of such a nature as to constitute an insult contrary to Article 65(2). The witness did give some further details of this incident to the investigating judge, but he did not identify the conduct of the accused upon which he based his assertion that he had been insulted.

158. The court was of the view that the story of the witness was not very plausible and was far fetched. First of all there was much confusion about the year in which the incident allegedly happened. The witness stated that the incident occurred in 1996 and not in 1997 or 1998 as in the latter years there were no relationships between Albanians and Serbs. Secondly there was no reason why the accused would ask somebody to take cabbage to his place as the green market was not far away from his place. Thirdly the witness lived in Poqest at a distance of two kilometers from the house of the accused. Why then would the accused ask the witness to bring the cabbage when the green market was much nearer?

B. Count 2 of the Indictment

1. The Averments

159. It is alleged that on or about 29 June 1999 where the accused's fields border with the fields of Shaban Misin Shala in Gorazdevac in the Municipality of Peja in the Administrative Province of Kosovo the accused shot at Shaban Misin Shala and his son thereby endangering both Shaban Misin Shala and his so who was a juvenile. The accused therefore committed the act of endangering the safety of other persons contrary to Article 48(2) of the Criminal Law of Kosovo (LPK).

2. The Evidence

160. Shaban Shala said that he was on the property of the co-operative, which is next to the land of the accused. He was out looking for his sheep and was with his 16-year old son Sami Shala. He alleged that he was walking on a path and the accused was standing with another person. The accused was wearing a uniform. Suddenly he saw that the accused was pointing a weapon at them. He shouted in Albanian not to shoot. His son was further away from the accused and he shouted at his son to run. He also started to retreat and the accused started shooting at them. As he was running away he kept shouting. He alleged that the accused fired three times. The gun was a 10-bullet gun, a big rifle. On the day of the incident he claimed that he reported it verbally to KFOR. KFOR considered the complaints to be ridiculous and they did not take it seriously. The witness' account of this incident was largely consistent with the evidence he gave the investigating judge although that evidence was more detailed. He described the accused as having a stout body, sometimes wearing a beard, sometimes not, and as being a couple of years older than him. He was 47 years. The witness said that he knew that the accused had a cousin called Besovic.

161. The son of the witness, Sami Shala, corroborated in essence the evidence of his father. Sami Shala stated that on 28 June, while they were looking for a calf on the land of the factory, his father saw a Serb who was aiming a gun at them. His father told him to go away and he went and hid behind a tree. He heard 3 or 4 gunshots. They left and went home. When they got home his father reported it to the Italians but they did not take it into consideration. Sami Shala said that he did not see the man who pointed the gun. Only his father did. His father told him that he had seen two people shooting at them. He said that his father told him it was the accused and that he knew him well. His father told him that the accused was from their village and that his house was a little further away from where their land was. Sami Shala said that he knew the accused as a neighbour and that he had seen him wearing the upper part of a uniform many times. The evidence given by the witness at the trial was largely consistent with that given to the investigating judge.

3. The Defence Case

162. The accused claimed that after the alleged shooting he was passing through the village of the witness everyday and he claimed that the witness did not report the case to KFOR.

163. The accused claimed that he did not know witness Shala and the witness was not telling the truth. He claimed that he left Gorazdevac on 28 June together with the Serbian Prince Karadjorjevic and a highly respected Orthodox priest, who had visited the village. He had asked them to give him a lift to Montenegro so he could get in touch with his family.

164. Ivo Bogoicevic gave evidence that he was aware of the visit by the Prince to the village of Gorazdevac. He claimed that he heard that he was there but he didn't go and see him because he was afraid to leave his house because his house was not in the center of the village. He did not hear who the officials were that were accompanying him. He could not remember the date or month. He said that it was in the beginning when they took refuge but he did not remember the exact time. He did not know the purpose of his visit. In essence he could not give any evidence that could corroborate the claim made by the accused that he had left on 28 June.

165. Vesko Kastratovic gave evidence that he was aware of the Prince Karadjorgevic visiting his village and that he was personally there and greeted him. He did not know the exact date on the visit but the purpose of it was to express respect and support to the Serbs who had remained in Gorazdevac. All those who were in the village at that time attended. The accused was there with his aunt who was 70 years, a friend from Doberdol, David Bogicevic, Maxic and his father. Vidic Miodrag knew of the visit of the Prince to the village and said that quite a lot of people attended.

166. Bozdar Krstic, Mayor of the village from June 1999 did not know of the visit of the Prince. He said that he would have known if it had happened. The accused asked the witness whether he remembered, "when the orthodox priests Mitropolit came from Montenegro to distribute humanitarian aid it was on 28 June". The witness stated that he remembered the priest Radovic was coming several times and he remembered that on that day he was distributing gifts next to the church. The witness claimed that he remembered the date as he was invited to go to the church and could not go there. He remembered because he called him and sent him greetings as he could not come. He said that all he remembered regarding the date was that he was coming and giving gifts and looking for him. The witness conceded that he remembered the event and not the date.

4. Findings of the Court

167. The court had no difficulty in rejecting the alibi of the accused. The court found it hard to believe that it would have been so easy for the accused to accompany important personalities at short-term notice when there was nothing urgent in his request to leave for Montenegro. The evidence given by the defence witnesses were contradictory on relevant issues. How could a mayor not be aware of the visit of a prince in his village? The court was of the view that the other witnesses who purported to have seen the accused at the gathering on 28 June were not very convincing on the assumption that such visits took place. The court did not attach too much importance to the assertion of the accused that no report was made against him. The basis of this assertion is presumably that the accused was never questioned by KFOR about the incident.

168. However, the main issue in the case was whether the witness Shaban Shala had recognized the accused as opposed to identification as he knew him. There were also a number of inconsistencies between his evidence at both trials and earlier statements given. In his evidence before the investigating judge the witness had said that he could not identify what clothes the accused was wearing, as he was 300 meters away. He also told the investigating judge that he could not say what the distance was precisely, if it was 80, 90 or 300 because he had not revisited the spot. He was asked by the investigating judge to make estimation by identifying an object from the window; he identified a distance of about 200 meters.

169. The panel was of the view that the inconsistencies in the evidence on the recognition made it unsafe to convict on that count. The court could not act on the evidence of Shami Shala to connect the accused with that offence. With regard to the evidence of Shaban Shala the court bore in mind that he knew the accused and the issue was not so much one of identification as recognition. The court asked itself whether from the distance at which he was he could have at least recognised the accused as opposed to identification. The court concluded that it was not safe to act on the evidence in relation to that charge.

C. Counts 3 and 4 of the Indictment

1. The Averments

170. It is alleged that on or about 9th December 1998 between Doberdol, Poqest and Gorazdevac in the Municipality of Peja in the Administrative Province of Kosovo the accused in the company of accomplices unlawfully detained Rrustem Arif Shala and tortured him by beating him severely causing him to lose conscious several times. He therefore committed the criminal acts of unlawful detention and causing serious bodily injury contrary to Article 63 paragraph 4 of the Criminal Code of Serbia (LPS. contrary to Article 38 paragraph 1 of the Criminal Law of Kosovo (LPK).

2. The Evidence

171. Rrustem Shala claimed that on 9 December 1998 the police stopped him. He knew the police officers. They were wearing black camouflage uniforms. They were from the village of Doberdol. They beat him. They took him to a cliff near the house of the accused. The accused arrived and took him to Gorazdevac village by car. There they again beat him. On the way to the village another group of police officers stopped them at the checkpoint. There he was beaten again by both groups of police. He almost lost consciousness. He remembered that they put him in the boot of the vehicle. They were heading towards Peja in order to take him to the Peja police. On the way to Peja they came across another police unit. They stopped and he was taken out and ill-treated. There were four policemen from Gorazdevac. At Peja police station he was kept for two days and two nights and continuously beaten. After that they released him. He spent two

weeks in Peja hospital and had five stitches. The witness alleged that the accused participated twice in the beatings inflicted upon him. When they were beating him at the cliff the accused beat him prior to taking him in the car and driving to the village of Gorazdevac. Once there he stopped and took the witness out of the car. Then three Serbs in the group of the accused, along with five from the other group, beat him.

172. When the accused came he talked to the other police officers in Serbian. The witness understood the words "so you have caught a UCK". The accused beat him up but he could not say whether he used his fists or feet or some instrument. He felt unconscious and came back to his senses in Gorazdevac where he had been taken in a red car, a Lada, which was driven by the accused. He was asked the question "Veselin Besovic was amongst those who beat you there" and he answered that "he was in the group of people who beat me but since it was a big group and I was defending myself". To the question "you can't say for sure that he was beating you" the witness stated "since they beat me a first time they beat me the second time". From Gorazdevac he was taken to Orach and he found himself in the trunk of a car, a Niva, and then they went to the village of Brezenik.

173. The witness said that he saw the accused very clearly on that day. He knew him well as he was his neighbour in Poqest. Their houses were about 2 to 3 kilometers away. He added that the accused was a commander in the police and later worked in Zastava factory. Before the investigating judge the witness did not mention that the accused worked at Zastava. When he was questioned by the prosecution he stated that he did not know whether the accused did work at Zastava or as police officer. He added that he had heard from an uncle of his that the accused worked at Zastava. He did identify the accused in the photo line up shown to him in court. The witness identified the accused from the photo line up shown by the investigating judge.

174. The witness also knew of Veselin Besovic who was a commander of the police station in Jablanica. The witness claimed that it was not this Besovic who had committed the acts against him. In his statement to the investigating judge, however, the witness had said that he knew Veselin Besovic for a long time, 10-15 years, and that he had been a policeman. He was the commander of the police unit in Jabllanica. He held this position for at least 2 to 3 years prior to the war and he lived in between Poqest and Doberdol. He said he did not know of any other man with the same name and it was this man who had inflicted the beating upon him.

3. The Defence Case

175. The accused claimed that he did not know the witness. He knew that his uncle used to work in Zastava. He also said that on the dates the witness mentioned there was the other Besovic living in his house. This other man, Besovic, was expelled from the village Krushevac in May 1998 and came to live in his house in

Gorazdevac while he lived in his house in Peja. The accused asked the witness the reason for which he did not point this fact out to the KFOR there and then. The witness claimed that the checkpoint was set up later in 2000.

176. The accused asked the witness whether there was a KFOR checkpoint in the village of Poqeste. The witness stated that there was. The accused also said that prior to the war he had a car that was similar to a Zastava, but it was a Russian Lada. This was the only car he had. It was a red car. His relative with the same name also had a Red Lada and later a Mercedes. He bought his Mercedes on 1 May 1999.

177. The accused also claimed that during the period of time mentioned by the witness he was in military hospital in Belgrade recovering from an operation. His treatment started on 2 December 1998 and he stayed there for two weeks. The hospital was the Military Academy hospital and he had surgery in relation to a serious problem of decreasing voice. A number of witnesses gave evidence on that alibi defence. Slobodan Jokic gave evidence that in 1998 the accused was sick and in hospital in Belgrade. He used to go to Belgrade and come back. He had an official car and only once they kept him for some six days because he had to undergo minor surgery. At the time of the regular inventory the accused was sick in the hospital in Belgrade and he sent an official car to pick him up in Belgrade as they could not do the job without him.

4. Findings of the Court

178. The Court considered that although the evidence of the witness as to beatings inflicted upon him is credible the possibility that it was the "other" Veselin Besovic who was involved and not the accused could not be excluded. The evidence of the witness before the investigating judge did not allow that reasonable possibility to be excluded. In that statement the witness stated that he knew the perpetrator and that he was the commander of the police station in Jabllanica. The accused and the other Veselin Besovic looked similar. Further, according to the accused, both he and his relative Veselin Besovic had red Lada type cars. The witness mentioned a Niva. The court could not exclude the high risk of a mistaken identity here.

D. Count 5 of the Indictment

1. The Averments

179. It is alleged that on or about the 15th August 1998 at the Village of Graboc in the Municipality of Peja in the Administrative Province of Kosovo the accused with a group of accomplices set on fire the house of Nezir Kelmendi as they burnt several other houses in that village and harassed the villagers with the purpose of expelling the villagers out of their village and out of Kosovo. Veselin 'Vesko'

Besovic committeed the offence of damaging the house of Nezir Kelmendi contrary to Article 145 paragraph 2 of the Criminal Law of Kosovo (LPK).

2. The Evidence

180. The witness stated that his house was burnt on 15 August 1998. He was not there but he saw the event. He was in Llozhan, which is not far from Graboc. The field of Llozhan and Graboc are next to each other. From where he was in Llozhan he could see his house burning as he was on a hill. He was at a distance of either 800, 1000 or 1200 meters. On that day the war started in Graboc; at 6:20 am military forces entered the village and burned houses and the villagers escaped and went to Llozhan. The Serbian forces came. They were bombing Llozhan. Some were in military uniform and some in civilian apparel. He could not be precise on the colour of the uniforms though he mentioned that they wore black. In Graboc there were about 40 to 50 houses. They were not all burnt on that day. Some were burnt two days later. His own house was surrounded by a wall.

181. Before the investigating judge he had said that the accused was not wearing a uniform that day and he did not know what he wore on other days. The witness clarified his evidence stating that on 15 August he was wearing civilian clothes, but on 16 August, when he was burning the houses, he was wearing a black police uniform. He added that he did not see the accused on 16 and 17 August. The witness said he only saw him on the day when they burned down his house, which was 15 August. The witness claimed that he told the investigative judge that he only saw him in civilian clothes on 15 August and that he did not mention 16 or 17 August before. He only saw the accused that day through the binoculars. The witness had glasses for long distance and close up. He was about 1/2 a kilometer away. He borrowed the binoculars from a friend who focused them for him. He had his glasses on. He only looked for a brief time as it upset him to see his home burning.

182. In his evidence he said all he saw was his house burning. To the investigating judge he had said that he had seen through the binoculars the accused was breaking into his house and slaughtering his cattle and sheep. In his evidence he said that they had been killed but that he did not see the accused doing it. He did see the accused enter his house and burn his house. He saw him enter the small gate to go into the yard. He saw the skins and carcasses of the animals.

183. The witness claimed that he knew the accused as they were friends and worked together at Zastava factory. He did not know anyone with the same name as the accused. He had worked there 18 years and left in 1998. On 15 August he saw the accused but he was not in uniform. In the first trial when the Presiding Judge asked him “on 15 August was he wearing a black uniform?” His answer was “yes he had a black police uniform with a cap on 15 August”. He was asked to explain this answer as he had said earlier that the accused was in civilian clothes. His explanation was “I think we misunderstand each other. On that day I saw him in

civilian clothes and uniform and before that other people have seen him in uniform as well. I have seen him on the particular incident on entering my house, he was in civilian clothes but on the same day I saw him in a black uniform with Arkan on the uniform." He also mentioned that Bajram Shala had seen the accused wearing a black uniform with a cap. When he was confronted with an answer he gave in the first trial that the accused was wearing a uniform on 16 August he stated that he had seen the accused only on 15 August.

3. The Defence Case

184. The accused stated that he did not know the witness and that he had never been in Graboc. The accused claimed not to have known the witness from Zastava. In answer to the accused the witness said that the accused worked in the store of the factory with the storekeeper Arif Blaka from Jallanica Vogel and that he was a friend. During the investigation the witness had stated that he and the accused did not work in the same shop.

4. Findings of the Court

185. The court found a number of inconsistencies in the evidence given at the trial and the previous statements. The court did not consider these inconsistencies were such as to undermine the essence of the testimony of the witness on the events that occurred on that day. The real issue was the reliability of his purported recognition of the accused. The court had strong doubts on whether in fact that witness had properly recognised the accused as being one of the participants on the scene in Graboc on that day. The witness could not explain satisfactorily how he got the binoculars. From the distance where he was and given the number of persons involved on that day, the court had strong doubts whether the witness could have identified the accused properly.

E. Count 6 of the Indictment

1. The Averments

186. It is alleged that on or about 5th July 1998 at divers places including Doberdol, Gorazdevac, Qerhone and Peja in the Municipality of Peja in the Administrative Province of Kosovo the accused with accomplices unknown tortured Arben Ahmet Bajraktari causing him serious bodily injury. The accused and his accomplices, in an apparent execution of the conflict of Serbs against Albanian Kosovars, rounded up the said Arben Ahemet Bajraktari and nine of his village mates. They were all from Doberdol village and were on their way to Gllogjan. The accused and his accomplices tortured these people in various ways including kicking, punching, and beating them with sticks causing them serious bodily injury. Finally, the accused and his accomplices took the ten men to the secret service ('SIA' also referred to as 'UDB') that again tortured them. Some of the men were killed but Arben Ahmet Bajraktari was subsequently detained and

remained in detention until 6th July 2000, causing further severe damage to his health. Veselin 'Vesko' Besovic is therefore charged with causing, in complicity with accomplices unknown, serious bodily injury to Arben Ahmet Bajraktari contrary to Article 38 paragraph 2 of the Criminal Law of Kosovo (LPK).

2. The Evidence

187. The witness stated that on 5 July 1998 he and nine other persons wanted to go to Albania to get weapons. On their way they ran into four Serbs who were in uniforms near Doberdol. They were stopped and beaten. The accused was among these Serbs and he maltreated the witness. They were taken to Peja in three vehicles. He had his hands tied. The accused was in one of the vehicles in which three of the men who had been captured were. These men died later. In Peja they were detained as terrorists. He was convicted and sentenced to two years' imprisonment. The accused was with a number of people. The accused beat them up and tied them up. They tied them with ropes and they put them on the back of the tractor and took them from Doberdol to Gorazdevac. The people they tied to the back of the tractor were Shaban Mehmetaj, Mustafe Mehmetaj, Gani Ahmet Gjekaj, Luan Ahment Gjekaj, Skender Bajraktari, Nezer Bajraktari and three others that were killed during the incident.

188. The witness stated that during the time he was being beaten he lost a necklace. It was a very strong silver necklace. In Gorazdevac they put them on the ground and beat them with wooden sticks. In Doberdol he was lying on the ground and his hands were tied and they pulled him from behind by his necklace, the police did this. When he was asked who took the necklace his answer was "there were many of them". At the first trial he said the police officer did this but he could not give a name. When he was reminded that he had told the investigating judge "Vesko took me by my necklace and pulled me up and at that moment I could see in his face" and asked how he got to know the name Vesko, he gave the following answer: "they were very difficult moments to go through. I can't say I remember details of the event but I probably heard his name being mentioned."

189. The witness claimed that he recognized the accused only when he took them from Gorazdevac to Doberdol. The witness said that he denied that he had given such a statement to the investigating judge. He had told the investigating judge that "the necklace was broken and he told me that the necklace was his now, you do not need it any more and I will kill you". The witness claimed that there must be confusion because the police broke the necklace and he didn't see who did it as he was lying on his face on the ground. Someone did say that they were going to kill him; they said it in Gorazdevac and in Doberdol. The witness claimed that the accused was one of the people who threatened him; he recognized his face very well.

190. The witness claimed that when he was in Doberdol they were lying on the ground and he heard someone say "we can't do anything without Besovic being there".

The accused then arrived in a car, a Zastava 101, yellow in colour. The witness claimed that when they were arrested they were in two cars, a Red Lada and a Zastava which was red. The accused's Zastava was yellow. The witness claimed that in Doberdol only the police were involved in beating them and that there were seven or eight of them. In Gorazdevac there were police and paramilitary and there were many. The accused was wearing a police uniform; it was dark blue in colour. That was the usual Yugoslav police uniform. The witness claimed that there were three cars and the three people who died were in the third car. They stopped the last car and they killed one of them with bullets and the other two they massacred and killed. The accused and his accomplices killed them. The witness knew this because the accused was in the car with them. The witness did not see because he was in the second car.

191. The torture at the police station was electro-shock, all sorts of tortures and solitary confinement. The witness said he could not tell more because it was too difficult for him. He had not even told his mother. They beat his hands with a plastic stick until they bled. His body was black from the beating and his face was cut. They took them to the police station in Peja and interrogated them until 6 July and they tortured them. After that he was taken before the court and on 11 September 1998 he was convicted for two years. He was convicted for terrorism.

192. The witness claimed that at the time he was able to distinguish between military paramilitary and police. He knew they were paramilitaries because they had painted their faces and had handkerchiefs on their heads. The accused's face was not painted. The uniform of the accused was a full uniform. To the investigating judge he had said that the upper part of the uniform was a police uniform and the bottom was a military uniform. The witness had never seen the accused before the incident and did not see him at the police station the day after the incident.

193. Though the witness had never seen the accused before he stated that he managed to identify him as one of those who assaulted him on that day. He saw the accused in a green uniform but when he was confronted with a previous statement that the uniform was blue he confirmed that it was blue. He identified the accused in court both in person and from a photo line up and said that the name Vesko that he had heard on 5 July referred to the accused. He denied having used the name Besovic in the first trial to identify the accused.

194. The witness carried out a photo identification of the accused before the investigating judge; he could not remember how many pictures he was shown, or the number of which the accused's picture was under. He remembered the picture of the accused because of the moustache and the way he looks.

195. In the course of the first trial the witness stated that the events he had described had taken place on 5 July. Before the investigating judge he mentioned 6 July. When questioned by the panel he explained that the events did take place on 5 July but that the report was made on 6 July 1998.

196. The witness said that he knew Haxhi Kastrati, but after the war. He knew him as a policeman in the street because he came to Peja to work and he saw police on the street. He claimed that Haxhi Kastrati had never told him anything about this case. His claimed that Haxhi Kastrati was still a policeman.

197. A number of witnesses gave evidence on the incidents of 6 July. Brahim Sadri Kastrati gave evidence that on 6 July 1998 he was in his field around 7:00 or 8:00 in the morning when two civilians' cars came. He did not see who were in the cars. There were shots from the cars and noises like a car crash. He continued to work in his field, until 10:00 or 11:00 am. A few police cars arrived at 11:00 am. Zoran Mijatovic arrived with a tractor. A policeman from Doberdol; it was the accused. At the tractor of Zoran Mijatovoc he saw people on a horse cart, tied up. They had tied them up with whatever means possible, with metal wires and iron bars.

198. Brahim Sadri Kastrati claimed that he had known the accused since childhood; they were neighbors, grew up together and had frequent contact. He knew the accused's house in the village of Gorazdevac. The witness claimed that the accused was a few years older than him and that they attended the same secondary school.

199. Haxhi Kastrati gave evidence that on 6 July 1998 they heard gunshots from different weapons form the direction of the village of Loxha. Sometime around 10:00 am, from the direction of the road that leads to Poqest two cars arrived heading towards the direction of Doberdol. The position of the witness's house was such that he could clearly see the whole road. The cars drove to the houses of Mijatovic and were stopped there by the local Serbian population including Zoran Mijatovic and others. He did not know what was exactly happening but heard screams and it appeared that it was some kind of violence. After half an hour from the direction of Poqest a Niva car arrived. This was a police car with a police license plate.

200. In the car there was Miodrag Paunovic, a supervisor with a high rank. He was responsible for the police for over 17 villages surrounding, Poqest, Gorazdevac, Orash, etc. The accused was in the same car with Paunovic. About 20 to 30 minutes after their arrival a tractor was started and left. The route of the tractor passed through fields owned by Albanians and he saw on a cart pulled by a horse, people tied with ropes with their backs touching each other. The driver of the tractor was Zoran Mijatovic. Two other persons were seated at the back of the tractor, one on the left and one on the right and they were holding their weapons directed at the people on the cart. At the end of the cart two other persons were standing and pointing their guns in the same manner. The Niva was following the tractor. The witness was able to observe the persons and the tractor until they reached the house of Drago Manojovic. He did not know what happened to them after that. They next day on the television he heard that ten persons had been

arrested in the village of Doberdol. It was further stated that three persons were executed near the place called Qerhane near Loxha.

201. Haxhi Ise Kastrati said that he knew the accused from the 6th grade in school in Gorazdevac. His house was situated in the outskirts of Gorazdevac. Before the war he had no relations with him, good or bad. The witness claimed that the first time he saw the accused was in 1998, after the war had started. He could not remember whether it was March or April. He saw the accused with Ivo Bogicevik, from the village of Gorazdevac, and Drasko Dogicevici from Doberdol. He was in the kiosk on the outskirts of the village of Doberdol, which was owned by Sadik Kastrati. The accused and the two others showed up in civilian clothes. They entered the kiosk and as there was no other place for them to sit he offered them to sit with him and his cousin. They had drinks together and everything was normal. That was in March or April 1998. The witness said that apart from this occasion the only other time he met with the accused was in 1985-1986 when he was working as a policeman in Prizren and he saw the accused and offered him coffee.

202. Rrustem Kastrati gave evidence that the accused was involved in the incident when people were put on a trailer. They captured eight people, and took the horse cart and attached it to a tractor and they took the people to Poqest, or Gorazdevac. He saw the accused with Zoran Mijatovic. The villagers were taken to field, toward the main road down the hill. That was all that he saw. He did not know exactly what the accused did. They were in the mountains, about 300 meters away. The accused and the eight people were near the house of Zoran. He could not recognize the people in the trailer because they were from another village. The witness claimed that the accused knew very well as in 1997 they spent time together.

203. Sherif Kastrati claimed that the accused was involved in the incident when eight Albanians were captured and tied to Zoran's tractor and taken to Gorazdevac. From hearsay evidence he concluded that three of them were killed that day. He did not see it himself. The witness told the investigating judge that he saw the people being tied to the tractor. In his evidence he agreed that this was correct, he had seen this. He could not recall the date but it was in May. It could have been 29 May. The tractor was a Ferguson tractor and was owned by Zoran Mijatovic. There was a horse cart attached to the tractor and the people were in there. They took them to the village of Gorazdevac and that was all he saw. He did not see the accused but heard that he was there.

204. Avni Kastrati gave evidence that he and others were watching the village when eight people from Rodica came, and Dragon Manolic stopped them and asked them where they were going. They said that they were going to Albania to get ammunition. When they reached the hill Zoran caught sight of them. It was Zoran and Bogicevic who captured the eight of them, tied them up and took them on a tractor-trailer. He saw them with his own eyes. He saw them take the eight

people to Gorazdevac, beating and cursing them. He was watching from the foot of the mountain. He did not see the accused.

3. The Defence Case

205. The accused claimed that the witness Arben Kastrati was not telling the truth. He said that if the witness was shown any photographs he could only say that his wallet and his ID had been stolen. He believed that the police showed the witness a photo from his ID card. With regard to the evidence of Brahim Kastrati the accused denied that he went to the same school as the witness and claimed that he could prove, as he had his school certificate, that he finished primary and secondary school in Peja. The accused stated that the witness had claimed that the distance between them was 2 kilometers. The witness agreed that the actual distance was six kilometers – from center to center, but the surroundings could be closer as Gorazdevac is spread out and Doberdol has bordering fields with Gorazdevac. The accused claimed that he did not know Rrustem Kastrati and had never seen him before.

4. Findings of the Court

206. The witness carried out a photo identification of the accused before the investigating judge; he could not remember how many pictures he was shown, or the number indicating the position of the accused on the line up. He remembered the picture of the accused because of the moustache and the way he looks.

207. The court did not doubt that the events as described took place. The court however could not act on the evidence implicating the accused in view of the following factors. It will be recalled that the witness had never seen the accused before the critical day and therefore the issue was whether there had been any proper identification and not simply recognition of the accused by the witness. The witness was confused on the name he had heard. He mentioned the name Besovic in the first trial and the pseudonym of the accused during the present proceedings. He simply went back on the fact that he had used the name Besovic on some other occasion. Further he could not properly explain the incident about the necklace and gave the impression that he had to establish at any cost that it was the accused who had taken his necklace and therefore he would be implicated in the events of the day. The court had strong reservations on the manner in which the witness identified the accused.

208. Three of the witnesses purported to recognize the accused, as he was a person previously well known to them. The identification made by them was considered to be reliable by the court. The other two witnesses gave evidence of the incident but did not see the accused participating in it. However, the court could not act on the evidence of those who had recognised the accused on that day. None of them could give any coherent account of the involvement of the accused in the alleged offence on that day. The court did not attach much importance to the

discrepancies between the corroborative witnesses with respect to how many persons were tied on to the tractor as these types of discrepancies can be explained in that each witnesses observed the events from a different position, and the two witnesses who knew that ten individuals were involved had heard reports on the radio or television. But the corroborative witnesses could only give evidence of seeing the men tied on the cart and being towed behind the tractor. They could not give satisfactory evidence how the accused was involved in the beating.

F. Count 7 of the Indictment

1. The Averments

209. This count reads: On the same date at the same places and in the manner described in count 5 the accused in complicity with his colleagues unlawfully detained Rrustem Shala and his colleagues thereby committing a criminal act.

2. Findings of the Court

210. It would appear that the count refers to the date 5 July of count 6. Logically it should refer to counts 3 and 4 above. Whatever be the case the court found no evidence of any unlawful detention of Rrustem Shala by the accused on 5 July 1998 from a reading of the evidence in relation to count 6 above. If the incident relates to counts 3 and 4 the reasons given for dismissing those counts are also applicable to count 7.

G. Count 8 of the Indictment

1. The Averments

211. It is alleged that on or about 14 August 1998 at the village of Doberdol in the Municipality of Peja in the Administrative Province of Kosovo the accused with a group of accomplices set on fire the house of Brahim Sadri Kastrati as they burnt several other houses in that village and harassed the villages with the purpose of expelling the villagers out of their village and out of Kosovo. The accused would therefore have committed the offence of damaging another person’s object contrary to Article 145(2) of the Criminal Law of Kosovo (LPK).

2. The Evidence

212. That witness attended court on 18 March 2003. He had a very arrogant and aggressive behaviour and was unwilling to testify. Before he left abruptly he stated the following:

213. “First, I would like to express my opinion that I do stand to the statement that I made previously. I am fully aware and conscious of what I have stated previously

and I see no reason why should I be maltreated by being called for the sixth time by the court. To keep it short I would like to make it known that I am a disabled person, I have my own health problems, I would like the court to finish as soon as possible by reading what I have said and finish as soon as possible, because as I remember from the first trial, I spent 6 hours in the courtroom and I can't stand this, it is too much for me.

214. Presiding Judge: Mr. Kastrati, first of all, though it is not the personal responsibility of any of the present members of the Panel, we will nevertheless apologize to you for the inconvenience caused to you by being summoned so many times in court. We can proceed in two ways. In light of what you have stated – are you saying that you are not willing to repeat the evidence you gave? We can listen to your statement and I will guide you as we go along or I can ask you questions.

215. Brahim Kastrati: I am willing, but as I have stated before and I do emphasize I have noticed that the court is working in favour of the accused and that the court will not punish him."

216. In his prior testimony he stated that on 14 August 1998 for the third time in the village Loxha the offensive started. It was 9:15 am and he and his family were watching the shelling when the accused and his group came from Loxha village. He recognized a couple of faces; one of them was Ivo Bogicevic. The accused set his hay on fire and then continued with some seven or eight families, even burning houses down. When asked by defence counsel whether he saw with his own eyes that the accused was setting his hay on fire and burning other properties the witness replied that that day it was not necessary to set fire to each and every place as it was 40 degrees and he set the fire at his place and the fire spread to the whole neighbourhood. He said that it was not true that he saw the accused with his own eyes set fire to seven and eight properties and that he meant that in general six or seven properties were burned.

217. The witness and his family left the house and went to Baroni valley for five weeks. Another offensive began there so they had to leave and go to Isniq. They stayed there for five days but the police forced them to go back to their houses. On the way back to his house, when they arrived in Slopek, he saw the accused with a group of paramilitaries. The accused asked where he had been and then took him to an officer at the market of Dezdar. The officer began to interrogate him. When he left there his cousin Iber Kastrati asked him if he knew the accused. When he said he did he asked if he could help him as the accused had threatened to kill him. He went to the accused and talked to him. The accused asked whether he could guarantee that he was not with the KLA and he told the accused that he could guarantee that not only him but also his whole family was not KLA. His cousin was released after a while.

218. The next day the witness went to Baran, after Dragan Mijatovic had told him that they had to hand over weapons, and bought a machine gun costing DM1200. He went back to Krushevac when the accused and the police forces were around and they took the machine gun away.

219. After the war he confronted the accused with the allegation that the accused had burnt down his house. He had returned form Albania some 2 or 3 weeks after the war. He had gone to the village of Gorazdevac and found his cow at Dusan Kastratovic's. When he reached the house of the accused the accused appeared with Srba Dakic and other Serbs from Gorazdevac. The accused and two of the Serbs stopped him on the road and told him that he had no right to pass through the road.

220. The witness told the panel that he was sure the accused would not be sentenced for what he deserved to be sentenced and would not be punished as he deserved. The Serbs had more support than the Kosovo Albanians. The witness claimed that KFOR would write down the names "but then probably while going to Gorazdevac and celebrate with the Serbs they would throw the notes away". The witness claimed that he and Delli Krasniqi were about to inform the Italian KFOR but ended up being brought to the police and the Italian KFOR attempted to beat them up. As he knew a little Italian he tried to communicate to them and tell them that the accused was the biggest criminal. He claimed that he reported to KFOR that the accused had committed these crimes and KFOR let them go and almost beat him and Delli Krasniqi up.

3. The Defence Case

221. Defense counsel put to the witness that he had claimed to the investigating judge that the accused was the commander of his group because he was a captain before the war; he was asked to give the basis of this conclusion. The witness replied that his evidence could have been taken down or translated differently. What he stated was that his cousin was a captain in the war and the accused's cousin had taught the accused how to act, taught him the skills.

222. The accused denied the allegations. The accused alleged that this witness was involved in perpetrating crimes against his property together with Haxhi Krastati. The witness did display a level of hostility towards the accused. The accused claimed that the witness stated that he was a captain because at the time when the witness and Haxhi Kastrati were looting his house, they found a uniform which belonged to his cousin who was a captain in the army. They were playing with the uniform and put it on top of a pole.

223. The accused further alleged that the witness shot at him on 21 November 1999 and that he saw the car, which stopped, outside his house. The accused asked why the witness had not reported him to KFOR. A checkpoint was there and accessible to him in 1999. The witness said that he had approached KFOR many

times and that when KFOR came to investigate he mentioned the name of the accused among others.

4. Findings of the Court

224. The version of that witness was not very consistent. There were a number of matters crucial to the involvement of the accused in the incidents on which his testimony was not very clear. Since he did not testify these matters could not be clarified. When he was asked by the defence whether he had seen the accused with his own eyes he stated that it was not true that he had seen the accused set fire to six or seven properties with his own eyes. What he meant was that in general six or seven properties had been set on fire. It will be recalled that this witness displayed a high level of hostility against the accused at the first trial and during the present proceedings. By itself such an attitude, though it is understandable, cannot justify the rejection of the evidence of the witness. But that factor should weigh with other factors like unexplained discrepancies and evidence not implicating the accused in the offence.

225. Though it is permissible by virtue of Art. 333 LCP to read the statement of a witness in court provided that testimony has been tested by cross examination on a previous occasion, the admissibility of such a statement should be distinguished from the weight to be given to it. The court felt unable to attach any weight to the testimony in view of numerous unexplained matters. One such matter was the date on which the house of the witness was burnt. The witness mentioned 14 August 1998. But when Haxi Kastrati gave evidence he said that the house of Brahim Kastrati was burnt on 17 April 1998.

H. Count 9 of the Indictment

1. The Averments

226. It is alleged that on or about 24th March 1999 at Village Doberdol the accused and his armed accomplices surrounded and shot at the house of Brahim Sadri Kastrati with the purpose of intimidating him so as to have him expelled out of the village and out of Kosovo. He therefore committed the offence of endangering the safety of other persons, viz. Brahim Sadri Kastrati and his family contrary to Article 48 paragraph 2 of the Criminal Law of Kosovo (LPK).

2. The Evidence

227. Brahim Sadri Kastrati alleged that on 24 March 1999 at about 12:00 a.m. the accused came with his group and surrounded his house. For about 20 minutes they just shot with weapons. He was forced to gather his family into one room. He was expecting them to enter the house at any minute. After ten minutes of attack he was sure that the accused tried to enter his yard with two or three other persons. A wall surrounded his yard, about three meters high. He recognized

Danilo Abramovic when he told them "don't jump because he will kill you". They fired shots and then left for the house of Zoran Mijatovic. When they reached that house they fired shots from there. He and his family stayed awake until 5:20 in the morning. At 5:20 am they heard the engine of a car at Zoran Mijatovic's house and heard the car leave in the direction of Poqest. They went to Vesko's house and stayed there 10 or 15 minutes and then followed the road in the direction of Peja. This was at midnight on 24 March.

228. The witness was asked how he could know that it was Danilo that addressed the accused. The witness claimed that Danilo was a neighbour who lived only 100 meters from him and that he could recognize his voice even while he was sleeping. It was put to him that Danilo did not mention the name of the accused. The witness claimed that he believed he had given a statement that he heard Danilo say "Vesko don't jump or climb that wall as he will kill you". He claims this was said to the investigating judge and in the evidence he gave that day.

229. He saw the accused come with his paramilitary group surround his house. He claimed that it was midnight. He saw the accused at the second part of his house. His house had two parts and the accused was underneath or at the foot of the yard's wall. As it was a full moon that night and it was easy to see people from 300 meters away. That same night they tried to enter the house of Tabja again, as his and Tabja's houses were at the end of the village. They were the first houses bordered with the Serb neighbourhood. There were 16 or 17 persons present. Some were dressed in police uniforms and some in military uniforms. The accused was dressed in a police uniform. Earlier in the day, when they came past singing Chetnik songs he saw approximately 10 or 12 of them. On the road, across the hill there was a larger number that he could not estimate. These people were dressed mainly in police uniform and were armed.

3. The Defence Case

230. The accused stated that on 24 March he was at his place. The NATO bombardment had started and he went on the street. He met his neighbour Dasic Miladin and they had a conversation about the bombardment. Dasic Miladin confirmed that version.

4. Findings of the Court

231. As stated in relation to count 8, the witness Brahim Kastrati did not testify in the present proceedings. Given the fact that the accused invoked an alibi which was supported, it was not possible through an interrogation of Brahim Kastrati to test that version of the accused against the allegations made by the witness. In these circumstances the court did not consider safe to act on the evidence of the witness.

I. Count 10 of the Indictment

1. The Averments

232. On or about October 1998 on a date unknown at Doberdol in the Municipality of Peja in the Administrative Province of Kosovo the accused and Drasko Bogicevic behaved obscenely when they forced Tabja Kastrati into their car to have sexual intercourse with her in that they tore her clothes and restrained her from escaping from the car in a public place. The accused thereby committed the offence of obscene behaviour contrary to Article 75 as read with Article 79 of the Criminal Law of Kosovo (LPK).

2. The Evidence

233. Brahim Sadri Kastrati stated that a month after 14 August 1998 when the accused had burnt the food for the livestock, around 2:00 to3:00 pm, he was at his cousin's yard when the accused and Drask Bogicevic came and asked him where Tabja Kastrati was. They said they wished to ask her some questions. He told them to ask him the questions. They said they had to ask her the questions and that she could respond from a certain distance of say 10 meters. They took her and put her in Vesko's car and drove about 300 meters up to a hill close to a forest. After 20 minutes her mother started screaming and crying so he was obliged to go and check what was happening. When he was about 100 meters from the car he heard the sounds of car doors banging so he rushed closer. When he was about 30 meters from the car the girl managed to get out, her clothes were torn off. He asked the accused what he was doing; he said it was not he but Drask Bogicevic. He told the accused that he had trusted the girl to him. Vesko told him to go away as they would let the girl go in ten minutes. Ten or 15 minutes later the girl came back, crying and almost without consciousness. She could not talk. He later verified that she had been raped. Since the time of the NATO intervention she left to go to Germany and no one has heard of her since.

234. The witness was asked about the discrepancy in his evidence concerning the date upon which he said the girl Tabja was raped. He had said before the investigating judge that it was 13 September 1998. The witness claimed that when they asked him to sign the statement he told them to correct the date, as it was not the correct one. If they did not do so that was not his fault. He claimed that the girl was raped around 3 weeks or a month after 13 September. When asked if he saw the accused rape the girl with his own eyes he replied, "If I did not see it I would not say it". When asked again whether he had seen it with his own eyes he replied, "I bet on my life he was the one who raped the girl". When asked why he had not told this to the investigating judge he said that he told the investigating judge that Tabja was raped and her clothes were torn off her body. He said that he did not know why this had not been taken down. On the day he was asked to sign the statement he was asked whether something was wrong. He told them there were a lot of discrepancies and misinterpretations and he told them that he would correct

all this at the trial. He had come as requested and signed the Albanian version on 17 September. It was put to the witness that he had told the investigating judge that another person attempted to rape Tabja and that now he was saying that it was the accused. He was asked which was the correct version. The witness replied that they attempted to rape the girl before he arrived. That act lasted 10 or 15 minutes. It was while he got back to the yard of her house and it was then that he saw her coming back with her clothes all torn off. He said that he was not a doctor to evaluate how long it took to rape someone.

235. Defence counsel asked the witness how he verified that Tabja had been raped. He claimed that she told him that she had been raped and stated that he had not wanted to enter such details as the accused and the attorney knew the Albanian customs and laws of the act of rape. It was put to him that to the investigating judges he had said; "most probably they have beaten her up in the car". The witness claimed, "I did not tell that for family honor, it is a sensitive issue." The panel asked him why he was prepared to say it now; the witness claimed that by stating that she might have been beaten up it was obvious enough that she was raped. He then claimed that there were two main reasons why it may not have been noted down previously, he either did not explain it to protect his family's honor or it was not entered down.

236. Haxhi Ise Kastrati gave evidence that sometime between 20 and 22 September, after the population came back from Ishniq, the accused and Drasko Bokovic went to house of Selim Kastrati and took his daughter Tabja Kastrati and the worst happened to her in the woods of Ismet Kastrati. He was told this by Brahim Kastrati who was at her home on that day. He added that he went to speak to the girl and she was in a state of shock and could give no information. This was two days after the event. He believed that the girl was now in Germany but he did not know her address. Her whole family was in Germany so there were no relatives left who could supply an address.

3. The Defence Case

237. In response to the evidence of the witness the accused stated that "My honor and my dignity is badly affected by the statement of the witness regarding the rape, I apologize but try to understand, I am a father of four children and I am 50 years old, and to challenge me with such accusation is a real shame. It is not about a life or death matter, my dignity and my honor and my children's honor especially is jeopardized about this. The witness does not say the truth."

4. Findings of the Court

238. The court took judicial notice of the fact that in Albanian culture rape is a very sensitive issue and is not a matter that people would wish to talk about openly. Rape is also not an allegation that would be readily made, and women would not easily admit to being raped. It may be that when the witness said that the girl was

beaten up he meant she had been raped is plausible in the context of Albanian culture. The court did take this into account in assessing the credibility of the witness. The court also was very much alive to the sensitive aspect of such an offence. However, it should be noted that the charge is not one of rape but of obscene behaviour.

239. It is unfortunate that Brahim Kastrati did not testify before the present panel. There are a number of issues that would have had to further clarified. The witness said the offence took place in September, that is one month after 14 August. Before the investigating judge he mentioned 13 September and at the first trial he mentioned that the alleged offence took place three weeks or a month after 13 September. He wanted the first panel to believe that the international judge would have refused to correct a mistake in the date. He could not say for sure whether it was the accused who had been the perpetrator. Before the investigating judge he gave a statement that another person attempted to rape the girl. Such discrepancies are not the kinds that a court of law can simply brush away as being minimal and of no consequence on credibility. They go to the root of the case and the explanations, at times fanciful given by the witness, left the court with no choice but to dismiss this count.

J. Count 11 of the Indictment

1. The Averments

240. It is alleged that between the 4th and 6th April 1999 at Village Graboc in the Municipality of Peja the accused and his accomplices tortured Bajram Shala and other villagers and expelled them out of Graboc village.

2. The Evidence

241. The witness stated that on 4 April 1999 he was in an area about half a kilometer away from his village as it had been burnt. When he was asked if anything had happened to him he answered that ‘nothing bad happened to me.” He went on to say that on that day the villagers had been given an ultimatum to go from Llozhan to Gorazdevac. The ultimatum was given by one Miga. In the course of the first trial he said the ultimatum was to go to Albania. It was then that he saw the accused. The time was 10:00 am. The accused and others came from Graboc and arrived at Gorazdevac. The witness and other villagers gathered at a mill at 10:00 or 11:00 am. They had their women and children with them. There was a checkpoint there. Military people with uniforms, policemen, militia, with all types of uniforms were also present.

242. At some distance from Gorazdevac they were detained by the military and the police for two hours. They were maltreated near a mill. When asked whether the accused had done anything on that day he stated that “there was an exchange of words as far as I saw.” He did not see Nezir Kelmendi or Xhedin Shala on that

day. The witness and other villagers stayed at the mill for a while and then left in a convoy following the way from Gorazdevac to Peja to Djakova to Albania. When they were near Decani others came in uniforms. They were militia, police and military. They were wearing masks and only their noses were visible. They broke the tractors, took the money of the villagers and beat up the young men. They were then sent to Prizren where they spent a day and a night. They were sent back to Peja on 6 April. Then they stopped at a graveyard and again went the way to Gorazdevac; some went to Kilina, others to Istok. Nobody bothered them anymore and the witness settled in Jllogjan.

243. The accused was a neighbour of his but he did not know him and was never introduced to him. The accused was wearing a black uniform, a hat and had a Kalashnikov. The accused was mistreating people. He did not speak to the witness. The witness was on his tractor next to a neighbour and the accused threatened his neighbour. He remembered hearing the accused say to his neighbor "you finished that bunker in the forest, you are keeping their hand grenades and ammunition". When he said this, the accused had hand grenades in his hand. The witness had told the investigating judge that on 4 April 1999 Rrustem Kastrati was with him on the tractor.

244. The witness said that the accused threatened him but did not ask him for money. The accused's uniform was dark, not black but dark. It was plain. He saw the accused for the first time on that day and had never seen him before. He had a moustache. He heard that it was Veselin Besovic when he was on the tractor with Rrustem. The witness had told the investigating judge that the accused was from Doberdol or Poqest. He had also said that while sitting on the tractor he had heard the name "Vesko". The witness had told the investigating judge that he did not know if the accused was wearing a police or military uniform. In his evidence the witness claimed that in his previous statement he had said that he was wearing a police uniform.

245. The witness had been shown photographs by the investigating judge. He identified photo 1 and photo 6 as the accused.

246. In the present proceedings the witness stated that he did not recognise anybody on that day. When he was confronted with what he had stated in the first trial "there were ten trucks and tractors around, police and military around me there I heard the name Vesko Vesko" and when he was asked whether he had heard the name Vesko on that day he answered "that was the first time when I saw him with an automatic in his hand going around tractors that was the first time when I saw him, he had a moustache, he had a police cap on". When he was asked to explain how he knew to whom Vesko referred he said, "someone perhaps recognised him. But as far as I am concerned it was the first time I saw him."

3. The Defence Case

247. The accused claimed that he did not know the witness and did not know what he was talking about.

4. Findings of the Court

248. The court dismissed that count on the ground that the identification by the witness was far from reaching the required standard of proof required in a criminal trial. The court bore in mind the fact the defence of the accused has been one of mistaken identity and that he could have been mistaken for the other Veselin Besovic. Though the court did not expect the witness to be precise about the uniforms that the accused would have been wearing on that day, the court still considered that there is an obvious difference between a uniform and civil clothes. Before the investigating judge the witness stated that he did not know whether the accused was wearing a uniform. In court he mentioned uniforms. He could not explain to the satisfaction of the court how he managed to get the name Vesko. The statement that he gave when he was asked to explain how he knew to whom Vesko referred "someone perhaps recognised him. But as far as I am concerned it was the first time I saw him" is very revealing and further weakens the evidence of identification of the accused.

K. Count 12 of the Indictment

1. The Averments

249. It is alleged that between the 4th and 6th April 1999 at Village Doberdol in the Municipality of Peja the accused and his accomplices tortured and robbed villagers of Doberdol, burnt their houses and afterwards expelled them from the village. Rrustem Kastrati was among the villagers expelled out of Doberdol village.

L. Count 13 of the Indictment

1. The Averments

250. It is alleged that between the 4th and 6th April 1999 at Village Doberdol in the Municipality of Peja the accused and his accomplices tortured and robbed villagers of Doberdol, burnt their houses and afterwards expelled them from the village. Haxhi Kastrati was among the villagers whose houses were burnt in Doberdol village.

2. The Evidence on Counts 12 and 13

251. Rrustem Kastrati stated that on 28 or 29 May when the war started in Vranac the accused with 10 or 12 others came to Krushevac and then diverted from

Krushevac to Doberdol. He was in the field when they came to Doberdol and saw that they were trying to get in to the village so they took the women and children and went to the mountains. He claimed that on 4 April when they gave them the order to leave the village he saw the accused in Poqest, Gorazdevac and Peja.

252. Haxhi Ise Kastrati stated that on 3 April 1999 a strict order was issued by Miodrag Paunovic and the accused, the accused being one of his deputies, that by 4 April 1999 at 8:00 am all of the inhabitants of the village of Doberdol should leave the village and go to the area surrounding the primary school in Poqest. The same order was issued for other surrounding villages like Loxhan, Poqest, Gorazdevac and Brezniq. In the present proceedings he said that on 4 April 1999 NATO had started air strikes. Miodrag Pauvonic sent a verbal ultimatum which was transmitted to the inhabitants of five villages that they had to leave by Danilo Ovranomovic. He knew the ultimatum came from Miga and the accused but he could not explain how he came to know that.

253. On 4 April at 4:00 am the witness separated from his family and headed for the nearest forest. He did this because 10 days earlier, Nebojisa Vidic Bljuskovic who was working for the intelligence services in Peja went to Danilo Ovranomovic who was the janitor of the school and asked specifically about him. His family went with other villages to the village of Decani heading for Albania. On their journey they arrived at a company called “Fructus” and a convoy of people was stopped by Nebojisa Vidic. A lot of Serbian forces were situated there and when the convoy stopped they asked for his family’s tractor and asked for him. There were nearly 30 people on his family’s tractor and they made everybody step down. They searched the tractor twice and asked where he was. The witness claims they wanted to find him because he had worked earlier in the police force and in the 1990’s they removed the Albanians by force from their jobs. He believed their intention was to look for him because they thought he might have knowledge of some strategic matters and they thought he was a dangerous person. They spoke with his father who told them that the witness had gone to Montenegro and they let the tractor go.

254. The witness went on to say that he did not know how to get to Montenegro so he remained in the forest, which was not even 100 meters from his village. From 4 to 17 April 1999 the village was looted of almost everything by the Serbs of the surrounding villages. He saw this with his own eyes. On 17 April at around 10:00 am the village was set on fire and started to burn. The first house to be set on fire was that of Brahim Kastratri which was near the entrance of the village. On the same day, at the other end of the village, two houses of Zhuke Kastrati and Bajram Kastrati were burned. The accused was the first one who started burning the houses in the village. The witness had prepared a list of all of the names. The first panel noted that the name of the accused was the only name that had been changed on the list. The witness explained that it was a simple mistake. The witness presented the first panel with a list of Serbs involved in crimes against the Albanian population during the war and also a document from the village council

of human rights in Doberdol. The witness was a member of the council who prepared the document. The list had been prepared in handwritten form when the witness was questioned by the investigating judge and later typed. The name of the accused was not on the list, the witness claimed that because his name was in the statement he gave to the court he saw no reason to include it.

255. The witness said that from 17 April until 15 May almost 98 percent of their village was burned in a systematic order by the local Serbs of the surrounding villages headed by the accused. One or two houses were burnt each day. He was able to observe this. His own house was burnt on 22 April, although his dates might be muddled. The witness submitted two photographs of his burnt house. The witness later corrected himself stating that the burning of their village did not take place only on 17 April but it started on 20 to 22 July 1998 when the first two houses of Shaban and Xhemel Shaferajk were burned and also the house of Brahim was burned on 15 May 1998. He did not see the accused on the day the fire happened. He did not see the accused on 15 May 1998, the day the grenades were thrown on the village and when Brahim was killed.

256. His house which was on the hills was set on fire but he could not be sure whether the accused had anything to do with it. He added that "the house was burned from the inside, which of course I could not see personally with my own eyes." When he was asked whether he knew who was responsible for the burning of the houses at that time he answered "I am assuming it was the same who burned Doberdol and these villages." There was some confusion on the date on which his own house was burnt and he finally stated it was on 22 April.

257. With regard to the events that took place on 7 July the witness said that troops came to Doberdol. One Miodrag Pauvonic also known as Miga with them. He was the commander of the police force in the region that covered twelve villages. Villagers were tied and were taken away on trailers. He did not know what happened to them. He did not see anyone being beaten or killed. He only heard about the events. At the investigating hearings and in the course trial the witness had stated that the events had taken place on 6 July and when he was asked to explained why he mentioned 7 July in the present proceedings, he corrected himself and stated that the correct date was 6 July 1998.

258. The witness knew the accused and he was aware he had worked in Zastava and that he had previously been arrested for armed robbery. He denied having told the accused that he would never get out of jail when he saw him in detention. On whether the accused was involved in the burning of houses including his, he said that he had seen the accused in a uniform with a dominating blue colour. Ten to fifteen people entered the courtyard led by the accused. When he was asked how he knew that it was the accused who was the leader of the group, his answer was "listen from the very beginning until the end of the war, the Albanians knew who was the leader and who perpetrated the crimes. I personally know all the leaders that headed the war or the activities at the time."

3. Findings of the Court

259. The court had no difficulty in accepting the evidence of Haxhi Kastrati on the events that took place on the different dates that he mentioned. The court also accepted the fact that the house of the witness as well as those of other villagers had been burnt. But nowhere in his evidence did the witness implicate the accused in a convincing manner. The impression was that he was either inferring from circumstances that the accused was involved in the incidents or he was assuming that this was so or had to be so. The court could not therefore act on the evidence on this count. As for the evidence of Rrustrem Kastrati it adds nothing to the way the accused was involved in the offence charged on count 12.

M. Count 14 of the Indictment

1. The Averments

260. It is alleged that between 24th and 26th March 1999 at the Village of Doberdol in the Municipality of Peja in the Administrative Province of Kosovo the accused with a group of accomplices set on fire the house of Mete Krasniqi as they burnt several other houses in that village and harassed the villagers with the purpose of expelling the villagers out of their village and out of Kosovo. The accused therefore committed the offence of damaging the house of Mete Krasniqi contrary to Article 145 paragraph 2 of the Criminal Law of Kosovo (LPK).

2. The Evidence

261. The witness did attend court. He was very aggressive and arrogant and he left the court abruptly after stating the following: "I would like to stress I need a doctor because my family and children are suffering trauma. UNMIK should come to the place to examine what's been going on and third they need to take photos and notes of the place where this happened, and truth will come out. All success to you today but I have to leave. I have mentioned my children suffering this trauma and I don't forgive anyone for this, not the accused or the court."

262. In his prior testimony the witness said that on 24 March 1999 between 8:00 and 9:00 pm three cars with fifteen people arrived and started to shoot from a distance of 30 meters. When KFOR arrived they collected the spent cases and took a look at the house, which had suffered the shootings. The witness claimed that he was inside the house on the balcony when the shooting happened. He got shelter inside the house and was not hit by anything. His two children and his wife were inside the house. On 26 March the same people came, shot at the house and burnt it down. The distance between the witness and the people was 800 meters.

263. The witness also claimed that one year prior to this event they searched his house. This was in August of 1998 and the accused was there. In July 1998 he claims

that the accused's son and Miga's son broke down the gates of the house. They had machine guns and rifles, in general it was rifles. He also claimed that the accused was carrying an automatic gun and bombs and that he had a Lada car. The bombs were hand grenades and his friends were carrying a hand launcher, they were from Babiq village.

264. The witness knew that the accused used to work in Zastava and that later he was a police reservist, he thinks this was from 1986 or 1987.

265. The witness claimed that the Yugoslav communist system had six uniforms. They were all masked and wore camouflage uniforms, for one month they were wearing a Serbian uniform, later on they were wearing another kind of uniform. The accused was wearing the uniform with patches, before that he wore a light blue uniform.

266. To the investigating judge the witness had said that on 24 March 1999 8 people came in three cars, his evidence now was that there were 15. When he was asked to clarify this he claimed that there had been two cases, sometimes 8, sometimes 15, sometimes 50. On 24 March there were two to three cars. It was dark and the events happened quickly and they were masked. He said he recognized the accused at his house but then said that it all happened very quickly and that he could not really see if they were wearing masks or not. He knew the accused was there because his house was only 700 meters away and he could see the accused going in and out of his house with the lights on. KFOR investigated the incident immediately after the war. His house was burnt about 8:00 pm on 26 March 1999. On that night they were shooting. When they burnt the house he was 800 meters away. His family was with him. They shot at the house with their guns. They arrived in three cars and the fire started later that night. Later they broke the windows, they took away the tractors, spare parts, and they set the cows free, took two cows and shot one of them. People from another village came and took away the materials and they set fire to the other house. He had rebuilt one of the houses. He saw the accused in the first incident but not in the second, but the cars came from his house.

267. The incident in July 1998, when he house was searched was carried out by the accused. He came to the house with an automatic gun and he was going around the house looking how to destroy it. Once he was with friends from Babiq, once alone. Before that there was his son and Mija's son who came to rob the house. There were a lot of searches of his house. He had not told the investigating judge about this, as she had not asked. The witness had also not been asked at the main trial. The witness claimed that all territory was under the command of Miga, Vida and Besovic.

3. Defence Case

268. The accused asked the witness whether they had gone to school together as they knew each other very well. The witness said that he finished school in Gorazdevac and he did not know about the accused.

269. The accused alleged that in the 80's he had problems with the Kastrati family and that the witness was amongst them. The accused said that what actually happened in the 80's was that he was going home passing by the Kastrati's house. They were about to attack him using different kinds of agricultural tools and that was his dispute with them and the witness was among them. He claimed that all this happened in front of the witness's gate, they attacked him and injured his head. He had some stitches.

270. The accused claimed that the witness mentioned Vidic, a police officer. He said he used to live in his house and came back to the village on 21 November 1999 after the KFOR arrived and before that he lived in Peja. He claimed that what the witness was talking about had nothing to do with him. The witness stated in the investigation that he used to see the accused in Gorazdevac. The accused claimed that the witness knew that the checkpoint in KFOR was on the corner of his property of his who came to the scene to make a report about the incident. In 1999 the accused's house was next to the house of Dragan Manovolic. There was a second KFOR in the center of the village and the witness did not report to KFOR about him. The accused claimed that the process against him was organized and set up by Haxhi Kastrati, Neke Bytyqi and the witness. The witness claimed that he had never discussed anything with Haxhi Kastrati.

N. Count 15 of the Indictment

1. The Averments

271. It is alleged that on or about 26th March 1999 at Poqest village in the Municipality of Peja in the Administrative Province of Kosovo three days after the commencement of the NATO bombing Neke Ramush Bytyqi saw a car driven by Gjukic of Vragoc village come from the direction of Babiq to Strakija Ristovic who was with six militiamen. He could not identify the occupants. Ristovic and these men joined the group of Veselin 'Vesko' Besovic who was with the commander of the territory Paunovic and then all of them went to set on fire the house of an Albanian family Mete Krasniqi. That family however had already abandoned the house. From there they came to the house of Neke Ramush Bytyqi. When they came to his house about 20 minutes later Neke Ramush Bytyqi saw that Vesko was in a red Lada, the commander and deputy commander Zeljko were driving in a white Mercedes without number plates. There were about seven or eight cars full of paramilitary groups and all the occupants in blue uniforms except the commander who had epaulets for rank. Vesko did the commanding more than the commander. The commander and deputy commander were

militiamen or regular policemen, it was difficult to tell the difference, but the rest were reservists. They shot at the house of Neke Ramush Bytyqi for quite some time while the 17 people who lived in the house took cover on the ground. Later Neke Ramush Bytyqi's family and the rest of the village escaped to the mountains. The next day when Neke Ramush Bytyqi came back to the village there was the black Mercedes without plates standing in the village with the deputy commander and two of his men waiting. One of the men was Djukic but Neke Ramush Bytyqi did not recognize the other man. Neke Ramush Bytyqi was ordered to gather the entire village together and leave for Albania. Neke Ramush Bytyqi did so and the village left at 5:00 pm. But the village went to Nabergtan across the river Bistrica instead of Albania. They were in Nabergtan for one month and they watched nightly smoke and flames spiral into the sky from their houses as paramilitaries looted and burned their houses. Therefore the accused committed in complicity with his friends the criminal acts of intimidation, damaging other people's property or self-willed destruction, stealing on a large scale and forceful dislocation of the civilian population of Poqest village.

2. The Evidence

272. Neke Ramush Bytyqi claimed that on 27 March 1999, three persons went to Poqest and picked up a young man from the village by the name of Ristovic. The witness did not know his first name. He was the son of an uncle of his and he did not know his name because young men were often called by nicknames. All of them left from there and headed uphill towards Vesko's house and over there they set a house on fire. The house belonged to Amrush Krasniqi. They then returned coming down towards his house where they were met by a number of their people. He did not know exactly how many there were as it was already dark and they arrived from three different directions. One group from the direction of Gorazdevac, another group from the direction of Vesko's house and the third from the village of Babiq. It was about 6:00 or 7:00 in the evening. They fired at his house will all sorts of weapons. He was inside with his three sons. They managed to escape and went to Babiq and took shelter in Bistrica in the fields.

273. The next morning he returned home with members of his family. At around 10:00 am the deputy commander arrived with a reservist called Djukic and another person from Babiq whose name the witness did not know. They asked him to come out of his house and told him that at 5:00 pm everybody in the village was to gather in front of the school. A number of village people gathered there and then some were moved towards Peja and some towards Gjakovoa and eventually towards Montenegro. The witness and several other village families did not take any of those directions but went straight towards Nabergtan and stayed there until 6 May 1999.

274. When he was asked by the investigating judge how the accused and others came to the village he said that "there were 7 or 8 cars, the commander and the deputy commander were driving a Mercedes without plate numbers, the accused was

driving a Red Lada, that night he wasn't driving the white car he was driving in the first case". In his evidence the witness stated that in the first incident the accused arrived in a white Ascona and in the second they drove from the direction of the accused's house, again in the white Ascona and on the third incident, on 27 March 1999, there were five or six different cars and he could not really distinguish much because it was dark and there was shooting going on. The witness was asked whether he did not now agree with what was said before the investigating judge that the accused was in the Red Lada. The witness claimed that he had mentioned to the investigating judge that the accused did most of his traveling around in the white Ascona of Dedovic as well as in the police car with his field commander, but he also drove around in several other cars, such as the Red Lada or the PZ 125. The accused had also driven around that time as well as in a yellow car.

275. The witness stated that he was unsure what he had said in his statement but that he had mentioned the commander being in a Mercedes, that the Mercedes was being driven by a Deputy Commander Zhelai and the Mercedes without the number plate was involved on the day they came to drive them out of the village and neither the commander or the accused was there that day. The witness was asked whether, the night on which his house was shot at for the second time he saw the Red Lada car. He answered that he did not manage to distinguish or see that car because of the flashes from he gunfire and the shots. It was put to him that he had told the investigating judge that on that night the accused was driving a Red Lada. The witness claimed that he did see the accused that night as he was four to five meters away from the house, but he did not manage to distinguish the cars because they were not immediately or directly in front of the house, they were either up or further down.

O. Count 16 of the Indictment

1. The Averments

276. It is alleged that on or about the 5th or 6th of May 1999 at Nabergtan in the Municipality of Peja in the Administrative Province of Kosovo paramilitary groups came to Nabergtan and forced Neke Ramush Bytyqi his family and about 50,000 other Albanian refugees from Poqest and other villages to leave. It was about 4:15 pm. Four members of the Iberdemaj family were burnt alive and 28 other people were shot on the spot. The 50,000 people were driven to Zavllac then to Klina and finally to Albania. He could not recognize the paramilitaries that day because they covered their faces; they wore masks and handkerchiefs over their heads. They were in different uniforms. Therefore the accused committed, in complicity with his accomplice paramilitaries the criminal acts of torture, murder and forced expulsion of the civilian Albanian population out of Kosovo.

2. The Evidence

277. The witness stated that on 6 or 7 May they were driven out of Nabergtan towards Klina and eventually to Albania. 28 people from Nabergtan were killed and four were burned inside a house. The witness stayed in Albania until 19 or 20 June 1999. He then returned home and found "no living souls". The witness did not see the accused on the night when they all left the house and took shelter in the forest. He saw two cars with about ten police in them. It was dark and difficult to distinguish things clearly. Dedovic mostly drove around in a white Ascona and there was the other car, which was a typical Zastava 101 police vehicle, of a bluish colour.

P. Count 17 of the Indictment

1. The Averments

278. It is alleged that on or about 6th July 1998 at Poqest village in the Municipality of Peja in the Administrative Province of Kosovo five people among whom was the accused came, apparently from Loxha village, to the Poqest village driving in a white German car which may have been an Ascona and they stopped about five to six meters from the house of Neke Ramush Bytyqi. They shot at the house using all kinds of weapons but the seventeen people who lived in the house lay on the floor for cover. Most people of the village escaped out of the village. Neke Ramush Bytyqi sent his family away but with his three sons he remained in the village. The five people who shot at the house had come in the same car driven by Dedovic a regular militiaman, the accused was a passenger, with Sllavisha Kastratovic, Sllava Ristovic and a fifth man. They were all in uniform, light blue uniform like that worn by police. The accused therefore committed, in complicity with his accomplices, the criminal act of endangering the Safety of Another Person. Veselin 'Vesko' Besovic is charged with endangering the safety of Neke Ramush Bytyqi, his sons and other members of his family, altogether seventeen people contrary to Article 48 paragraph 2 of the Criminal Law of Kosovo (LPK).

Q. Count 18 of the Indictment

1. The Averments

279. It is alleged that at the same time at the same place and in the same manner as in the count above the accused committed, in complicity with his accomplices, the criminal act of Unlawful Damage of Another Person's Property, namely the property of Neke Ramush Bytyqi contrary to Article 145 paragraph 2 of the Criminal Law of Kosovo (LPK).

2. The Evidence

280. When Neke Ramush Bytyqi gave evidence in relation to the incident relating to these counts, the witness said he could not remember the date. He added that he could not remember exactly but he suggested it could have been the 6th July 1998 when the military launched an offensive in Loxha. The witness said the accused came with friends of his in an Ascona vehicle and from about five or six meters from the witness's house the group started shooting at the house with automatic weapons. They were in police uniforms and they shot at the windows and walls of the house where the gun shot holes can still be seen today. The witness was all the time in the house with 17 members of the family. But he saw the accused and his friends as they arrived and started shooting. Dedovic, a regular militiaman, Sllavsha Kastratovic, and Sllava Ristovic accompanied the accused. The witness could not recognize the fifth person. They fired at the house with all kinds of weapons. After a while the elderly members of the family left with many other village and went to hide in the mountains. The witness remained with his elder sons. The next day, however all the villagers were forced to abandon the village and they went to Baran.

R. Count 19 of the Indictment

1. The Averments

281. It is alleged that on or about 26th June 1999 at Poqest village in the Municipality of Peja the accused and four other people displayed violent behaviour when they drove around in a car playing loud Chetnik music. The drove around past Neke Ramush Bytyqi and others knowing that this was impudent and that it would endanger the tranquility of the citizens considering that a war had just been ended and that the accused and his group had terrorized Neke Ramush Bytyqi and his fellow villagers of Poqest. The accused thereby committed the offence of conducting himself in a violent behaviour contrary to Article 190 of the Criminal Law of Kosovo (LPK).

2. The Evidence

282. Neke Ramush Bytyqi claimed that when the battle was underway in Loxha he was at home. At about 6:00 pm Vesko arrived from the direction of Loxha through Gorazdevac to Poqest. An Ascona being driven by a person called Dedovic pulled up in the front of his house. Also in the car was a person with the name of Kastatoviq and two other people who he did not know. They produced automatic weapons and they fired at his house. The bullet holes are still visible. He could not remember the date; he thought that it must have been around June 1998. To the investigating judge, he had said it was around 6th July. He said in his evidence that it may have been around that time, but he had told the investigating judge that he did not have the exact dates. That night he left the house and went away. He and his family moved to Baran where they stayed with friends.

283. Neke Ramush Bytyqi claimed that two days after he returned from Albania, he returned on either the 19 or 20 June 1999, he saw the accused. He had grown a long beard and he had the same moustache. He was playing music in his car. He was going from his house towards the house of the witness in the direction of Gorazdevac. The Italians had a checkpoint in the front of his house. He came in his car with several other people and drove past the house of the witness, past the checkpoint and provoking them. He drove through the village and towards Gorazdevac when it was possible for him to have driven a different route within the village without disturbing or provoking anyone.

284. Neke Ramush Bytyqi had known the accused since 1960 and that they had been on good terms until 1989. They used to call the accused "Vesko". The accused lived quite close to him and was registered as living as a resident of the village of Gorazdevac, although there was 1-1/2 kilometers distance between the village and his dwelling house. Between the house of the witness and the accused was a distance of approximately 700-800 meters. Vesko was both an employee of Zastava and also a reservist in the police. He knew that the accused worked for Zastava and that they were in frequent contact with each other. He knew that the accused had two houses, one of them was in village, he is noted as being a resident of Gorazdevac but he lives in-between there and Poqest. His other dwelling place is in Peja close to the shoe factory. He knew that the defendant was married and had met his wife on numerous occasions. She was a housewife and she also worked at the hospital as a nurse.

285. When the witness saw the accused he was always wearing military clothes, a police type of uniform. It was the kind of uniform that used to be worn by Yugoslav police officers which was sky like colour, a kind of blue, which everybody in the service wore. It was the same as he used to wear before the war and he didn't change after the war. Even before the outbreak of the war he was a reservist and the witness did not remember him changing the type of uniform he wore. He also saw the accused in civilian plain clothes. When he saw the accused walking around he was armed. On each occasion he saw that the accused had an automatic gun.

286. The witness had met Haxhi Kastrati before the war when he was serving as a policeman. During the war he did not see him. After the war he saw him only once. He never spoke to him about his evidence in the case. He said that he met him before the investigative judge heard him on this case and at that time Haxhi Kastrati came to the shop with some friends, had a drink and left. He did not at that time talk about what to say in court. At that time a hearing had not been set and the judge had not approached them.

287. The witness said that prior to giving a statement to the investigating judge he spoke with a group of people from Pristina. He did not know what their duties or positions were. They listened to him and then they asked him to go with them to

Vesko's house. He went with them in their vehicle along with an interpreter. They went into the yard of the accused and indicated to them where his plots were and also which plots belonged to his brother. These people showed him a set of photographs and that he was able to identify the accused, he was in the second row, the second picture on the left. The witness claimed that he had not spoken to any other group besides this group. He claimed that he did not tell anyone about these things.

3. The Defence Case

288. The accused stated that he knew the witness very well but that the witness was not telling them the truth.

289. The accused asked why the witness did not inform KFOR about him as he saw him every day. The witness claimed that they sent reports to KFOR. He did not send any written information as he was hoping to talk to the court about it. The accused claimed that the witness would have seen him as the bus stop is in front of the house of the witness and he would go there every day when he was living in the village. The witness agreed that this was the case before the war, when they were on good terms, but not after. He used to see him after riding in cars with loud music and being escorted by Italian troops. The accused denied ever being escorted. The accused claimed that the witness had been told to say what he was saying and that they had been through a lot together. The witness stated that this was the case prior to 1999.

4. Findings of the Court on Counts 14-19

290. The court agreed that the incidents averred in counts 14 to 19 had taken place. The issue was whether the accused had been properly identified as one of the participants and his involvement in them.

291. Whether the witness had seen the accused in the course of the incidents was an issue of recognition, as he knew the accused. In relation to the averments in count 14 at no time did the witness involve the accused in any manner. All he said was that in July 1998 the accused had come with one Miga and had broken down the gates of his house. When he was asked to clarify the number of cars he had seen on that day as he had mentioned three before the investigating judge and he mentioned in the first trial, his answer was it was dark. The events happened quickly and the alleged perpetrators were masked. In the same breath he added that though the accused was 700 meters away he could recognise him. He went on to say that his own house was burnt on 26 March but that he did not see the accused on that day. The court concluded that no proper and safe recognition could have been possible in these circumstances. As for the burning of the house on 26 March the accused was not present at the scene. That count was dismissed.

292. On count 16 the court found no evidence of the presence of the accused at the scene of that incident. The witness himself said he did not see the accused.

S. Count 20 of the Indictment

1. The Averments

293. It is alleged that on the 14th May 1999 at Zahaq Village in the Municipality of Peja in the Administrative Province of Kosovo the accused in a group of paramilitaries tortured and attempted to cause the death of Rame Ramaj who was in a group of other villagers who had also been tortured, robbed and some of whom were killed with the purpose of expelling the Albanian population out of Kosovo. The survivors, including Rame Ramaj, were put on tractors and ordered to leave the village.

2. The Evidence

294. Rame Ramaj gave evidence that on 13 May, around 8 in the evening, Zoran Gojkovic came to his house and told him that the following morning a team would come to his village to search for KLA soldiers. He advised him to stay at home and not to move out because, if they found him out when they came, they would think that he was from the KLA and would kill him. The next morning, 14 May at 6:30 am, Milislav Marjanovic, Vodjadin Corovic and Vesko Vulvovic, his neighbours, came and asked where his sons were and he told them they were at home and was asked to see them. He invited them to have coffee. They said they did not have time to come it, but to make sure that they stayed inside because a team would be coming to search around for KLA soldiers. He them accompanied them to the house of Hajrulla Hysuni. He was asked in the same way where his sons where and he told them they were inside the house. They then had coffee together and spent about 20 minutes in the courtyard.

295. At around 7:00 am they heard the first gunshots from Qyshk and could see smoke and fire. He asked Milislav Marjanovic, Vodjadin Corovic and Vesko Volevic what was going on and what he should do. They told him that he was safe and to stay in his house. The gunshots were coming closer and they got to Pavlan. He asked them again what he should do, whether he should go because the shots were getting closer. They advised him to stay where he was. Those firing the weapons came closer until they reached the edge of the village. As the army was getting closer fleeing families were arriving at his village. The army started burning the house of Brahim Nikqi whom they had killed, along with his wife and sister-in-law. As the army was getting closer more and more families were coming near his house. He lived near the Serbian cemetery. The army surrounded the neighborhood and cut them off from the rest of the village. He did not know how many soldiers there were but there were many. Then a camouflaged mini-van full of soldiers arrived and stopped before his house. When they got out of the vehicle he recognized two of them, one was Slavisha Kastratovic and the other was

Veselin Besovic. They were in the front of the door of Milisav Marjanovic and they talked to him. He was about 20 to 30 meters away and could not hear what they said. Other soldiers in camouflaged uniform were guarding them and they had their faces painted.

296. The accused had a heavy weapon and rounds of ammunition around his neck. The witness claimed that he spoke to the accused who was 10 to 15 meters away with his weapon pointed at them. He was on the road, near the house of Milisav. Sllavisha took five soldiers from his courtyard and went to the house of Tamhir Delia and he sent three soldiers to the house of the Ramaj family. They heard gunshots coming from the direction of the Ramaj family. They had taken three people out Sadri, his son and Vladet and put them in the barn of Sani Uka. Later the witness saw that they had been killed and burned. After they had done this one of the soldiers came back to them. The accused asked the soldier whether there were any dead and the soldier replied that there was. When the witness heard this conversation the accused was about 15 meters away from him and the soldier was in another direction about 20-30 meters away. He also said in the course of the present proceedings that there was an exchange of words among the soldiers. One of them called Mitvi, meaning death in Serbian, asked about the dead.

297. The witness claimed he then spoke to the accused in Serbian. He asked him "What are you doing with us with us, what do you want to do to us?" He claims that the accused said "We want to put you in your grave, you asked for NATO. Where is NATO now? Neither NATO nor Clinton can do anything." The accused then ordered him to take off his coat and to put all money, paper and jewellery, everything they had on the coat. The accused told the group to hand over everything they had or they would be killed. When they finished doing this, Sveta Vilovic, whom he knew very well, and another soldier, divided the money and jewellery from the papers. They left the papers on the coat and then a soldier came and took the coat and the papers. They went into the courtyard of the witness where his car was parked. The soldier put the papers into the car and set the car with the papers on fire. He then told them to take their tractors and cars and go to Albania. The accused stayed until they started to move in a row. They got into the cars and also in a big truck and took the direction of the old post office to get to the main road.

298. At the main road they came across Miqi Ramush who was a policeman. The group was stopped until they all gathered together. Then the other soldiers came. They started to shout at the group, insulting and offending them. The group, organized in a row, then got onto the main road. The soldiers stood on both sides of the road at a distance of 10 or 15 meters up to the Red Service, a place where they repaired the trucks in the village. There they were stopped. Three soldiers with hoods came out along with a number of other soldiers. The witness saw the accused further away on the main road. He also recognized Mija Bajovic very

well, who was with Steva Vulvovic. Vllasta Vulovic was in the car and they were accompanying the row of people in their car, driving alongside of them.

299. They made the young men get out of the tractors and lean against the wall. There were 18 of them leaning against the wall, among them the two sons of the witness. One of the men, Hamz Murati, tried to escape. He ran for about 200 meters, they heard gunshots. He did not see him killed but heard the shots. They told the group to "Go to Albania", and the row of people started moving again and went to Qyshk. Once there, Bernovic, the commander of Kliqina, diverted the row of people into the Village of Qyshk. They spent 1/2 an hour there and it was there that they found out that they had burned Qyshk and killed the people. After 1/2 an hour the soldiers came again, along with the three people with the hoods. They began firing in the air and then sent them back to the main road. They continued to move along the main road and then the police and army stopped them at the battery factory. They asked them for money and beat up all the people, who were aged between 17 years to 60 years.

300. The last time he saw the accused during the incident was at the Red Service in the main road. The witness claimed that they were kept there for three hours or longer. At the battery factory they were beat on and told to go to Montenegro and not Albania. They then turned back and entered Qyshk again. From there they went to Katuni i Ri and from there to Vitomorice.

301. The Serbs stopped the group at the crossroads of the roads to Rzhoje and Mitrovica and kept them there for another hour. There they beat up two or three people and then turned them back again and told them to go to their homes. They turned back and arrived at the Red Service in the evening. The sons of the witness had been killed there. They looked in the dark at the wall where they had been lined up and couldn't see them. The door of the service was open and they went in and saw the bodies there. The witness did not go in himself, but his neighbors went in and saw the bodies. Mija Bernovic was there with a gun along with some others that he did not recognize. He told them to "Go away or we will make it a darker day for you." They left and never saw their dead people again.

302. When interrogated by the investigating judge about these bodies on 16 October 2001 the witness had claimed that they had attempted to retrieve two of the corpses but Mija Bernovic shot with his automatic gun. When reminded of this at the first trial the witness agreed that Mija Bernovic had shot in the air. The witness had also said to the investigating judge that Hasan Shala had told them to go out because they were going to kill them also. In his evidence the witness claimed that he did not see Hasan Shala there and did not know whether he was in the convoy. In his evidence he claimed that it was Mija Brajovic who shot in the air and said these words. He shouted. The witness recognized his voice.

303. To the investigating judge the witness had claimed that while he was in the convoy the accused had come to him and said "I will kill you" and that he had

replied “Okay, then kill me.” During his evidence the witness claimed that this must be a mistake as it wasn’t the accused that said this. It was somebody else. The accused was at that time standing at a distance with an automatic weapon. The accused had said to him, when he had asked him “Where are you taking us”, “We will put you all in graves”.

304. To the investigating judge the witness had said that the accused and Kastratavic had given the order to them to get the tractors and cars ready to go. During his evidence the witness said that the accused was there with others. He heard them say ‘Take the tractors and the cars” but he did not know who said it.

305. Rame Ramaj claimed that he had known the accused for about six to ten years. He did not socialize with him but they were neighbors. Their lands were next to each other and only a river separated them. When asked to identify the witness from the photo line up the witness told the investigating judges that he was not sure which one was the accused. During his evidence the witness claimed that this was a misunderstanding. The judge had asked him whether it looked like the accused and he had replied that it was the accused. On the day that he saw the accused, 14 May, he claimed that he was unshaven, had a moustache, and had paramilitary clothes, a big gun, and rounds of ammunition around his neck. His hair was combed on one side. He was between 40 or 50 years and had grey hair. His face was not painted or covered in any way. He said that he knew that this person was the accused as he had seen him hundreds of time. He had seen him in another village, he had seen him going by and had seen him in the market. The accused was wearing a paramilitary uniform. The colour might have been something like blue; he did not know the names of the colours. The accused also had a cap, which he took off and put on his belt. He claimed that before the war the accused used to live in Gorazdevac, and that his house was near a church, in a field. During his evidence the witness said that since the events he had spoken to lots of people about the events. The accused was the only Besovic that he knew from Gorazdevac.

306. Isak Demaku gave evidence that on 14 May the accused was there as an offensive was undertaken in the village of Zahaq. The villagers were thrown out of their houses by the Serb paramilitaries and soldiers sent to the area of the Serbian cemetery. In a violent way the forces took their money. They took their papers from them and then separated them into two groups. They were told that whoever owned a tractor was to go to the village and bring the tractors back to the house. They got on the tractors and continued their way to the asphalted road.

307. Once there, the paramilitaries that had been with them before arrived at the cemetery. They told them that they had one minute to get off the road or they would kill them. They continued on their way for about one kilometer. They were then stopped by soldiers wearing masks and uniforms. They took away from the group young people and also some older people. The young people were lined up against the wall. He managed to escape by hiding in the trailer. From that

position he managed to see everything. They were taking one young man from each tractor, they approached the trailer where he was hidden but did not see him. He was covered with clothes and a piece of sponge. They took almost all the young people in the group and only he and one or two other young men survived. These young men remained lined uo against the wall while the other villagers headed to Peja.

308. Once at the entrance to Qyshk the police directed them to the center of the village. He heard shots from the direction of some houses. The soldiers then told the villagers to turn the tractors around and take the direction towards Albania. As the tractors were making a circle he jumped from the trailer he was on to the next one. He thought that he had been seen. The soldiers told his brother-in-law, who was driving the tractor to stop the tractor, and the other tractors continued on their way. After the convoy left the soldiers approached their tractor and searched it. They took away the daughter of the witness' uncle, Esmi Demaku. She was 32 or 33 years old. They told them to wait until they went to the asphalted road and the direction of Klina. The people who took his cousin away had a green Golf 1. The soldiers then told them to keep going. They never received any information about what happened to their cousin. The convoy was in the distance and they could see that it had stopped at the factory of batteries in Peja. When they got closer they noticed soldiers wearing masks. They were beating people up severely, young, old, women and children. They then turned the convoy in the direction of Klina. They took the way that leads to Vitromeric through Katuni i Ri. When they arrived at the crossroad one roadway leads to Istok, the other Rozhaje. They were told that there was no way they could go back to Rozhaje as there was fighting there and that they had better go back to their houses. They were sent back the same way they had arrived. On their way back to Zahac village, at the previous place where the group of young people had been collected, near the Red Service, they noticed only the jackets of the people in front of the entrance door. The people had been killed. Some of the people who had their family members or relatives in the group went to see and check but the soldiers were hidden behind the railway tracks. They told the people that they had to leave within one minute.

309. The witness saw the accused when they were gathered at the cemetery. The accused was wearing a uniform and carrying a weapon in his hand. He was standing guard with two or three others there while two or three other guys were collecting money and jewellery. He was not masked but his face was painted. He was standing directly in front of the witness. This happened before he hid himself in the trailer. That was the only time he saw the accused that day. He saw him again the next day.

310. The witness had told the investigating judge that he saw the accused only once on 14 May and that was when he took his uncle's daughter. During his evidence the witness said that he only saw him once and that was at the cemetery. He said that this was a mistake, a translation mistake and that he only saw him at the cemetery. When his uncle's daughter was taken away there was only three soldiers, two of

them were masked, one what not and they were from another village. He did not know them.

311. Isak Demaku knew the accused. He knew him by the name of Vesko and only lately discovered his name was Veselin Besovic. He claimed that nobody told him the name. When he got the summons from the court he saw the full name. The witness was shown the photo line up by the investigating judge and he identified the accused as number 6 (he was number 4). The witness said that after seeing the accused he was now 100 per cent sure that he was the person he saw. When he saw the accused his face was painted, but not very much. He did recognize him.

312. The accused claimed that he did not know the witness and had never seen him. He was not involved in the events as the witness alleged. The witness agreed that he never had any contact with the accused but said that he just knew him by face.

T. Count 21 of the Indictment

1. The Averments

313. It is alleged that on or about 14th May 1999 at Village Zahaq in the Municipality of Peja the accused and his accomplices tortured and robbed villagers of Zahaq, burnt their houses and afterwards expelled them from the village. Osman Zeqiri was among the villagers expelled out of Zahaq village.

2. The Evidence

314. Osman Zeqiri claimed that on 14 May 1999 he was at home in Zahaq when he heard gunshots. It came from the direction of Qyshk and Pavlan. The forces started burning the houses in those villages and they could see smoke. The fire and sounds of shooting was coming closer and closer. Shooting then started from the end of the village and they started burning houses at the end of the village. They were surrounded on all sides. He saw Ali Nikqi, whose house was above his, with his family members running away on the road. He asked him what was happening and he told him to take his family members and join the group because the Serb forces were killing whoever they found in the houses and burning them in their houses.

315. He and his family joined the families on the road and went to the center of the village. They came to the house of Ram Salihi and Milisav Marjanovi and gathered in a small field near a Serbian cemetery. The shooting kept coming closer. A military jeep arrived and some Serbian paramilitary soldiers got out of it and started to shoot in the air and positioned themselves around the group with their automatic guns. The families were surrounded. Uniformed men began entering the houses and burning them. The ones pointing the guns at the families ordered them to take out all of their money, gold and documents and watches.

They ordered Ram Salihi to take of his fur coat and place it on the ground. They placed all their valuables on it.

316. As this occurred the witness was sitting at the end of the mass of people, and near a tree and the Serbian cemetery. The accused was seven to eight meters away from him. The witness placed his ID document and some German marks on the coat and went to sit back down. The driver's license and car documents he had kept. As soon as he sat down the accused called him and said, "This is the last warning that you have to put every single document there and tell to the masses in the Albanian language that this is the last warning to put all the things that they have on them". He told him that if they found something left on a person that person would be shot in the presence of the group. The witness then placed all of his documents on the coat and told the others to give everything they had or they would be shot. To the investigating judge the witness had said that he hid the driver's license under some leaves next to a nut tee and it was spotted by someone else. In his evidence he explained this by saying that something was omitted during the translation.

317. Some of the uniformed people came and took all the money and gold. They put it in plastic bags. One of them took all the documents and the fur and put it in the car of Shaban Rama which was already burning. The documents were destroyed in the fire.

318. Milisav Marjanovic and Vesko Vuljevic strolled in front of the people, observing them. They then went to the house of Milisav Marjanovic with some other paramilitaries. They stayed there for about 10 to 15 minutes. The accused was guarding the group pointing his automatic rifle at them, along with others. The persons in Milisav's house came out and addressed the group. They told them they didn't have a place there anymore, their place was in Albania. They ordered them to get their vehicles and tractors and to go to Albania. Some of them stood up and went to look for their vehicles. The witness went to his house with his son and took his vehicle and tractor. His house had been burnt down. He took his vehicle to the front of the house of Milisav Marjanovic. The accused had moved there. The witness addressed the accused. This was the second contact he had with the accused. He addressed him. He asked him what road to take for Albania.

319. The villagers then started their journey through the main road in the direction of Peja. When they came between Zahaq and Pavlan the convoy was stopped at Kuci, the auto-mechanic shop by some of the paramilitaries. They took some of the younger people out of the car and made them lean against the wall. The accused pointed his automatic gun at him and he opened the car window. The accused asked him his name and he gave him a false one. The accused then continued on his way. That was the third contact he had with him.

320. The paramilitaries continued to the end of the convoy taking people out from the cars. They took out about 19 or 20 people and made them lean against the wall of

the shop. They told the rest of them to continue on their way. The convoy then continued up to the battery plant. There was no way to escape the convoy. A young man attempted to run away; he was from Bashqe Madhe. The witness saw him when he jumped out of the convoy and after that he heard the weapon. He did not see what happened but he thought that they shot him.

321. At the battery plant another checkpoint stopped them and held them for about two or three hours. The villagers were maltreated. They then ordered them to go back to Qyshk. They went up to the road Vitomerice and were stopped by another checkpoint. They were maltreated again and money taken from them. The forces ordered them to go back to their village. They went back the same way they had come. When they came to the place where they had taken out some young men, at the auto shop Kuci, there was a heavy movement of paramilitaries. Two of the paramilitaries stopped him and took him out of the car with his family. They took the car and took out Fejs Hyseni and his wife and others. There were three or four people; they took them out of their tractors. Some of them ran to the door of the auto mechanic shop. They opened the door and saw their sons and the young boys dead in the channel of the auto mechanic shop. The paramilitaries shot in the air and ordered them to leave. Nineteen men were killed; he did not know their names. He did not see the bodies himself; he only heard the screams of the people who entered, Fejz Hyseni, his wife, his brother Hajrullaj Hyseni, Abdyl Hyseni. He did not know what happened to the bodies.

322. The witness claimed that he had three contacts with the accused. The first time was the before noon, about two hours later he saw him again when he asked him what direction to take, between the first and second contact the accused was there all the time. The third time was when he pointed his weapon at him while in the convoy; this was near the auto-mechanic shop.

323. Before the war the witness was a police officer. He knew the accused before the war as a citizen of Gorazdevac. He knew him by appearance but he had never had any contact with him. He had three contacts with him on 14 May 1999 and he said that he still had his picture in his mind. He had “big difficulties” in recognizing the accused and had doubts that it was him. This was because they wore uniforms. The witness said that he had been without a job for ten years and only went out when he was driving a bus, his movements were limited. He realized that it was the accused when he saw the photographs in the building where he worked as a police officer. The lady judge had asked him to keep a watch on the courtroom during the time they had a break. The translator had asked him to open the courtroom for her. He had gone in and saw an open book with the photographs. He went closer and looked at them and recognized the accused. Lisa Sherif was surprised when he told her that the person seemed like one he knew. She asked if he knew his name and he said he could not remember it. The judge came and Lisa Sherif informed her and the judge then summoned him and questioned him.

324. The witness said that he knew that that day was the hearing of Veselin Besovic. The witness said that he remembered his face as the only one who did not wear the mask. He recognized his moustache and picture as a picture. The witness claimed that two or three did not wear masks and some of them had scarves on their heads and paint on their faces. The whole group had the same uniforms; it was the Yugoslavian reservist military and the unit that was in reserve, which was a special uniform. The witness could not identify the uniform from the album shown to him. He said that he uniform was of an olive green colour and the pants were with patches. The accused was wearing a hat that was part of the uniform. Each of them introduced themselves as a commander. The witness claimed that he had not spoken to any of the witness that day. The witness had not reported the accused to anyone previously. The accused had lost some weight since the time he had seen him. The witness was shown the photos of the investigating judge and he identified picture number 4 as that he recognized on 25 September. He said that when he recognized the picture he told Lisa Sherif that it was the person with whom he had had three contacts. He only learned his name afterwards. He could not say when he had seen him before May 1999.

325. The accused said that he and the witness had met in 1985 when there was a lot of snow. They went duck hunting and one of the ducks fell. He had very high boots and the witness asked him to collect the duck. The witness confirmed that there was snow in the winter of 84/85 and at that time he was doing his service in Mitrovica. He enrolled himself in the association of hunters and got the weapon in 1986. The accused said that it was January 1985 when they met and the witness asked him where he was from and he said he was from Gorazdevac and he asked him whether he knew Mija Vitic. After that incident he would meet the witness during his service as a traffic policeman and they would say hello. The accused knew the witness as a hunter and as a police officer. The witness denied that the incident with the duck had occurred.

326. The first panel investigated the circumstances surrounding the witnesses looking at the judge's file. The witness claimed that he entered the court after the translator Lisa, looked at the windows of the courtroom and looked to see if there was any change in the room. He made a circle of the courtroom and when he passed by the judges table he saw an open folder, he approached it and looked at it. He was checking the courtroom for security reasons. The panel asked the witness to re-enact the circumstances in which he came to observe the judge's file. During the re-enactment the witness had to step onto the podium in order to observe the file. He had not stated this in his evidence before. It was put to the witness that to the investigating judge he had said that he had seen the summon which had been sent to Fazir Hyseni and he had told the panel that during the incident he witnessed on 14 May that he saw Fazir Hyseni and his son that was killed. He was asked whether when he realized that Fazir Hyseni was to be a witness in the Besovic case and whether this caused him to think that the case might be connected to the incident on the 14 May that he had witnessed. The witness agreed that he had thought of that. He could not remember on what day he

had seen the summons. He could give no explanation as to why he did not approach the prosecution or the investigating judge then. He said that he had heard from word of mouth that the case involved an incident on 14 May.

327. Lisa Sherif gave evidence that during the investigation a KPS officer in charge of security of the court had, upon re-opening the court after a break had been taken by those using the court, walked up to the judges table and noticed on that table an open file. He saw in that file a photo line up and purported to identify the accused from that photo line up as a person who had threatened his life. The investigating judge having been informed of the identification by the KPS officer determined to interrogate him as to what he knew of the accused. Lisa Sherif was the court reporter for the investigation and the first person that had entered the courtroom with the KPS officer. Upon making the identification the KPS officer had informed her and she had informed the investigating judge. The panel asked the witness whether it was usual procedure for a police officer to walk up to the judge's desk and to check the courtroom upon it being re-opened. Her evidence was that it was a usual procedure. Her evidence was that the KPS officer identified photograph number 4 and she knew this to be the accused.

U. Count 22 of the Indictment

1. The Averments

328. It is alleged that on the 14th May 1999 at Qyshk Village in the Municipality of Peja in the Administrative Province of Kosovo the accused in a group of paramilitaries tortured and attempted to cause the death of Isa Gashi who was in a group of other villagers who had also been tortured and some of whom were killed with the purpose of expelling the Albanian population out of Kosovo.

329. Isa Gashi claimed that on 14 May 1999, a Friday, at 7:00 in the morning in the village of Qyshk the burning and mass killings occurred. At the time he was not aware of what had happened. He was with his family at home. He came out into the courtyard and noticed that there was smoke coming from somewhere in the village. He saw the flames and heard gunfire. He went inside and woke his children because the village had been set on fire. They didn't know if people had been killed or not. People were fleeing from the area. He heard that three people had been killed in the village. At 8:00 am the forces came to the house of the witness. His family had already left the house, as had most people from the village. People from three neighborhoods had been pushed into one area of the village. The witness and a couple of relatives were amongst the people. The police and army unit immediately began to fire upon them and told them not to move. They told them that Jashari's house was on fire and that he had been killed. They assaulted and ill-treated the group physically and mentally and also beat and robbed many of them. He had DM200 in his pocket. They took their ID and threw it on the ground. They set the house of his brother, now deceased, on fire. His brother's wife was robbed of DM850. They pushed the witness, his

brother and wife towards the place where everybody from the village was driven from three neighborhoods. There were Gashi, Lushi and Kelmendi. There were also people who had been displaced from other villages, including those families who had been driven out of Gorazdevac and Rohoshiq. The police and army then got everyone together. They were battered and ill treated, insulted, beaten and forced to hand over all of their valuables. They were made to stand with their hands behind their heads for fifteen minutes, after which they were divided into three groups. The group the witness was with was driven into the courtyard of Ajet Gashi and ill treated again. They were then removed from that courtyard. His family had been put in the courtyard of Rexhe Gashi and the rest of them in the courtyard of Sali and Haki Gashi. They asked them where was NATO and said "They didn't provide protection for you, so we are the ones who will take care of you."

330. They moved the group inside the house of Syle Gashi. The witness was behind the others, at the back of the group. They leaned them all against the wall. They again asked them for money. They all told them that they had already taken their money. One of the soldiers said that he needed to speak to the commander. The commander in control of the troops which surrounded them was Srecko Popovic. The soldier then spoke to the commander by radio. The voice could be heard distinctly. The witness heard the commander speak in Serbian. "Kill them all" he said. The soldier turned into the room and pointed the machine gun towards them and said in Serbian "In the name of Serbia, you are all to be shot dead". He then opened fire at them.

331. The solider who opened fire was wearing a military uniform. All of them were masked. They had painted their faces and had handkerchiefs on their heads. The uniforms were camouflaged, some were darker and some were lighter. When he fired at them eleven people were killed. The witness was wounded. Iber Kelmendi fell dead over him and also his brother. He stayed beneath them for about ten minutes. One after another the soldiers entered the room and shot at the dead. The witness did not know who they were shooting at and the room filled with smoke. He was not sure but he thought that after the person who shot first, four others came in and shot four magazines of bullets. He could see them with his own eyes. His face was facing them and he could see them coming in and shooting. After they had finished shooting they slammed the door. He heard the person who had shot first say to his friend in the ante-room "I killed them all".

332. The soldiers then set a sponge on fire and threw it into the room from the window. The bodies on top of him began to burn. He pushed the two bodies and went to the middle of the room. Although he was wounded he checked to see if anyone else was alive. He went into the anteroom and saw that they had set the house on fire. He saw a window and he jumped out. There was no one in the courtyard. He moved about 50 meters away and sheltered in the grass in the field. The grass was tall and reached up to his neck. He stayed there wounded from 10:00 in the morning until 5:00 in the afternoon. At that time he stood up and saw that his

house and that of Jashari were burning. There was not a living soul to be seen. He then saw his daughter and the son of his uncle. He could not speak but stood up and raised his hand and tried to whistle to get their attention. They came and took him to the village and the house of Rexhe Kelmendi. This house was further from where they had been executed. He stayed there for two days. After that he went back to his neighborhood and stayed there for five weeks until KFOR forces came in. He dared not go into the house but spent the whole time in the fields. He did not go to the hospital because there were no Albanian doctors and cured himself with cheese.

333. The witness claimed that there were three main groups executed. His group was the first to be executed. There were two other groups. He had not seen them; he left them against the wall and did not see where they took them. There were executions in the three different houses; one of the houses is Gashi's. He didn't see the others. He also stated that the accused participated with his friends in the events. He saw him with his own eyes. He knew him very well. The accused had worked in Zastava until 1997/1998. He heard that he was wearing a uniform prior to that time. The accused was there from the moment they took them near the graveyard and lined them up with their hands behind their backs. The witness claimed that he had worked together with the accused for 24 years.

334. The witness was asked why during several interrogations with several agencies he had not previously named the accused. UNMIK police, Red Cross and others, interrogated him but he had never before said that the accused was involved. The witness claimed that at that time he was distressed and didn't even know the names of his children. He was shown photographs when the accused had been arrested. He saw five photographs and he identified the accused as number four. The witness claimed that prior to speaking to the investigating judge he had not named the accused as a perpetrator because no one had asked him who had participated in the events.

335. The witness claimed not to know Haxhi Kastrati, even though Haxhi Kastrati had his details and knew that the witness had a daughter, Shkurta, who was 31 years of age. The witness could not explain how he knew these things.

336. The witness claimed that he saw both army and police units with his own eyes. The police had a different uniform colour and the police caps were like cowboy caps. The soldiers and the army had a different colour and did not have cowboy caps. Most of them did not have caps. The army arrived both by foot and vehicles. He also saw a jeep. He had told the investigating judge that he had seen a tank but denied that this was true. Both the military and the police had painted faces, but most of the military were without caps. The accused was wearing a police uniform. The witness claimed that even in the Zastava factory the accused wore a uniform. This uniform was darker than that of the policemen. This was what he was wearing on the day, it was a normal camouflage uniform of the Yugoslav police.

337. The witness claimed that there were 12 people in the room of the house including him. The entire group had weapons, he saw the accused and others with weapons and saw not only the accused but also all of them using their weapons. He only saw the accused at the time of the separation of people at the cemetery. He did not see the accused again. The accused had an automatic gun. He did not see him fire the gun or point the gun.

338. The witness had told the investigating judge that there were about 200 to 300 people with tanks. In this evidence the witness said that he did not see 200 to 300 people with his own eyes. He denied that he had told the investigating judge that the military were there with their tanks. He claims that he said Kalashnikov and light weaponry.

339. The accused claimed that he had did not know the witness and that he had never been in his village. There were over 2600 employees in the Zastava factory; he did not know all of them. The witness might have known him because he was a kind of a boss.

340. Isa Gashi described Vesko as tall, fat with black grizzled hair and a black moustache. He was shown the photo line up. At first he pointed at photos number 1 and 6 saying that any of those two could be Vesko but eventually he changed his mind and pointing at photo number 4 and said that he was 50 percent sure that Vesko was number 4.

V. Count 23 of the Indictment

1. The Averments

341. It is alleged that on the 14th May 1999 at Qyshk Village in the Municipality of Peja in the Administrative Province of Kosovo the accused in a group of paramilitaries tortured and attempted to cause the death of Hazir Berisha who was in a group of other villagers who had also been tortured and some of whom were killed with the purpose of expelling the Albanian population out of Kosovo.

2. The Evidence

342. Hazir Berisha claimed that on 14 May at around 7:30 am the military and the police forces entered the village. They started shooting and burning houses. The witness went out of his house into the street and saw them coming. Neighbours then told him that the police had entered the village. When he saw that there was shooting all over and that they were burning houses he retreated to the neighbours. They then surrounded the village from all sides and told the villagers to go to the main street near the graveyard. The Serb forces separated men from women and children, men on one side, women and children on the other side. They fired into the air and asked for everything that was in their pockets. They

were shooting in the ground at the same time. They collected all the documents and money that the villagers had and they took two small children. They separated the documents, the ID and passports from the money and threatened them several times that if they found something in their pockets they would kill one of the children. The women started giving all that they had.

343. They took the men into a street nearby. Some of them they took into the courtyard of Tahir Gashi's house. They made the rest of the men lean on the wall of the house belonging to Demeali Gashi. They offended and insulted them saying, "Where is NATO? Where is Clinton? Where is Tony Blair?" They were looking for the villager Ajet Gashi but he was not there. They took all the cars that were there. They told the people to take the cars and tractors onto the road. They took the women into the courtyard of the two houses that were burning. The witness could see one of the houses, which were burning, and in the courtyard the women and children were crying because the electricity wire above them was burning.

344. The police and soldiers told them to hand over their watches. They took the watches, which were good and threw the others away. While they were lining up against the wall they divided the group. The group of which the witness was in was taken to the higher part of the village, the other group to the lower part of the village.

345. Once this was done they took the first group of men who were in Tahir Gashi's house in the direction of Azem Gashi on the right side of the graveyard. Five or six military people accompanied them and the number of people that accompanied them was 50 to 70. The witness then heard three gunshots, automatic firing. After a while the witness saw fire from the house and a group of policemen came back and met with Srecko Popovic.

346. The group the witness was in was taken by the accused and four or five other soldiers. When they were on the street where they first leaned them up against the wall, near the graveyard, near the street there was this house; the soldiers were talking amongst themselves saying that they should put them inside the house. They were accompanying them from a distance of one or two hundred meters with their guns pointed at them. They had their hands on the back of their heads and were not allowed to talk or to look back or to the side. One of them said that it is too close to put them here, because the smell will be noticed. They then took them further ahead to the house of Sahet Mehmet Gashi. They took them into the hallway of the house and made them lean against the wall of the bathroom. The witness was the last in the group inside the house. One of them opened the door, he does not remember who it was. He had an automatic machine gun of 1.4 calibres. He opened the door of one of the rooms and told them to go inside and sit down. They all went into the room. The witness was one of the last persons to enter and when he entered everyone was sitting on couches or beds. There were 12 or 13 people there. He sat down on one of the couches. Four of the police stood at the door. Another police officer came inside near the door and

they pointed their guns at them. They offended them in the Serbian language and then began to shoot at them. When the shooting started. The witness heard three long automatic burst shoots without interruption. Then they shot again, this time they shot on the floor as many of the people had fallen to the floor of the house.

347. The witness was still sitting at this time; he had not yet been wounded. In the second part of the shooting the first burst hit his left leg and the third burst hit his right kneecap and right leg. The shooting stopped after awhile and he heard the groaning of the wounded and then heard separate shots one by one. He had the impression that they were shooting with a pistol, after the shots the groaning of the victims stopped. They got to one or two people before the witness and then the shooting stopped. He smelt gunpowder. He stayed where he was for some time, trying to hear something. He then opened his eyes a bit and tried to see the door. He saw that there was nobody there and moved to sit on the couch. As he moved he touched Isuf Shala, he was dead. On the left side was Ariam, the boy, who was also dead. In one corner of the room he saw a blanket, which was burning. They had set it on fire. There was also a sponge mattress with which they had covered some bodies. The witness looked out of the window and saw five or six soldiers or police in a circle talking to each other. One of them tried to enter the room. The witness heard his footsteps and then looked in the direction of the door with his eyes semi-open. He could not see his face, but saw only the right side of his body when he threw a bottle of gas with his right hand. A lot of black smoke came out of the bottle. The whole room was black and there was fire in the house, he felt it on his face. The temperature was very high and there were flames and his face was covered with a black substance from the gas.

348. The witness stood up and pushed his right leg and lost control. There was a wooden stove and he put his hand on the stove and took the first step. He leaned against the door and pushed his body with his arms. There was nobody there. He moved to one of the other rooms. He opened the door and saw bursts of fire coming out of the room where the dead bodies were. He came near the window of the room and looked out and saw cars, some civilian and some military. He did not see any soldiers or police. He then managed to jump out of the window. He fell to the ground and crawled to a corner in the fence two or three meters from the house. After sometime he heard gunshot wounds coming from the direction were they had been gathered before. He thought that this shot had killed Qaush Lushi. He was found dead in a wooden bathroom near the road two days later. He heard the shouting and crying of women and children and could hear the starting of the car and tractors and trucks. He heard them take the direction of the main road and saw them from a distance of 30 to 40 meters.

349. The witness claimed that he stayed there for roughly four hours and then started to crawl in the direction of his house in the upper part of the village. It took him possibly an hour to cover the distance of 70 to 80 meters. He saw some children of his cousin playing near a field. He called the wife of a cousin and she heard him. She saw him and came towards him. She was horrified and scared. He told

her to go and get a wheel cart, which she did from the house where they had been executed. He got into it. He was not taken to hospital. His cousins, there was only the women, took him to the house that was the only house in the field. In the courtyard of that house they tied his wounds and cleaned them with cheese without salt. After five weeks after KFOR entered he was taken to hospital. The witness showed his left leg to the court where the bullet had passed through and the scar on his right leg.

350. The Serb forces took about DM150 from him, all of his documents, his ID and everything that he had. The witness had told the investigating judge that the accused was the one who took the belongings from the people. In his evidence he said that it was the accused and his friends. He claimed that he saw the accused and his friends picking up the valuables of the people; there were 15 or 20 of them.

351. The witness said that he had heard that Popovic was in charge of the operation on 14 May. Popovic was there and when they took their action they always directed by him. There were two or three others but he does not remember. He saw the accused talking to him but did not hear what they were saying.

352. Hazir Berisha claimed that he knew the defendant by face as a worker of the factory. He knew him in 1987/1988 when he started working at the shoe factory and the accused was working at the Zastava factory.

353. The witness claimed that it was the accused and his friends that burnt the houses and robbed the people. He was in the room where the witness had been taken and he pointed his gun. He was wearing a camouflaged uniform, different from the police, because it was darker, closer to the colour of the policeman. The witness had told the investigating judge that he was wearing the military uniform. The witness claimed that he called in general terms uniforms of military command, this may have been translated as a uniform but the colour was that of the police. All the people there were wearing camouflage uniforms, some were darker and some were lighter, but they belonged to the army command, they were military in general. The accused's face was not masked or painted; he just had a few simple marks on his cheeks. Some of the people had masks; there were people who had handkerchiefs tied on their heads. The witness claimed that he had no difficulty in recognizing the accused. He had seen him several times going to work.

354. The witness had been shown photos of the accused. He did not remember when that was. He had been shown photos by the police and by the court. He could not say how many times he had seen the accused; it could have been 10 or 100 times, because he was not interested in him. When the witness was going to the factory and the accused was going to Zastava he used to see him. Before the war he only knew him by face. The witness claimed that the accused looked paler and his hair and moustache greyer than in May 1999. He thought he had the same weight but was not sure. The witness claimed that it was easy for him to recognize the

accused as he had seen him many times before. He did not remember him having a long beard, though he may have been unshaven. The witness had told the investigating judge that the accused had a beard.

W. Count 24 of the Indictment

1. The Averments

355. It is alleged that on the 14th May 1999 at Qyshk Village in the Municipality of Peja in the Administrative Province of Kosovo the accused in a group of paramilitaries tortured and attempted to cause the death of Rexhe Kelmendi who was in a group of other villagers who had also been tortured and some of whom were killed with the purpose of expelling the Albanian population out of Kosovo.

2. The Evidence

356. Rexhe Kelmendi gave evidence that before 14 May 1999 they left the village and went to Nevargjan. On that day Serb forces came and from the village of Qyshk they started burning the houses. They killed first Met Shala, Rasim Morina and Brahim Gashi. They started burning the houses and doing so they also killed Hasan Ceku and another of the same family, Cedair Ceku. After that they went to the Gashi family, they killed them, they beat them up and maltreated them and stole everything they had. Two young guys were killed Haki Gashi and Selim Gashi; they put both of them in houses that were burning. After burning and killing Lushi, Gashi and Kelmendi families they came near the house of the witness.

357. The Serb forces entered the houses and gathered all the women and children and lined them up in the graveyard. They separated men from women and they forced them to give everything they had in their pockets. They took everything they had. All watches and earrings of the women. They then told them to go and bring their tractors. He went and got his tractor and put everything on it to leave the place. When he brought the tractor three persons gathered and one of them was a fat man wearing a moustache. They said something, which he did not hear, and then in their language they said that they would decide. At that time Sali Rexhe's house was burning. All of his family was put in the yard of the house and he asked him to stay on the carriage of the tractor with his hands on the back of his neck.

358. The men and women were then separated by the fence of the graveyard. They separated the first group where his brother was. That group was composed of 13 people. He heard with his ears when they were executed and burned. After that there were shots, one by one. He was in the second group. He was asked whose house it was where they were lined up. He said that it was Ajet Gashi's house. He was asked where Ajet Gashi was and he said that he did not know. Then he and nine others were directed to Adem Gashi's house, which is another

direction from the house were the persons were executed. One of them was not wearing a mask. He was a young man wearing a military uniform. The other person was fat and he had an automatic weapon in his hand. When they entered into the room there were two rooms on the right and two rooms on the left side. One of them threw a match into the corridor. He was the first person in the room and the son of his uncle told him to take the match and burn the house. He bent on the right side to take the match and all the persons were then executed. Eight persons were executed and after that he didn't get up. After a while he left and went to the forest. In the forest he saw some families and after that he left again.

359. The third group was composed of 11 or 13 people he did not know. In the evening two other persons were killed in another house. One of them was killed on the stairs. He was killed after they asked him whether he knew how to drive a tractor and he had said no. Qaush Lushi was killed in the toilet after giving them the keys to his car.

360. The witness said that he went to the end of the land and saw all the houses burning. After 30 minutes or one hour after the massacre Zoran Hashovic, together with the husband of his sister, Vaso, took the Serb flag and they went to the place where the massacre occurred. Every kind of document belonging to the men was burnt, passports, permissions. The documents of the women were thrown into the stream. The women asked where the men were and they told them that the police had arrested them and that they were in prison but that they would be released.

361. After the massacre occurred everything was taken. The Serb forces took the women and children to the asphalt road and then up to the battery factory. They kept them there for two hours under the sun and after that told them to go back to their own houses. When they were back in the village again they were forced to leave. In the afternoon they were told to go back again. When they went back to the village he also went back and saw the place where the massacre had taken place and saw the bodies burnt. All the persons were burned out except the son of his uncle who is Skender Kelmendi. They were three brothers and the son of his brother; four people were executed in a house from the Kelmendi family. After they killed 47 people they again came back and started to steal. Every time they came they used to burn the houses. He and another person, a son of his uncle, was saved.

362. The witness did not know the accused. He recognized some of the paramilitaries. He recognized Srecko Popovic. He was wearing a scarf on his head and his face was painted with stripes of different colours. Apart from a boy, who was blond, all the other persons were painted and were wearing crosses and different things. Two persons were wearing beards and the others were wearing masks. The witness claimed that if the accused was unmasked he would have recognized him. He was not 100 percent sure if he was the fat person wearing a moustache and he was not able to recognize him by body movement.

X. Count 25 of the Indictment

1. The Averments

363. It is alleged that on the 14th May 1999 at Qyshk Village in the Municipality of Peja in the Administrative Province of Kosovo the accused in a group of paramilitaries tortured and attempted to cause the death of Muje Gashi who was in a group of other villagers who had also been tortured and some of whom were killed with the purpose of expelling the Albanian population out of Kosovo.

2. The Evidence

364. Muja Gashi gave evidence that on 14 May there was a massacre in his village in which 41 people were killed. He claimed that people were gathered in three houses and killed there. One other person was killed in the yard of his neighbour and another person was killed in the toilet of his uncle. The person killed in the toilet had his throat cut. The people killed in the three houses were killed and burned. Among these people was his father, Halil Gashi. This happened in the morning. The Serb forces arrived at the village at around 7:00 am. The witness claimed that he was feeling ill so he could not escape the siege. He thought it better to pretend to be handicapped. Among the people who came there were police and paramilitary. They were wearing camouflage and had their faces painted. One of them asked him how old he was, he lied and they told him to go back to his family.

365. They were then forced to get in the tractors, all of them, women, children and old people. One of them told him that he had to drive the tractor. They took the direction of the main road Pristina/Peja and took the direction towards Peja. They arrived at Zastava and were sent back. They were told that they had nowhere else to go and that they should go back to their houses and nobody would touch them. They went back and gathered inside the yard of the house of one of their neighbours and stayed there until 3:00 pm.

366. The witness said that he saw the burned people of the massacre of 14 May. He was the one who collected the remains of his father and uncle. He saw them arriving in the village and they put them on a convoy and they forced them to put their hands behind their neck and after he was released. The people who remained there were separated and remained in three different houses. He was not present when they were killed but when they returned to the village he saw the burned people and all that was remained of them. He claims that it was his idea of pretending to be handicapped which saved him.

367. The moment when the massacre happened his family and he were ordered to leave and take the direction of Montenegro and Albania, but then were sent back again towards the village. He was not present when the massacre happened. They returned in the afternoon and knew what had happened. On 14 May he saw the

accused but he did not see him doing anything. He had told the investigating judge that he had seen him beating people and burning houses. He did not see these things with his own eyes.

368. The witness had known the accused from 1996 when he was working in the Zastava factory. Before the investigating judge the witness had wrongly identified the accused as number two from the photo line-up. In his evidence he said that at that time he had said that he was not sure whether that was the accused. This is not what is said in the minutes before the investigating judge. The witness insisted that he had said at that time that he was not sure.

369. The witness was asked about his statement before the investigating judge that he recognized the accused because of "his manner of walking, his body shape, but to tell you the truth I was unable to recognize him by his face". The witness agreed that that was correct. He stated that only a river separated Gorazdevac village and Qyshk village and the land was very close and that they all knew each other very well.

370. On 14 May the accused was wearing a uniform and his face was painted. They were using a black kind of thing around their eyes so that the villagers would not recognize them. He had a moustache but none of them had a beard. He was not sure if the accused was wearing a moustache but some in the group were. In his statement to the police the witness had described the accused as tall, 40 years and clean-shaven.

Y. Count 26 of the Indictment

1. The Averments

371. It is alleged that on the 14th May 1999 at Qyshk Village in the Municipality of Peja in the Administrative Province of Kosovo the accused in a group of paramilitaries tortured and attempted to cause the death of Haki Gashi who was in a group of other villagers who had also been tortured and some of whom were killed with the purpose of expelling the Albanian population out of Kosovo.

2. The Evidence

372. Haki Gashi gave evidence that he saw the accused on 14 May 1999. He was dressed in military clothes. When they gathered them together they asked for all the documents and money they had. Someone called Srecko Popovic was in charge and they followed his orders. They sent a soldier with him to collect his money. He did not know who the soldier was. He was swearing at him and insulting him. After collecting the money he was returned to the line up. The accused was painted. To the investigating judge the witness had said that the accused was wearing a dark mask which covered all of his face and that he had said that it did not matter that he was wearing a mask because he could tell that it

was him because of the way he walked. The witness claimed that he was with his brother, Hasan Abdyli who knew the accused very well. When they put them in the yard his three brothers were there as hostages. His first and second brothers were killed with the group they took. The third brother told him that they killed them. He didn't see how they were killed but he heard the shots. The distance from the house he was about 60 meters.

373. The witness had told the investigating judge that the accused on 14 May was wearing a mask that covered all of his fact except the eyes and teeth. He was now saying that he had paint on his face. The witness denied that he stated that to the investigating judge – he had said that the accused's face was painted.

374. The witness claimed that when he withdrew he did not see anyone. He plunged into the river and then he left the river and walked to the area of Xheki, the accused knew where it was. The witness claimed that the accused with a lot of friends killed 47 people. In the morning they came and gathered them up and lined them up and maltreated them in all sorts of ways. The accused killed the people and he burned them. The witness was rather distressed throughout the giving of his evidence. He had been traumatized by the events he had witnessed.

375. The witness claimed that he saw it with his own eyes that the accused killed Berisha. He was an old man and they killed him because he was Albanian. The witness said that he heard the shooting. He did not see it because he was going away, trying to escape. Before he ran away they asked him to bring the money and to do so within two minutes. He went and got the money but did not return. He escaped through the fields and they followed him. He ran into Berisha and told him to escape because they were shooting. He ran to the right and Berisha took the left and then he heard the shooting. That happened on 14 May.

376. On 14 May there were other Serbs around in addition to the accused and Popovic. They came three times, the first two times they took their money and cars and items and on the third they attacked them. There could have been over 40 Serbs. The first two times it was the regular military forces and they were Serbs from Serbia and they did not touch them. The third time when they attacked them they were different people, in different uniforms, even people with masks. The masked people were local Serbs and they could tell because Serbs from Serbia do not speak Albanian.

377. The witness claimed that on 14 May there was no stealing or looting, they just attacked. The investigating judge put to the witness that other witnesses had said that on 14 May the Albanian people were separated into groups and forced to hand over their belongings to the Serbs. The witness claimed that that was the last moment when they divided them into three groups and put them into three different houses and that is when they asked for money and belongings. The witness said that he was amongst these groups at the beginning when they lined

them up where the graveyards are. They searched them and asked for money and that is when he escaped. They continued with the grouping later.

378. The witness claimed that when they were lined up the accused was asking for money and taking money and was very aggressive and used offensive words. He was wearing a green colour uniform, a soldier's uniform, and they had hats with the sides turned upwards like cowboy style. He saw with his own eyes. During the war the accused always wore a uniform of the same kind.

379. When he said before the investigating judge that the accused burnt his brothers but did not kill them he meant that he first killed them and then set the houses on fire with them inside. When the accused came to his village they came on foot. They came from Zastava to the village and Zastava is only ten minutes away. He has never seen the accused in a car during the war. Before the war the accused had a Zastava 101, but he might have changed it.

380. To the investigating judge Haki Gashi stated that he knew the accused as they had been going and guarding the cattle together. He stated that the profession of the accused was as a simple farmer but that during the war the accused took up any profession that he was given. He stated that the accused lived in Gorazdevac but he did not know if he had a former profession in Peja. Before the war he was involved in business, marketing. He described the accused as having a moustache and being well built. He had black hair and he was wearing a beard during the war.

381. Shkurta Isa Gashi gave evidence at the main trial on 25 September 2002. She also attended the present proceedings and after starting testifying for a few minutes she stated that she was upset and that she stood by her previous testimony and had nothing to add.

382. Shkurta Isa Gashi stated in that testimony that she was a witness of the massacre in Qyshk village. She was present along with the rest of the village. Her father was Isa Gashi who survived the massacre. She knew the accused because he had worked with her father for 24 years at the same factory.

383. On 14 May at around 7:30 am the village was surrounded by Serb forces. The forces started to burn houses and kill people. They did not know about this at the time because they lived deeper in the village. She is not sure exactly of the time because they did not have watches but thinks that it was about 7:30 am. A man came to them, who had sought refuge in their village and told her father that everybody had to leave because the village was surrounded. He said that there was smoke everywhere and the place was burning. Her father told them not to be afraid but just stay together. Her sisters and one brother then went on ahead and she stayed behind with her mother and father as her father did not want to leave as he felt he had done nothing wrong. Then her father told her to leave.

384. She left her father and found everybody was gathered, women, children and a little later the whole village. She saw her father's brother Halil Gashi and his son Jashar Gashi. She also saw Halil Gashi's wife from whom they had taken DM800. The Serbs were walking behind them. The villagers were holding their hands behind their heads. She saw the Serbs hitting her uncle and his son with the butt of a rifle.

385. The Serb forces gathered all the inhabitants of the village at one place. Once they had gathered all the villagers the forces started to separate women and children from their husbands. She saw the men talking to the police telling them that they had done nothing wrong but this made no impression and they continued to separate them placing all males to one side and women and children on the other. As they did so they started cursing at them. Their main words were "You were asking for NATO". After they had separated them they brought the men from the cemetery and they forced them to put their hands on the backs of their head. They began to ask for money. The men gave their money. All of the females, in order to save the males, gave everything they each had. The witness remembered Syle Gashi asking whether she knew anything about his son and she told him that he was with them. When they passed the place she was the last one there, holding the hand of Flakron, the son of Syle Gashi. She was left with the soldiers. Flakron was separated from Syle, who was to be executed.

386. She asked one soldier where their husbands were and told him that there was nobody to drive the tractors. He told her to shut up as something worse could happen to her. One of the daughters of one of her uncles said that they were probably killed by now and then they started jumping on the tractors. At that moment the rubble from Aget Gashi's house started falling very close to their tractor. There were over 40 people on that tractor. People started yelling because the debris was falling down and they could not start the tractor. She asked a soldier whether he had any mercy and that there was a risk that women and children would be burned. She told him that they did not know how to turn the tractor on and he just hit her on her lip. This was not intentional, but he tried to push her and ended up hitting her on her lip. Another solider then came and turned the tractor on. Then a boy of about 13 years drove the tractor away. They continued yelling at them, cursing them and offending them. They accompanied them to the accumulators' factory. They left them waiting there for three hours. They thought that this was because they wanted to make sure the bodies were completely burnt so they would not have any knowledge of what happened there.

387. After leaving them waiting for three hours they made them go back to the village and then they met with the local Serbs from the village. All of them were looking for their husbands or families and asked the local Serbs where they were. They said they knew nothing, one said that it appeared the men had been sent to prison.

388. The group was then gathered in the courtyard of Shaban Kelmendi, which was further from their village. Her uncle's daughter went to see what had happened in

their village and she met there with Hazir Berisha. He had survived the massacre and he had his legs broken. He told her that the other men had been burned and killed and she came back and told them. The local Serbs were still with them.

389. She remembered that when they returned to their village they could not because of the bad smell. She presumed that this was because of the burning bodies. They found on the ground the glasses, jackets and other personal belongings of their husbands. The first body they found belonged to Ibish Gashi, which had been massacred. This was found in the courtyard of Sali Gashi's house.

390. The witness then began to look for her father. Her younger sister had already found him hiding in some high grass. He had made a sign to her younger sister but she had been too afraid to go to him. They went to the spot where he was and saw that he was injured. He could not stand as he was very weak and had been losing blood for six hours. Her uncle's daughter asked about his father Halil Gashi and her father told her that the last time he saw him was in the room of Ashem Gashi with 11 other people. He told how he had managed to escape being burnt alive. He asked for water and she went to her uncle's house to fetch some. The water was close to where the bodies were still burning in the courtyard. She saw that the bodies were still burning. The lower part of the bodies was totally burned and the upper part was still burning. She saw her Uncle Halil Gashi burning. She recognized him as the upper part of his head was not burned yet and also from his teeth.

391. The witness claimed that she did not discuss what had happened with her father afterwards. She said that she could never ask him the details because he did not like to be asked and she did not like to ask. She said that he had told her that he recognized the people who performed the massacre but she never asked him about names, even though he had given statements. She never asked him because he has a weak heart and she did not feel the need to ask because she had witnessed the whole event herself.

392. The witness claimed that she recognized the accused mainly by his moustache because the local Serbs from Kosovo were also wearing masks at that time so they could not recognize them. At the time they were gathered in the courtyard she spoke to an uncle of hers who is dead now. She told her Uncle Ramadan "I am not sure, but I think that this is the guy with whom my dad worked in the Zastava factory and he said "Don't talk, we do not dare say that." She could not say that she saw him killing somebody or shooting somebody, as she could not see this, as they were isolated. She remembered him being on the move all the time and she remembers him cursing people, in the same way as his friends who were with him. She saw him again when they were accompanying them out of the courtyard to put them in tractors. She saw him holding a submarine gun with the barrel down on the ground. As for the moment people were killed and how it happened she did not know.

393. The witness claimed that some of the Serbs had their faces painted, they were wearing masks and some long gloves and some wearing bandanas. They were wearing different types of uniforms like camouflaged blue. The Serbs from Nakull were not wearing uniforms, but mostly they were soldiers. The witness claimed that the accused was wearing a mask. It was a very hot day and the mask was a balaclava one and you could only see the eyes, it was thin material and looked like leather. The witness remembers seeing the accused take the mask off as it was very hot. That was after they had killed all the men. He took it off because he thought that none of them could recognize him and that is the moment that she could recognize him. To the investigating judge the witness had said that the first time she saw the accused was in the courtyard and that she recognized him them. She said that her uncle was the one that named him; she simply recognized him as someone that she knew, but she could not remember from where. Her uncle explained who it was. In her evidence the witness claimed that she had said that she recognized the accused by herself but she was not sure where she had seen him previously. She claimed that she said to her Uncle Ramadam that "This person looks to me like Besovic" and he had told her to be quiet and not to say a word implying that he also recognized him. When her statement to the investigating judge was put to her she said that the truth was as she had said earlier. She recognized him but could not recall his name and asked her uncle and her uncle told her that it was the man who had worked for 24 years with her father. She claimed that when she asked her uncle who the person was he had the mask on, but although he had the mask (which was a type which was used by Serbs and covered the face but not the eyes and not the mouth and not underneath the nose) it was possible to see the moustache even when he had the mask on his face. She was not sure but as it was hot he might have lifted it up but she could not be sure.

394. The witness was shown photographs by the investigating judge. In her evidence she remembered identifying two photographs, number 6 and she could not recall the second (it was number 4).

395. When the defence sought to ask the witness questions she stated, "I do not want to hear any questions from him I cannot". The questions of the defense were put to the witness by the panel.

396. Rexhe Kastrati alleged that before 14 May he left the village and went to Nevargjan and on 14 May Serb forces came and starting from the beginning of Qyshk they started burning the houses and they killed first Met Shala, Rasim Morina and Brahim Gashi. They started burning the house and doing so they also killed Hasan Ceku and another of the same family Cadai Ceku. After that they went to the Gashi family, they killed them, they beat them up, maltreated them and stole everything there. Two young guys were killed Haki Gashi and Selim Gashi and they put both of them in houses that were burning. After burning and killing Lushi, Gashi and Kelmendi families they came near the house of the witness. They entered and gathered all the women and children and lined them up

in the graveyard. They separated the men from the women and forced them to give everything they had in their pockets. They took everything. They told them to go and get their tractors. He went and got his tractor and had everything on it to leave the place. When he brought the tractor three persons gathered and one of them was a fat man wearing a moustache. At that time Sali Rexhe's house was burning. All the family was put in the yard of that house and he asked the witness to stay on the carriage of the tractor with his hands on the back of his neck in order not to move.

397. The men and women were separated by the fence of the graveyard and they separated the first group where his brother was. There were 13 people in that group and he heard when they were executed and burns and then shots one by one. He was in the second group. He was asked whose house they were lined up in and he said it was Ajet Gashi's house. Nine persons were directed into the house, which was in another direction from the house where the men had just been executed. One of those that directed them was not wearing a mask and he was a younger man wearing a military uniform. The other was a fat person and he had an automatic weapon in his hand and the other man had a weapon with a revolving magazine. When they entered the room there were two rooms on the right and two on the left. There were stairs in the front of them. One of the sons of his uncle told him to take a match and burn the house. As he bent on the right side to light a match all the other persons were executed from the belt up. They were shot in the upper part of the body. Eight persons were executed. After that he did not get up. He stayed there and after awhile left and went to the forest.

398. In the forest he saw some families and then left again. As for the third group, which was composed of 11 persons, he did not know. In the evening two other people were killed in another house. One was killed on the stairs and Qaush Lushi, after giving them the keys to his car, was killed in the toilet.

399. The witness claimed that he eventually went to the land and observed all the houses burning. About 30 minutes to an hour after the massacre Zoran Jashovic and the husband of his sister Vaso took the Serb flag and went to the place were the massacre occurred.

400. The witness claimed that all the documents collected from the people were thrown in the stream. Everything was taken, cars and everything. They took the women and children to the asphalt road and they were taken up to the battery factory and kept there for two hours and after that told to go back to their homes. When they got back to the village they were forced to leave again and then in the afternoon told to go back again. When they went back he also went back and saw the place where the massacre had taken place and saw the bodies burn. All the persons were burned out except the son of the son of his uncle, Skender Kelmendi. They were three brothers and the son of his brother. Four men were executed in the house from Kelmendi. After they killed 47 people they again came back and started to steal. Every time they came they used to burn two houses.

401. The witness did not know the accused. He said that he did recognize some of the paramilitaries. He recognized Srecko Popovic. He was wearing a scarf on his head and his face was painted with stripes of different colours. Apart from a blonde boy all the other persons were painted and were wearing crosses and different things. Two persons were wearing beards and the others were wearing masks.

3. The Case for the Defence on Counts 21-26

402. The accused set up the defence of alibi with regard to the charges of 14 May 1999. The accused said that on that day he was attending the celebration of St. Jeremia day in Gorazdevac, the patron saint of the village. A friend of his, Miko Dasic, was the host for the celebration. He left from the Zastava factory to proceed to the celebration. He could not be precise about the time that he left the factory on that day but it could have been earlier than 15:00 hours. He could not say at what time he reached the place of the host nor the time at which he left the ceremony. He remembered that he and his colleagues from the factory went to the house of the host and then went to the church. He had never been to the village of Qyshk.

403. When he was further questioned on his movements on that day he stated that on that day, he went to church in Gorazdevac and then to the place of his friend, Mijlko Maksic, who was a colleague at Zastava. That friend had invited him to attend the celebration. He could not say how many days before he had received the invitation. They left the factory in two cars. He was in car with Vuko Lekic who was the driver. He could not remember whether he was sitting at the back or in front. He was asked where the others and he answered: “please understand it’s more than four years and I cannot recall such things”.

404. The director was in another car. He was able to leave the factory because the director had authorised him to do so as nobody could leave without such authorisation. He could not recall who was in the other car. From the factory the first destination was the church and then the house of Mijlko Makic which was about 700/800 meters from the church. Then he added he did not remember where he went first, the church or the house. He stayed at the house till late in the evening. He also visited other houses on that day as the whole village was celebrating.

405. When he was asked about the time he left the factory on 14 May, his answer was, “by the end of duty time”. He was then asked to give the approximate time and he stated “normally duty time ended at 3:00 pm”. He added that he did not leave the factory at 3:00 pm. After further questioning he ended up by saying that they started duty on that day at 7:00 am and they left at some time close to the end of duty time, which was close to 3:00 pm. It might have been 11:00 am or noon or 1:00 pm. He could not recall clearly as this happened four years ago. When he again asked whether he could have left the factory between 11:00 am and 1:00 pm

he said he could not say precisely but he was certain he attended duty on that day and "went to the celebration on the same day, but I am not sure where I was at certain times". When he was asked whether the time he attended the church was closer to the time he had left the factory, he answered: "I really don't know, I can't recall these things."

406. He did remember having gone to the house of Vesko Kastratovic on that day. He also confirmed that the celebration lasts two days but that it was more important to attend on 14 May. He attended only on 14 and not 15 May.

407. All the witnesses called on behalf of the defence confirmed the presence of the accused at that celebration with the exception of Bagas Djordjije, Vladimir Besovic, Alexander Milosav, who did not attend the celebration and Bogoljub Ljubo, Milovan Besivic and Dragan Knezevic who did not mention anything about the celebration.

408. Slobodan Jokic stated that he attended the celebration on St. Jeremia in the village of Gorazdevac. Miko who was an employee of Zastava was the host in 1999. He went to the celebration from the factory with other workers including the accused. At 10:00 am he chose a few workers who were "more reputable in the village and who had most friends" and they left in two cars. The reason for choosing the accused was that he enjoyed a good reputation among the villagers of Gorazdevac. They reached a place called Bjelince at about 11:00 am. When he was asked to state the date he did so after some hesitation and mentioned it was 14 May.

409. Vuko Lekic was one of the workers who left from Zastava. The accused travelled in the same car as him and they reached the village at about 10:00 or 11:00 am. He left the celebration at 7:00 or 8:00 pm. According to him there were 1,000 people there.

410. Buric Cedomir, a fellow worker of the accused, stated that those who left the factory to attend the celebration went after breakfast. He heard about but did not see the vehicles that left the factory on that day. He himself did not attend and he left the factory at 3:00 pm.

411. Stevan Ivanovic attended the celebration. He saw about 500 people there and amongst these people he could see and recognize the accused. When he was asked why he mentioned the name of accused he answered: "because all this here is about him".

412. Vladimir Vidic attended the celebration with his family. He reached the place at noon and saw the accused there. He even greeted him. He added "At that time all of them came together in two vehicles." When he was asked how he knew that these people had come in two cars he said the area is a huge flat one in front of the church and whoever arrives with cars can be seen. He saw the cars and their

occupants including the accused. When he was asked what attracted his attention to the two cars from Zastava, he answered "I know the people and I met them there." He knew the car of the director of Zastava was black but could not give the colour of the other car. There were 1,000 people according to him.

413. Milic Kastratovic stated that there were more than 200 people at the celebration on 14 May, the same number as in previous years. He went to say that the celebration lasted two days. On 14 May he attended alone and on 15 he went with his children. The first day is dedicated to a religious celebration and the people go to church. On that day mass starts at 10:00 am. The celebration ends at about 12:00 or 12:30 the first day. On that day the host will invite a small group of his friends to his house to continue the celebration there. The second day is St. Semestro. On that day women bring household items to the church. The second day is the day of rejoicing and entertainment. On the second day the celebration goes on until 2:00 or 3:00 in the morning. There is a short service in the church which starts at 7:00 am and after that people start to dance until the early hours of the morning.

414. Vesko Kastratovic corroborated the version of Milic Kastratovic that the St. Jeremia celebration lasts two days, 14 and 15 May. He said on that day, 14 May, the accused came to his place with the director of Zastava, Slobodan Jokic. He went to say: "I was with this group from the factory and we all went to my house, it might be something like 13:00 hours when we came to my house because we were all together. I did not care particularly about time, but I believe it was that time." When he was asked whether the first destination from the factory was his house, his answer was: "Yes. I can confirm it under moral and material responsibility." They stayed at his place for about two to three hours and went "further on". He did not go to church on that day and was always in the company of the accused. When he was asked whether he knew if the accused had attended church on that day, he answered "I don't know if he went to church during the morning, but later on as I said we went to my house and the houses of other friends until late in the evening." To a further question on whether the accused attended church he said, "Maybe he went for ten to fifteen minutes just to light a candle." He said 5,000 people attended the celebration.

415. Miodrag Vidic confirmed the presence of the accused and his colleagues from Zastava at the celebration, which was attended by 1,000 people.

416. Ivan Bogicevic said that St. Jeremia is celebrated on 14 and 15 May. The priest leads the people on a tour of the village and after that they go back to the church. The ceremony lasts the whole day.

417. Bozdar Krstic stated that St. Jeremia is celebrated on 14 or 15 May. When he was asked whether he was sure about the date, he answered: "It does not matter if it is 14, 15 or 16, we celebrate for two or three days." When he was asked whether the accused was there he gave the following answer: "You know on that day there is a

religious procession going through the village and the fields and it was so crowded I would not see anyone."

4. Findings of the Court on Counts 20-26

418. There can be no doubt that the events in Zahaq described by Rame Ramaj and Osman Zeqiri did take place and those in Qyshk described by Isa Gashi, Shkurta Gashi, Hazir Berisha, Rexhe Kelmendi, Muje Gashi, Haxi Gashi did take place. The defence did not try to contest that fact. The court focused on three aspects in relation to these events. First, was the accused properly identified? Secondly, was the alibi credible, a fact that is linked with the first point? Thirdly, were the witnesses credible and reliable on those points?

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

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

421. The issue of the involvement of the accused is discussed below.

422. On the credibility of the alibi, the panel was of the view that there were two main reasons which militated against the testimony of the defence.

423. First, there were a number of substantial discrepancies in the testimony of the witnesses in relation to the celebration that the accused and the witnesses allegedly attended in Gorazdevac. In this connection, the panel focused on the following matters: (i) the panel found it strange that a person like Slobodan Jokic, the director of the Zastava factory at the time, was unable to remember on which day St. Jeremia is celebrated when he himself was organizing the workers who should be attending the celebration; (ii) the accused was very confused about the approximate time he left the factory to attend the celebration. When pressed with questions, the accused gave different times at the hearing. To say the least, his

evidence was very vague and he was visibly very embarrassed to explain in a coherent manner the time at which he left. He started by saying that he left at the end of duty time and duty time ended at 3:00 pm. He then said that he left close to duty time and it could have been 11:00 am, noon or 1:00 pm. He ended up by saying that he could not recall matters; (iii) Slobodan Jokic gave the time of leaving as 10:00 am; (iv) Vesko Kastratofic stated that the time at which they reached his place from the factory was about 1:00 pm. In this connection, the panel noted that in the course of the ocular inspection the drive from Zastava factory to Gorazdevac church and the vicinity took a maximum of thirty minutes; (v) Vladimir Vidic, who allegedly saw the accused coming in a car, could not explain what drew his attention to that particular car. The panel asked the question how could it be possible for that witness to focus on that car when he did not know beforehand that the accused was coming to the celebration and when there were, according to him, about 1,000 people present, and many other cars; (vi) the accused stated he attended church on that day but Vesko Kastratovic said that everybody came to his house. Later, he tried to lamely explain that it could be that the accused attended church.

424. The panel did not consider these discrepancies as minor ones that could be brushed aside on the ground of memory failure or lapse of time. The impression that these witnesses left on the panel was that they were out to prove at all costs that the accused was with them by using the St. Jeremia as an ideal ground for doing so. The panel also had in mind the fact that both Rame Ramaj and Osman Zeqiri, who were residing in Zahaq at the time, stated that they heard gunshots coming from the direction of Qyshk. Isa Gashi and Muje Gashi, residents of Qyshk, gave evidence that the attacks in Qyshk started at around 7:00 am. Hazir Berisha, another resident of Qyshk, stated it was 7:30 am. Though the accused stated that he started work at 7:00 am on 14 May there was no cogent evidence of this fact. All the evidence of the defence focused on his departure from the factory, a time which could not be established with precision. The panel also considered the evidence that the accused was in a position to leave the factory at his will. For example, on the day his mother died nobody knew where he was. He was ultimately located at the place of a friend of his.

425. Secondly, most of the defence witnesses said that they had not heard of nor seen any movements of troops or Albanians leaving in convoys. Even if this had taken place, it was a deliberate strategy by the Albanians to create the impression that there was a calamity in Kosovo so that foreign forces could intervene to cause harm to Serbia. The panel simply was not prepared to believe such witnesses. Either they were lying or displaying a blissful ignorance of the events unfolding around them in Kosovo and in the regions where they lived. The panel rejected the evidence of these witnesses. If indeed they were ignorant of the events, they must have been the only people in the civilized world who were unaware of the events at a time when the attention of the international community was focused on the events in Former Yugoslavia, including Kosovo. This version of the witnesses contained in itself the germ of self-destruction.

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

VII

ARTICLE 142 OF THE CCFRY

427. The accused is being prosecuted under Art. 142 Para.1, CCFRY. That article reads:

> *The person who, violating the regulations of international law during war, armed conflict or occupation, orders that* ***attack be performed against civilian population, settlement, individual civilian persons incapable of fight, which had a consequence of death, heavy physical injury or heavy disturbance of the health of the people; attack without selection of the objective hitting civilian population; that murder, torture, inhumane treatment, biological, medical or other scientific experiments, taking tissue or organs for transplantation, causing great suffering or violation of physical integrity or health; displacement or re-settling or forced de-patriation or conversion to another religion; forcing prostitution or rape; application of measures of intimidation or terror****, taking hostages, collective punishment, forced taking to concentration camps and other illegal imprisonment, deprivation of the right to correct and impartial trial; forced service in armed forces of the enemy force or its intelligence service or administration; forcing forced labor, starvation of the population,* ***confiscation of the property, looting of the property of the population, illegal and self-willing destroying or taking possession of the property in great scales, which is not justified by military needs****, taking illegal and disproportionally large contribution or requisition, devaluation of the value of domestic money, be performed against the civilian population, or the person who performs some of the stated acts, shall be punishment by at least five years of imprisonment or twenty years of imprisonment* [emphasis added].

1. The Offences Provided by Article 142

428. The heading of the article is *War crimes against civilian population*. The article then goes on to enumerate the acts that are prohibited. The article prohibits the ordering or execution of acts directed against the civilian population during a war or armed conflict if the ordering or the execution of the acts violate international law.

429. In the commentaries to that article, the commentator Lubjbisa Lazarevic refers to The Hague Conventions dated 1899 and 1907; the 1949 Geneva Conventions on the Protection of Civilians During War; Additional Protocol I to the Geneva Conventions. These Conventions have been ratified by the FRY as is evidenced by the "Official Gazette of the Presidium of the National Assembly of the Federal People's Republic of Yugoslavia", no. 6/50 and the "Official Gazette of the Socialist Federal Republic of Yugoslavia – International Agreements", no. 16/78.

430. The author then discusses the various offences contained in Art. 142.

431. The author starts by stating that war crimes against civilian population may be performed only during war, armed conflict or occupation. War crime against civilian population can also be performed in the conditions of civil war, i.e. when it is a non-international armed conflict.

432. According to the author war crimes are *the forms of this criminal act, which is directed against the basic rights of citizens: their life or physical integrity, freedom, property, right to correct and impartial trial etc. Those activities are serious violations of the regulations of international war law towards civilian population during war, armed conflict or war occupation. The author is careful to point out that by the activities that are not included in this Article, war crime against civilian population cannot be performed. However, it will also be possible to qualify the activities incriminated in the law as this criminal act, only if they violate the regulations of international criminal law*.

433. The author points out to the limited protection of civilians in an internal conflict: *according to the 1949 Geneva Convention and the Supplementary Protocol with the Geneva Conventions on the Protection of the Victims of Non-International Armed Forces (Protocol II), the regulations of international war law are applied in limited scope, i.e. the ban of only some of the activities stated in this Article is stipulated. The ban includes the attacks against the life and physical integrity, in particular murder in all forms, injuries, torture and causing suffering, inhumane treatment, humiliating and diminishing treatment, taking hostages, deprivation of the right to a correct and impartial trial, rape, forced prostitution, etc.*

2. Article 142 and International Customary Law

434. One view has been expressed that since the Former Republic of Yugoslavia has ratified the Four Geneva Conventions in 1950 and the 1977 Additional Protocols, the only international legal obligations of the SFRY arise from the Geneva Conventions and the Additional Protocols and therefore it would appear that customary international law and general principles of law would rarely play a role in Art. 142 related matters in view of constitutional law hurdles.[17] That view was expressed after a discussion on the relevant constitutional provisions of the SFRY and the FRY, as they appear in the Constitutions of 1974 and 1992 in relation to the basic criminal provision *nullum crimen sine lege*.

435. Article 27 of the SFRY 1992 Constitution reads:

> *(1) No one may be punished for an act which did not constitute a penal offense under law or by-law at the time it was committed, nor may punishment be inflicted which was not envisaged for the offense in question.*
>
> *(2) Criminal offenses and criminal sanctions shall be determined by statute.*
>
> *(3) Everyone charged with a criminal offence.*

436. Article 181 of the 1974 SFRY Constitution reads:

> *No one shall be punished for any act, which before its commission was not defined as a punishable offence by law or a legal provision based on law, or for which no penalty was threatened. Criminal offences and criminal sanctions can only be determined by law.* [It would appear another translated mentions statute instead of law].

437. Article 16 of the 1992 SFRY Constitution reads

> *(1) The Federal Republic of Yugoslavia shall fulfill in good faith the obligations contained in international treaties to which it is a contracting party.*
>
> *(2) International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order.*

438. Article 210 of the SFRY 1974 Constitution reads

[17] Gabriel Oosthuizen, Paper presented at Seminar for International Judges, Kosovo, 20 August 2002.

International treaties shall be applied as of the day they enter into force, unless otherwise specified in the instrument of ratification or by an agreement of the competent bodies. International treaties which have been promulgated shall be directly applied by the courts.

439. In the light of these provisions and given the principle of *nullum crimen sine lege* the following view has been expressed:

By requiring that criminal offences and penalties be determined by statute as opposed by law (assuming that this is the correct translation, Art. 27 of the 1992 Constitution appears to be more favorable to defendants (UNMIK Regulation 2000/59, section 1(4)). Read together, these provisions mean that courts cannot apply international law directly to defendants in criminal proceedings. The conduct in question has to be criminalised, and sanctions have to be provided.[18]

440. *A different view has been taken on the application of customary international law in the interpretation of Art. 142.*[19]

441. *The first point is that Kosovo, as part of Serbia, is a party to the Hague Conventions of 1907, the Four Geneva Conventions of 1949, and the Additional Protocols of 1997. The ratification (in parliament) and promulgation (the date identified upon which the treaty comes into force) of these treaties means that under Article 16 of the 1992 FRY Constitution these treaties* ***constitute part of the internal legal order of Kosovo****, that is they are part of the domestic law applicable in Kosovo.*

442. *Further, the reference in Article (2) to "****generally accepted rules of international law****" can only mean that the FRY accepts that it is also subject to those rules of international law that are generally accepted by the international community, i.e. rules of customary international law and that those customary rules also constitute part of the domestic legal order of Kosovo.*

443. *The second point is that Article 142 requires the fact finding tribunal to look beyond its terms to international law to determine that the offence was an offence at international law, the fact that an offence is identified in Article 142 is not sufficient to make it a war crime, it must constitute such at international law. In looking beyond Article 142 the fact finding tribunal can look to the treaties that underpin that Article and generally accepted rules of international law, that is customary international law, as both are Constitutionally part of the internal law of Kosovo.*

444. *The third point is that there is no logical reason why Article 27 of the 1992 Constitution should be read in a way that derogates from the obligations*

[18] See footnote 17.
[19] Ms Gabrielle McIntyre, Paper presented Seminar for International Judges, Kosovo, 2003.

undertaken by Article 16. One of the first rules of international law and obligations undertaken by states in relation to it, is that although States have a discretion as to how they incorporate their international obligations into their domestic legal orders they cannot use their national law to override the international obligations they have undertaken. In most legal systems, where international law is incorporated as part of the internal order of a State, provisions of a Constitution will be read consistently with those international obligations. In some jurisdictions, if there is a clear conflict between the two provisions, the international obligations will take precedence, any national derogations constructed as unconstitutional.

445. *In my view there is actually no conflict between these two provisions. Each offence that is a crime during armed conflict is a crime in the domestic setting in any event. For example, crimes against humanity at customary international law which are not specifically identified as such in the Criminal Code include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious grounds, and other inhumane acts, when defined to their elements, already exist as offences under the Criminal Code, and in most instances under Article 142 itself.*

446. *The fourth point is that Kosovo is part of Serbia: Serbian accused, and now Kosovar accused are being tried at that Tribunal. The Hague Tribunal has its own Statute, and as such it has been considered that proceedings there are different than proceedings here. However, they need not be. The Report of the Secretary-General that accompanied the Statute of the ICTY makes it quite clear that to avoid offending the principle of legality the Tribunal can only apply that law, which was beyond doubt customary international law at the time that alleged violation of international humanitarian law, occurred. So, although the Tribunal has a Statute of identified offences, which are based upon the Geneva Conventions and Additional Protocols, accused facing trial at the Tribunal can only be convicted of those offences that are established at international customary international law as being criminal at the time they were committed (or has Statutory application as FRY is a the international treaty). Those judgments establish that the Four Geneva Conventions of 1949 are considered by the international community to be customary international law. Those Conventions, in conjunction with Additional Protocol II of 1997, are applicable to international armed conflicts. Not all of Additional Protocol II is considered to constitute customary international law, but those provisions that relate to the protection of civilians and civilian objects are. Further, Common Article 3 to the Four Geneva Conventions is considered to be customary international law applicable to internal armed conflicts. In addition, the provisions of Additional Protocol I (applicable to internal armed conflicts), which concern the protection of civilians and civilian objects, are considered by the international community to be customary international law. Finally, in determining the penalty to be applied for these offences the ICTY looks to the sentencing practice of the FRY, i.e., it looks*

to the penalty that could have been applied to those offences by the domestic regime.

3. Conclusions of the Panel

447. The addition of the words **generally accepted rules of international law** in Art. 16(2) of the FRY 1992 Constitution would strongly suggest that the framers of the Constitution wanted to make it clear that these rules would be in addition to international treaties which are mentioned at the very beginning of the article. Further in the commentaries on Art.142.the author says *by the activities that are not included in this Article, war crime against civilian population cannot be performed*. **However, it will also be possible to qualify the activities incriminated in the law as this criminal act, only if they violate the regulations of international criminal law** [emphasis added]. This being the case there was no necessity in the view of the panel to incorporate expressly such customary rules in the internal legal order of SFRY or FRY.

448. In the Nicaragua case it was stated that

In order to deduce the existence of customary rules the Court deems it sufficient that the conduct of States should in general be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[20]

449. In the Tadic[21] case the Trial Chamber expressed the view that internal conflicts are also governed by customary law. In the Celibici case the Trial Chamber resorted to customary law to gauge the meaning of offences not defined in the 1949 Conventions. The Tribunal said

450. *The offences of torture, wilfully causing great suffering or serious injury to body or health and inhuman treatment are proscribed as grave breaches of the Geneva Conventions. The offences of torture and cruel treatment are prohibited under common article 3 of the Geneva Conventions. However, no definition or elaboration of these offences are provided in the Conventions themselves. Thus, the Trial Chamber must find the customary international law definitions of the elements of these offences as they stood at the time period to which the Indictment relates.* [Para. 441]

451. The panel also noted the opposition that FRY made concerning the sovereignty of Bosnia and Herzegovina in relation to the Genocide Convention on 15 June 1993. In fact it was the contention of the FRY that Bosnia and Herzegovina having obtained sovereignty contrary to the rules of international law it could not be a

[20] ICJ Report, 1986.
[21] See footnote 14.

party to the Convention on Genocide, by filing a notice of succession with the Secretary General in December 1992. However FRY was quick to point out that though in its view Bosnia Herzegovina was not such a party it considered the new republic to be *bound by the obligation to respect the norms on preventing and punishing the crime of* ***genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide***[22] [emphasis added].

452. Eichmann was prosecuted by Israel for crimes against the Jewish people, crimes against humanity and war crimes in violation of the Nazi and Nazi Collaborators (Punishment) Law of 1950. One of the objections against the prosecution was that the Law violated the principle of *nullum crimen sine lege*. On the issue of retroactivity the Supreme Court of Israel held that the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle *nulla poena* or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objective.

453. Though the prohibition of retroactive criminal law is a fundamental principle of criminal justice, Article 7(2) of the European Convention of European Rights derogates from the principle of non-retroactivity of criminal law provisions. Ben Emmerson comments on this derogation as follows: "*The exception created by art. 7(2) was intended to allow the application of national and international legislation enacted during and after the Second World War to punish war crimes, treason and collaboration with the enemy. The practical effect of art. 7(2) is simply to make it clear that the international law exception in art. 7.1 is not confined to treaty-based or customary international law, but extends to conduct regarded as criminal under general principles of law recognized by civilized nations*".[23]

454. Common Art. 3 and Additional Protocols I and II are binding on Kosovo by virtue of the treaty obligations of the SFRY and FRY and UNMIK Regulation 1999/24, as amended by 2000/59. These instruments prohibit acts that are also punished in Kosovo law. The acts listed in the international treaties and international law, such as murder, taking hostages, pillage, degrading treatment and rape constitute offences both under international law and the national law of Kosovo. So nobody who commits or is party to one more of those offences can claim in good faith that he/she was not aware of the prohibition.

455. On the construction of the offences listed in Art. 142 CFRY, the panel followed the definitions of the offences as they appear in the commentaries on the criminal law applicable in Kosovo. In relation to these offences that are not defined or explained in the local law, the panel referred to the 1949 Geneva Conventions and international customary law and sought guidance from the case law of the ICTY.

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[22] See Genocide in International Law, Schabas, Cambridge, 2000, p. 511.
[23] Human Law and Practice, ed. Lord Lester, Butterworths, 1999.

VIII

THE CONFLICT IN KOSOVO

456. Since the accused is facing charges of war crimes and these crimes are serious violations of international humanitarian law committed in the course of an armed conflict were issues arise for determination in the context of the case, first whether an armed conflict existed, secondly whether the conflict was internal or international in character, and thirdly whether there was a nexus between the offences and the armed conflict. In carrying out this exercise the panel referred extensively to two reports, Under Orders, War Crimes in Kosovo, published by Human Rights Watch[24] and OSCE Report, Kosovo As Seen As Told.[25]

1. Judicial Notice of the Historical Events

457. No evidence was presented at the trial on the events relating to the conflict but the prosecution made wide reference to them and the defence did not object to that course of action. The court considered whether it could take judicial notice of the historical facts, as being notorious facts of which proof was not needed [Art. 322 LCP by Grubac and Vasiljevic, Criminal Procedure, 1982; Prosecutor v Blagoje Simic et al. Decision On The Pre-Trial Motion By The Prosecution Requesting The Trial Chamber To Take Judicial Notice Of The International Character Of The Conflict in Bosnia-Herzegovina, 25 March 1999; Prosecutor v Krajisnik, Decision on Prosecution Motion For Judicial Notice Of Adjudicated Facts, 28 February 2003; Prosecutor v Slobodan Milosevic, Decision on Prosecution Motion for Judicial notice of Adjudicated Facts, 10 April 2003].

458. The panel limited itself to taking judicial notice of the historical facts as they were not disputed, they were notorious and they were contained on two authoritative reports. The court however drew its own inferences from the facts on the nature of the conflict with a view to the application of the appropriate international humanitarian law. In the case of Blagoje Simic, the Trial Chamber of the ICTY held in relation to Rule 94 of the Rules and Procedure and Evidence of the Tribunal that the rule is intended to cover facts and not legal consequences.

[24] Human Rights Watch publication 2001 and www.hrw.org.
[25] www.ocse.org/kosovo/document/reports/hr.

2. History of the Conflict in Kosovo

A. The OSCE Report

1. Kosovo: The Historical and Political Background

459. "In the early 20th century Kosovo and western Macedonia, emerging from the dismantling of the Ottoman Empire in south-eastern Europe, were the main areas of collision between Albanian and Serb nationalist aspirations. The Albanian national revival, under way since the foundation in 1878 of the League of Prizren, aimed at uniting the areas of mainly Muslim Albanian-speaking populations. The Serb focus was on history and symbolism rather than on contemporary demographics. Serbian historians held the Kosovo area to be the cradle of their civilization, where some of the defining events relating to their sense of nationhood had taken place, notably the final and unavailing stand made by Prince Lazar against Ottoman forces at the Battle of Kosovo Polje in June 1389. The Orthodox monasteries of Kosovo were of great significance in their religious and cultural identity; Pec/Peja in particular was the seat of the Serbian Patriarchate.

460. Serbia, itself an independent principality only since 1878, after centuries of almost uninterrupted Ottoman rule, gained control of Kosovo in 1912 as a result of the First Balkan War. The Albanian state which came into being at this time thus did not include territory where some 800,000 Albanians lived. Only briefly during the Second World War, when the area was conquered by Italian and then German forces, was an Albanian vassal state allowed to administer most of Kosovo (1941-44).

461. Movements of population during this period are a matter of much dispute. From 1912 onwards, Serb families were moved into Kosovo in considerable numbers, the wealthier Albanians living there were dispossessed by land reforms, and possibly as many as half a million Albanians were moved out. Conversely, it is frequently asserted by Serbs that hundreds of thousands of Albanians moved into Kosovo between 1941 and 1945.

462. Under communist rule in post-1945 Yugoslavia, Albanians were recognized as a minority nationality, with legal rights to education in their own language and protection for cultural institutions. Kosovo, as part of Serbia, had a degree of home rule, extended in 1968.

2. Autonomous Province Status

463. The 1974 Constitution - the third of the period of the rule of Marshal Tito - was a major step in the devolution of government and economic power to the republics – Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia - which made up the Socialist Federal Republic of Yugoslavia (SFRY). However,

Tito had long been occupied with the problem of Serbia's weight within the SFRY. It was by far the largest republic, with over nine million inhabitants - 40 percent of the total population. The 1974 Constitution addressed this issue by giving nearly one-third of Serbia's inhabitants a large degree of autonomy, in the provinces of Kosovo (where the population was 90 percent Albanian, totalling some 1.7 million and rising) and Vojvodina (the home of a 400,000-strong Hungarian minority).

464. While they were defined as autonomous provinces of Serbia rather than given full republican status, Kosovo and Vojvodina were recognized by the 1974 Constitution as constituent members of the federation. Their leaders thus had separate membership of the rotating collective state presidency which took over after the death of Tito in 1981. The autonomous provinces each had their own central bank and separate police, educational systems and judiciary, a provincial assembly as well as representation in the Serbian parliament, and most importantly a provincial communist party, in Kosovo's case the League of Communists of Kosovo.

465. In 1981, demands by Kosovo Albanians for full republican status (notionally including the right to secede) gathered impetus in mass protests, but the demonstrations were countered by a hard-line response. The federal army was deployed and a state of emergency was declared in the province. As unrest continued over the next seven years, according to official figures 7,000 Kosovo Albanians were sentenced to short prison terms, and over 1,750 more received longer sentences, of up to 15 years, in connection with nationalist activity.

3. The Serb Nationalist Backlash

466. Complaining of discrimination, of violent attacks upon them going unpunished, and of the domination of political and economic life by the Kosovo Albanian community, Kosovo Serbs had already been migrating from the area in growing numbers since the 1960s. Petitions began to circulate, and Kosovo Serbs' resentment was galvanized into protest and resistance following the sensational publication in a mass circulation newspaper in September 1986 of the Memorandum of the Serbian Academy of Arts and Sciences. An unfinished draft of an academic paper, the Memorandum ranged over issues including an alleged conspiracy against Serbia by Slovenia and Croatia. Such divisive nationalism was heresy in the SFRY and was duly denounced across the country. Its effects were nevertheless explosive, and nowhere more so than in Kosovo, where the Memorandum warned Serbs that they faced total genocide unless they could reverse the "Albanianization" of the province.

467. 24 April 1987 was a critical day for Serb nationalism and for the future of Kosovo. Slobodan Milosevic, a prominent figure in the republican communist party, the League of Communists of Serbia, had gone to Kosovo for a dialogue with the local Serbs about their grievances. While he was in Kosovo Polje/Fushe

Kosove meeting their representatives, a large crowd demonstrating in their support was driven back by local police using batons. The crowd fought back, and then Milosevic came out to address them. He made himself the instant hero of the Kosovar Serbs, telling them in front of the television cameras that "no one should dare to beat you", and making their controversial nationalist agenda his own. By the end of 1987 Milosevic was in firm control of both the party and government in Serbia.

4. The Loss of Autonomy Status

468. The following year, as both the Albanian nationalist agitation and Serb anti-discrimination rallies maintained their momentum, proposals were put forward to amend the Serbian constitution to give Belgrade more control over security in Kosovo and Vojvodina (as well as over financial and social policy), thereby reducing provincial autonomy. Leading members of the League of Communists in both provinces resigned before the constitutional amendments were approved in February-March 1989 by the Serbian parliament and the respective provincial assemblies.

469. Further stages in the removal of provincial autonomy followed. The main step, including dissolving the provincial assemblies, was taken in the form of amendments to the Serbian constitution proposed in May 1990, implemented in June and supported in a republic-wide referendum that July. The last visible political institutions of provincial autonomy - representation on the collective SFRY presidency and in the Federal Assembly - remained nominally intact, but in practice the presidency itself was in chronic crisis as the federation approached the end of its existence. At one stage in March 1991 the Kosovo representative was recalled for "anti-Serbian activities" and the Serbian Assembly voted to abolish the post. Although this was soon rescinded, two months later the Kosovo delegation walked out of the Federal Assembly when it voted to confirm a candidate chosen by Serbia as the new Kosovo representative on the Presidency.

470. Of greater real significance than this political maneuvering within the Presidency were the withdrawal or closure of publicly funded Albanian language media in 1989, the publication in 1990 of a new schools curriculum for Kosovo to bring Albanian-language teaching into line with that in the rest of Serbia, the ending of teaching in Albanian in most secondary schools in 1992, and the cutting of Albanian-language teaching at Pristina University at the same time. Kosovo Albanians responded with a schools boycott and attempts to maintain a "parallel" system of Albanian-language education, often provided by teachers who had lost their jobs.

471. Periods of particularly acute tension in the continuing unrest included violent rioting over the 1989 constitutional amendments and the arrest of popular local political leader Azem Vlasi; disturbances in Pristina in early 1990, quelled by the temporary imposition of a state of emergency, after Milosevic had issued a call

for Serbs to begin a campaign of mass settlement to reverse the decline in their numbers in Kosovo; protests over the dissolution of the provincial assembly that July; and a general strike in September 1990 over mass dismissals of Kosovo Albanian officials. A state of emergency, backed by a strong Serbian police and security presence, was in force in Kosovo from late 1989 until the latter part of 1992.

5. Parallel Kosovo Albanian Administration in Kosovo

472. After the Kosovo Assembly was dissolved in June 1990, an attempt was made by 114 of its 180 deputies on 2 July to declare Kosovo independent from Serbia and a full republic within the SFRY. This move was declared illegal by both Serbia and the SFRY, so on 7 September 111 of the deputies, meeting secretly in Kacanik/Kacanik, proclaimed an independent Republic of Kosovo. Criminal charges were subsequently brought against them. That December, Kosovo Albanians boycotted elections to the Serbian parliament.

473. In September 1991 the Kosovo Assembly deputies, still resisting Serbian efforts to declare their activities illegal, organized a referendum on sovereignty in which they reported an 87 percent turnout and almost 100 percent voting in favour. A provisional coalition government formed in October, and given diplomatic recognition on 22 October by Albania. It claimed to run its own police forces and to support its activities by collecting taxes from the Kosovo Albanian population, but had to act clandestinely to avoid the arrest of its members by Serbian police and security forces.

474. The first parallel elections organized in Kosovo did not take place until May 1992. By this time the wars of the Yugoslav succession had begun, the SFRY had ceased to exist, four of its constituent republics had declared their separate independence, and Serbia and Montenegro had joined in forming in April 1992 a new Federal Republic of Yugoslavia (FRY). Within the FRY structure, both Vojvodina and Kosovo and Metohija (as it was officially called by Serbia) were officially designated as autonomous provinces, but the confrontational situation in Kosovo meant that Kosovo Albanians continued to boycott Serbian and FRY federal assembly elections, while there was no official Kosovo assembly and Serbia condemned any parallel elections among the Kosovo Albanian community as illegal.

475. In the May 1992 parallel elections the Democratic League of Kosovo (LDK), founded in September 1990 and led by Ibrahim Rugova, won most of the seats in a 130-member “constituent Republican Assembly”, and Rugova was declared to be President of the Republic of Kosovo. The attempt to hold an inaugural assembly session was abandoned in June, however, in the face of action by the Serbian security forces to seal off the building.

476. Thereafter, international attention turned mainly to the war in Bosnia-Herzegovina. At the outset of that conflict, the role of Serbia was generally seen by the international community as that of a bellicose protagonist. By the time of the Dayton peace agreement for Bosnia-Herzegovina in November 1995, however, the Milosevic regime in Serbia was regarded as a factor in bringing about a negotiated solution, and UN sanctions imposed on the FRY were revoked once that solution had been put in place.

477. In Kosovo, Rugova's approach of seeking a peaceful settlement did record one apparent success, an agreement in 1996 that an Albanian educational curriculum should be restored. This had yet to be implemented, however, and student demonstrations had been met with violent suppression, by the time the second parallel elections were organized in March 1998. These elections once again produced an overwhelming majority vote in favour of Rugova as president, although this was partly because groups other than his LDK opposed the holding of the poll at a time of crisis and escalating Serbian military action (see below). As before, the Serbian authorities denounced the elections as illegal.

6. The Intensification of Armed Conflict

478. By the beginning of 1998, the nature of the Kosovo situation had changed. A new element had entered the equation in the form of the Kosovo Liberation Army (UCK), and the Serbian authorities were responding with a huge increase in military force.

479. The declared purpose of the UCK, a Kosovo Albanian paramilitary group which claimed its first actions in 1996, was to offer resistance to Serbian police and security forces in Kosovo and to pursue separatism by armed struggle. The UCK intensified its activity in 1997 and early 1998, with attacks on police stations, police officers, Serb civilians and Kosovo Albanians working for or with the authorities, but in the two years up to mid-January 1998 it had only claimed the killing of a total of 10 Serbian police and other officials, and 11 Kosovo Albanians.

480. The Serbian authorities brought in special security forces in January 1998. They responded to clashes with the UCK by reprisal attacks on villages, using military helicopters and armoured personnel carriers, accompanied by brutal house-to-house raids and indiscriminate arrests. Two such attacks on villages in late February were followed by an assault on the village of Donji Prekaze/Prekazi i Poshtem (Srbica/Skenderaj municipality) in early March, where at least 54 people were killed including a local UCK leader, most of his family and other women, children and elderly men. The reprisals continued with further attacks on villages in the central Drenica region, causing many villagers to flee their homes. In this downward spiral of violence, many Kosovo Albanians, including erstwhile supporters of the LDK’s non-violent stance, became UCK members or active sympathizers.

481. Limited international sanctions against Serbia, as threatened on 9 March 1998, were intended to back up calls by the six-country "Contact Group" (France, Germany, Italy, Russia, the United Kingdom and the USA) for negotiations on autonomy in place of the use of force. The deadline for compliance was postponed, but to no effect, and the sanctions were eventually introduced in late April. The UN Security Council also imposed an arms embargo under Resolution 1160 of 30 March. In Serbia, however, in a referendum in April 1998 Milosevic gained overwhelming support for his stance of rejecting any international mediation in the Kosovo conflict. Substantial additional Serbian military reinforcements were sent in to Kosovo in May 1998. Ignoring a "strong final warning" from European governments in June, Serb forces began concentrating their actions in the Drenica region and along the south-western border, using artillery to force villagers out of their homes and then going in to loot and burn them. Aid agencies estimated that some 200,000-300,000 Albanians were driven from their homes between April and September 1998.

482. Western countries intensified their demands for a halt to this campaign in response to the evidence of a major Serbian offensive against the UCK, and the discovery of further massacres. The U.S. ambassador to the former Yugoslav Republic of Macedonia, Christopher Hill, announced on 2 September that his attempt to promote a negotiated settlement had achieved a procedural breakthrough, in that both Milosevic and Rugova had expressed a willingness to defer consideration of the long-term future of Kosovo. Kosovo Albanian leaders produced a draft proposal later in the month for an interim arrangement in which Kosovo would settle temporarily for republican status within the FRY, short of full independence.

7. UN Security Council Resolution 1199 and the Milosevic-Holbrooke Agreement

483. On 23 September 1998 the UN Security Council adopted Resolution 1199, acting under Chapter VII of the UN Charter. The vote was 14 to 0, with China abstaining. Resolution 1199 called for an immediate cease-fire in Kosovo, an international presence to monitor it, the withdrawal of "security units used for civilian repression", and dialogue on the future of Kosovo. The Serbian Prime Minister Mirko Marjanovic claimed on 28 September that all "anti-terrorist activities" had ended and that "peace reigns in Kosovo", but his claim was undermined by the lack of evidence of any withdrawal of Serbian forces, and the simultaneous discovery of three particularly shocking massacres of civilians in and near the neighbouring villages of Gornje Obrinje/Obri e Eperme (Glogovac/Gllogoc) and Donje Obrinje/Obri e Ulet (Srbica/Skenderaj).

484. Although Russia explicitly declared its opposition to the use of force to back up UN Resolution 1199, the use of air bombardments against the FRY for this purpose was officially approved by NATO, and a deadline issued for Serbia to

comply. The deadline was repeatedly postponed in the succeeding days. On 16 October, however, the so-called Milosevic-Holbrooke agreement was announced.

485. This agreement was the product of protracted discussions between Milosevic and U.S. envoy Richard Holbrooke during a succession of visits by the latter to Belgrade. Its text was not published, but its key provisions, in addition to the ending of hostilities, were threefold. All those who had fled their homes in Kosovo and become refugees were to be allowed to return. Serbian forces in Kosovo, including both army units and special forces, were to be scaled back to their pre-1999 levels. Under the Milosevic-Holbrooke agreement, and an agreement between OSCE Chairman-in-Office Bronislaw Geremek (Minister of Foreign Affairs of Poland) and the Yugoslav Foreign Minister Zivadin Jovanovic on the same day, international observers, in the shape of a 2,000-member OSCE mission, were to be allowed into Kosovo to verify compliance. This mission, the OSCE Kosovo Verification Mission (OSCE-KVM), began to be deployed in the field from November

8. The Renewed Escalation of Human Rights Violations

486. For two months the Milosevic-Holbrooke agreement appeared to be making progress on all these provisions, despite a number of violations of the cease-fire. Meanwhile United States and European diplomats pursued their efforts to promote a Kosovo settlement, although still without including the UCK in the process.

487. In the last week in December and the first half of January 1999, however, three things became clear. One was that the reduction in fighting between Serb forces and the UCK had been no more than a temporary lull, which ended in December with a new Serbian offensive in the north-east. The UCK had used the lull to rearm and retrain, while a large force of Yugoslav/Serbian troops was being assembled just outside the province in apparent preparation for a spring offensive. The second was that in these circumstances the OSCE Kosovo Verification Mission (OSCE-KVM) was neither equipped nor mandated to play a peacekeeping role, so a 2,300-strong NATO “extraction force” was put in place just across the border in the former Yugoslav Republic of Macedonia to evacuate the monitors if necessary. The third was that atrocities against unarmed civilians had not ceased. In mid-January, 45 people - some of them children - were found murdered in Racak/Recak (Stimlje/Shtime), mostly shot in the head at close range.

488. It was this last development, and its immediate repercussions, which precipitated the next initiative by the six-country Contact Group. Ambassador William Walker, the head of the OSCE-KVM, was ordered out of the country by the Serbian authorities when he publicly accused them of responsibility - rejecting their claim that UCK guerrillas had been killed in a battle at Racak and their bodies then rearranged by their comrades to look like civilian victims of a

massacre. Ambassador Walker refused to leave, while NATO threatened military action against the FRY unless the cease-fire was restored. In a bid to break the impasse by diplomatic means, the Contact Group then announced a conference on the future of Kosovo, to be held in Rambouillet near Paris on 6 February.

9. The Rambouillet Negotiations

489. At Rambouillet, the Serbian and Albanian leaders (the latter including both LDK and UCK) were presented with the latest version of the Western plan as a basis for a negotiated settlement.

490. The plan stipulated that the UCK must be disarmed within three months (the provision they most strongly opposed) and all Yugoslav/Serbian troops withdrawn from Kosovo apart from 1,400 border guards and 2,500 security forces. A 30,000-member NATO "enabling force" would be deployed in Kosovo (the provision most strongly opposed by the Serbian leadership) to ensure implementation of the agreement. For a three-year interim period, Kosovo would have autonomous institutions once again, as before 1989, including its own elected assembly, president and constitutional court. There would be greater devolution of power, however, to the province's municipalities, in areas such as policing. More contentiously, the different "national communities" of Kosovo would have powers to block legislation if it threatened their national interest, and official posts would be divided up among them on a quota basis. At the end of the three years, there would be a further international meeting "to determine a mechanism for a final settlement" - a formula which did not exclude independence, although the Contact Group was known to be against it.

491. The Kosovo Albanian delegation eventually agreed in principle at the end of February to sign the agreement, and returned to Paris for the signing ceremony on 18 March. The Serbian side, however, did not. As fighting continued in Kosovo, and reports indicated that 30,000 more Yugoslav/Serbian troops were being deployed along with tanks and irregular militia units, the OSCE-KVM was pulled out on 20 March. NATO issued another ultimatum demanding Serbia's signature, but the Serbian parliament confirmed the rejection of the Rambouillet proposals, and on 24 March 1999 the NATO forces began their campaign of aerial attacks on FRY targets.

10. The NATO Air Campaign and the June 1999 Agreement

492. NATO air strikes, which inflicted considerable damage and loss of life within Yugoslavia, continued until June. The NATO action was formally suspended on June 10, once it was confirmed that Serbian forces were beginning their withdrawal under a peace plan embodied that same day in UN Security Council Resolution 1244 (on which China again abstained).

493. This peace plan, accepted by FRY President Milosevic and formally approved by the Serbian National Assembly on 3 June, had emerged from a series of efforts at mediation, starting with initiatives by Russian special envoy Viktor Chernomyrdin. General principles for a solution were agreed at the Bonn meeting of the Group of Eight (G-8, the seven major Western industrialized countries plus Russia) in early May, and eventually accepted by the FRY government in early June after further Russian and European Union mediation.

494. The basic elements of the June 1999 peace agreement began with the requirement that all Serbian forces should be withdrawn, and all refugees allowed to return. The UCK and any other armed Kosovo Albanian groups were to "end immediately all offensive actions" and comply with requirements for demilitarization. Implementation would be overseen by KFOR, an "effective international security presence with substantial NATO participation", meaning in practice a 50,000-strong joint NATO-Russian peacekeeping force, and by a 3,000-member UN civilian security force. Kosovo would have a civilian administrator, appointed by the UN Secretary-General, overseeing the establishment of "substantial autonomy" for Kosovo within the FRY and "provisional and democratic institutions" under an interim administration "pending a final settlement". No time limit was set on the life of the interim administration, nor was any specific mention made of a referendum on Kosovo's future status.

495. The tense relationship between Yugoslav government and Albanian local population in Kosovo of late 1980s and early 1990s gave way to armed conflict that began in full scale in early 1998. From February 28, 1998, the situation was that of an internal armed conflict. The KLA in defence or for the Albanian population sought to resist and fight against the government authority and their war machine, whereas the government forces of the army, police, paramilitaries and allegedly foreign mercenaries resorted to the indiscriminate use of force."

B. The Human Rights Watch Report

1. Brief History of the Kosovo Conflict

496. "One must go back centuries to address fully the relationship between Albanians and Serbs and their struggles in Kosovo. Both consider the province central to their cultures and political well-being, and have proven willing to fight for control of the region. Keeping Kosovo and its historic sites a part of Serbia has become a centerpiece of Serbian nationalist policy. Violent confrontations have marked the area's history, although Albanians and Serbs have also fought as allies on occasion. Mutual accusations of atrocities in the Balkan Wars, World War I, and World War II, as well as battles long before, cloud the region's history.

497. While this background is central to understanding the conflict, and the region's history plays an important role in contemporary affairs, historical debates are

secondary to the more recent developments that influenced the Kosovo war. Selective versions of history and past grievances provided fertile ground for opportunistic politicians in the 1980s and 1990s to exploit the fears and frustrations of Albanians and Serbs. History was abused by aggressive nationalist politicians who benefited by promoting hatred, xenophobia, militarization and, ultimately, war.

2. Kosovo in the Socialist Federal Republic of Yugoslavia

498. After World War II, the federal constitution defined ethnic Albanians in Yugoslavia as a nationality "rather than a constituent nation", despite being the third largest ethnic group in the country. This was a status distinct from that of the other major ethnic groups in the country - Serbs, Croats, Bosnians, Slovenes, and Macedonians. Still, Yugoslavia provided a semblance of minority rights to all ethnic groups in the name of socialist "brotherhood and unity".

499. Kosovo was the poorest region in Yugoslavia. With the exception of the bountiful Trepca mines, most of the province is agricultural. Poverty and underdevelopment among all ethnic groups in Kosovo exacerbated tensions. Some improvements came after student demonstrations in the late sixties, such as increased public investment, the opening of a university in Pristina, and the recruitment of Kosovar Albanians into the local administration.

500. Endeavoring to strike a better balance among the country's competing ethnic groups - and to check the power of Serbia within the federation - Yugoslav leader Josip Broz Tito orchestrated a new constitution in 1974 to provide two regions in Serbia with more autonomy: Kosovo and Vojvodina (with a large ethnic Hungarian population). Although they did not achieve the status of federal republics like Bosnia, Croatia, Macedonia, Montenegro, Serbia, and Slovenia, the two provinces were declared "autonomous regions", which gave them representation in the federal presidency alongside Yugoslavia's republics, as well as their own central banks, separate police, regional parliaments and governments. Ethnic Albanians were brought into some of the ruling elite's inner circles.

501. Ethnic Albanians, who made up approximately 74 percent of the Kosovo population in 1971, took most key positions of power in Kosovo and controlled the education system, judiciary, and police, albeit under control of Tito and the Communist Party, which was the dominant political force in the country. The Albanian-language university in Pristina, opened in 1970, was promoted by the authorities.

502. Kosovo's autonomy was never embraced by a wide sector of the Serbian ruling elite, which viewed it as a threat to Serbia's interests and sovereignty. Autonomy for Kosovo and Vojvodina, some argued, had diluted Serbia's power in Yugoslavia. Criticism was muted during the seventies, but began to mount after Tito's death in 1980. The following year, ethnic Albanians, led by university

students initially discontented with bad food and poor dormitory conditions, took to the streets to demand higher wages, greater freedom of expression, the release of political prisoners, and republic status for Kosovo within Yugoslavia. Their demonstrations were dispersed forcibly by the Yugoslav Army and federal police, resulting in a number of ethnic Albanian deaths and numerous arrests over the ensuing months. Some political prisoners from that time, together with young men who fled Kosovo to avoid arrest, later formed the radical émigré groups in Western Europe that evolved fifteen years later into the KLA. A new ethnic Albanian communist leadership was installed by Belgrade. From 1981 on, pressure grew in Serbian political circles to rein in what was viewed as a growing "Albanian secessionism".

3. Treatment of Non-ethnic Albanians

503. Throughout the late 1970s and 1980s, Kosovo's Serbs complained of harassment and discrimination by the ethnic Albanian population and leadership, with the intention, Serbs claimed, of driving them from the province. According to a report submitted to the influential Serbian Academy of Sciences and Arts in 1988, more than 20,000 ethnic Serbs moved out of Kosovo in the years 1981-1987. Albanians claim that Serbs left for economic reasons because Kosovo remained Yugoslavia's poorest province.

504. Ethnic Serbs and other minorities, such as Turks and Roma, were subjected to harassment, intimidation, and sometimes violence by extremist members of the ethnic Albanian majority. The government in Kosovo, run by ethnic Albanians, did not take adequate steps to investigate these abuses or to protect Kosovo's minorities against them.

505. At the same time, the ethnic Albanian population was consistently growing with Kosovar Albanians having the highest birth rate in Europe, resulting in what the Serbian Academy of Sciences and Arts called, "heavy pressure not only on available resources, but also on other ethnic groups".

4. The Rise of Serbian Nationalism

506. The mid- and late-eighties were marked by a distinct rise in Serbian nationalism, especially among Serbs living outside of Serbia proper, who felt increasingly isolated and threatened by the nationalism that was rising around them in Croatia, Bosnia, and Kosovo. The most vocal were Serbs in Kosovo who complained about their mistreatment at the hands of ethnic Albanians.

507. In September 1986, a document from the Serbian Academy of Sciences and Arts was published that addressed "the Serbian question" in Yugoslavia. Known as the Memorandum, the document attacked Serbian politicians for doing nothing in the face of threats, attacks, and even "genocide" against the Serbs of Kosovo. Among other inflammatory claims, the Memorandum stated:

508. The physical, political, legal, and cultural genocide of the Serbian population of Kosovo and Metohija is a worse historical defeat than any experienced in the liberation wars waged by Serbia from the First Serbian Uprising in 1804 to the uprising of 1941.

509. Criticized by then-Serbian President Ivan Stambolic, the Memorandum reflected a common, albeit unspoken, sentiment among the Serb populace. With communism failing as an ideology, Serb politicians began to harness this discontent for their own political means.

510. No politician understood this better than Slobodan Milosevic, by that time communist party chief of Serbia. A communist apparachik and Stambolic protegé, Milosevic grasped the potency of fear and nationalism to fuel his own rise to power.

511. On April 24, 1987, Milosevic was sent to address a crowd of Kosovo Serbs in Kosovo Polje who were protesting maltreatment by Albanians. He rallied the demonstrators with the exhortation that: “No one should dare to beat you!” The phrase was repeated frequently on the Serbian state television that was under Milosevic’s control and became a rallying cry for Serbian nationalists. Making the conversion from communist to nationalist, Milosevic continued:

512. You should stay here. This is your land. These are your houses. Your meadows and gardens. Your memories. You shouldn't abandon your land just because it’s difficult to live, because you are pressured by injustice and degradation. It was never part of the Serbian and Montenegrin character to give up in the face of obstacles, to demobilize when it’s time to fight. You should stay here for the sake of your ancestors and descendants. Otherwise your ancestors would be defiled and descendants disappointed. But I don’t suggest that you stay, endure, and tolerate a situation you’re not satisfied with. On the contrary, you should change it with the rest of the progressive people here, in Serbia and in Yugoslavia.

513. With determined precision, Milosevic used his new found nationalist populism to eliminate political opponents, including Stambolic. The state media, especially the Serbian Radio and Television (RTS), purposefully spread misinformation on abuses against Serbs in Kosovo, including the rape of Serbian women, and campaigned to promote negative images of Albanians. Over the next two years, massive gatherings were held in Yugoslavia called the “Rallies of Truth” in which Milosevic invoked Serb glory and demanded constitutional changes to revoke Kosovo’s autonomy. In one such rally, Milosevic said:

514. We shall win the battle for Kosovo regardless of the obstacles facing us inside and outside the country. We shall win despite the fact that Serbia’s enemies outside the country are plotting against it, along with those in the country. We tell them that we enter every battle with the aim of winning it.

515. Ethnic Albanians organized their own strikes and public protests against the growing restrictions and repression in the province. Unlike the rallies in Serbia proper, the Albanian demonstrations were often broken up by force, and many ethnic Albanians were arrested. On November 17, 1988, the Kosovo communist party leadership was dismissed. A few days later, Kosovar Albanian miners went on strike at the Trepca mines near the town of Kosovska Mitrovica. On November 25, the Federal Parliament passed constitutional amendments that paved the way for changes to the Serbian constitution. Azem Vllasi, the communist party chief of Kosovo and then the leading ethnic Albanian politician at the Yugoslav federal level, was dismissed.

516. On February 20, 1989, the Trepca miners struck again, demanding the reinstatement of the Kosovo party leaders. The government deployed the army and imposed "special measures" on the region, which amounted to a form of martial law. An atmosphere of fear prevailed in the province, especially among ethnic Albanian political leaders and intellectuals. The other Yugoslav republics, especially Slovenia, began to protest Serbia's aggressive nationalism.

517. After a massive pro-Milosevic rally in Belgrade, Vllasi was arrested on March 2. Three weeks later, a new Serbian constitution was announced. The Kosovo assembly - mostly ethnic Albanians but under direct pressure from Belgrade - accepted the proposed changes to the Serbian constitution which returned authority to Belgrade.

518. While Belgrade celebrated, Kosovar Albanians vehemently protested the changes. On March 28, 1989, riot police opened fire on a protesting crowd, killing at least twenty-four persons. Although government forces may have come under attack, the state's response was indiscriminate and excessive. A joint report by Helsinki Watch and the International Helsinki Federation for Human Rights at the time found that there was "no justification for firing with automatic weapons on the assembled crowds".

519. Riding an ever-stronger wave of nationalism, Slobodan Milosevic was elected president of Serbia on May 8, 1989, a post he held for the next eight years, until he was elected president of Yugoslavia on July 23, 1997 - the position he held until October 2000.

520. In July 1989, the Serbian parliament passed the Law on the Restriction of Property Transactions, the first in a series of laws that severely discriminated against ethnic Albanians in Kosovo. The law forbade Albanians to sell real estate without the approval of a special state commission run by the Serbian Ministry of Finance. On March 30, 1990, the Serbian government adopted a new program that laid the ideological foundation for the government's policy in Kosovo. Ironically called, "The Program for the Realization of Peace, Freedom, Equality,

Democracy, and Prosperity of the Socialist Autonomous Province of Kosovo" the program stated:

521. The autonomy of Kosovo may not serve as an excuse or reason for the malfunctioning of the legal state and possible repetition of nationalistic and separatist unrest and persistent inter-ethnic tension. It may not be misused in pursuit of unacceptable and unfeasible goals: prevention of the return of Serbs and Montenegrins, displaced under pressure, and all the others who wish to come and live in Kosovo, and especially for any further emigration of Serbs and Montenegrins and secession of a part of the territory of the Republic - the state of Serbia so as to constitute a new state within or without Yugoslavia.

5. The Revocation of Kosovo's Autonomy

522. On July 2, 1990, ethnic Albanian members of Kosovo's politically gutted assembly declared Kosovo's independence. Two months later, on September 7, members of the parliament, which had been dissolved on July 5, met secretly and adopted a new constitution of the Republic of Kosova. A clandestine government and legislature were elected. Three weeks later, on September 28, the Serb Assembly promulgated the new Serbian constitution that formally revoked the autonomous status of both Kosovo and Vojvodina.

523. The new Serbian constitution was important because, by formally revoking the autonomy of Kosovo and Vojvodina, Serbia assumed two additional seats in the eight-member Yugoslav presidency. In coalition with its partner Montenegro, the "Serbian Block" controlled half of the federal body.

524. In September 1991, Kosovar Albanians held an unofficial referendum on independence. Ethnic Albanians voted overwhelmingly for independence from Yugoslavia. The Yugoslav government refused to recognize the results. Only the government in Albania, at that time still ruled by the communist party, recognized Kosovo's independence.

6. Albanian Non-Violence and the Parallel State

525. Kosovar Albanians responded to the revocation of autonomy by creating their own parallel state which was, based on the September 1991 referendum, declared independent from Yugoslavia. Albanian deputies of the dissolved parliament established "underground" institutions of government, and Kosovar Albanians refused to recognize the Serbian state.

526. Underground parliamentary elections on May 24, 1992, established the three-year-old Democratic League of Kosova (Lidhja Demokratike te Kosoves, or LDK) as the strongest ethnic Albanian party and a previously little-known literary figure, Ibrahim Rugova, was named president. The LDK expanded the parallel system and established structures to collect taxes from Albanians in Kosovo and

from the ever-growing diaspora community. Rugova and a prime minister, Bujar Bukoshi, represented the "Kosova Republic" abroad.

527. The revocation of Kosovo's autonomy and the subsequent abuses garnered little response from the international community, which was increasingly preoccupied with the growing conflict in Slovenia, Croatia, and then Bosnia. In the summer of 1992, the Conference for Security and Cooperation in Europe (now the Organization for Security and Cooperation in Europe (OSCE)) sent missions to Kosovo, Vojvodina, and Sandzak, but the missions were forced to leave in July 1993 when the Yugoslav government refused to renew the mandate.

528. In December 1992, after Serbian special police forces had enforced rule in Kosovo, U.S. President George Bush issued what became known as the "Christmas Warning". Bush reportedly wrote, in a letter to President Milosevic, that the U.S. would be "prepared to employ military force" in the event of conflict in Kosovo caused by Serbian action - a warning that was repeated by President Clinton when he came to office a few months later.

529. The United States and West European governments strongly encouraged ethnic Albanians to pursue a moderate approach, fearing that a conflict in Kosovo would spin out of control and engulf the region. The primary goal was to avoid a conflagration in Kosovo, and non-confrontation, the West believed, was the best way to achieve this.

530. Rugova was identified as the prime advocate of this moderate line and received the unconditional support of Western governments, especially the United States. He was frequently invited for high level meetings in Washington and West European capitals which greatly boosted his popularity among the strongly pro-Western Kosovar Albanian public. At the same time, however, Western governments never expressed support for Kosovo's independence, although most Kosovar Albanians believed the West did so.

531. Meanwhile, thousands of Kosovar Albanian men were leaving Kosovo for the United States and Western Europe due to ongoing persecution or fear of being drafted into the Yugoslav Army. Many of these disenfranchised young men abroad and in Kosovo, without education or steady employment, later joined the insurgency.

7. The Downward Cycle of Violence

532. In early 1996, the first organized violence took place against Serbian civilians and police. Although individual attacks had occurred before then, the first coordinated attack occurred on February 11, when grenades were thrown at the gates of Serbian refugee camps in Pristina, Mitrovica, Pec, Suva Reka, and Vucitrn. No one was injured.

533. In this climate of increasing violence, Milosevic allowed the U.S. government to open a U.S. Information Agency office in Pristina, which was welcomed warmly by Kosovar Albanians as a sign of increased American involvement. The office, considered wrongly by some Albanians as an embassy, was announced in early February and opened in July 1996.

534. By mid-1996, there was a clear pattern of arbitrary and indiscriminate retaliation by the Serbian police and special security forces against ethnic Albanians who lived in the areas where KLA attacks were taking place. Police broke into private homes without warrants and detained ethnic Albanians, often abusing them physically.

535. The next important political development came on September 1, 1996, when Rugova and Milosevic signed a much-heralded education agreement that envisaged unconditional return to Albanian-language schools for ethnic Albanian pupils, students, and teachers. The details were to be worked out by a joint commission of three Serbs and three Albanians. Despite the international fanfare, the agreement was never implemented, and ethnic Albanian pupils remained locked out of most school buildings.

536. On September 31, 1996, the U.N. lifted sanctions on Yugoslavia that had been in place since May 1992, and many European states upgraded diplomatic relations with Yugoslavia. European Union countries began to re-establish diplomatic relations with Belgrade - broken during the war in Bosnia. France, Italy, and Greece restored a high level of economic relations.

537. Human rights abuses in the province intensified toward the end of 1996 as the government attempted to weed out the growing insurgency. Publicly, the Serbian government continued to deny that human rights violations existed and officials defended the need to protect the sovereignty of the state.

538. At the end of 1996, the political scene inside Serbia changed. In municipal elections on November 17, opposition parties won in fourteen of Serbia’s nineteen largest cities. The government declared “unspecified irregularities” in those areas where the ruling party had lost, sparking eighty-eight days of peaceful demonstrations by opposition party supporters and students, some of which were broken up forcibly by the police. The government recognized the election results on February 22, 1997, but it did so without losing power on the national scene. Internal bickering and power struggles quickly weakened the opposition's power and support.

8. Growth of the Kosovo Liberation Army

539. The KLA continued its attacks against Serbian policemen and civilians in early 1997, especially in the more rural areas, although the group’s size, structure, and

leadership remained a mystery. The insurgency's impact was limited by restricted access to arms.

540. This changed with the dramatic 1997 events in Albania. By March, the so-called "pyramid schemes" (linked with money laundering and other illegal activities) that the Albanian government had allowed to flourish collapsed, creating mayhem throughout the country. In the ensuing lawlessness, weapons depots were looted and, in some cases, opened by the government. More than 100,000 small arms, mostly Kalashnikov automatic rifles, as well as some heavier weapons, were readily available for prices as low as fifty German Marks. Many of these arms found their way across the northern border into Kosovo.

541. By late 1997, the central region of Drenica was known among ethnic Albanians as "liberated territory" because of the strong KLA presence. Serbian police only ventured into the area during the day.

9. The 1998 Armed Conflict - The Drenica Massacres

542. The Serbian government launched a major assault on the central Drenica valley, a stronghold of the KLA. On February 28 and March 1, responding to KLA ambushes of the police, special forces attacked two adjacent villages, Cirez (Qirez) and Likosane (Likoshane). On March 5, special police attacked the nearby village of Prekaz-home of Adem Jashari, a known KLA member. Jashari was killed along with his entire family, save an eleven year-old-girl. In total, eighty-three people lost their lives in the three attacks, including at least twenty-four women and children.

543. Although the KLA engaged in combat during these attacks, Serbian special forces fired indiscriminately at women, children, and other non-combatants. Helicopters and military vehicles sprayed village rooftops with gunfire before police forces entered the village on foot, firing into private homes.

544. The Serbian police denied any wrongdoing in the attacks and claimed they were pursuing "terrorists" who had attacked the police. A police spokesman denied the "lies and inventions" about indiscriminate attacks and excessive force carried by some local and foreign media and said "the police has never resorted to such methods and never will".

545. The Drenica massacres also marked the beginning of the Kosovo conflict in the terms of the laws of war. It was only after February 28, 1999, that the fighting clearly went beyond mere internal disturbances to become an internal armed conflict.

546. The significance of the Kosovo conflict being classified an "armed conflict" went beyond a mere invocation of standards. Once open conflict broke out, the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia over

Kosovo began. Mandated to prosecute crimes against humanity and violations of the laws or customs of war in the territory of the former Yugoslavia, the tribunal, on March 10, stated that its jurisdiction "covers the recent violence in Kosovo", although tribunal investigators did not visit the province until four months later.

547. As the conflict grew, so too did the insurgency. Money from the diaspora community that was previously given to the LDK was increasingly diverted to the fund of the KLA, known as Homeland Calling. Increasingly, Albanian men from Western Europe and later the U.S. joined the insurgency.

10. Role of the International Community

548. Over the next seven months, notwithstanding continued state violence, threats of sanctions and other punitive measures were weakly, if ever, enforced. Concessions were granted after the slightest progress, after which Serbian commanders, under the command of Milosevic, would often order renewed violence.

549. On March 9, the Contact Group met in London and gave the FRY government ten days to meet a series of requirements, including: to withdraw the special police from Kosovo and cease actions against the civilian population by the security forces; to allow access for the ICRC and other humanitarian organizations as well as by representatives of the Contact Group and other diplomatic representatives; and to begin a process of dialogue with the Kosovar Albanian leadership. The Contact Group proclaimed that, if President Milosevic took those steps, it would reconsider the four punitive measures that it had adopted. If he failed to comply, the group would move to further international measures, including an asset freeze on FRY and Serbian government funds abroad.

550. The Contact Group met again on March 25. In the days prior to the March 25 meeting, the Milosevic government briefly reduced the police attacks in Kosovo and agreed to implement the education agreement, a long-standing demand of the international community and one of many needed confidence-building measures cited in the March 9 Contact Group statement. Though not enough to bring the Contact Group to lift its previously adopted measures, the FRY gestures kept the group from imposing new measures and bought Milosevic some time. The Contact Group agreed to meet again in four weeks to reassess the situation.

551. On March 31, the Security Council passed Resolution 1160 which condemned violence on all sides, called for a negotiated settlement, and imposed an arms embargo on Yugoslavia. In April 1998, Milosevic organized a popular referendum on whether there should be international mediation in the Kosovo conflict. The vote for no international involvement was overwhelming.

552. During the second quarter of 1998, the KLA, called a "liberation movement" by most ethnic Albanians and a "terrorist organization" by the Yugoslav government,

took loose control of an estimated 40 percent of Kosovo's territory, including the Drenica region and the area around Malisevo. KLA spokesmen, increasingly in the public eye, spoke of "liberating Pristina" and eventually Kosovo. Serb civilians in areas under KLA control were harassed or terrorized into leaving, by assaults, kidnapping, and sporadic killing.

553. In late April and early May, the KLA took control of the villages northeast of the main road running between Decani (Decane) and Djakovica, with a headquarters in Glodjane. Serbs were forced out of these villages and fled to Decani town, where inter-ethnic tensions increased sharply.

554. After five days of intense shuttle diplomacy by U.S. Special Envoy Richard Holbrooke, Milosevic and Rugova agreed to meet on May 15 in Belgrade, together with four other Kosovar Albanian representatives.

555. In a major concession to Milosevic, the meeting took place without the presence of foreign mediators, a long-time condition set by both the international community and the Kosovar Albanians. Milosevic agreed to continue negotiations and named a team to be headed by Ratko Markovic, Deputy Prime Minister of Serbia. After the meeting, Milosevic's office issued the following statement:

556. President Milosevic pointed out that it is only by political means - through a direct dialogue on the basis of principle - that peaceful, human, just and lasting solutions to the problems in Kosovo and Metohija can be found. These solutions should be based on the equality of all citizens and ethnic communities in Kosovo and Metohija.

557. In the first known joint action between the Serbian special police and the Yugoslav Army, government forces attacked a string of towns and villages along the border with the specific intent of depopulating the region and ousting the KLA.

558. Although there was clearly fighting between the government and the KLA, many villages from Pec in the north to Djakovica in the south were shelled indiscriminately without consideration for civilian lives. Non-combatants who fled the attacks were sometimes fired on by snipers, and a still undetermined number of people were taken into detention.

559. Around the same time, Milosevic also took steps to consolidate his power in Serbia proper. In May 1998, the Serbian parliament passed a highly restrictive university law that marginalized independent or opposition-oriented academics. The government also continued its assault on the independent media by refusing broadcast licenses to some independent radio and television stations. Milosevic's political ally from Montenegro, Momir Bulatovic, was appointed Yugoslav prime minister.

560. While the first FRY government offensive partially dislodged the KLA along the border with Albania, the insurgents gained territory in other parts of Kosovo, especially around Malisevo. The rebels' growth throughout the spring dispelled thoughts of international military action as too likely to tip the balance in favor of Kosovo independence. Forceful KLA statements about "liberating Pristina" and even eventual unification with Albania made the international community even more reluctant to take any action that might be construed as supporting the insurgency.

561. Emboldened, the KLA's first major offensive began on July 19 when it attempted to capture the town of Orahovac. The offensive failed badly, as the police recaptured the town two days later, as well as the KLA stronghold of Malisevo. In the Orahovac fighting, at least forty-two ethnic Albanians were killed. Witnesses reported summary executions and the use of human shields by the police. An estimated forty Serbs also vanished during the brief time that the city was under KLA control, most of who were still missing and are presumed to have been murdered as of August 2001 (see section below on KLA Abuses in 1998).

562. The government forces intensified their offensive throughout July, August, and September despite repeated promises from Milosevic that it had stopped. By mid-August, the government had retaken much of the territory previously held by the KLA. Unable to protect the civilian population, the KLA retreated into the hills of Drenica and some pockets in the west and south of Kosovo.

11. Government Abuses in 1998

563. The government offensive, which continued unabated despite the deployment of KDOM, was an apparent attempt to crush civilian support for the rebels. Government forces attacked civilians, systematically destroyed towns, and forced thousands of people to flee their homes. The police were repeatedly seen looting homes, destroying already abandoned villages, burning crops, and killing farm animals, as well as committing summary executions, all violations of the rules of war. The majority of those killed and injured were civilians.

564. The Serbian and Yugoslav government offensive closed in late September with serious combat around Suva Reka and in the Drenica region. On September 27, KDOM [Kosovo Diplomatic Observer Mission established 6 July 1998] observers discovered the bodies of twenty-one ethnic Albanian civilians executed in the forest near the village of Gornje Obrinje (Abri i Eperme). The next day, researchers from Human Rights Watch and journalists visited the site and documented the killings, as well as the execution of thirteen ethnic Albanian men in nearby Golubovac. The massacre galvanized world opinion and helped spark a new round of diplomatic negotiations led by the U.S.

12. KLA Abuses in 1998

565. The KLA also committed serious violations of international humanitarian law during this time, as well as in early 1999, including the taking of hostages and extrajudicial executions. On June 21, 2000, in Pristina, ICTY chief prosecutor Carla Del Ponte announced that “five episodes” of alleged KLA crimes were under investigation by the tribunal.

566. In some villages in areas of KLA control, the rebels drove ethnic Serbs from their homes. In some cases, elderly Serbs stayed behind, either too old to flee or unwilling to abandon their homes. Some of these people went missing and are presumed dead. The KLA also attacked and killed or seized some ethnic Albanians and Roma whom it considered “collaborators” with the Yugoslav government.

13. Response of the International Community

567. The international response to the summer offensive was considerably weakened by persistent disunity within the international community. In the Security Council, China and Russia, both permanent members with veto power, maintained that the conflict was an internal matter for resolution by the Yugoslav authorities. This position effectively blocked a forceful Security Council response to the conflict.

568. Prior to September, the only measure adopted by the Security Council having any bite had been Resolution 1160, passed on March 31, 1998, imposing an arms embargo on FRY, a position reached with China abstaining and only after repeated warnings by the Contact Group had been ignored. U.N. Security Council Resolution 1199, passed on September 23, 1998, (again with China abstaining), went further by condemning acts of violence committed in Kosovo, reaffirming the arms embargo and, under authority of Chapter VII of the U.N. Charter, demanding an immediate cessation of hostilities.

569. Resolution 1199 also called upon the FRY and Kosovar Albanian leadership to enter into immediate and meaningful dialogue and demanded that FRY implement immediately the measures set out in the June 12 statement of the Contact Group. The resolution called on the president of FRY to implement his own commitments from the June 16 joint statement with Yeltsin, among other things, not to carry out any repressive actions against the peaceful population, to facilitate refugee return, and to ensure full access for the ICRC and UNHCR. The resolution also called on the government of FRY, the Kosovar Albanian leadership, and all others to cooperate fully with the prosecutor of the ICTY, and it underlined the need for FRY authorities to bring to justice members of security forces involved in mistreatment of civilians and the deliberate destruction of property. It stated that the Security Council would consider “further action and additional measures” if the measures demanded in its two resolutions were not taken. Porous borders, a

well-established Balkan arms market, and weak enforcement had kept the embargo from having any substantial impact on the ground.

570. On September 24, NATO took the first formal steps toward military intervention in Kosovo, issuing an “ACTWARN” for both a limited air option and a phased air campaign in Kosovo.

14. The Deployment of the Kosovo Verification Mission

571. U.S. envoy Richard Holbrooke flew to Belgrade for talks with Milosevic. At the same time, after the Gornje Obrinje killings, the Serbian police and Yugoslav army wrapped up the summer offensive in the end of September and began a partial withdrawal from Kosovo. As one Serbian journalist wrote of the Gornje Obrinje massacre, government forces “slammed the door on the way out”.

572. With the offensive over, Milosevic had largely achieved his goals, and then granted Holbrooke some concessions: a cease-fire, NATO air surveillance to verify compliance with UN Security Council Resolution 1199, and the deployment of an observer mission from the Organization for Security and Cooperation in Europe (OSCE) called the Kosovo Verification Mission (KVM). By January 1999, the KVM had 2,000 observers in the field, many of them westerners with military experience. Human rights officers were also deployed throughout the province to monitor, document, and publicly report on violations. A subsequent agreement brokered by NATO set the limit of Yugoslav Army and Serbian Ministry of Internal Affairs troops allowed in Kosovo. Hours before the deadline for meeting these limits, the Yugoslav government complied.

573. A major turning point took place on January 15, 1999, when forty-five ethnic Albanians were killed in the village of Racak. Although the attack was possibly provoked by a KLA ambush that killed three Serbian policeman a few days before, government forces responded by shooting at civilians, torturing detainees, and committing summary executions.

574. The massacre in Racak was well documented by the OSCE mission, and immediately condemned by the mission’s head, U.S. diplomat William Walker. The Yugoslav government said that the Albanians were KLA fighters killed in combat, and threatened to expel Walker - labeled “a representative and a patron of separatism and terrorism” from the country.79 On January 18, Chief Prosecutor Louise Arbour of the war crimes tribunal was denied entry into Kosovo, where she planned to investigate the Racak incident.

575. The Racak massacre provoked an outcry among the Western public and Western governments began consulting on ways to back up diplomacy with force. NATO increased its threats of military action if attacks on civilians did not stop.

15. The Rambouillet Conference

576. Kosovar Albanians and Serbs were hastily summoned to a government chateau in Rambouillet, France, for negotiations between February 6 and 22, 1999. The British and French foreign ministers co-sponsored the talks, with negotiators from the U.S., Austria (as president of the E.U.) and Russia. A diverse delegation of Kosovar Albanians representing the various political forces elected Hashim Thaci, political leader of the KLA, as their spokesman. Milosevic refused to attend and sent Serbian president Milan Milutinovic to head a motley delegation of ethnically diverse but unimportant representatives from Kosovo - an attempt to demonstrate his multi-ethnic and tolerant approach to the province.

577. After two weeks, the negotiators presented both sides with an interim agreement that would have provided for substantial autonomy and self-government for Kosovo inside Yugoslavia, protected by a strong NATO presence on the ground. The final status of Kosovo was to be worked out in three year's time by an international conference.

578. The Serbian delegation refused to sign, stating that Kosovo was an integral part of Yugoslavia. Some parts of the accords were clearly of particular concern to the delegation, such as NATO's unrestricted access throughout Yugoslavia and NATO's authority to detain individuals. The Kosovar Albanian delegation, while more inclined to give support, said it needed approval from the regional commanders of the KLA - a reflection of the group's decentralized character. The conference was halted while Thaci returned to Kosovo to get the commanders agreement. The conference reconvened in Paris on March 15. Three days later, under great pressure from the West, the Kosovar Albanian delegation signed.

579. Throughout the conference, Serbian and Yugoslav forces were observed positioning themselves around the Kosovo border with Serbia proper, a clear indication - coupled with the Serbian delegation's intransigence - that a military offensive was in preparation. According to the OSCE, "a significant build up of VJ forces" was taking place throughout Kosovo. Many observers believe that Milosevic never had any intention of signing an agreement; he simply used the time to further reinforce his troops, and he gained three weeks because of Thaci's need to consult commanders inside Kosovo.

580. In anticipation of the NATO bombing and the deteriorating security situation, the OSCE's KVM mission withdrew from Kosovo on March 20. Although there had been fear the observers would be seized as hostages, government forces welcomed rather than hindered their withdrawal. That day, attacks against Kosovar Albanians began in parts of Kosovo, notably Drenica and the Llap region near Podujevo. Yugoslav soldiers, Serbian special police, paramilitaries, and armed irregulars poured into the province. With no local information, ethnic Albanian civilians sat waiting for the worst.

581. In a final effort to avoid bombing, U.S. special envoy Richard Holbrooke flew to Belgrade to meet Milosevic and threaten air strikes unless he signed the agreement. He left empty-handed on March 23 and, the next day, NATO air strikes commenced without awaiting approval from the United Nations Security Council."

16. Forces Involved in the Conflict

582. "The government forces involved in the conflict were a complex combination of the Serbian Ministry of Internal Affairs police and special police, Yugoslav Army soldiers and special units, *paramilitary forces*, *local militias*, all operating under orders from the government in Belgrade. The Yugoslav Army had overall command during the period of NATO bombing, with the police and paramilitary forces subservient to its orders according to law, although top officials in the Serbian Ministry of Internal Affairs clearly exercised significant influence over the campaign. The army controlled the main roads and the borders, coordinating and facilitating the "ethnic cleansing". The police and paramilitary forces were more involved directly in the expulsion of civilians and destruction of villages, with artillery support from the army. It is during these operations that men sometimes were separated from women and children, interrogated about the KLA, and summarily executed.

583. The structure of the Serbian Ministry of Internal Affairs (Ministarstvo Unutrasnjih Poslova, or MUP), from what the witnesses testified also contained the state security service, or secret police, which played a major role in Kosovo. In addition to covert activities monitoring and harassing ethnic Albanian political activists and the KLA, state security also deployed its special operations units, and assisted various paramilitary organizations. The report then endorses the quotation that we have taken from the testimony of Mete Krasniqi:

584. Lastly, various paramilitary forces as well as foreign gunmen were active in Kosovo, largely under the control of the central government. Aside from being among the most violent forces in Kosovo, one of the paramilitaries' primary activities was looting and theft.

585. Although the precise lines of command and control of these paramilitary forces remain unclear, they clearly cooperated closely with the Yugoslav Army and Serbian police. At times, individual members of the police or army tried to warn or protect ethnic Albanian civilians from paramilitary forces, although this was rare; more commonly, regular militias and police personnel worked closely with paramilitary units, often maintaining a cordon around targeted communities while paramilitary troops moved in. There is much evidence of this from the massacre at Zahaq where three friends of the accused warned some of their village mates of the impending attack by Serb forces.

586. The various units and groups within the MUP make the chain of command less discernible than with the Yugoslav Army. According to Yugoslav law, in a declared state of war, the Yugoslav Army has jurisdiction over the Serbian police, thereby giving the Yugoslav Army *de facto* and *de jure* command of the police during the period of the war especially during the NATO bombing HRW, Public Prosecutor:. 9-11.

587. The Serbian and Yugoslav government security forces are a complex combination of republican and federal institutions, along with more clandestine groups of irregulars and paramilitaries. The Yugoslav Army's military police and army special forces, antiterrorist units of the Serbian police and special police, special forces of the secret police, paramilitary groups, international mercenaries, and armed local Serbs were all active in Kosovo in 1998 and 1999 in operations coordinated by Belgrade.

588. The various forces often engaged in joint operations, in close coordination, and at times used interchangeable uniforms. Insignias were not always displayed, and nametags or identification numbers were rarely visible. Many of the government's forces came from outside Kosovo, making it difficult for Kosovar Albanians to identify either a particular force or individuals, compounded by the difficulties of observation in a violent and shocking environment.

589. But paramilitary forces were not operating on their own. On the contrary, paramilitary units were operating in close concert with the police, army, and secret police (known as the state security service). There may have been specific incidents when paramilitary units or individuals got out of control, but the general deployment of paramilitary units and their coordination with other sectors of the security apparatus were planned components of the Kosovo campaign.

590. In general, it appears that the Yugoslav Army was in command during the war, with the police and paramilitaries subordinate to its orders, although top officials of the Serbian Ministry of Internal Affairs exercised significant influence over the campaign. The army controlled the main roads and the borders, coordinating and facilitating the "ethnic cleansing". The police and paramilitaries were more directly involved in expulsions and the destruction of villages, with artillery support from the army. It is during these operations that men were separated from women and children, interrogated about the KLA, and sometimes executed.

591. The two principal military forces in Yugoslavia in 1998 and 1999 were the Yugoslav Army (Vojska Jugoslavija, or VJ) and the Republic of Serbia's Ministry of Internal Affairs (Ministarstvo Unutrasnjih Poslova, or MUP). The Republic of Montenegro's Ministry of Internal Affairs remained loyal to the Montenegrin government and were not active in Kosovo.

592. From the time he became president of Serbia in 1989, Slobodan Milosevic gradually strengthened and expanded the MUP over the VJ and the Yugoslav

federal police, both of which he viewed as less loyal forces. Friction between the MUP and VJ occasionally emerged over the increased resources and prestige provided to the former. One noted incident regarding Kosovo occurred after the first police attacks on Drenica in late February and early March 1999, in which more than eighty people were killed, including twenty-four women and children (see Background). An unnamed high official of the Yugoslav Army cited in the Serbian press criticized the police for their "completely amateurish manner", saying that the operation had acquired "the dimensions of a massacre" because the police "succumbed to emotions".

593. Only the Serbian regular police, special police, and possibly state security special forces were active in Kosovo in the first half of 1998. The army, although present in the province, was restricted to maintaining security along the borders with Macedonia and Albania. This changed in April 1998, when the army participated in military actions in southwestern Kosovo along the border with Albania. The army and the police cooperated from that point on, but for the most part, actions against the KLA remained the responsibility of the Serbian Ministry of Internal Affairs throughout 1998.

594. The primacy of the MUP began to change in late 1998 and early 1999 when President Milosevic reshuffled some key members of the police and army, placing known loyalists in top positions. Among other changes, Dragoljub Ojdanic replaced Momcilo Perisic as Chief of General Staff of the Yugoslav Army and Nebojsa Pavkovic was promoted to commander of the VJ's Third Army, which had responsibility for southern Serbia and Kosovo. Radomir Markovic replaced Jovica Stanisic as head of Serbia's security service (for more details, see Background). In late March 1999, when faced with attacks by NATO, the police, army, paramilitaries, and other irregulars units coordinated their attacks on the KLA and their defense against air strikes.

595. It should also be noted that Serbian state security played a major role in Kosovo throughout the 1990s, monitoring Kosovar Albanian political circles, especially the KLA. State security also had a special operations unit called the JSO (Jedinice za Specijalne Operacije - Special Operations Unit), which was active in Kosovo in 1998 and 1999.

17. Serbian Ministry of Internal Affairs (MUP)

596. The structure of the Serbian Ministry of Internal Affairs (MUP) is far more complicated than that of the VJ, which has a transparent chain of command. The profusion of units and groups within the MUP make such a hierarchy less discernible, although it is clear that, according to law, ultimate authority for the MUP during the war rested with then-Yugoslav President Slobodan Milosevic. Although he was not at the top of the MUP's de jure chain of command during times of peace, a position nominally held by the Serbian Minister of Internal Affairs, he was the indisputable de facto commander of its forces. According to

Yugoslavia's Law on Defence, during a state of war, the republican police come under the jurisdiction of the Yugoslav Army. A state of war existed in Yugoslavia between March 24 and June 10, 1996.

597. The security apparatus of the Serbian MUP is divided into three branches: the public security service, the state security service (known as the SDB-Sluzba Drzavne Bezbednosti), and educational institutions, such as the police academy. The public security service has eleven departments, including the police department. The state security service, or SDB, is also known as the secret police.

598. Within the MUP were also many local militia and reservist groups, such as Munja ("Lightning") in Pec, which was responsible for the massacre in Cuska village on May 14.

18. Structure and Strategy of the KLA

599. Since World War II, small groups of militant Albanians had sought Kosovo's independence from Yugoslavia, although their activity and impact were minimal. Some of these organizations, such as the Levizja Popullore per Republiken e Kosoves (People's Movement for the Republic of Kosovo) and later the Levizja Kombetare per Clirimin e Kosoves (National Movement for the Liberation of Kosovo) gained strength in the 1980s, especially after the government's crackdown in 1981. Support was provided by Kosovar Albanians living abroad, as well as through illegal activities by Kosovar Albanians in the Balkans and Western Europe.

600. Throughout the 1990s, the majority of the population pursued the peaceful politics of Ibrahim Rugova, but a fringe element of militants was active in some areas, especially Drenica. As repression in Kosovo continued, the movement gradually gained members and, as noted above, the initial fragments of the Kosovo Liberation Army were, by 1996, attacking police outposts in Kosovo. The flow of weapons from Albania in 1997, after the government there fell, greatly assisted the nascent insurgency.

601. A crucial turning point came with the police crackdown in Drenica in February and March 1998, in which more than eighty civilians were killed. The brutality of the Serbian government radicalized the Albanian community. Many villagers turned to the KLA either out of frustration with Rugova's ineffective non-violent approach or because they saw the KLA as their only means of protection. At the same time, some villages clearly did not encourage the presence of the armed group, since they feared it would provoke a government response, which it often did.

602. Throughout early 1998, the KLA was primarily a disorganized collection of armed villagers, often built around family structures, without a clear chain of command. Strong regionalism dominated the organization, as evidenced by the

post-war splintering of the insurgency. Operational areas raised their own funds and purchased their own weapons.

603. This changed gradually throughout the year as the KLA secured a steadier arms supply and organized itself into a more centralized structure. Ethnic Albanians with experience in the Yugoslav Army or its predecessor in the former Yugoslavia, the Yugoslav National Army (Jugoslovenska Narodna Armija, or JNA), gradually joined the insurgency. Contacts with Western governments, mostly through KDOM or the KVM, were strengthened. The ceasefire period from December 1998 to March 1999 was used to strengthen the central command and to reorganize operations. By March 1999, the KLA was a better organized rebel force, albeit with strong personalities in the various regions who did not always agree with one another. A military police force and military courts were more firmly established with detention facilities, along with civilian political structures that issued decrees in areas under KLA control.

604. By 1999, the main political representative of the KLA was Hashim Thaci (a.k.a. Snake), who represented the insurgency at political negotiations such as the Rambouillet conference in February 1999. In April 1999, Agim Ceku, an ethnic Albanian former brigadier general in the Croatian Army with close ties to the United States government and military, was appointed head of the KLA's General Staff, making him the chief military commander. He replaced Syleman Selimi (a.k.a. Sultan). Both Ceku and Thaci sat on the KLA's General Staff (Stafi i Pergjithshem), the main decision-making body of eighteen people, along with many of the other key members of the insurgency.

605. The KLA was organized into seven operational zones, each with a regional commander and chief of staff: Drenica (Glogovac, Srbica, Malisevo, and Klina municipalities), Shala (Kosovska Mitrovica), Dukagjin (Pec, Prizren, Decani, and Djakovica municipalities), Llap (Podujevo), Nerodine (Urosevac), Kacanik, and Pastrik. Prominent among the regional commanders were Ramush Haradinaj in the Dukagjin zone, Ekrem Rexha (a.k.a. Commander Drini) in the Pastrik zone, Rrustem Mustafa (a.k.a. Remi) in the Llap zone, and Sami Lushtaku in Drenica. Each region had brigades and companies, usually based around a village or series of villages. Rexhep Selimi was head of the military police and Kadri Veseli (a.k.a. Luli) was head of the KLA's secret service, that later became known as the Sherbimi Informativ i Kosoves (SHIK).

606. Given the regional divisions within the KLA, a central chain of command was sometimes difficult to discern. Even within the operational zones, it was not always clear how much control the various commanders had over their troops.

607. On the other hand, as 1998 progressed, regionally based and central command structures were increasingly discernible. Local commanders initiated military actions and issued decrees within their areas of responsibility. The military police and courts were functioning, albeit haphazardly, in areas of KLA control. The

General Staff coordinated military actions and political activities to an extent throughout Kosovo, a structure which allowed decisions to be transmitted down to the fighters. It also coordinated logistical and financial support from Albania and the Albanian diaspora in Western Europe and the United States.

608. In interviews and public statements, KLA spokesmen repeatedly expressed the organization's willingness to respect the rules of war. In an interview given to the Albanian-language newspaper Koha Ditore in July 1998, KLA spokesman Jakup Krasniqi said, "From the start, we had our own internal rules for our operations. These clearly lay down that the KLA recognizes the Geneva Conventions and the conventions governing the conduct of war."

609. KLA Communique number 51, issued by the KLA General Headquarters on August 26, 1998, stated that, "The KLA as an institutionalized and organized army, is getting increasingly professional and ready to fight to victory."

610. In addition to the above the International Prosecutor also referred to the following fact. On 24 February 2003, Latif Gashi, a high-ranking KLA officer answering charges of war crimes in a different case said that "a few days before the 15th or 16th May 1998 the Shala Operative Zone had become public". He was referring to a Zone of the KLA. This would illustrate not only that the KLA was organized but was also a military group with military hierarchy. The KLA had a spokesperson; it described itself as an organized army and considered itself as responsible for its own acts. The KLA's view of itself therefore, coupled with its command structure, its control and use of so much territory of Kosovo, about 40 percent between April and July 1998 which included numerous towns, made it an insurgent armed group."

IX

A. THE EXISTENCE OF THE CONFLICT

1. Facts Establishing the Conflict

611. Article 2, common to the four Geneva Conventions of 1949, states that an international armed conflict must involve a declared war or any other armed conflict which may arise "between two or more of the High Contracting Parties" to the Convention. The official commentary to the 1949 Geneva defines an armed conflict as any difference between two States leading to the intervention of armed forces.[26] In the Tadic case the Appeals Chamber of the ICTY[27] stated that *an armed conflict exists wherever there is resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State*.

[26] International Committee of the Red Cross (ICRC), Commentary III Geneva Convention, 1960.
[27] Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

612. The official commentary to Common Article 3 of the Geneva Conventions, which regulates internal armed conflicts, lists a series of conditions that, although not obligatory, provide some pertinent guidelines. First and foremost among these is whether the party in revolt against the *de jure* government, in this case the KLA, "possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention".

613. The 1977 Protocol II to the Geneva Conventions governs internal armed conflicts that reach a higher level of hostilities, which is more elaborate than Common Article 3 in its protection of civilians. Protocol II is invoked when armed conflicts:

> *Take place in the territory of a High Contracting Party (i.e. signing party of the document) between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*

614. In the Tadic[28] case the Trial Chamber referred to the test applied to an armed conflict by the Appeals Chamber in 1995

> *The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.* [Para. 562]

615. From the facts and principles discussed above, there is no doubt that the conflict that was taking place in Kosovo involved the KLA, which was a well structured organization, and the members of either Serbian regular forces officially so designated, or other forces that were involved in the conflict with the express or tacit assent of the Serbian government. These unofficial forces could be described as agents of the Serbian government.[29] From the testimony of witnesses there were various kinds of Serb forces involved in the war and in the atrocities committed against the civilian Albanian population. It was a mixture of the military, paramilitary, police and militia.

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[28] See footnote 14.
[29] See discussion Tadic case, footnote 14, paras. 585 to 606.

616. There was no doubt well structured forces fighting each other in Kosovo itself and that the level of the fighting was quite intense. It cannot also be disputed that the aim of the Serbian government was to fight people and an organization, that were in their assessment, insurgents just it was the aim of the KLA and other inhabitants of Kosovo to fight the invaders. The fact that atrocities were committed on either side does not change this factual situation. Given the forces involved and the intensity of the fighting there was an armed conflict at the critical time in Kosovo. The Yugoslav government clearly recognized the KLA as an organized armed force. In addition to the Serbian regular and special police, who operated similar to a military organization, the government used its regular military forces, the Yugoslav Army, against the insurgents.

2. The Nature of the Conflict

617. Could it be said that the major purpose of the NATO bombing was to fight the insurgency that had been provoked in Kosovo or simply to put an end to the alleged atrocities of the Serbian forces in many of the provinces of FRY including Kosovo? The NATO bombing involved only the Serbian forces and NATO and not the KLA and the latter was still in a process of armed conflict against the Serbs, be it regular forces, police or paramilitary. The panel considered that there were two parallel conflicts going on with the intervention of NATO and that the main aim of the NATO intervention was to put an end to atrocities, mainly ethnic cleansing, being perpetrated by the Serbian forces. At the other end the KLA was fighting against the forces that were active in Kosovo.

618. Whilst not being bound by what appears to be a legal finding in the OSCE Report, the panel nevertheless referred to it as a matter of interest. Indeed that report qualifies the conflict as an internal one for the period October 1998 to June 1999. The Human Rights Report qualifies the conflict as an international one as from the start of the NATO bombing.

619. The panel at best considered the conflict was of a mixed nature at the time the NATO bombing started and concluded that the better view would be to treat the conflict as from March 1999 as a mixed one. The panel derived some support from the observation in the Tadic[30] judgment where the Appeals Chamber seems to be suggesting that if the conflict is a mixed one the rules of internal armed conflict should apply.

3. The Law Applicable to Internal Armed Conflicts

620. The 1977 Protocol II to the Geneva Conventions governs internal armed conflicts that reach a higher level of hostilities, which is more elaborate than Common Article 3 in its protection of civilians. Common Article 3, Section 1, states:

[30] See footnote 14.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who had laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

> *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
>
> *taking of hostages;*
>
> *outrages upon personal dignity, in particular humiliating and degrading treatment;*

the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

621. Common Article 3 thus imposes fixed legal obligations on the parties to an internal armed conflict to ensure humane treatment of persons not, or no longer taking an active role in the hostilities.

622. As stated above, Protocol II is also applicable to armed conflict involving insurgents and government forces.

623. Internal armed conflicts are also governed by customary international law, such as the customary international norms enunciated in United Nations General Assembly Resolution 2444. Adopted by the unanimous vote on December 19, 1969, this resolution expressly recognizes the customary law principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times. The preamble to this Resolution states that these fundamental humanitarian law principles apply "in all armed conflicts", meaning both international and internal armed conflicts. In 1998 international bodies acknowledged the internal conflict in Kosovo. There were three United Nations Security Council Resolutions addressing the war in Kosovo. On 31 March 1998 the United Nations Security Council passed Resolution 1160 condemning "the use of excessive force by Serbian Police against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army …" Clearly the Security Council specifically recognized at this

time that the KLA was a fighting force. On 23 September 1998 it passed Resolution 1199 and again on 24 October 1998 it passed Resolution 1203 both reiterating this point.

624. Regarding combatants' respect for international humanitarian law, Yugoslav law is also very clear. The Yugoslav Law on Defense, Article 19, obliges soldiers to respect international law dealing with the wounded, prisoners, and civilians. The article says:

Members of the Yugoslav Army participating in an armed conflict are obliged under all circumstances to abide by the rules international humanitarian law and other rules on humane treatment of wounded and prisoners, and on the protection of civilians.

B. THE NEXUS BETWEEN THE CRIMES AND THE CONFLICT

1. The Nexus

625. War crimes do not qualify as such unless a nexus is established between the crimes and the conflict. The acts committed must be sufficiently connected with the hostilities.

626. In the Tadic[31] case the Trial Chamber discussed this aspect in relation to crimes against humanity.

The Appeals Chamber, in dismissing the Defence argument that the concept of armed conflict covers only the precise time and place of actual hostilities, said: "It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict". Thus it is not necessary that the acts occur in the heat of battle. The foregoing supports a narrow interpretation of the required nexus to an armed conflict. This interpretation is further supported by Virginia Morris and Michael P. Scharf who note in regard to the inclusion of the requirement "in armed conflict" that "[t]his limitation is temporal rather than substantive in character, as indicated by the phrase 'when committed in armed conflict'. This phrase does not require any connection with a war crime or any substantive connection to an armed conflict." [Para. 632]

The Appeals Chamber found that: On the basis of the foregoing the Trial Chamber accepts, with some caveats, the Prosecution proposition that it is sufficient for purposes of crimes against humanity that the act occurred in the course or duration of an armed conflict. The first such caveat, a seemingly obvious one, is that the act be linked geographically as well as temporally with the armed conflict. In this regard it is important to note that the

[31] See footnote 14.

> *the temporal and geographic scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.* [Para. 633]

Secondly, the act and the conflict must be related or, to reverse this proposition, the act must not be <u>unrelated</u> to the armed conflict, must not be done for purely personal motives of the perpetrator. [Para. 634]

627. In the Kordic[32] case, the Trial Chamber stated:

In this regard, the Trial Chamber observes that, in order for norms of international humanitarian law to apply in relation to a particular location, there need not be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms a part.

Although the acts or omissions must be committed in the course of an armed conflict, the nexus which is required is between the accused's acts and the attack on the civilian population. [Para. 34]

628. In the Tadic Jurisdiction judgment the Appeals Chamber[33] held

Even if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed . . . international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. [Para. 70]

629. Applying the principles above, the panel concluded that on the evidence presented, the historical facts that the panel has judicially taken note of, and the evidence in general, that the acts alleged were committed in the course of hostilities occurring in Kosovo.

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[32] ICTY, Trial Chamber, Judgment 26 February 2001.
[33] ICTY, Appeals Chamber, Judgment 10 August 1995.

2. Protection of Civilians

630. International humanitarian makes a distinction between civilians and combatants and in an armed conflict the targeted persons *must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population*.[34]

631. In fact *[t]he protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law. In 1938, the Assembly of the League of Nations, echoing an important statement made, with reference to Spain, in the House of Commons by the British Prime Minister Neville Chamberlain, adopted a Resolution concerning the protection of civilian populations against bombing from the air, in which it stated that "the intentional bombing of the civilian population is illegal". Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice, that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law*.[35]

632. The Trial Chamber also discussed the meaning of civilians for the purposes of crimes against humanity.

> *The second aspect, determining which individual of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict", provides that in an armed conflict "not of an international character" Contracting States are obliged "as a minimum" to comply with the following: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy.*[36]

633. Generally speaking *the civilian population comprises all persons who do not actively participate in the hostilities*.[37]

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[34] Tadic, see footnote 14, para. 638.
[35] ICTY, Trial Chamber, Kupreski Judgment 14 January 2000.
[36] Kupreski, see footnote 35.
[37] R. Goldman International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua in American University Journal of International Law and Policy, 1987.

634. In the light of the above principles and the evidence there can be no doubt that the villagers in the villages of Zahaq and Qyshk were civilians and therefore were entitled to be treated humanely.

X

WAR CRIMES CHARGED

A. Murder

635. In the law of Kosovo, Art. 30 of the CCK which provides for the offence of murder states that *whoever takes another person's life shall be punished by at least five years in prison*. The articles then lists the aggravated forms of murder for which higher penalties are prescribed.

636. Murder is committed when a perpetrator acts it with premeditation, either direct or indirect.

637. *According to the legal definition of premeditation, intended murder is committed if a perpetrator was aware that he is carrying out an act by which he could murder a person and if that act is aimed at a living person (awareness of causality) and if the perpetrator wanted to murder a person (direct intention) or consented to the that foreseen consequence - death of a person (indirect intention) The awareness of the illegality of the murder committed is not a condition so that the false belief about illegality does not preclude responsibility. A perpetrator who would falsely believe that in a concrete case an act is not illegal would be responsible for murder with premeditation. The lack of awareness about some of the real characteristics of murder (e.g. perpetrator was not aware that the act that has been carried out could cause death of a person or he was not aware that his act was directed against a person) precludes responsibility for intended murder, but he could be considered responsible for involuntary manslaughter, provided that the perpetrator could and had to be aware of that crucial circumstance.*[38]

638. From the foregoing the offence of murder is an intentional killing with premeditation. In the case of Prosecutor Ayaseku,[39] the ICTR sought to make a distinction between killing and the French word *meurtre* which appears in the Rwanda Penal Code. In fact in French law, a distinction is made between *meurtre* which is manslaughter and *assassinat* which is murder. The distinction is that in addition to intention, premeditation is required in murder. In the case of Prosecutor Kayishema and Ruzindana[40] the ICTR said that there was no

[38] Srzentic Nikola and Ljubisa Lazarevic, commentary on the Criminal Code of Serbia, 1995.
[39] See footnote 5.
[40] ICTR, Trial Chamber, Judgment 21 May 1999.

distinction between the two words. In the case of Kunarac[41] the Trial Chamber stated:

The ICTY and the ICTR have consistently defined the crime of murder as requiring that the death of the victim result from an act or omission of the accused committed with the intent to kill, or with the intent to cause serious bodily harm which the perpetrator should reasonably have known might lead to death. [Para. 132]

639. It was the view of the panel that the elements of the offence as defined in the Law of Kosovo and by the Ad Hoc Tribunals were the same in that wilful killing or intentional killing comprises the element of premeditation.

B. Torture

640. Torture is not defined in the law of Kosovo and the panel sought guidance from the case law of the ICTY. The 1949 Conventions and the Additional Protocols which apply to both in internal and international conflicts prohibit the offence of torture with which the accused is charged.

641. There have been conflicting views on the elements of torture and more particularly on one element of the offence. In this connection the Trial Chamber stated in the Kvocka[42] case:

Differing views have been expressed in the jurisprudence of the Tribunal as to whether the suffering must be inflicted by a public agent or the representative of a public authority in order to meet the definition of torture. [Para. 137]

642. In fact in the case of Delalic[43] Trial Chamber stated

Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities. [Para. 473]

643. However, in the Kvocka[44] case the Trial Chamber held

The Kunarac judgment departed from the previous definitions of torture set forth by the Trial Chambers of the ICTY and the ICTR, in ruling that, in contrast to

[41] ICTY, Trial Chamber, Judgment 22 February 2001.
[42] ICTY, Trial Chamber, Judgment 2 November 2001.
[43] ICTY, Trial Chamber, Judgment 16 November 1998.
[44] See footnote 42.

international human rights law, international humanitarian law does not require the involvement of a state official or of any other authority-wielding person in order for the offence to be regarded as torture. [Para. 138]

The Trial Chamber is persuaded by the reasoning of the Kunarac Trial Chamber that the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law. [Para. 139]

644. The Tribunal then set out the elements of the offence

The Trial Chamber applies the following definition of torture to this case:

(i) *Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental;*
(ii) *the act or omission must be intentional; and*
(iii) *the act or omission must be for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.* [Para. 141]

645. With regard to the element of suffering, the Kvocka[45] case stated: [Paras. 142-149]

Consistent with human rights jurisprudence interpreting torture, the Celebici Trial Chamber has indicated that the severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences.

A precise threshold for determining what degree of suffering is sufficient to meet the definition of torture has not been delineated. In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm.

The UN Special Rapporteur on Torture, human rights bodies, and legal scholars have listed several acts that are considered severe enough per se to constitute torture and those that are likely to constitute torture depending on the circumstances. Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts per se constituting torture.

[45] See footnote 42.

The jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies, has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.

In several cases involving Zaire, the U.N. Human Rights Committee found that various combinations of the following acts constituted torture: beatings, electric shocks to the genitals, mock executions, deprivation of food and water, and the "thumb press." In considering individual complaints brought against Uruguay and Bolivia, the Human Rights Committee found that systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, repeated immersion in a mixture of blood, urine, vomit and excrement ('submarino'), standing for great lengths of time, and simulated executions or amputations amounted to torture.

In the post World War II trials held in Japan, the International Military Tribunal for the Far East (IMTFE) found that the most prevalent forms of torture systematically inflicted by Japanese soldiers upon Allied forces or occupied civilians included "water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging." Clearly, an exhaustive list of torturous practices is impossible to devise.

Although such torture practices often cause permanent damage to the health of the victims, permanent injury is not a requirement for torture.

Damage to physical or mental health will be taken into account in assessing the gravity of the harm inflicted. The Trial Chamber notes that abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. Similarly, the Furundzija Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.

646. The other element is the prohibited purpose behind the torture. The Delalic[46] case dealt with this point

Another critical element of the offence of torture is the presence of a prohibited purpose. As previously stated, the list of such prohibited purposes in the Torture Convention expands upon those enumerated in the Declaration on Torture by adding "discrimination of any kind". The use of the words "for such purposes" in

[46] See footnote 43.

the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative. Further, there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose. [Para. 470]

647. In Kvocka[47] the Trial Chamber agreed that the prohibited purpose element should not be limitatively construed and stated

The Trial Chamber also agrees with the Celebici Trial Chamber that the prohibited purposes listed in the Torture Convention as reflected by customary international law "do not constitute an exhaustive list, and should be regarded as merely representative ", and notes that the Furundzija Trial Chamber concluded that humiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law. [Para. 140]

648. On what amounts to a prohibited purpose the same Chamber in Kvocka[48] stated:

The jurisprudence of the Tribunals recognizes certain prohibited purposes that qualify as torture. The Akayesu Trial Chamber adopted the prohibited purposes contained in the Convention against Torture, namely to obtain information or a confession from the victim or a third person, to punish the victim or a third person, to intimidate or coerce the victim or the third person, or for any reason based on discrimination of any kind. The Furundzija Trial Chamber added intent to humiliate to the list of prohibited purposes.

The Celebici Trial Chamber rightly emphasized that the prohibited purpose need be neither the sole nor the main purpose of inflicting the severe pain or suffering.

In interpreting the prohibited purposes of torture, the Trial Chambers have regularly found torture existed when the perpetrator's intent was to punish or to obtain information or a confession. The Tribunals have also found instances when torture was inflicted as a means of discriminating on the basis of gender. Moreover, the Celebici Trial Chamber emphasized that violence inflicted in a detention camp is often committed with the purpose of seeking to intimidate not only the victim but also other inmates.

649. The panel chose to follow the reasoning in the Kvocka[49] case, because, to insist on the involvement of a public official in the commission of the offence makes it very difficult, if not impossible, to prove the exact status of the individuals as in the case of armed conflicts. In such conflicts given the variety of participants it would be very difficult to say who is acting in an official capacity.

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[47] See footnote 42.
[48] See footnote 42.
[49] See footnote 42.

650. With regard to the intentional element, the panel followed the observation in the Kvocka[50] case:

As to intentional infliction, in the Aksoy v. Turkey case, the European Court of Human Rights found that when the victim was stripped naked, had his armed tied together behind his back, and was suspended by his arms, "this treatment could only have been deliberately inflicted: indeed, a certain amount of preparation and exertion would have been required to carry it out." [Para. 150]

C. Inhuman and Cruel Treatment

651. The court also considered whether the accused could be guilty of inhuman treatment as provided by Art. 142 CCY. Additional Protocol II mentions cruel treatment whereas Protocol I speaks of inhuman treatment. In the Delalic[51] case the Trial Chamber made the following observations on what constitutes inhuman treatment.

In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain, ordinary meaning of the term inhuman treatment in the context of the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment. [Para. 543]

In this framework of offences, all acts found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment. However, this third category of offence is not limited to those acts already incorporated into the other two and extends further to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. Ultimately, the question of whether any particular act which does not fall within the categories of the core group is inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case. [Para. 544]

652. In the same case the offence of cruel treatment was discussed

[50] See footnote 42.
[51] See footnote 43.

The basis of the inclusion of cruel treatment within Article 3 of the Statute is its prohibition by common article 3(1) of the Geneva Conventions, which proscribes, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture". In addition to its prohibition in common article 3, cruel treatment or cruelty is proscribed by article 87 of the Third Geneva Convention, which deals with penalties for prisoners of war, and article 4 of Additional Protocol II, which provides that the following behaviour is prohibited:

> *violence to life, health and physical and or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.* [Para. 548]

As with the offence of inhuman treatment, no international instrument defines this offence, although it is specifically prohibited by article 5 of the Universal Declaration of Human Rights, article 7 of the ICCPR, article 5, paragraph 2, of the Inter-American Convention of Human Rights and article 5 of the African Charter of Human and Peoples' Rights. In each of these instruments, it is mentioned in the same category of offence as inhuman treatment. [Para. 549]

In the Tadic Judgment, Trial Chamber II provided its view of the meaning of this offence, stating that, according to common article 3, "the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in hostilities shall in all circumstances be treated humanely." Thus, that Trial Chamber acknowledged that cruel treatment is treatment that is inhuman. [Para. 550]

Viewed in the context of common article 3, article 4 of Additional Protocol II, the various human rights instruments mentioned above, and the plain ordinary meaning, the Trial Chamber is of the view that cruel treatment is treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions. [Para. 551]

In light of the foregoing, the Trial Chamber finds that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment. [Para. 552}

In this regard, the Trial Chamber notes that any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location. As previously stated by the Trial Chamber in the Kupreskic case forcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity. [Para. 523]

653. It is reasonably clear from the above pronouncements that what is inhuman treatment for the purposes of the grave breaches is tantamount to cruel treatment under Additional Protocol II.

654. The fact of forcible displacement of the villagers on 14 May in Zahaq and Qyshk added to the manner they were subjected to moral suffering amounted to inhuman or cruel treatment.

D. Pillaging and Stealing

655. Article 142 of the CFRY mentions pillaging and stealing on a large scale. Additional Protocol II refers to pillage of civilian property as a prohibited act.

656. The panel referred to Art. 141 of the CCK which deals with the offence of plunder as is stated in the title. The offence in the articles reads *whosoever commits one or several criminal acts of grave thefts*. The offence of plunder is not defined in the Law of Kosovo. The panel referred to Art. 165 and Art. 166 of the Criminal Code of Serbia which deal with larceny and grand larceny respectively.

657. The commentary to Art. 165 defines the simple form of larceny as follows:[52]

Paragraph 1 defines the basic form of larceny, as taking away another person's movable property with the intent to obtain unlawful material gain for himself or for another person by its appropriation. This is at the same time a general notion of larceny.

Qualified forms of larceny are foreseen in Article 166, and the privileged form in Article 173.

658. On Art. 166 the following commentaries appear:[53]

Grand larceny is defined in the case when it is committed by several persons who have associated themselves to commit larcenies. Therefore, there are two cumulative additional elements that define grand larceny in the sense of this provision. The first one is that the act has been committed by several persons and the second one is that the persons who had committed the larceny have associated

[52] See footnote 38.
[53] See footnote 38.

themselves to commit larcenies. Although the term "several persons" is not precise in the sense of defining whether it is sufficient that the larceny was committed by two persons and that only two persons associated themselves or if this term implies at least three persons (the practice has adopted a unified standpoint that association of two persons is sufficient). This standpoint was also expressed by the Supreme Court of Serbia in its decision Kz 1565/65, whose justification said that even two persons represent such a composition that is capable, with joint action, on the basis of previous agreement, to create an increased social danger that also represents the basis for qualifying their act as grand larceny. At least two persons should participated in the larceny, and it is not important whether all persons are co-perpetrators or whether other persons, beside the perpetrator, act as abettors.

The further requirement for qualifying a larceny as grand larceny because it was committed by several persons is that those persons have associated themselves to commit larcenies, which means that previous agreement and association for committing only one larceny, that is, the committed one, is not enough, but rather their previous agreement to commit together at least two larcenies must exist. It is not even enough if those persons agreed after every committed larceny about the commission of the following larceny, but rather association should encompass in advance two or more larcenies (Supreme Court of Bosnia and Herzegovina, Kz 79/56). Association to commit a larceny shall also exist in the case if the participants have agreed to commit several larcenies, but those larcenies have not been defined specifically in terms of time, place and subject, as well as the manner of the commission, but those circumstances were to be determined on the occasion of beginning the commission of every specific larceny that is committed on the basis of the agreement (Supreme Court of Croatia, Kz 2683/55 and the Section of the Supreme Court of Serbia in Pristina, Kz 373/64).

659. It would appear that the offence of plunder that existed under Art. 172 of the CCS no longer exists. It is also to be noted that articles 168 to 170 deal with aggravated forms of larceny and misappropriation.

660. The panel did take note of the above commentaries as reflecting the applicable law but did not derive much assistance from them. The panel chose to seek guidance on the offences of plunder and pillage from the Geneva Conventions as interpreted by the ICTY Chambers the more so as the offence of plunder appears in Art. 141 of the CCK.

661. In the case of Delalic[54]

In considering the elements of the offence of plunder, the Trial Chamber must take as its point of departure the basic fact that international humanitarian law not only proscribes certain conduct harmful to the human person, but also

[54] See footnote 43.

contains rules aimed at protecting property rights in times of armed conflict. Thus, whereas historically enemy property was subject to arbitrary appropriation during war, international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party. The basic norms in this respect, which form part of customary international law, are contained in the Hague Regulations, articles 46 to 56 which are broadly aimed at preserving the inviolability of public and private property during military occupation. In relation to private property, the fundamental principle is contained in article 46, which provides that private property must be respected and cannot be confiscated. While subject to a number of well-defined restrictions such as the right of an occupying power to levy contributions and make requisitions, this rule is reinforced by article 47, which unequivocally establishes that "[p]illage is formally forbidden". Similarly, article 28 of the Regulations provides that "[t]he pillage of a town or place, even when taken by assault, is prohibited". [Para. 587]

The principle of respect for private property is further reflected in the four Geneva Conventions of 1949. Thus, while article 18 of Geneva Convention III protects the personal property of prisoners of war from arbitrary appropriation, article 15 of Convention I and article 18 of Convention II expressly provide that parties to a conflict must take all possible measures to protect the shipwrecked, wounded and sick against pillage, and prevent their being despoiled. Likewise, article 33 of Convention IV categorically affirms that "[p]illage is prohibited". It will be noted that this prohibition is of general application, extending to the entire territories of the parties to a conflict, and is thus not limited to acts committed in occupied territories. [Para. 588]

662. The Chamber also stated that the basic principle that violations of the rules protecting property rights in armed conflict can constitute war crimes, for which individual criminal liability may be imposed cannot be questioned. [Para. 589]

663. The Chamber also held that acts of plunder or pillage as amounting to the unjustified appropriation of properly gives rise to individual criminal responsibility. [Para. 590]

E. Displacement of Civilians

664. The accused is also charged with expulsion of civilians. Expulsion is a word that encompasses two notions, deportation and displacement. In the Kristic[55] case the Trial Chamber said

Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer

[55] ICTY, Trial Chamber, Judgment August 2001.

beyond State borders, whereas forcible transfer relates to displacements within a State. [Para. 521]

However, this distinction has no bearing on the condemnation of such practices in international humanitarian law. Article 2(g) of the Statute, Articles 49 and 147 of the Geneva Convention concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Article 85(4)(a) of Additional Protocol I, Article 18 of the ILC Draft Code and Article 7(1)(d) of the Statute of the International Criminal Court all condemn deportation or forcible transfer of protected persons. Article 17 of Protocol II likewise condemns the "displacement" of civilians. [Para. 522]

665. The transfer should also be forcible. In the same case the element of force was discussed

The Chamber next must determine whether the civilians were in fact forcefully transferred. The commentary to Article 49 of Geneva Convention IV suggests that departures motivated by the fear of discrimination are not necessarily in violation of the law. [Para. 528]

[T]he Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorise voluntary transfers by implication, and only to prohibit 'forcible' transfers.

However, the finalised draft text of the elements of the crimes adopted by the Preparatory Commission for the International Criminal Court provides that:

[t]he term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment. [Para. 529]

666. Evacuation of population is permitted only in exceptional circumstances during an armed. As pointed out in the same case.

Article 49 of the Fourth Geneva Convention and Article 17 of Protocol II allow total or partial evacuation of the population "if the security of the population or imperative military reasons so demand". Article 49 however specifies that "persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased" conflict. [Para. 524]

667. In the present case there was no justification for the evacuation of the civilians from their villages. There was no evidence of any imperative or security reasons for doing so. The villagers were peaceful quiet people whose sole sin was to belong to the Albanian ethnicity.

F. Illegal and Self-willed Destruction of Property

668. Destruction means what it means and does not need further elaboration. The evidence established clearly that many properties had been burned down in the villages of Qyshk and Zahaq on the material day.

XI

CUMULATIVE CHARGING

A. Article 48 CFRY

669. In view of the nature of the charges in the indictment, the panel had to consider whether there could be cumulative convictions in respect of all those charges. The panel referred to the following commentaries:

> *Apparent ideal concurrence on the basis of consumption. The nature of some criminal acts is such that they already contain in themselves the body of another criminal act, or that, when they are committed, the body of another criminal act may be realized too. Most frequently it refers to a serious criminal act which was also followed by the commission of a less serious criminal act.*[56]
>
> *Apparent concurrence on the basis of consummation exists when one criminal act is contained in another. It is assessed, whether such a case exists, by abstract comparison of the legal descriptions of criminal acts, when the value assessment of the committed acts is conducted, in the sense that it is assessed, whether one criminal act is contained in another, and whether it is included in it. More serious act always consumes the less serious one, which is contained in it. Therefore, for example, a murder of one person consumes the bodily injury that was inflicted by the perpetrator in that event, the criminal act of theft committed in a burglary consumes the damage to the items which was done by the burglary, and the criminal of breaking and entering consumes the intrusion of inviolability of the apartment, committed by entering another person's apartment for theft. Therefore, in such cases, there is only apparent concurrence between a consumed criminal act and the criminal act that consumes it, since only the second part is significant. That is also the meaning of the ruling of the Federal Supreme Court Kz. 120/60, according to which, in case the perpetrator inflicted to the injured, on the same occasion, both, a light and a grave bodily injury, there is only one criminal act of grave injury, which in itself consumes the light bodily injury as*

[56] Ljubisa Lazarevic, Commentary on CFRY, 1999.

well. Apparent concurrence, on the basis of consumption, exists also when someone, with two aspects of complicity, participates in the completion of one and the same criminal act, or the first incites other person to commit another criminal act and then, together with him, commits this criminal act as an accomplice. In such cases, the more serious form of complicity consumes the less serious form, so there is only one criminal act committed in the most serious form of complicity. According to that, inciting consumes assisting, organizing of crime associations consumes inciting and assisting, and perpetration or co-perpetration consumes all forms of complicity in the same act. This is also the meaning of ruling of the Supreme Court of the People's Republic of Serbia Kz. 72/52, according to which an accomplice, who simultaneously incites and assists in the commission of the same criminal act, may be liable only for the inciting. The case of consumption may also occur as apparent ideal concurrence, as well as apparent real concurrence.[57]

670. The principles were quoted in the local case of Prosecutor v Jeton Selmani.[58]

B. Conclusions on Cumulative Charging

671. The panel also referred to the principles discussed in the case of Kvocka[59] in relation to the cumulative charging of murder, torture, persecution and outrage upon personal dignity. After an analysis of the principles the Trial Chamber concluded that it is permissible to charge the offence of murder with torture but that it was not permissible to enter cumulative convictions for torture and inhuman treatment or cruel treatment as the two latter offences are subsumed in the offence of torture. In fact all torture, inhuman treatment and cruel treatment connote the infliction of suffering in varying degrees

XII

INDIVIDUAL RESPONSIBILITY OF ACCUSED

A. The Heads of Liability

672. The prosecution is running this case as one of complicity or alternatively that the accused was acting pursuant to a joint criminal enterprise. Under both of these heads the accused can be liable for the actions of those he was with, even though he himself may not have personally perpetrated any of the crimes himself. What is important is the establishment of his presence and his participation in the events in which the incidents occurred.

673. The stand of the prosecution is quite understandable It is a fact that very often war crimes and the related crimes against humanity "*do not result from the criminal*

[57] Srzenvic Nikola and Ljubisa Lazarevic, Commentary on CFRY, 1982.
[58] Pristina District Court, P 274/2002, 16 October 2002.
[59] See footnote 42.

propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question".[60]

B. Complicity

674. In the Delalic[61] case Trial Chamber held that *individuals may be held responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law*. It cannot be disputed that all major criminal systems do provide for that head of criminal liability under the heading complicity, aiding and abetting, joint criminal enterprise. In Kosovo the matter is dealt with under Art. 22 and Art. 26 of the CCFRY.

675. Article 22, CFRY reads *If several people participate in a criminal act or in any way become associated as accomplices, each of them will be punished according to the prescribed punishment*.

676. Article 26 CFRY reads *Whoever has, for the purpose of committing criminal acts, created or used an organization, gang, conspiracy, group or any other association shall be criminally liable for all criminal acts which have transpired from the criminal plan of these associations and shall be punished as if he himself had committed them, regardless of whether or not and in which role he has directly participated in the commission of any of these acts*.

677. Whereas Art. 22 deals with the liability of some one who aids and abets, Art. 26 deals with the concept of common purpose or design.

1. Aiding and Abetting

678. With regard to aiding and abetting the following commentaries are made:[62]

According to this article, complicity exists when several people participate in the act of committing a crime. Thus, complicity is a conscious and willing act of associating with other participants, with intent of jointly accomplishing a certain deed. Such a situation exists when several people who meet all the requirements pertaining to the main actor of a particular deed and jointly agree to act as accomplices.

[60] See footnote 14.
[61] See footnote 43.
[62] Ljubisa Lazarevic, Commentary on Criminal Code of FRY, 1995.

An accomplice is the perpetrator of the deed. An accomplice can be only that person that has all the qualities such as those that the essential law stipulates in the case of the perpetrator. If for a criminal act, in its legal description, one seeks certain intent, each and every participant must operate in accordance this intention. In other words, on the side of every participant, all required subjective elements as foreseen by the essence of the criminal act as described by the law must be present.

Overall, it is important an accomplice, along with another carries the decision about the act and that this decision, together with another, he performs in a way which labels him as a person with an important role in the process of the performance of the (criminal) deed. The fact that he is a participant of such a decision and a part of this process of realisation – in a decisive way makes him a perpetrator of the act, because he is thus in the position to – along with another person – hold the act of perpetration in his hands, i.e. to have authority (ownership of) over the act. This ownership of the act, subjectively speaking, requires a certain relationship of perpetrator towards the actual act in such a way that every individual takes part in the bringing above of the decision about the act (in a functional sense, without this being so, one cannot have the ownership over the act); while, objectively speaking, such a person performs certain activities related to the actual joint performance, i.e. carrying out of the act, as an important segment of the entire process.

679. In the Furundzija[63] case the ICTY Trial Chamber summarized the elements of complicity.

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate. [Para. 249]

680. In the case of Tadic[64] the ICTY Trial Chamber stated:

The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. [Para. 689].

[63] ICTY, Trial Chamber, Judgment 10 December 1998.
[64] See footnote 14.

2. Common Purpose or Design

681. With regard to the concept of common purpose or design, the following appears in the commentaries:[65]

1. The provisions of this Article regulate a specific form of complicity, which is not recognized by the majority of contemporary criminal legislations. The overwhelming opinion is that it is about the overcome form of complicity which should be eliminated from our criminal legislation as soon as possible, particularly since criminal association is foreseen in the criminal laws of the Republics as an independent criminal act (Article 227 of the Criminal Law of Serbia).

In order to establish the existence of this form of complicity, it is necessary to have the following three cumulative conditions fulfilled: the creation of criminal association, the existence of a criminal plan and the commission of at least one criminal act by the members of the association.

(a) Under the term of creation of a criminal association one should primarily understand a formation of an association, which had not previously existed for the purpose of committing criminal acts. As possible forms of this association, the law states a gang, conspiracy, group or any other association. About these forms see the commentary accompanying Article 136 of this Law. Therein the manner in which the association is created bears no significance. This form of complicity, however, also exists in the case when someone, for the commission of criminal acts, uses an association, which was not created for criminal purposes but its activities are as a rule legitimate. During World War II, associations of some national minorities which were created for specific cultural and similar goals were used for criminal purposes.

(b) The existence of a criminal plan means establishing criminal acts, which will be committed by the members of the association. It has to involve the commission of an unspecified number of criminal acts, which must be specified in terms of content. This form of complicity shall not be the case if an association is created in order to undertake criminal or in general unlawful activities, however, shall be the case if, for example, an association is created for the purpose of property criminal acts, attacks on the constitutional organization of the country and similar.

(c) Finally, it is necessary for the members of the association to have committed at least one criminal act which was included in the plan or which ensued from the plan. It is believed that an act the commission of which was necessary in order to commit a criminal act foreseen by the plan, also ensues from the plan. For example, if a gang was created for the purpose of committing thefts, the organizer

[65] Ljubisa Lazarevic, Commentary on the Criminal Code of FRY, 1995.

shall be liable also for the serious bodily injury, the commission of which was necessary in order to commit the theft.

2. The organizer shall be liable for all criminal acts committed by the members of the association if they were foreseen by the criminal plan or if they ensued from it. That also means that he is liable both for the acts in the commission of which he directly participated as well as for the acts committed by the members of the association. In all these case, he is punished as the perpetrator.

682. With regard to the special form of complicity under Art. 26 the panel noted that the first element is the creation of a criminal association. In practice it might be difficult if not impossible to have direct evidence of such a fact. The existence of this element may be inferred from the circumstances. Thus if a multitude of persons embark on the commission of a criminal act it may be inferred that they were operating in the midst of an association. The panel found support for this approach in the following commentaries on Art. 136 CFRY.

"When it involves illegal organisations with anti-constitutional and anti-social goals, when assessing this issue the decisive factor is the actual situation, conduct and action of the people involved. Thus, whether or not such persons can be considered members of such illegal organisations, that is, whether gathering other persons can be deemed as creating new organisations, should be assessed from such realistic, and not from a formal point of view". (From the decision of the Supreme Court of Croatia Kz 1100/60). Whether or not an association has been created shall be decided based on concrete circumstances. Therein it is significant to bear in mind that the creation of an association is a process comprising a series of special activities and that the creation encompasses all such activities. This means that for this act to exist it is not decisive whether or not an association has been created, it suffices that the actions undertaken enter into the process of creation.[66]

683. It is significant to note from the above commentaries that the manner in which the association is created is not very relevant. What matters is that the association existed for some time or came into existence spontaneously with the aim of committing the criminal act.

684. The second element is the existence of a criminal plan. As stated in the commentaries on Art.26, the existence of a criminal plan means establishing criminal acts which will be committed by the members of the association. On Art. 136 the commentaries say the following *for this act to exist it is even less important whether the association has started operating within the framework of its plan, or that, as stated in the decision of the Supreme Court of Croatia*

[66] Commentary on CFRY, source unavailable.

Kz 1650/73, "the association started to conduct criminal acts for the purpose of which it was created".[67]

685. It appears from these commentaries that the plan need not have come into existence before the group embarks on the commission of the acts. The panel considered that it would be unrealistic to insist on the proof that a plan had already existed. What is important is that the acts were committed in furtherance of a plan irrespective it existed well beforehand. In this connection the panel found support in the following reasoning in the Tadic case where the Appeals Chamber[68] stated there was *no necessity for the plan, design or purpose to have been previously arranged or formulated. The common plan may materialize extemporaneouisly and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.* [Judgment 15 July 1999]

686. The third element is the commission of the criminal acts by the members of the association. From the commentaries on Art.26 the organizer is liable for all criminal acts committed by the members of the association if they were foreseen by the criminal plan or if they resulted from it. In other words liability would arise for the acts committed by the perpetrator and also for acts committed by the members of the group.

687. This view is no different from that expressed in the case law of the ICTY. Situations are distinguished under this theory. The first situation is *participation entailing responsibility for all the acts flowing from the criminal plan.*[69] The author elaborates on this issue and says: *As in most national legal systems, also in international criminal law all participants in a common criminal action are equally responsible if they (i) participate in the action whatever their position and the extent of their contribution, and in addition (ii) intend to engage in the common criminal action. Therefore they are able to be treated as principals, although of course the varying degree of culpability may be taken into account at the sentencing stage.*[70]

688. The second situation is *participation entailing responsibility for the foreseeable crimes of other participants* [Cassese p.187]. This would the situation where a multitude of persons participates in the commission of a crime. *It may happen that, although all participants share from the outset the common criminal design, one or more perpetrators commit a crime that had not been (expressly or implicitly) agreed upon or envisaged at the beginning, and therefore did not constitute part and parcel of the joint criminal enterprise.*[71]

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[67] See footnote 56.
[68] ICTY, Appeals Chamber, Judgment 15 July 1999.
[69] Antonio Cassese, International Criminal Law, Oxford, 2003, p. 181.
[70] Antonio Cassese, footnote 69, pp. 181-182.
[71] Antonio Cassese, footnote 69, p. 187.

689. In the Tadic[72] case held in this connection that *responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.* [Para. 228]

690. It was the view of the panel that these principles should be adopted in the interpretation and application of Art. 26 CFRY.

XIII

INVOLVEMENT OF THE ACCUSED IN THE OFFENCES

A. Murder and Attempted Murder

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

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

693. Given the pattern of events that was unfolding at the time, the panel was of the view that the accused and the groups of people with him had as common design the displacement of the villagers as their primary objective. This conclusion fits in with the ethnic cleansing policy for a Greater Serbia. In the pursuit of that goal the paramilitaries and others robbed the people of their belongings and villagers were killed. The responsibility of the accused as a co participant in the killings could

[72] See footnote 14.

only arise it it was foreseeable that such a crime would be committed and knowing that the accused took the risk as explained in the Tadic case[73]. The evidence did not bear this out. Nor in the view of the panel could the accused be found guilty of aiding and abetting in the killing The panel did not find enough evidence to conclude that the accused participated in the objective element of aiding and abetting in the killing which constitutes *practical assistance, encouragement or support* and with the requisite knowledge that his actions would be of assistance to the authors of the killings. As was stated in the Kvocka[74] case.

during periods of war or mass violence, the threshold required to impute criminal responsibility to a mid or low level participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion. The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavor, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime. Perhaps the most important factor to examine is the role the accused played vis-à-vis the seriousness and scope of the crimes committed: even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape. [Para. 311]

694. As for attempt, the elements that should be present for an attempt as explained in the commentary on Art. 19, Para 1, are "initiation of perpetration, absence of consequence, premeditation on the perpetrators behalf to commit the initial criminal act". With regard to the first element a distinction is made between mere preparatory acts and a beginning of perpetration. It is in the latter phase that a perpetrator can be said to have attempted an offence provided the two other elements mentioned above in the commentary are also present. These are that the perpetrator should also be aware that, once he has entered the phase of the beginning of the perpetration, he wanted to obtain a certain purpose and that the initial purpose did not materialize. The legal position is aptly summarized in the following passage:

[73] See footnote 14.
[74] See footnote 42.

> *It is characteristic of the attempt that the perpetrator premeditatively began committing the criminal act but he has not completed it. Put most generally, the attempt is a begun and a non-complete criminal act. The attempt is a special excerpt from the total dynamic of the criminal event, placed between the perpetration and the completion of the criminal act; it is more than a preparatory activity and less than a completed criminal act.*[75]

695. The panel found that none of the actions of the accused amounted to an attempt.

B. Torture

696. The panel, following the principles relating to concurrence of criminal acts under Art. 48 CFRY and the principles of cumulative charging in the jurisprudence of the ICTY, concluded that the offence of cruel treatment is subsumed in torture as held in the Kvocka[76] case. The panel therefore considered only the offence of torture.

697. For the purposes of that offence the panel followed the reasoning in the Kvocka case that the offence of torture need not be perpetrated by a public official. Anybody resorting to such an act should be held accountable, if the evidence so warrants, on his individual criminal responsibility.

698. The panel found that the primary aim of the torture perpetrated was the expulsion of the villagers. The panel took the view proposed in the Kvocka[77] case that requirement of *limited purpose* should not be restrictively construed but that the act of torture must be perpetrated with a purpose. The court found that the element had been proved.

699. The villagers in Zahaq and Qyshk were subjected to fear with the coming of armed paramilitaries, police and others. They were deprived of their personal belongings. They were made to line up against a wall and before they were expelled from their villages they were in fear of their lives. They were living in that fear until they were expelled except for those who were killed. The panel nevertheless sought to make a distinction between acts that may not amount to torture in what may be described as normal circumstances and situations of armed conflict where innocent civilians are at he mercy of their captors. The panel concluded that this amounted to torture in the sense that the villagers were put under an immense psychological strain in so far as their well-being is concerned. The panel was of the view that there cannot be a greater form of torture from the psychological point of view when someone is held in suspense regarding his life

[75] Commentary on CFRY, source not available.
[76] See footnote 42.
[77] See footnote 42.

whilst being totally defenceless in the midst of armed persons. Such an act in the view of the panel amounted to torture.

C. Displacement

700. On the evidence the panel found that the evacuation of the villagers from Zahaq and Qyshk amounted to a displacement of civilians rather than deportation but as pointed in the Kristi case but both acts are equally reprehensible. Though many witnesses stated that they were told to leave for Albania the evidence did show that they returned subsequently to their villages without reaching Albania. This however does not detract from the fact that the villagers were made to flee or leave in a climate of terror.

D. Pillaging

701. The evidence presented in the case proves very clearly that the villages were unjustifiably deprived of their property, namelytheir money and jewellery. Such taking of property amount to plunder or pillage as explained above.

E. Involvement of the Accused in the Offences of Torture, Displacement and Pillaging

702. The accused played a very active part in these offences. He arrived at the scene of the incidents with other people. He terrorized the villagers verbally and physically. He helped actively to gather them and was keeping watch over them before they were expelled from their villages. When they were asked to leave on their tractors and trailers the accused was present and helped in that process by directing the villagers to leave and their place was not in Kosovo. He participated in the common design of depriving the villagers of their belongings. As it was put in the Kvocka[78] case.

> *an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability.* [Para. 312]

[78] See footnote 42.

F. Destruction of Property

703. Destruction of property means what it means and needs no further elaboration. The acts of burning the property were concomitant with the acts of torture, pillaging and displacement. The accused was not seen to have set fire or destroyed property on the material day. But the panel concluded that by his presence at the scene on the critical day he did witness the destruction of the property around him. It is not always easy to draw the line between the aiding and abetting in an offence and perpetrating it as the Tribunal pointed out in the Kvocka[79] case *the Trial Chamber acknowledges that it may sometimes be difficult to draw distinctions between an aider or abettor and a co-perpetrator, particularly when mid-level accused are involved who do not physically perpetrate crimes.* [Para. 284]

704. On the evidence presented the panel concluded that the accused was not a co-perpetrator in the destruction. There is no evidence to show that he was actively engaged or was bringing that level of assistance to the others who were setting fire to the properties. It will be recalled that most of the witnesses described the role of the accused as having ended once the villagers had been moved from the villagers. There is also evidence that establishes that the burning of properties had occurred even before the accused came on the scene.

XIV

SENTENCING

705. The court passed a combined sentence of seven years on the accused. As he has spent almost three years in detention he would, if he serves his full sentence, have spent ten years in jail.

A. Sentence Prescribed by Article 142 CFRY

706. Article 142 used to provide for a minimum sentence of 5 years imprisonment and the death penalty for war crimes. The court noted that the death sentence provided in Art. 142 was replaced by a maximum of 20 years in FRY in 1990. UNMIK Regulations 1999/24 which came into force on 10 June 1999 abolished the death penalty and by an amendment UNMIK Regulation 2000/59 substituted a maximum term of 40 years imprisonment in lieu. By virtue of UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59 the law applicable in Kosovo shall be the regulations promulgated by the Special representative of the Secretary General and the law in force in Kosovo on 22 March 1989. In case of a conflict the regulations shall have precedence. The regulation also states that“ the defendant shall have the benefit of the most favourable provision in the criminal provision in the criminal laws which were in

[79] See footnote 42.

force between 22 March 199 and the present regulation". This provision is only an expression of what is provided in Art. 7(1) of the European Convention on Human Rights, which prohibits the retroactive application of criminal offences and penalties. The only derogation created is in relation to war crimes under Art. 7(2) of the European Convention on Human Rights.

707. In view of the above discussion the court concluded that the penalty in force for war crimes between 1990 and the date of the regulation in June 1999 was a maximum of 20 years under Art. 142 CFRY.

B. Guidelines for Sentencing

708. In matters of sentencing it is not always easy to determine the proper measure. This is even more difficult for war crimes as such offences are considered to be amongst the most heinous of offences by the international community. Even the Statutes of the ad hoc Tribunals in The Hague and Arusha state that these Tribunals should seek guidance on sentencing from what obtains in the national jurisdiction of Yugoslavia and Rwanda. The ICTY and the ICTR have on a number of occasions interpreted that provision to mean that they may seek guidance without being bound by the decisions of the national jurisdictions.

709. In the Delalic[80] case the Trial Chamber said

It may be justifiably argued that the guidelines prescribed in Article 41(1) of the SFRY Penal Code for the determination of sentences after conviction, are more comprehensive than the criteria prescribed in a combined reading of Article 24 (2) of the Statute and sub-Rule 101(B) of the Rules. Accordingly, whilst resort may be had to the sentencing practices of the courts in the former Yugoslavia, such practice cannot be determinative. This Trial Chamber agrees completely with the opinion expressed in the Erdemovic Sentencing Judgement, 29 November 1996, that:

> *[g]iven the absence of meaningful national judicial precedents and the legal and practical obstacles to a strict application of the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, the Trial Chamber considers that the reference to this practice can be used for guidance, but is not binding.*
>
> *Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.* [Para. 1200]

[80] See footnote 43.

In this context it may further be observed that the statute of the ICTR, in its provision on penalties, similarly provides that recourse shall be made to the general practice regarding prison sentences in the courts of Rwanda in determining terms of imprisonment. In the recent case of The Prosecutor v. Jean Kambanda it was held that such practices were not binding upon the ICTR but were only one of the factors to be taken into account. [Para. 1201]

710. This view was confirmed by the Appeal decision in the Delalic[81] case.

C. Factors Governing Punishment

1. Retribution and Deterrence

711. In the Delalic[82] case the Appeals Chamber laid emphasis on the retribution and deterrence aspects of sentencing.

The cases which come before the Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted, that is "serious violations of international humanitarian law". Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal. On the contrary, the Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. [Para. 806]

712. But in the Aleksovski[83] case the ICTY Appeals Chamber laid more emphasis on deterrence.

The Prosecution submits that a manifestly disproportionate sentence defeats a purpose of sentencing for international crimes, namely to deter others from committing similar crimes. While the Appeals Chamber accepts the general importance of deterrence as a consideration in sentencing for international crimes, it concurs with the statement in Prosecutor v. Tadic that 'this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal'. An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognised by Trial Chambers of this International Tribunal as well as Trial Chambers of the International Criminal

[81] ICTY, Appeals Chamber, Judgment 20 February 2001.
[82] ICTY, Appeals Chamber, Judgment 20 February 2001.
[83] ICTY, Appeals Chamber, Judgment 24 March 2000.

Tribunal for Rwanda. Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show "that the international community was not ready to tolerate serious violations of international humanitarian law and human rights". [Para. 185]

2. Reconciliation

713. In the case of Furundzija[84] the Trial Chamber made a reference to the reconciliation factor and also endorsed the deterrence and retribution functions of punishment.

It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that punitur quia peccatur *(the individual must be punished because he broke the law) but also punitur ne peccatur (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.* [Para. 288]

D. Article 41 CFRY

714. The panel also considered Art. 41(1) of the CFRY which sets out the factors to be considered in determining sentence

[T]he court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, keeping in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment, and particularly: the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object; circumstances of the commission of the offence; the perpetrator's past life; the perpetrator's personal circumstances and his behaviour after the commission of the offence; as well as other circumstances relating to the perpetrator.

E. The ICTY Jurisprudence

715. With these considerations the panel then referred to some of the sentences passed by the ICTY. Admittedly in some of these cases the accused pleaded guilty and the ICTY took that factor into consideration. In Kosovo a plea of guilty is an unknown procedure and even if an accused confesses, or in other words accepts his liability, it is still the duty of the court to look for corroborative evidence of the guilt. A conviction cannot be based on this acceptance of guilt only.

[84] See footnote 63.

1. The Aleksovski Case[85]

716. In the Aleksovski trial the accused was found guilty of violations of the laws and customs of wars. Detainees in a camp were used as human shields or trench-diggers and this amounted top an outrage upon personal dignity. He was found guilty of aiding and abetting in such acts. He was sentenced to **two and half years' imprisonment** [emphasis added].

2. The Stevan Todorovic Case[86]

717. Stevan Todorovic was charged for his alleged involvement in committing, planning, instigating, ordering or otherwise aiding and abetting a campaign of persecutions and "ethnic cleansing" and committing other serious violations of international humanitarian law directed against the Bosnian Croat, Bosnian Muslim and other non-Serb civilians residing in the Bosanski Samac and Odzak municipalities in the territory of Bosnia and Herzegovina from approximately 1 September 1991 until 31 December 1993. The indictment charged the accused on the basis of his individual criminal responsibility (Article 7(1)) and superior criminal responsibility (Article 7(3)) with crimes against humanity (Article 5 - persecutions on political, racial and religious grounds.

718. According to the indictment Stevan Todorovic was Chief of Police for Bosanski Samac municipality and a member of the Serb Crisis Staff from 17 April 1992. He occupied a position of superior authority to all other police officers in Bosanski Samac. **He was sentenced to ten years imprisonment** [emphasis added]. The Trial Chamber said

> *the crime of persecution is inherently very serious. It is the only crime against humanity which requires that the perpetrator act with a discriminatory intent and, by its nature, it incorporates other crimes. On account of its distinctive features, the crime of persecution justifies a more severe penalty. The gravity of Stevan Todorovic's criminal conduct was aggravated by his superior position and by the manner in which the crimes were committed. Thus, in the Chamber's opinion, his crime was particularly grave.* [Para. 113]
>
> *While mitigating factors have been given considerable weight in the determination of the sentence in this case, the Chamber wishes to emphasise that this in no way detracts from the gravity of Stevan Todorovic's crime. The Chamber considers that Stevan Todorovic's timely plea of guilt and his substantial cooperation with the Prosecutor are of primary importance as mitigating factors in this case. Indeed, had it not been for these factors, he would have received a much longer sentence. The Chamber has also taken into*

[85] ICTY, Trial Chamber, Judgment 25 June 1999.
[86] ICTY, Trial Chamber, Judgment 31 July 2001.

consideration in mitigation of sentence Stevan Todorovic's expression of remorse, which it has accepted as sincere. [Para. 114]

3. The Delalic Case[87]

719. In the Delalic case the Trial Chamber found

Zdravko Mucic guilty, pursuant to Article 7(3) of the Statute, for: the wilful killing and murder of Zeljko Cecez, Petko Gligorevic, Gojko Miljanic, Miroslav Vujicic and Pero Mrkajic, Scepo Gotovac, Zeljko Milosevic, Simo Jovanovic and Bosko Samoukovic, and for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Slavko Susic counts, the torture of Milovan Kuljanin, Momir Kuljanin, Grozdana Cecez, Milojka Antic, Spasoje Miljevic and Mirko Dordic (counts 33 and 34); the wilful causing of great suffering or serious injury to body or health to, and cruel treatment of, DraganKuljanin, Vukasin Mrkajic and Nedeljko Draganic, and the inhuman and cruel treatment of Mirko Kuljanin (counts 38 and 39); and for the inhuman and cruel treatment of Vaso Dordic, Veseljko Dordic, Danilo Kuljanin, Miso Kuljanin, Milenko Kuljanin and Novica Dordic (counts 44 and 45). The Trial Chamber has further found that Zdravko Mucic, by his participation in the maintenance of inhumane conditions in the Celebici prison-camp, as well as by his failure to prevent or punish the violent acts of his subordinates by which the detainees in the Celebici prison-camp were subjected to an atmosphere of terror, is guilty of wilfully causing great suffering or serious injury to body or health, and cruel treatment (counts 46 and 47). Mr. Mucic has also been found guilty pursuant to Article 7(1) of the Statute of unlawful confinement of civilians (count 48). [Para. 1237]

The Trial Chamber has found that conditions of detention in the Celebici prison-camp were harsh and, indeed, inhuman. The feeding conditions were at starvation level, medical health and sanitary conditions were inadequate and indeed deplorable. The guards were hostile, and severe beatings, torture and humiliation of detainees were the norm. Some guards experimented punishment methods on detainees, and the death of detainees was a common occurence and not a surprise. No one appeared to care whether the detainees survived. These were the conditions perpetrated by Zdravko Mucic, who was the commander of the Celebici prison-camp after its creation. There is evidence that Mr. Mucic selected the guards. He also chose his deputy, Hazim Delic in apparent demonstration of the type of discipline he expected in the prison-camp. In addition, the prison-camp was set within the Celebici barracks, where soldiers of the Bosnian army had free access. [Para. 1242]

The uncontradicted evidence before the Trial Chamber is that Mr. Mucic was the commander of the prison-camp, with overall authority over the officers, guards and detainees, and the person to whom the officers and guards were subordinate.

[87] See footnote 43.

Mr. Mucic was responsible for conditions in the prison-camp and for the unlawful confinement of the civilians there detained. He made no effort to prevent or punish those who mistreated the prisoners, or even to investigate specific incidents of mistreatment including the death of detainees. Instead, there is evidence that he was never in the prison-camp at night, when mistreatment was most likely to occur. He was regularly away to visit his family, and remained absent for days in obvious neglect of his duty as commander and the fate of the vulnerable detainees. According to the evidence before the Trial Chamber, he was aware that detainees were being mistreated or even killed. In apparent encouragement, he tolerated these conditions over the entire period he was commander of the prison-camp. [Para. 1243]

The conduct of Mr. Mucic before the Trial Chamber during the course of the trial raises separately the issue of aggravation. ***The Trial Chamber has watched and observed the behaviour and demeanour of Mr. Mucic throughout the trial. The accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process. The Presiding Judge has, on occasions, had to issue stern warnings reminding him that he was standing trial for grave offences. The Prosecution has also presented evidence of an exchange of notes between Zejnil Delalic and Zdravko Mucic conspiring about the fabrication of evidence to be given at the trial. There have also been allegations that Mr. Mucic participated in the threatening of a witness in the courtroom. Such efforts to influence and/or intimidate witnesses are particularly relevant aggravating conduct, which the Trial Chamber is entitled to take into account in the determination of the appropriate sentence*** [emphasis added]. [Para. 1244]

In addition to the number of aggravating factors, there are some mitigating instances. There was, in the Konjic municipality, a strong anti-Serb feeling at the time relevant to the Indictment. It was in the midst of this anti-Serb hostility that Mr. Mucic became the commander of a detention facility for Serbs suspected of anti-Bosnian activities. Zdravko Mucic was a Bosnian Croat among Bosnian Muslims. He could not ordinarily be seen to be favouring the Bosnian Serbs, who were perceived by many as the enemies of the Bosnian State. These considerations, probably in self-preservation, prevented him from taking stronger measures to contain the obvious mistreatment of detainees. [Para. 1245]

720. **He was given a sentence of seven years** [emphasis added]. The convictions were dismissed on appeal.

4. The Kvocka Case[88]

721. In that case the amended indictment charged the accused as follows:

> Miroslav Kvocka on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) and on the basis of superior criminal responsibility (Article 7(3)) with violations of the laws or customs of war (Article 3 - outrages upon personal dignity; murder; torture; cruel treatment) and Crimes against humanity (Article 5 - persecutions on political, racial or religious grounds; inhumane acts; murder; torture).
>
> Dragoljub Prcac on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) and on the basis of superior criminal responsibility (Article 7(3)), with violations of the laws or customs of war (Article 3 - torture; cruel treatment; murder; outrages upon personal dignity), and Crimes against humanity (Article 5 - persecutions on political, racial, or religious grounds; inhumane acts; murder; torture).
>
> Milojica Kos on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) and on the basis of superior criminal responsibility (Article 7(3)) with violations of the laws or customs of war (Article 3 - outrages upon personal dignity; murder; torture; cruel treatment), and Crimes against humanity (Article 5 - persecutions on political, racial or religious grounds; inhumane acts; murder; torture).

722. It was alleged that between April and August 1992 Bosnian Serb authorities in the Prijedor municipality unlawfully segregated, detained and confined more than 6,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area of northwestern Bosnia and Herzegovina in the Omarska, Trnopolje and Keraterm Camps. In the Omarska camp the detainees included military aged males and political, economic, social and intellectual leaders of the Bosnian Muslim and Bosnian Croat population. There were about 37 women detained in the camp. At Keraterm camp the majority of the detainees were military aged males. At Trnopolje camp the majority of detainees were Bosnian Muslim and Bosnian Croat women, children and the elderly. It was alleged that living conditions at the Omarska and Keraterm camps were brutal and inhumane, interrogations were conducted on a daily basis and regularly accompanied by beatings and torture. Severe beatings, torture, killings, sexual assault and other forms of physical or psychological abuse were commonplace, with camp guards using all types of weapons and instruments to beat and otherwise physically abuse the detainees. At a minimum, hundreds of detainees, whose identities are known and unknown, did not survive. It is alleged that the conditions at the Trnopolje camp were also abject and brutal. Both male and female detainees were killed, beaten and otherwise physically and psychologically maltreated. In addition,

[88] See footnote 42.

many of the women detainees were raped, sexually assaulted, or otherwise tortured.

723. Miroslav Kvocka was the first commander of the Omarska camp, becoming deputy commander in June 1992. As commander he was in a position of authority superior to everyone in the camp. As deputy commander, he was in a position of authority superior to everyone in the camp other than the camp commander. Dragoljub Prcac replaced Miroslav Kvocka as deputy commander of the Omarska Camp in June 1992. As a deputy commander, he was in a position of authority superior to everyone in the camp other than the camp commander. Milojica Kos and Mladjo Radic were appointed as two of the three shift commanders of guards at the Omarska camp. As shift commanders, and when present in the camp, the accused were in a position of superior authority to all camp personnel, other than the commander or deputy commander, and most visitors. It is alleged that Zoran Zigic entered all three camps during the period of May to August 1992 for the purpose of abusing, beating, torturing and/or killing prisoners.

724. Miroslav Kvocka was found guilty by virtue of his individual criminal responsibility on **one count of crimes against humanity and two counts of violations of the laws or customs of war and sentenced to seven years' imprisonment** [emphasis added]. The reasoning of the Trial Chamber was the following.

The Trial Chamber found that Kvocka's knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him ***responsible for war crimes and crimes against humanity for persecution, murder and torture****. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views* [emphasis added]. [Para. 712]

The crimes for which Kvocka is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp, and many of whom did not survive the violence and intense suffering. [Para. 713]

Kvocka holds the highest level of authority of any of the defendants in this case. He was the deputy commander of the camp, a duty officer, and an experienced active duty policeman. Although he was not the architect of the persecutions committed against the non-Serb population confined in Omarska camp, he participated in the persecutions. [Para. 714]

His participation in the enterprise renders him a co-perpetrator of the joint criminal enterprise. He played a key role in facilitating and maintaining the functioning of the camp, which allowed the crimes to continue. On a few

occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved relatives or friends. [Para. 715]

The Trial Chamber also notes that Kvocka gave a voluntary statement to the Prosecution and gave evidence in Court, which are mitigating factors. The Trial Chamber is also persuaded that Kvocka is normally of good character. He was described as a competent, professional policeman. His experience and integrity can be viewed as both mitigating and aggravating factors – his job was to maintain law and order and, although he apparently did a fine job of this prior to working in the camp, he failed seriously to perform his duty to uphold the law during his time spent in Omarska camp. Holding a position of respect and trust in the community, his failure to object to crimes and maintaining indifference to those committed in his presence was likely viewed as giving legitimacy to the criminal conduct. [Para. 716]

The Trial Chamber takes note of the fact that Kvocka was not convicted of physically perpetrating crimes. [Para. 717]

725. Dragolub Prac was found guilty by virtue of his individual criminal responsibility on **one count of crimes against humanity and two counts of violations of the laws or customs of war and sentenced to five years' imprisonment** [emphasis added].

726. The trial Chamber gave the following reasons:

Dragoljub Prcac, a Bosnian Serb, was 55 years old at the time the crimes were committed. He was a retired policeman and crime technician who was called upon to assist Zeljko Meakic in Omarska camp, after the departure of Kvocka. He was primarily an administrative aide, a pencil pusher, in Omarska camp. Prcac was detained by SFOR on 5 March 2000, whereupon he was transferred to the Tribunal detention facility in The Hague. [Para. 719]

The Trial Chamber found that Prcac's knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for ***war crimes and crimes against humanity for persecution, murder, and torture****. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views* [emphasis added]. *[Para. 720]*

The crimes for which Prcac is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp and many of whom did not survive the violence and intense suffering. ***He called out names of victims***

and had to know that in doing so, he was sending them to be tortured or killed *[emphasis added]. [Para. 720]*

The Trial Chamber takes note of the fact that Prcac voluntarily gave a statement to the Prosecution and has not been convicted of physically perpetrating crimes. [Para. 722[

Prcac's participated as a co-perpetrator in the crimes ascribed to him as part of the joint criminal enterprise. He facilitated and maintained the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved former colleagues or friends. [Para. 723]

Prcac spent approximately 22 days in the camp at the end of its existence. The Trial Chamber takes note of the fact that Prcac is the oldest of the defendants, he is in ill health, and he has two disabled children. [Para. 724]

727. Milojica Kos was found guilty by virtue of his individual criminal responsibility on one count of **crimes against humanity and two counts of violations of the laws or customs of war and sentenced to six years' imprisonment** [emphasis added]. The following reasons were given

Milojica Kos was 29 years old in 1992, at the time the crimes were committed. He was arrested by SFOR on 28 May 1998. In 1992, he worked as a waiter until he was mobilized as a reserve policeman to work as a guard shift leader in Omarska camp. [Para. 727]

The Trial Chamber found that Kos' knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible as a co- perpetrator of ***war crimes and crimes against humanity for persecution, murder, and torture****. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.* [emphasis added] [Para. 728]

The crimes for which Kos is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp and many of whom did not survive the violence and intense suffering. [Para. 729]

As a guard shift leader, Kos facilitated and maintained the functioning of the camp, which allowed the crimes to continue. On a few rare occasions he assisted detainees and attempted to prevent crimes. [Para. 730]

The Trial Chamber notes that Kos has been convicted of perpetrating crimes of physical assault and harassing detainees by demanding money and stealing valuables from them. He exploited the vulnerability of detainees for his own personal gain. [Para. 731]

The Trial Chamber notes that Kos is the youngest of the defendants, and he was an inexperienced and untrained police officer at the time he took up his duties in the camp, whereas three of the other defendants had extensive training in police matters. Because he did not hold a position of high esteem in the community prior to his position in Omarska, he likely would not have been a role model for the guards and thus his silence would not carry the same degree of complicity in encouraging or condoning crimes as would, for example, Kvocka and Prcac, who were treated with considerable respect in the community prior to their participation in the activities in Omarska. [Para. 732]

5. The Kupreskic Case[89]

728. In that case Zoran Kupreskic, Mirjan Kupreskic Vlatko Kupreskic, Drago Josipovic and Vladimir Santic were charged on the basis of individual criminal responsibility (Article 7(1) of the Statute) with violations of the laws or customs of war (Article 3 - murder; cruel treatment), Crimes against humanity (Article 5 - persecutions on political, racial or religious grounds; murder and inhumane acts. The indictment charged Dragan Papic on the basis of individual criminal responsibility (Article 7(1)) with Crimes against humanity (Article 5 persecutions on political, racial or religious grounds).

729. The amended indictment of 9 February 1998 alleged that during the armed conflict between the forces of the Croatian Community of Herceg-Bosna, the Croatian Defence Council (HVO) and those of the Government of Bosnia and Herzegovina, from January 1993 until at least May 1993, the HVO systematically attacked villages chiefly inhabited by Bosnian Muslims in the Lasva River Valley Region of central Bosnia and Herzegovina.

730. **The accused were charged for their alleged involvement as HVO soldiers in the persecution of Bosnian Muslims in the village of Ahmici-Santici and its environs from October 1992 to April 1993, and in the participation in an attack on Ahmici-Santici on 16 April 1993. During the attack the village was shelled from a distance and then groups of HVO soldiers went from house-to-house attacking Bosnian Muslim civilians and burning their houses, barns and livestock** [emphasis added].

Zoran Kupreskic and Mirjan Kupreskic were sentenced to 10 and 8 years imprisonment *respectively. Both were ultimately released on appealed. The trial Chamber gave the following reasons for the sentence passed.* [emphasis added]

[89] ICTY, Trial Chamber, Judgment 14 January 2000.

Zoran Kupreskic and Mirjan Kupreskic have been found ***guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute*** [emphasis added]. [Para. 851]

The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. Zoran and Mirjan Kupre skic have been found guilty of persecution in the form of the expulsion of Muslim civilians, including women and children from Ahmici-Santici and its environs, the destruction of Bosnian Muslim homes and property and their active presence in the area whilst armed. In particular, they entered the house and expelled the family of Suhret Ahmic. This is in spite of the fact that even as late as March 1993 both attended Muslim holiday celebrations. Of the two accused, Zoran Kupreskic played a more leading role as the local commander. [Para. 852]

The fact that Zoran Kupreskic and Mirjan Kupreskic voluntarily surrendered to the International Tribunal on 6 October 1997 is a factor in mitigation of their sentence. 853

731. **Vlatko Kupreskic was sentenced to six years imprisonment**. He too saw his conviction quashed on appeal. The Trial Chamber grounded the sentence as follows: [emphasis added]

Vlatko Kupreskic has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute). [Para. 854]

Vlatko Kupreskic has been found guilty of ***persecution in the form of aiding and abetting****, by helping in the preparation of the attack on Ahmici, such as unloading weapons in his store and allowing his house to be used in the attack. He was also present near the house of Suhret Ahmic, shortly after the attack on the latter's house. Thus he was clearly supportive of the attack.* [emphasis added] [Para. 855]

It is noted that prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or ethnic prejudice. [Para. 856]

Unlike the other accused, Vlatko Kupreskic did not surrender to the International Tribunal. He was arrested on 18 December 1997. During the arrest there was an exchange of fire with the arresting forces. [Para. 857]

732. **Drago Josipovic to 15 years imprisonment** [emphasis added]. The Trial Chamber gave the following reasoning

Drago Josipovic has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute); Count 16 (murder as a

crime against humanity under Article 5(a) of the Statute); and Count 18 (other inhumane acts as a crime against humanity under Article 5(i) of the Statute). [emphasis added] [Para. 858]

As far as persecution is concerned, Drago Josipovic played an active role in the killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmici-Santici region. In particular, Drago Josipovic participated in the attack on the Pušcul house, during which the house was burnt down and Musafer Pušcul was killed and the family was expelled from their home after having been forced to witness the murder of Musafer Pušcul. He also participated in the attack on the house of Nazif Ahmic in which Nazif and his 14-year old son were killed and he was actively involved in the burning of private property. The attack was launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape. [Para. 859]

In mitigation, the evidence shows that Drago Josipovic lent an HVO army vest to Mr. Osmanovic, a Muslim, to assist him to escape. During the attack on 16 April he stopped other soldiers from killing Witness DD. Another factor in mitigation is that he voluntarily surrendered to the International Tribunal on 6 October 1999. [Para. 860]

6. The Kronejelac Case[90]

733. In the Kronejelac case the third amended indictment, dated 25 June 2001, charged the accused Milorad Krnojelac on the basis of individual criminal responsibility (Article 7(1) of the Statute) and, or alternatively, superior criminal responsibility (Article 7(3) thereof) with Violations of the laws or customs of war (Article 3 of the Statute torture; cruel treatment; murder; slavery), Crimes against humanity (Article 5 thereof persecutions on political, racial and religious grounds; torture; inhumane acts; murder; imprisonment enslavement).

734. It was generally alleged that from the beginning of April 1992 until mid-July 1992, Serb military forces took control and occupied Foca and the surrounding villages. The Serb authorities arrested Muslim villagers throughout the municipality and separated the men from the women. Thousands of Muslims and other non-Serbs were unlawfully confined. The Foca Kazneno-Popravni Dom (KP Dom) prison became the primary detention facility for men and functioned as a detention facility from April 1992 to October 1994. Most of the detainees, the number of which reached a peak at 760, were civilian Muslim men from 16 to 80 years of age, including mentally handicapped, physically disabled and seriously ill persons, who had not been charged with any crime. According to the indictment, from April 1992 until August 1993, Milorad Krnojelac, was the commander of the KP Dom and is alleged, while acting as camp commander, to have subjected

[90] ICTY, Trial Chamber, Judgment 15 March 2002.

Muslim and other non-Serb males to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings, prolonged and frequent forced labour and inhumane conditions within the KP Dom detention facility. In addition, Krnojelac is alleged to have assisted in the deportation or expulsion of the majority of Muslim and non-Serb males from the Foca municipality. **The accused was sentenced to undergo seven and half years' imprisonment** [emphasis added].

735. The Trial Chamber gave the following reasons:

> ***The Accused has been found criminally responsible under two heads of liability. For his participation in the imprisonment of the non-Serb detainees, the Trial Chamber has found that, although the Accused did not intend that the non-Serb detainees be imprisoned, deprived of the necessities of a humane existence, or be subjected to physical and psychological assaults, he knew that this was happening*** *at the KP Dom and he did little to try to prevent it. For these offences, the Trial Chamber has found the Accused guilty of aiding and abetting the cruel treatment and persecution of the non-Serb detainees pursuant to Article 7(1) of the Statute upon the basis that, by his failure to take any action in relation to the offences which he was aware had been committed, he knowingly contributed in a substantial way to the continued maintenance of those those offences by encouragement to the principal offenders. With respect to the beating of the non-Serb detainees established as cruel treatment and as inhumane acts not forming the basis of the persecution charge under Article 5(h) of the Statute, the Trial Chamber has found the Accused criminally responsible as a superior pursuant to Article 7(3) of the Statute. The Accused expressed no regret for the part he played in the commission of these offences, and only insubstantial regret that the offences had taken place.* [emphasis added] [Para. 513]
>
> *The Trial Chamber considers that the Accused's aiding and abetting of the cruel treatment and persecution of the detainees is aggravated by the fact that he held the most senior position in the KP Dom. This is a case in which the Accused chose to bury his head in the sand and to ignore the responsibilities and the power which he had as warden of the KP Dom to improve the situation of the non-Serb detainees. The sentence in this case must make it clear to others who (like the Accused) seek to avoid the responsibilities of command which accompany the position which they have accepted that their failure to carry out those responsibilities will still be punished. The extent of that aggravation in the present case must nevertheless be tempered to at least some extent by two possibly countervailing factors.* [Para. 514]
>
> *First, prior to his appointment as warden of the KP Dom, the Accused had been employed as a mathematics teacher for most of his working life. He was not well experienced, and perhaps not well suited, for the task he chose to undertake. He also did not have a particularly strong character, and the expert reports of both the Prosecution and the Defence were agreed that the Accused had a conformist*

personality. The Accused appears for these reasons to have felt unable to confront the authority of the military or persons of strong character such as deputy warden Savo Todovic. Secondly, unlike other persons who filled roughly similar positions as the Accused did and who have been dealt with by this Tribunal, his participation in these crimes was limited to his aiding and abetting the criminality of others. [Para. 515]

The first of these matters may, in some circumstances, constitute a matter in mitigation of sentence. The Trial Chamber does not, however, consider it appropriate in the present case to mitigate the sentence of the Accused on the basis that he is the type of person who did not have the strength of character to challenge what he knew to be criminal behaviour by those over whom he had authority in the KP Dom. The Accused voluntarily accepted this position of authority, and the fact that he may have had difficulties in exercising the authority which that position gave him did not, in the circumstances, mitigate his responsibility. However, both matters to which reference has been made have led the Trial Chamber to place less weight upon the aggravating feature of the Accused's position as warden than it otherwise would have. [Para. 516]

The Prosecution submitted that there were other aggravating circumstances which the Trial Chamber should accept. In relation to some of these matters (such as discriminatory motives and ethnic hatred on the part of the Accused), the Trial Chamber has already stated that it is not satisfied that they have been established in the evidence. Other matters put forward by the Prosecution as aggravating circumstances which have not previously been dealt with by the Trial Chamber are the allegations that the Accused acted primarily for personal gain and out of a desire for social, political and career advancement, and that he was guilty of abuse of his authority. The Trial Chamber is not satisfied that these allegations have been established on the evidence. The Trial Chamber has already taken into account other matters put forward by the Prosecution as aggravating circumstances when it considered the gravity of the offences proved, such as the particular vulnerability of the direct victims, the length of time over which the crimes continued during the Accused's tenure as warden of the KP Dom, and the extent of the long term physical, psychological and emotional suffering of those victims. The Trial Chamber considers that it would be impermissible double counting to take these matters into account again as matters of aggravation as well. [Para. 517]

There was some evidence that, in cases where the Accused was personally approached by individual detainees with particular requests, he did act to help those detainees. There was also some evidence of attempts on the part of the Accused to improve the condition of all detainees by securing more food for the KP Dom. Although these acts on the part of the Accused had limited practical effect upon the welfare of the non-Serb detainees in general, they do mitigate the criminality of the Accused when compared to that of those subordinate to him. [Para. 518]

The Trial Chamber has also taken into account that, prior to his appointment as warden at the KP Dom, the Accused was a person of good character and that, since the termination of his appointment as warden of the KP Dom, the Accused returned to his teaching profession without any suggestion of further criminal conduct on his part. The Trial Chamber has also taken into account the Accused's good conduct in the Detention Unit since his arrest. [Para. 519]

Finally, the Trial Chamber has given credit to the Accused for the extent to which his Counsel co-operated with it and with the Prosecution in the efficient conduct of the trial. Counsel were careful not to compromise their obligations to the Accused, but the restriction of the issues which they raised to those issues which were genuinely in dispute enabled the Trial Chamber to complete the trial in much less time than it would otherwise have taken. [Para. 520]

In the present case, the actions of others for which the Accused has been found to bear criminal responsibility either individually or as a superior may be described as follows:

The imprisonment of a vast number of non-Serb civilians, the overwhelming majority of whom were Muslims, including young and elderly, ill, wounded, physically incapacitated and mentally disturbed persons. They were detained for periods ranging from four months to two and a half years. None had been charged with any offence, and their detention was unlawful. Their imprisonment and continued confinement was discriminatory on religious or political grounds.

These non-Serb civilian detainees were housed in cramped conditions making it impossible for them to move freely, or in some instances, to sleep lying down; they were isolated from the outside world and denied access to their families; they were subject to deplorable hygienic conditions; they were exposed to the freezing temperatures of winter 1992, and they were fed starvation rations which led the detainees to suffer considerable weight loss ranging from 20 to 40 kilograms. Many of the detainees were denied access to medical care which was available, and those requiring emergency medical attention were not handled with proper care. The non-Serb detainees were also subjected to a psychologically exhausting regime while detained at the KP Dom. They were exposed to the sounds of their fellow detainees being beaten and tortured, leading many to fear that they would be next, and attempts made by the detainees to improve their living conditions were punished harshly with beatings and periods in the isolation cells. As a result of these conditions, the physical and psychological health of many of the non-Serb detainees deteriorated or was destroyed. The substantial cause of the death of one such detainee was the failure to provide access to medical care, and 19 other detainees suffered serious physical and psychological consequences as a result of the living conditions of the KP Dom. Most suffered severe weight loss, many spent periods in hospital after their release, and some still require constant medication and medical care. Nearly all continue to suffer from some form of psychological

disorder, including anxiety attacks, sleeplessness, nightmares, depression or other nervous conditions.

The non-Serb civilian detainees were also systematically beaten and mistreated while detained at the KP Dom by the KP Dom guards, and by soldiers and military police coming from outside the KP Dom, for whose actions he was not responsible but who were permitted to enter the KP Dom in order to mistreat detainees in this way by the guards under the control of the Accused and for whose actions he was responsible. Over fifty of those incidents of beating were sufficient severity as to constitute inhumane acts and cruel treatment. Two further beatings of detainees had been inflicted upon religious or political grounds. [Para. 523]

F. Sentence Passed on the Accused

736. The panel considered the degree of participation of the accused in the offences of which he was found guilty. He was on the scene and no doubt and participated in the pillage of property, the displacement of people and torture. The court also considered the gravity of such acts and the circumstances in which they were committed. The court did consider that such offences occurred at a time of ethnic conflict, a conflict though started by the Serbs also saw the Serbs being victims. The house of the accused was destroyed and he was also a target of harassment by the Albanians. The panel also took into consideration the age of the accused and the state of his health, and his attitude throughout the trial which was not arrogant. Bearing all this in mind and the fact that the maximum sentence was 20 years at the time for the offences charged, the court passed the sentence it did as this was considered reasonable in the circumstances when judged by the yardstick of the ICTY case law.

Court Recorder
Cecilia Takoff

Presiding Judge
Vinod Boolell

Legal Remedy: An appeal is allowed against this verdict to the Supreme Court through this court fifteen (15) days from the date it is notified to the parties.