SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 89/2010
Prishtinë/Priština
26 January 2011

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judges Martti Harsia and Charles L. Smith III and Kosovo Judges Emine Mustafa and Nesrin Lushta as members of the panel.

With the assistance of EULEX Legal Officer Sampsa Hakala and International Court Recorders Eriona Bitri Brading and Mia Mezini as Court Recorders and International Interpreters Edmond Laska, Altina Ruli-Williams and Biljana Maric.

In the criminal proceedings against the accused:

I[redacted] G[redacted], aka Commander "L[redacted]",

N[redacted] M[redacted], aka "D[redacted]",

R[redacted] M[redacted], aka "R[redacted]",

All three accused were convicted by the verdict of the District Court of Prishtinë/Priština P. Nr. 526/05 dated 02 October 2009 for War crimes against civilians contrary to Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) as follows:

1. L[redacted] G[redacted] guilty of War crimes against civilians as described in count 5, count 8 and count 14 of the verdict and was sentenced to serve a term of imprisonment of 6 years. Pursuant to Article 351 paragraph 1 of the Law on Criminal Proceedings of the SFRY (LCP), the accused L[redacted] G[redacted] was ordered to compensate to the injured party M S for the damages caused, which was determined in the sum of 5.000,00 (five thousand) Euro.

2. N[redacted] M[redacted] guilty of for War crimes against civilians as described in count 5 and count 8 of the verdict and was sentenced to serve a term of imprisonment of 3 years.

3. The accused R[redacted] M[redacted] guilty of War crimes against civilians as described in count 5 and count 8 of the verdict and was sentenced to serve a term of imprisonment of 4 years.

Acting upon the appeals filed in favour of defendants L[redacted] G[redacted], N[redacted] M[redacted] and R[redacted] M[redacted], respectively dated 17, 12 and 15 February 2010, against the verdict of the District Court of Prishtinë/Priština in case P.Nr. 526/05, dated 2 October 2009.

Considering the reply of the Special Prosecution Office of the Republic of Kosovo (SPRK), dated 5 March 2010 and the opinion and motion of the Office of the State Prosecutor of Kosovo (OSPK), dated 15 April 2010.

After having held a session on 25 January 2011, open to public and in the presence of the accused L[redacted] G[redacted], N[redacted] M[redacted] and R[redacted] M[redacted], Defence Counsels [redacted] and Chief EULEX Prosecutor Johannes van Vreesvijk, representing the Office of the State Prosecutor of Kosovo.

Following the deliberation held on 25 January 2011, pursuant to Articles 384 and 385 (1) and (3) of the LCP, the pronounces in public this

VERDICT

The appeals filed in favour of the defendants L[redacted] G[redacted], N[redacted] M[redacted] and R[redacted] M[redacted] against the verdict of the District Court of Prishtinë/Priština in case P.nr. 526/05, dated 2 October 2009, are hereby PARTIALLY GRANTED.

The verdict of the District Court of Prishtinë/Priština in case P.nr. 526/05, dated 2 October 2009, is cancelled with reference to its Count 8 and to the aggregate punishments that were imposed upon each of the accused. The separate

punishments for counts 5 and 14 as determined by the re-trial court are upheld, whereas the challenged verdict is cancelled with respect to the aggregate punishment for each of the accused. The first instance court, after considering count 8 as instructed by the Supreme Court, shall then determine the aggregate punishment on all counts.

The case is returned to the first instance court for re-trial with regards to the cancelled part of the verdict P.Nr. 526/05.

The verdict of the District Court of Prishtinë/Priština in case P.nr. 526/05, dated 2 October 2009, is affirmed in its remaining parts. The appeals filed in favour of the accused are REJECTED insofar.

CONTENTS

REASONING

Procedural History

1. On 19 November 2002, an indictment was filed against the three accused as well as the now late N[redacted]K[redacted] in the District Court of Prishtinë/Priština.

The indictment was subsequently amended on 04 February and on 30 June 2003. Pursuant to the amended indictment, the accused had to stand trial for 14 different counts, charging them for the criminal offense of War Crimes against Civilians, in violation of Article 142 of the CC SFRY, applicable law in the proceedings pursuant to UNMIK Regulation 1999/24 issued by the United Nations Interim Administration Mission in Kosovo (UNMIK) as amended by UNMIK Regulation 2000/59.

2. The 1st Instance Trial was held before the District Court of Prishtinë/Priština which, in its decision dated 16 July 2003, dismissed counts 4, 6, 7, 10 and 13 of the indictment in total as well as the charges of counts 1 and 11 of the indictment against L[redacted]G[redacted]. The charges of Inhumane Treatments, Beatings and Torture of civilians allegedly committed at the detention centres in Majac and Potok of counts 5 and 8 of the indictment against the accused were also rejected as well as the charge of count 12 against N[redacted]M[redacted] and the charges of count 14 against N[redacted]M[redacted] and R[redacted]M[redacted].

With the said decision, the accused were found guilty for the criminal offence of War Crimes against Civilians in relation to the remaining charges. As a consequence, terms of imprisonment of 10 years for L[redacted]G[redacted], 13 years for N[redacted]M[redacted] and 17 years for R[redacted]M[redacted] were imposed.

3. The Defense Counsels of the three accused appealed the conviction, challenging all the counts for which their clients had been found guilty; the Prosecutor filed an appeal only in relation to the term of the sentence imposed by the trial panel to L[redacted]G[redacted].

4. The Supreme Court of Kosovo, with its decision dated 21 July 2005 (Ap. – Kz. 139/2004), further reduced the extension of the indictment, thus 'cancelling in their entirety' counts 1, 2, 3 and 12 (all related to the charge of Unlawful Detention and Arrest), and acquitting the accused for count 11 because the factual allegation had not been proven 'beyond all doubt'. Nevertheless, the enacting clause of the respective Supreme Court decision reads that *"verdict no. 425/01 [...] is annulled and cancelled in its entirety and the case [...] remanded for retrial"*. Therefore, the remaining counts were sent back to the 1st Instance Court for re-trial, pursuant to Article 381 of the LCP. Contextually, the Supreme Court of Kosovo released the accused from custody and ordered restrictive measures (which were finally lifted by the Presiding Judge of the 1st Instance Re-Trial Court with two successive rulings dated 28 April and 15 July 2009).

5. The District Court of Prishtinë/Priština (P 526/05) considered that a new main trial had to be held in regards to the remaining counts of the indictment 5, 8, 9 and 14, being

however the facts referred to in count 8 already properly ascertained and confirmed by the Supreme Court in its decision (Ap.-Kz. 139/2004) and limited itself, regarding this specific count, to the only sentencing.

6. On 14 April 2009, the EULEX SPRK Prosecutor filed an amended indictment against the three accused in which the single count of War Crimes against Civilians was divided into three sub-counts encompassing counts 4, 5, 6, 7, 8, 9, 11, 13 and 14 of the original indictment. The Defense Counsels objected to the indictment, submitting that the amended indictment included charges which were not part of the *thema decidendi* anymore.

7. The amended indictment was rejected by decision of the District Court of Prishtinë/Priština dated 08 July 2009 and, as a consequence, the amanded indictment dated 30 June 2003 was taken as a basis for the re-trial regarding counts 5, 8, 9 and 14.

8. The Re-Trial commenced on 07 July 2009 before the District Court of Prishtinë/Priština in front of a mixed EULEX/Kosovo panel at the presence of the accused and their Defense Counsels, and without any of the of the duly summonsed injured parties.

9. The 1st Instance Court held altogether 12 sessions between 07 July and 02 October 2009, within which the indictment and its amendments were read in accordance with Article 390 of the LCP as well as the decisions on rejecting the amended indictment, the three accused were examined and the following witnesses were heard: K H , G Z S G , R E , K P , N G , N . Г , K K , M L , I S A M , T A , V , J , F M , F S , M S and R B . All witnesses confirmed their statements given to the Investigative Judge in 2002 or in front of the 1st Instance Trial Panel in 2003 and answered on request some additional questions.

Moreover, the Court entered into the records as evidence the statements of witness "Q" given to the Investigative Judge on 01 and 11 February 2002, the statement of witness S B given to the Investigative Judge on 18 July 2002, the statements of witness "4"given to the Investigative Judge on 18 October 2002 and the record of the testimony of the witness given at the main trial on 20 and 21 March 2003 as well as the statement of witness V V (originally witness "H") given to the Investigative Judge on 06 February 2002 and the record of the testimony of the witness given at the main trial on 05 March 2003. In addition, the Court accepted and reviewed evidence already offered during the first main trial and submitted to the Re-Trial Court by the Prosecutor as follows: exhibit no. 4 ("the brown book"); exhibit no. 33, (the OSCE report titled "as seen and told"); exhibit no. 26 and 27 (medical records on M . S .) and the records of the Site Inspection conducted during the first main trial on 27 June 2003 as well as attached photos, in particular photo no. 7, 8 and 9. The 1st instance Court heard the final speeches from the Public Prosecutor, the Defense Counsels of the accused and the accused themselves and announced the Judgment on 02 October 2009, when also the

arrest of the accused L[redacted]G[redacted] was ordered pursuant to Article 353 paragraphs 1 and 7 of the LCP.

10. In the course of his final speech, the SPRK Prosecutor withdrew the charge of Count 9 of the amended indictment dated 30 September 2003, regarding the alleged beating and torture of illegally detained Kosovo-Albanian citizens in a detetion centre in Koliq.

11. On 02 October 2009 the 1st Instance Re-Trial Court, District Court of Prishtinë/Priština with Judgment P 526/05 found the accused guilty as follows:

- The accused **L[redacted] G[redacted]** of the criminal offense of **War Crimes against Civilians** (pursuant Article 142 as read with Articles 22, 24, 26 and 30 of the CC SFRY), as described in Count 5, Count 8 and Count 14 of the amended indictment of the 30th of June 2003 and sentenced him to a term of imprisonment of six (6) years; moreover, the Court ordered him to compensate the injured party M S for the damage caused in the sum of five thousand (5000,-) €.
- The accused **N[redacted] M[redacted]** and **R[redacted] M[redacted]** of the criminal offense of **War Crimes against Civilians** (pursuant Article 142 as read with Articles 22, 24, 26 and 30 of the CC SFRY), as described in count 5 and count 8 of the amended indictment of the 30th of June 2003 and sentenced them to a term of imprisonment, N[redacted] M[redacted] of three (3) and R[redacted] M[redacted] of four (4) years.

With the same Judgment, the 1st Instance Court ordered all three accused to reimburse the costs of the criminal proceeding pursuant to Article 98 paragraph 1 and 2 of the LCP, with exception of the costs for interpretation and translation.

12. With a separate Ruling, pursuant to Article 353 paragraph 1 of the LCP, the 1st Instance Court imposed detention on remand on L[redacted] G[redacted] until the verdict would become final.

13. The 1st Instance Judgment was served to L[redacted] G[redacted] personally on 3 February 2010, to N[redacted] M[redacted] on 4 February 2010 and to R[redacted] M[redacted] on 3 February 2010. The Defence Counsels of all three accused filed their appeals within the prescribed period of time: the Defense of **L[redacted] G[redacted]** appealed on 18 February 2010, the Defense of **N[redacted] M[redacted]** on 15 February 2010 and the Defense of **R[redacted] M[redacted]** on 16 February 2010. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. Therefore, the Defense Counsels requested as follows:

- **the Defense Counsels of L[redacted] G[redacted]** that the Supreme Court of Kosovo modifies – in endorsing their appeal – the 1st instance Judgment by acquitting L[redacted] G[redacted] of all charges
- **the Defense Counsel of N[redacted] M[redacted] and the Defense Counsel of R[redacted] M[redacted]** that the Supreme Court of Kosovo annuls the appealed Judgment and

returns the case back to the 1st instance Court for re-trail, or amends it by acquitting N[redacted] M[redacted] and R[redacted] M[redacted] from all charges.

14. **The Special Prosecution Office of Kosovo (SPRK)**, with a reply dated 05 March 2010 and registered with the Registry of the Supreme Court of Kosovo the same day objected to the appeals as being without merit and unfounded. The Special Prosecutor proposed to reject the appeals of all three accused and to affirm the Judgment of the District Court of Prishtinë/Priština no. 526/05 dated 02 October 2009 in its entirety.

15. **On 13 May 2010 the Office of the State Prosecutor of Kosovo (OSPK)** filed an opinion dated 15 April 2010 pursuant to Article 370 paragraph 1 of the LCP and proposed:

1) **as main request**, to reject the appeals of the Defense Counsels of the accused L[redacted] G[redacted], N[redacted] M[redacted] and R[redacted] M[redacted], submitted against the Judgment P.Nr. 526/05 dated 02 October 2009 of the District Court of Prishtinë/Priština and to confirm the contested Judgment and

2) **as subsidiary request**, should the Supreme Court consider that the factual situation was not properly ascertained in regards to some of the facts referred to in the counts for which the defendants have been convicted,

a) to consider opening a hearing according to the combined reading of Article 372 paragraph 1 and Article 373 paragraph 1 of the LCP, in order to clarify where needed, with the gathering of additional relevant evidence (including the hearing of eventual witnesses) the facts requiring clarification and in this way avoiding unnecessary delays; or

b) to cancel the contested Judgment (partly or completely) and return the case for retrial pursuant to the combined reading of Article 381 paragraph 1 and Article 385 paragraphs 1 and 3 of the LCP, by providing clear instructions and guidance to the 1st Instance Court, in any case without opting for the acquittal; of the defendants based on the reasons that an additional trial would be in breach of the defendants' rights to be tried within a reasonable time and without applying the same conclusions adopted in the decision of the Supreme Court of Kosovo (Ap.-Kz. no. 1/2009, dated 07 October 2009), currently subject to a Request for Protection of Legality filed by the OSPK on 26 March 2010.

3) **As alternative subsidiary request**, should the Supreme Court ascertain the existence of essential violations of the principles of the criminal procedure or that the Supreme Court Decision Ap.-Kz. 139/2004 annulled, in its substantial totality, Judgment Ap.-Kz. 139/2004 act in accordance with Article 385 paragraphs 1 and 3 of the LCP and annul, partially or totally, the Judgment P 526/05 and order a new trial before the court of original jurisdiction, with the same requests outlined in aforementioned point 2) sub b) in regards to the need to issue clear instructions and guidance to the 1st instance Court and concerning the non application of the

same principles and same conclusions reached in the Supreme Court decision Ap.-Kz. no. 1/2009.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

I. Formal Insufficiencies and Contradictions of the Enacting Clause

16. The Defense Counsels of all three accused, partially with different reasoning, have stressed that the enacting clause of **the 1st Instance Judgment would violate Article 364 paragraph 1, sub-paragraph 11 of the LCP** (equivalent to Article 403 paragraph 1 item (12) of the Kosovo Code of Criminal Procedure (KCCP)).

17. The Supreme Court of Kosovo, having carefully analyzed the 1st Instance Judgment in comparison with the applicable law, finds the following:

18. Although some of the requirements of Article 357 of the LCP are not fully met by the challenged 1st Instance Judgment, these shortcomings do not justify the modification or annulment of the Judgment in question, since the alleged violations did not affect the rendering of a lawful and proper judgment as required by Article 364 paragraph 1, sub-paragraph 11 of the LCP.

1. The 1st Instance Judgment as such and its compliance with Article 357 of the LCP

19. According to the Defense, the 1st Instance Judgment as such does not contain an enacting clause at all. The Judgment respectively reads "Enacting Clause" instead of "Judgment" and moreover the appealed decision would lack most of the elements of Article 357 of the LCP, although the latter would be mandatory. Article 357 of the LCP would be violated, since the enacting clause would lack necessary data of the accused as foreseen by Article 357 paragraph 4 as read with Article 351 of the LCP.

20. In this regard, the Supreme Court of Kosovo found that according to the minutes of the Main Trial dated 02 October 2009, in which the challenged Judgment was announced, there are no discrepancies between the written verdict and the verdict as it was announced in the session. Therefore, the respective requirement of Article 357 paragraph 1 of the LCP is met.

21. Moreover, the 1st Instance Judgment in general is structured in compliance with Article 357 paragraph 1 of the LCP. It consists of an introduction, an enacting clause and an explanation (reasoning). It particularly it is structured as follows:

- Introduction p. 1

- Enacting Clause p. 2-4
- Reasoning p. 4-30
  - Procedural History p.4-7
  - Legal Findings p.7-20
  - Analysis of the relevant counts (5, 8, 9 and 14 of the indictment) p.21-30
- Sentencing (as part of the reasoning) p.30-31

22. At this point, it is worth mentioning that the introduction of the Judgment contains all necessary information as required by Article 357 paragraph 2 of the LCP.

Article 357 paragraph 2 of the LCP stipulates as follows:

The introduction of the verdict shall contain the following: statement to the effect that the verdict is pronounced in the name of the people, the name of the court, the first and the last name of the presiding judge of the panel and the members of the panel and the court clerk, the first and the last name of the defendant, the criminal act with which he is charged, notation as to whether he was present at the main trial, the date of the main trial, indication as to whether the main trial was public, the first and the last name of the prosecutor, defense counsel, legal representative and attorney who were present at the main trial, and the date when the verdict pronouncement was announced.

The 1st Instance Judgment particularly is pronounced "In The Name Of The People", this statement, as the headline to the whole Judgment, informs that the verdict is given by the District Court of Prishtinë/Priština, contains the first and the last name of both, the Presiding Judge Francesco Florit and the panel members, EULEX Judge Tron Gunderson and Kosovo Judge Rahman Retkoceri and also refers to the full name of the Court Clerk, saying that the panel was *"assisted by the court clerk undersigned"*, whose full name, Francesco Caruso, is not contained in the introduction, but is given at the end of the Judgment (p.32 of the English version). The Supreme Court insofar finds that – although the latter aspect is not fully in line with the requirements of Article 357 paragraph 2 of the LCP - this circumstance does not endanger the validity of the Judgment, since the Judgment needs to be read as a whole and finally also contains the full name of the Court Clerk.

The introduction moreover contains the first and the last name of all three accused, which are **L[redacted] N[redacted] M[redacted]** and **R[redacted] M[redacted]**, although the criminal acts they were charged with, are not mentioned in the introduction. However, this again does not render the Judgment invalid since the respective charges are given in all details in the enacting clause (p. 2 of the English version) and considering the fact that the Judgment needs to be read as a whole.

The 1st Instance Judgment in its introduction moreover notes as well the fact that the defendants have been present during the Main Trial as it gives information on the date of the Main Trial, which in its last session commenced on 1st October 2009, and on the date when the verdict was pronounced, which was 02 October 2009.

The introduction of the Judgment indeed does not contain the first and last name of the Prosecutor and the Defense Counsels, nor does it give any information on whether the Main Trial was held publicly as required by Article 357 paragraph 2 of the LCP.

However, as to the Prosecutor and the Defense Counsels, the Judgment in its introduction says: *"... after having held the main trial, in the presence of the Public Prosecutor, of the accused and their defense counsels; ..."* (p. 1 of the English version).

It goes without saying that the Judgment is based on the Main Trial sessions as reflected in the minutes.

From all the minutes to the 12 sessions of the Main Trial, which commenced on 7, 8, 9, 10 and 15 July 2009, 9, 10, 11, 15, 18 and 30 September 2009 and on 02 October 2009, the names of the Defense Counsels can be read as follows:

- [redacted] and [redacted] for L[redacted] G[redacted]
- [redacted] for R[redacted] M[redacted]
- [redacted] for N[redacted] M[redacted]

It also can be read from all the aforementioned minutes that *"the session* ... [was] ... *public"*, (always p. 1 of the English version).

The aforementioned viewpoints of the Supreme Court of Kosovo are supported as well by the relevant commentaries on Article 357 of the LCP, which stipulate as follows:

"[t]he introduction of the verdict is, in itself, and based on its fixed content, a specific part of the verdict because it objectively identifies the agents-participants in the proceedings at the main trial, the case and time of trial. In that, one also has to bear in mind the fact that the provisions of Article 364, paragraph 1, item 11, refer only to the introduction of the verdict, which means that a minor flaw in the introduction of the verdict would not represent any significant violation of the provisions of criminal procedure from Article 364" (Branco Petric; Commentary on the Law on Criminal Procedure 1986; 2nd Edition, Official Gazette of the SFRY; Belgrade; Article 357; item II.3.).

23. The Supreme Court of Kosovo therefore finds that the 1st Instance Judgment in its introduction contains some formal weaknesses, which otherwise do not lead to the Judgment being invalid, since in fact it can be understood from the minutes that no formal mistakes have been made in that regard.

2. The enacting clause and its compliance with Article 357 as read with 351 of the LCP

24. The Defense moreover has stressed that Article 357 of the LCP would be violated, since the enacting clause would lack necessary data of the accused as foreseen by Article 357 paragraph 4 as read with Article 351 of the LCP. Moreover, the enacting clause would not describe at all the charge from count 9 of the verdict against **L[redacted] G[redacted]** and **R[redacted] M[redacted]** and why it was refused.

25. The Supreme Court of Kosovo finds that the enacting clause of the 1st Instance Judgment fulfills at least the minimum requirements of the law and that it is structurally and substantively sufficient. Insofar, Article 357 paragraphs 3 and 4 as read with Articles 218 and 351 of the LCP are decisive regarding the form and contents of the enacting clause.

Article 357 paragraphs 3 and 4 stipulate as follows:

(3) The enacting clause of the verdict shall contain personal data on the accused (Article 218 paragraph 1) and the decision declaring the defendant guilty of the criminal act with which he was charged or acquitting him of the charge of that criminal act or rejecting the charge.

(4) If the defendant has been found guilty, the enacting clause of the verdict must include the necessary data referred to in Article 351 of this Law, and if he is acquitted of the charge or the charge is rejected, the enacting clause of the verdict must include description of the criminal act with which he is charged and the decision on the cost of criminal proceedings and property claim if submitted.

Article 218 paragraph 1 of the LCP as far as being relevant in the case at hand, reads as follows:

(1) ... [T]he accused ... shall be asked his first and last name, his nickname, if he has one, the first and last names of his parents, his mother's maiden name, his birth place, his address, his date of birth, the nationality he belongs to and the country of which he is a citizen, his occupation, and his family situation, he shall also be asked if he is literate, which schooling he had, ... has he been convicted ...
Article 351 of the LCP, as far as relevant here, stipulates as follows:

In a verdict declaring the defendant guilty, the court shall pronounce the following:

1) *the criminal act of which the defendant is found guilty, along with citation of the facts and circumstances which constitute the features of the criminal act and those on which the application of the particular provision of the criminal law depends;*
2) *the legal name of the criminal act and the provisions of the criminal law applied;*

3) *the punishment to which the defendant is sentenced or release from punishment under the provisions of the criminal law;*
4) ...
5) ...
6) *a decision crediting pre-trial custody and time already served;*
7) *a decision concerning costs of criminal proceedings, concerning a property claim, and concerning whether the verdict in effect is to be made public through the press, radio or television;*
8) ...

26. The Supreme Court of Kosovo finds that all the necessary requirements of the law towards the enacting clause as lined out before are met by the 1st Instance Judgment and that based on the information given the identification of the accused beyond al doubts is possible.

27. In general, it needs to be mentioned that the enacting clause of the 1st Instance Judgment as such indeed does not contain the relevant personal data of the three accused as required by Article 357 paragraph 3 as read with Article 218 paragraph 1 of the LCP. However, this data is given in all details in the introduction of the Judgment. The introduction gives the first and last name as well as the nicknames of all three accused, i.e. **L[redacted] G[redacted], aka Commander "L[redacted]", N[redacted] M[redacted], aka "D[redacted]" and R[redacted] M[redacted], aka "R[redacted]"**. It mentions the names of both parents of each of the defendants (although not the respective maiden names of their mothers), the place and date of birth of all three accused as well as their addresses/places of residence, which at the time of the 1st Instance main Trial was either a private address or a detention centre. Their nationality and citizenship as given as "Kosovo Albanian by ethnicity" in each case and also their respective occupation and family situation as well as the fact that none of them was previously convicted is lined out in the introduction. For the details, reference is made to p. 1 of the 1st Instance Judgment (English version) and to the personal data of the accused as given in this Supreme Court Judgment. Considering that the Judgment needs to be read as a unique document, the respective requirements of the law are fulfilled by the Judgment at hand.

It in particular it can not be *ratio legis* of the respective provisions of the applicable criminal procedure law, which in the case at hand is the LCP, to have the facts quoted several times in the judgment, in particular in the introduction, in the enacting clause and maybe again in the statement of grounds part of the judgment, just for formalistic reasons or to include large and necessary parts of one part of the judgment also into another part of the same judgment, in the case at hand into the enacting clause. While the enacting clause at hand is clear and understandable, a judgment has to be considered as being a unique document composed of three parts as there are introduction, enacting clause, and statement of grounds (Article 357 paragraph 1 of the LCP). Since the enacting clause is an integral (and most decisive) part of the judgment it has to be read and interpreted in connection with all the other parts of the judgment.

28. It is noteworthy that indeed the Judgment of the 1st Instance Court does not give any information on the question whether the accused are literate. However, it is pointed out that all three of them hold law degrees of the University of Prishtinë/Priština and thus it may be considered that they are literate.

29. Also, the maiden names of the mothers of the three accused are not mentioned in the Judgment. However, the purpose of this requirement of the law is to make sure the identity of the accused beyond any doubt. Since the latter is not the case but the identity of all three accused is clearly established in the course of the introduction to the 1st Instance Judgment, this lack of information can not have any effect on the validity of the Judgment.

30. Finally, it is worth mentioning that no information is given on the military service and possible decorations of the three accused. Despite from the question whether or not these requirements of the LCP are still up to date and relevant at all for the finding of an appropriate sentence, the military functions of the three accused, up to a certain degree, are subject of the case as such and of the analysis as carried out by the 1st Instance Court. Therefore, they are discussed at length in the course of the reasoning to the Judgment. However, also this lack of information can not have any impact on the validity of the Judgment at hand.

31. The Supreme Court of Kosovo moreover finds that the decision declaring the defendants guilty of the criminal acts with which they were charged, as required by Article 357 paragraph 3 of the LCP are lined up in detail in the enacting clause of the 1st Instance Judgment (p. 2 of the English version). After it is said which counts of the indictment the three accused are found guilty for, the respective counts of the indictment in relation to the accused are quoted in the enacting clause.

32. Moreover, the 1st Instance Judgment in its enacting clause correctly rules on rejecting the charge of Count 9 of the indictment with which **L[redacted]G[redacted]** and **R[redacted] M[redacted]** had been charged (p.3 of the English version). The decision was made based on the withdrawal of the respective count by the Public Prosecutor. Thus, the enacting clause of the 1st Instance Judgment also fulfills the second requirement of Article 357 paragraph 3 of the LCP.

33. Finally, the Supreme Court of Kosovo also finds that the enacting clause of the verdict includes the necessary data referred to in Article 351 of the LCP as required by Article 357 paragraph 4 of the LCP. It pronounces the criminal acts of which the accused are found guilty along with citation of the facts and circumstances which constitute the elements of the criminal acts as well as those on which the application of the respective criminal law depends (Article 142 as read with Articles 22, 24, 26 and 30 of the CC SFRY). Insofar, reference is made to what was pointed out before, saying that the 1st Instance Judgment quotes the respective counts of the indictment in detail (A. I. 2., p.13 item 31). The legal name of the respective criminal acts is given as *"War Crimes against Civilians"*, whereas the correct name used by the CC SFRY is *"War Crimes against*

Civilian Population", which nevertheless does not amount to a procedural violation of any impact to the validity of the decision.

34. Finally, the punishment to which the three accused were sentenced is lined out separately for each of the accused on p. 3 of the 1st Instance Judgment (English version).

35. Last but not least, the enacting clause also contains a decision on crediting pre-trial custody and time already served and rules on the costs of the criminal proceedings (p.3 of the English version) as well as on the property claim of the injured party M S . (p. 4 of the English version).

3. General inconsistencies and contradictions of the enacting clause

36. The Defense has claimed that the enacting clause of the 1st Instance Judgment would be incomprehensible and inconsistent, since **it could not be understood, whether the accused had been sentenced for only one unique criminal act of War Crimes against Civilians, or for more of them.** It in particular would be in contradiction with Article 48 of the CC SFRY. Therefore, Article 364 paragraph 11 of the LCP would be violated.

37. Reference is made to Article 364 paragraph 11 of the LCP as read with Article 357 paragraph 5 of the LCP and – materially - Article 48 of the CC SFRY. The Supreme Court of Kosovo finds that the sentencing part of the enacting clause of the 1st Instance Judgment (p.3 of the English version) indeed lacks some clarity but reading the entire enacting clause illuminates that an aggregate punishment on two criminal offences of War Crimes against Civilians pursuant to Article 142 as read with Article 22, 24, 26 and 30 of the CC SFRY was imposed to the accused N M and R M (counts 5 and 8 of the indictment) and three of them to the accused L C (counts 5, 8 and 14 of the indictment). Therefore the Supreme Court finds that no essential violation of Article 364 paragraph 11 of the LCP was committed by the 1st Instance Court in this regard.

Article 357 paragraph 5 of the LCP reads as follows:

"In a case of concurrent criminal acts, the court shall incorporate in the enacting clause of the verdict the penalties determined for each individual criminal act, and thereupon the sentence pronounced for all the concurrent criminal acts".

Article 48 paragraph 1 of the CC SFRY, as relevant in the case at hand, stipulates as follows:

(1) If an offender by one deed or several deeds has committed several criminal acts, and if he is tried for all of these acts at the same time (none of which has yet been adjudicated), the court shall first assess the punishment for each of the acts, and then proceed with the determination of the integrated punishment (compounded sentence) for all the acts taken together.

(2) The court shall impose the integrated punishment by the following rules: ...

38. The enacting clause of the 1st Instance Judgment in terms of the sentencing reads as follows:

"[T]he accused L[redacted] G[redacted] is found guilty of the criminal offence of War Crimes against Civilians, as described in count 5, count 8 and count 14, of the amended indictment of the 30th of June 2003 and described below;

[T]he accused N[redacted] M[redacted] and R[redacted] M[redacted] are found guilty of the criminal offence of War Crimes against Civilians, as described in count 5 and count 8, of the amended indictment of the 30th of June 2003 and described below;

Count 5 from October of 1998 until late April of 1999, L[redacted] G[redacted] N[redacted] M[redacted] and R[redacted] M[redacted] pursuant to a joint criminal enterprise, ordered and participated in the establishment and perpetuation of the inhumane treatment of Kosovo Albanian civilians detained in the detention centre located at Llapashica, by housing those civilian detainees in inhumane conditions, depriving them of adequate sanitation, food and water, and needed medical treatment. The inhumane treatment of the civilian detainees caused immense suffering or was a violation of the bodily integrity and health of those detainees and constituted an application of measures of intimidation and terror. Thus incurring in personal and superior responsibility for the war crimes contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Count 8 L[redacted] G[redacted] N[redacted] M[redacted] and R[redacted] M[redacted] from of 1998 until late April of 1999, pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians detained in the detention centre at Llapashica, in an attempt to force those detainees to confess to acts of disloyalty to the KLA. Thus incurring in personal and superior responsibility for the war crime of inhumane treatment, immense suffering or violation of the bodily integrity and health, application of measures of intimidation and terror contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY.

Count 14 from 2 August 1998 until late September 1998, L[redacted] G[redacted] ordered and participated in the beating and torture of M S , a Serbian forest ranger who was detained in detention centres located at Bare, Bajgora in an attempt to force him to confess to acts against the KLA or to provide intelligence information, thus incurring in personal responsibility for the war crime of inhumane treatment, immense suffering or violation of the bodily integrity and health, application of measures of intimidation and terror contrary to Article 142 of the CCY as read with Articles 22, 24, 26 and 30 of the CCY. [...]

For the above mentioned reasons the Panel, pursuant to Article 42 and 48 paragraph (1) and (2), sub-paragraph (1) of the LCP issues the following:

SENTENCE

1. ***L[redacted]G[redacted] shall serve a term of imprisonment of 6 years;***
2. ***N[redacted]M[redacted] shall serve a term of imprisonment of 3 years;***
3. ***R[redacted] M[redacted] shall serve a term of imprisonment of 4 years;***

[...]"

39. The Supreme Court of Kosovo finds that indeed the sentence as such does not meet the requirements of Article 357 paragraph 5 of the LCP and moreover in its wording lacks clear reference to Article 48 of the LCP, which is mandatory. The latter would have been the case stipulating that each of the accused shall serve an *"integrated"* punishment of ...[x]... years.

As far as Article 357 paragraph 5 of the LCP is concerned, it needs to be stressed that according to relevant commentaries the non-observation of the provision leads to the incomprehensibility of the enacting clause as envisaged by Article 364 paragraph 11 of the LCP:

"If individual sentences, stipulated for criminal acts in concurrence, were not stated in the enacting clause of the verdict, then the enacting clause of the verdict would be incomprehensible (Article 364 paragraph 1, item 11), as it would not be evident, based on which individual sentences the sentence was pronounced" (Branco Petric; Commentary on the Law on Criminal Procedure 1986; 2nd Edition, Official Gazette of the SFRY; Belgrade; Article 357; item IV.4.).

Nevertheless, the Supreme Court of Kosovo finds that this concern is not relevant in the case at hand, since it can not be concluded that it is *"not evident, based on which individual sentences the sentence was pronounced"*.

40. In the case at hand it illuminates from the reference to Article 48 paragraph 1 and 2, sub-paragraph 1 of the LCP as made by the 1st Instance Court in its introduction to the sentence, that the Court has intended to impose an aggregate punishment based on separate punishments for each of the accused and the respective counts in question. This, read together with the specification of the respective counts of the indictment in detail as listed before, makes it very clear that beyond all doubt the 1st Instance Court has sentenced each of the three accused for several criminal acts of War Crimes against Civilians pursuant to Article 142 as read with Articles 22, 24, 26 and 30 of the LCP, i.e. N[redacted]M[redacted] and R[redacted] M[redacted] for two of them and L[redacted] G[redacted] for three of them.

41. Both aforementioned findings of the Supreme Court become even clearer considering the respective part of the reasoning on the sentencing of the accused, which reads as follows (on page 31 of the English version):

"Taking as most severe behavior the conduct described in count 8 (considering the repeated beatings and torture as more severe than the detention in inhumane condition) ***R*** *M* *is given 4 years of detention,* ***N*** *M* *3 years and* ***L*** *G* *5 years. In relation to count 5, 2 years are added to* ***R*** *M* *, 1 year and six months are added to* ***N*** *M* *and 2 years to* ***L*** *G* *Eventually, in relation to count 14,* ***L*** *G* *is given a further term of 2 years, to be added to the previous ones, inflicted to the accused. The resulting totals (6, 4.5 and 9 years respectively) are subject to the application of a diminishing circumstance that applies to all of the accused".*

42. The Supreme Court of Kosovo considers it as being beyond all doubts that the 1st Instance Court has imposed separate punishments for each relevant count of the indictment as committed by each of the accused and then – based on this – imposed an integrated punishment for each of them as provided by Article 48 paragraph 1 and 2, sub-paragraph 1 of the LCP and reflected in the sentencing part of the enacting clause.

43. Moreover, the Defense of **R** **M** has stressed that the 1st Instance Court had not adequately explained the notion of *"superior"*, when referring to a leading role of the respective accused. The Defense therefore alleges the **enacting clause of being contradictive in terms of talking about *"personal and superior responsibility"* of the accused.**

44. The Supreme Court of Kosovo in this regard finds that the 1st Instance Re-Trial Court fully has referred to a number of facts as already established in the first main trial in 2003 (P 425/01) and thereafter confirmed by Supreme Court decision Ap.-Kz. 139/2004. This approach of the Re-Trial Court is based on the Court's consideration of having a role as being limited to the review of counts 5, 8, 9 and 14 of the original amended indictment dated 30 June 2003 only. The latter particularly can be understood from the extensive reasoning of the Court as related to the interpretation of the Supreme Court decision Ap.-Kz. 139/2004 (p.8 ff and particularly p. 10 of the English version). It in this regard is worth mentioning that the 1st Instance Re-Trial Court particularly with reference to parts of counts 5 and 8 of the indictment of 16th July 2003 has referred to the Customary Law Principle of *tantum devolutum quantum appellatum*, which is applicable also in Kosovo and means that the appeal judge may decide only on those parts of the appealed decision, which have been contested by either party. On this point the 1st Instance Re-Trial Court has considered the view of the Defense of the three accused as being correct, that the respective parts of the counts, of which the accused had been acquitted, had not been challenged by the Prosecutor and thus had become *res judicata.* It needs to be underlined in the context given that the application of a legal principle like the one at hand can not be limited to certain parts of a case and only as far as certain results are favored, but needs to be conducted in a unique manner with reference to the whole case. On this background, the principle of *narra mihi factum, narra tibi ius* leads to the result that the already established and uncontested facts of a case serve the ground for the respective judge to establish the applicable law. This freedom of the judge to apply the law is generally contained to some extent by the legal characterization of the alleged facts by the indictment only. However, what was gathered by the District Court of

Prishtinë/Priština by itself would suffice, alone, to convict this defendant for at least the facts represented in Count 5 of the amended indictment dated 30 June 2003.

45. Finally, as to the position of the Defense **that the enacting clause did not describe the contents of Count 9 of the challenged verdict against L[redacted] G[redacted] and R[redacted] M[redacted] nor state why the charge was refused,** the Supreme Court of Kosovo finds this argument without merits at all. It can clearly be read from the enacting clause of the 1st Instance Judgment that *"The trial panel, noting that the prosecutor on 30th of September 2009 withdrew the charge against L[redacted] G[redacted] and R[redacted] M[redacted] as per count 9 of the amanded indictment, after reading Article 349 n.3 of the Law on Criminal Proceedings of the Socialist Federal Republic of Yugoslavia, REJECTS the charge of count 9"* (p.2 and 3 of the English version). Since this reasoning is self-explaining, the Supreme Court at this point refrains from any further explanation. Since the charge was withdrawn by the Prosecutor, there was no need to state its contents in the Judgment again.
The Supreme Court of Kosovo insofar notes that indeed no description of the contents of count 9 is provided by the challenged 1st Instance Judgment. However, the Supreme Court finds that this fact – although not in line with the procedure provided – does not harm anybody, since the respective count was withdrawn by the Prosecutor in the course of his final speech and therefore rejected by the 1st Instance Re-Trial Court, which is why this part of the procedure is clearly in favor of all three accused only. A procedural violation amounting to the cancellation of the challenged Judgment was not established in the context given.

II. Contradictions concerning the Reasons of the 1ST Instance Judgment

46. The Defense Counsels of all the three accused moreover have challenged the reasoning of the Judgment as such.

1. Alleged contradictions between the enacting clause and the reasoning concerning the punishment

47. The defence counsel particularly of L[redacted] G[redacted] has alleged that the enacting clause of the judgment is in contradiction with the reasoning because L[redacted] G[redacted] was sentenced to a term of imprisonment of six (6) years, "for one criminal offence", whereas in the reasoning of the judgment, a specific punishment was pronounced against the defendants for each count of the indictment and according to that the punishment would be higher and particularly in the case of L[redacted] G[redacted] amount nine (9) years .

48. The Supreme Court as to this point, refers to what already was pointed out before under Section A. I. 3, particularly on p.14, item 36 ff. of this Judgment. Beyond all doubts the 1st Instance Court has imposed an aggregate punishment, which was described in the enacting clause and based on separate punishments for each relevant count of the indictment as elaborated in the sentencing part of the reasoning of the challenged

Judgment (p. 31 of the English version). Therefore, no violation of Article 364 paragraph 1, item 11 of the LCP was established in the context given.

2. Alleged violation of criminal procedures by disregarding the legal name of an identified criminal act

49. The Defence moreover has stressed that the 1st Instance Court had violated criminal procedures, since it had disregarded the legal name of the criminal offence imposed, which, according to Article 142 of the CC SFRY would be "War Crimes against the Civilian Population", and not – like in the wording used by the 1st Instance Court – "War Crime" or "War Crimes against Civilians".

50. The Supreme Court in this respect finds that the 1st Instance Court in its Judgment clearly refers to the criminal offence defined by Article 142 of the CC SFRY as read with Articles 22, 24, 26 and 30 of the CC SFRY. The fact that the Court does not repeat the name of the criminal offence in a servile manner, does not affect the rendering of a proper and lawful Judgment, particularly keeping in mind that the naming of an offence as defined by the law is under the discretion of the law maker and serves the purpose to make a clear difference to other, probably similar provisions, but does not impact the contents of the respective criminal offence at all. Therefore, no incomprehensibility or inconsistency of the challenged Judgment can be established in the context at hand.

3. Necessity to specify the personal data of each civilian concerned by criminal act of War Crimes pursuant to Article 142 of the CC SFRY

51. The Defence of the accused has claimed a violation of Article 364 paragraph 1, item 11 of the LCP because the challenged 1st Instance Judgment failed to specify the identities of the victims deprived of freedom and held in conditions as described in the enacting clause, or against whom actions such as beating and torture were carried out.

52. The Supreme Court of Kosovo finds that no violation of criminal procedure can be established in the context given. This illuminates through an interpretation of the respective requirements of Article 142 of the CC SFRY.

53. Article 142 of the CC SFRY as relevant in the context at hand stipulates as follows:

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to [... list of relevant criminal acts ...] *or who commits one of the foregoing acts, shall be punished ...*

54. From the commentaries, it can be understood that Article 142 of the CC SFRY protects the civilian population as a whole. The commentaries insofar read as follows:

"The civilian population is the victim of the criminal act. The criminal-legal protection includes all the civilians in the occupied territory, i. e. both the citizens of the country which is completely or partially occupied, as well as foreigners. The protection also refers to the civilians under the authority of the aggressor also when they are not in the territory of their country [...]" (Ljubisa Lazarevic; Commentary of the Criminal Code of FRY; 1995; 5th Edition; Savremena Administracija; Belgrade; Article 142; item 3. at the end)

55. Therefore the Supreme Court considers that – although specified personal data of alleged victims might be helpful in certain cases – it is not always necessary to specify the identities of the persons that may be subject to the acts criminalized under Article142 of CC SFRY. This in particular applies when the subjective and objective elements of the same criminal acts are fulfilled and considered proved by the court as in the present case.

Reference is made to what already was established in the course of procedural history as described in this Judgment (p.4 and 5, item 9). It was found that the 1st Instance Re-Trial Court had heard the witnesses K H , G Z S G , R E K P , N G , N I , K K M L , I S , A M , T A V J , F M , F S , M S , and R B and that all witnesses have confirmed their statements given to the Investigative Judge in 2002 or in front of the 1st Instance Trial Panel in 2003 as well as they have answered on request some additional questions. It also was found that the 1st Instance Re-Trial Court has entered into the records as evidence the statements of anonymous witness "Q" given to the Investigative Judge on 01 and 11 February 2002, the statement of witness S B , given to the Investigative Judge on 18 July 2002, the statements of anonymous witness "4"given to the Investigative Judge on 18 October 2002 and the record of the testimony of the witness given at the main trial on 20 and 21 March 2003 as well as the statement of witness V V (originally witness "H") given to the Investigative Judge on 06 February 2002 and the record of the testimony of the witness given at the main trial on 05 March 2003. Many of these witnesses have been on the victims' side during the times, when the crimes in question have been committed.

56. Despite the immediate national law as applicable in the case at hand, it is one of the key principles of international humanitarian law that non-combatants (civilians but also former combatants, such as prisoners of war and fighters rendered *hors de combat* because they are wounded, sick, shipwrecked or have surrendered, who all are often referred to as "protected persons") are to be spared from various forms of harms, irrespective of their identities. Therefore, at the heart of war crimes law a series of prohibitions of violence against and mistreatment of non-combatants is provided.

57. The International Criminal Tribunal for the Former Yugoslavia (ICTY), in establishing the legal conditions of a War Crime has stipulated that *"*[t]*he victims of the alleged crimes must qualify as protected persons pursuant to the provisions of the 1949 Geneva Conventions"* (ICTY Trial Chamber I, Prosecutor v Brdjanin, Judgment dated 1 September 2001, paragraph 121; and also *ICTY Trial Chamber II, Prosecutor v Simic, Tadic and Zaric, Judgment, Trial Chamber dated 17 October 2003, paragraph 106),*

and/or that "[a]*s Common Article 3 protects persons taking no active part in the hostilities, the victims of the alleged violation must have taken no active part in the hostilities at the time the crime was committed" (ICTY Trial Chamber II, Prosecutor v. Fatmir Limaj et al, Judgment dated, 30 November 2005, paragraph 176).*

58. Specification of the identity of victims such as names, surnames, date and place of birth etc never has been required so far. This in addition would lead to the quite questionable situation that for the sake of criminal responsibility of alleged perpetrators the identity of anonymous witnesses would have to be made public in the court decision. Considering the fact that in cases of war crimes – and not only in the case at hand – there might be numerous former victims willing to state only anonymously, the result would be a lack of witnesses willing to testify at all.

4. Alleged wrong and incomplete application and quoting of Article 22 of the LCP in the enacting clause

59. The Defense particularly of L[redacted] G[redacted] has challenged the enacting clause of the 1st Instance Judgment due to the fact that in its Count 14 only the actions undertaken by L[redacted]G[redacted] would be described, whereas in the qualification of the criminal offences for which they were found guilty, the provision of Article 22 of the CC SFRY had been applied, which punishes co-perpetration.

60. The Supreme Court of Kosovo finds that no essential violation of criminal procedure can be established in this regard. This clearly illuminates from the reading and interpretation of Article 22 of the CC SFRY.

61. Article 22 of the SFRY stipulates as follows:

If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as described for the act.

62. The Supreme Court understands the intent of the Defense to complain about the fact that it would not be possible that a crime be committed in co-perpetration without the identification of the other (or of all the other) co-perpetrators.

63. It goes without saying that co-perpetration requires a group of people (at least two of them), willingly co-operating with each other in order to commit a crime. This is supported also by the definition given in the relevant commentaries, defining that complicity under the CC SFRY is *"a conscious and willing act of associating with other participants, with the intent of jointly accomplishing a certain deed' (Ljubisa Lazarevic, Commentary of the Criminal Code of FRY 1995, 5th Edition; Savremena Administracija; Belgrade; Article 22; item (1)).*

Although without question criminal responsibility always necessarily is a personal one, and therefore all formal-objective as well as subjective theories on complicity, thus

having impact on the quality of participation in a crime as a main perpetrator or just as an aider, also requires a clearly defined person as an accomplice, there is no need for the investigating authorities or for the judge to know all perpetrators of a crime by personal data, if it can be established, in which way a crime was committed and if at least one out of a group of alleged perpetrators including his or her involvement into the crime can be defined. It goes without saying that the lack of information on other co-perpetrators cannot lead to the result that a person under reasonable suspicion of having committed a crime will not be prosecuted and/or sentenced according to the law. The Supreme Court refers to its previous adjudication as established in the case of Bedri Krasniqi *(Supreme Court of Kosovo, Judgment in the case of B[redacted] K[redacted] Ap.-Kz. 153/08, 12 January 2010, p.21-22 of the English version)*. The respective Judgment stipulates as follows:

> *"Although there is not much more than this very poor legal definition, literature defines complicity under the CC SFRY as "a conscious and willing act of associating with other participants, with intent of jointly accomplishing a certain deed" (Ljubisha Lazarevic, Commentary of the Criminal Code of FRY 1995, 5th edition, "Savremena Administracija" Belgrade, p. 66, item (1) on Article 22 SFRY).*
>
> *Without discussion, this definition requires a group of people, willingly co-operating with each other in order to commit a crime. Of course, since criminal responsibility always necessarily is a personal one, all formal-objective as well as subjective theories on complicity, thus having impact on the quality of participation in a crime as a main perpetrator or just as an aider, also require a clearly defined person as an accomplice. The principle of individualization includes the person of a participant as well as the very act itself. Every other understanding easily could lead to a situation of criminal non-responsibility.*
>
> *However, even considering the objective as well as subjective component of complicity as an act, being based on the will of the acting person (which the latter also requires a person behind the action), there at the other side is no need for the investigating authorities or for the judge to know all perpetrators of a crime by personal data, if it can be established, in which way a crime was committed and if at least one out of a group of alleged perpetrators including his or her involvement into the crime can be defined. It goes without saying that the lack of information on other co-perpetrators cannot lead to the result that a person under reasonable suspicion of having committed a crime will not be prosecuted and/or sentenced according to the law. [...].*
>
> *The same would apply to the criminal act of aiding somebody else's deed, according to Article 24 of the CC SAPK, since aiding is recognized as another possible form of complicity (Ljubisha Lazarevic, Commentary of the Criminal Code of FRY 1995, 5th edition, "Savremena Administracija" Belgrade, p. 76, item (1) on Article 24 CC SFRY). Although the question of assistance also was addressed by the Defense Counsel within the appeal, there is no need to go*

deeper into the details, since the defendant was neither accused nor sentenced for assistance and the First Instance Judgment was not challenged insofar".

64. Therefore the fact that the names of the co-perpetrators are not mentioned in the enacting clause does not render the 1st Instance Judgment invalid.

5. Alleged misinterpretation of the Supreme Court Decision Ap.-Kz. 139/2004 by the 1st Instance Court

65. The Defense of L[redacted]G[redacted] and of N[redacted]M[redacted] further have claimed violations of the provisions of the criminal procedure because, allegedly, the 1st Instance Court had misinterpreted the Supreme Court Decision Ap.-Kz. 139/2004 which "ANNULLED AND CANCELLED IN ITS ENTIRETY" the decision P 425/2001 and remanded the case for re-trial.

66. The Supreme Court of Kosovo, after careful analysis of the referred Supreme Court decision Ap.-Kz. 139/2004 finds that no grievous misinterpretation as carried out by the District Court can be established, particularly in light of the referred charges of War Crimes against the Civilian Population.

67. The Supreme Court, in its decision Ap.-Kz. 139/2004, has established that a number of charges, particularly those represented in Count 1, 2, 3 and 12 of the amended indictment of 30 June 2003 and found proven by the Main Trial Judgment P 425/2001 had to be considered *"not grounded in the law"*. In its reasoning, the Supreme Court has pointed out that *"neither Article 3 Common of the Geneva Conventions nor Article 6 of its related Protocol II refers to illegal arrest or illegal detention during the period of an armed internal conflict" (pg. 12, English version of Ap.-Kz. 139/2004).* Therefore, the respective charges (to use the wording in the Supreme Court Decision Ap.-Kz. 139/2004) had to be *"CANCELLED IN THEIR ENTIRETY"*.

68. Based on this, the District Court of Prishtinë/Priština in its challenged Judgment (P 526/05) has concluded that some of the issues of the case, in particular Counts 1, 2, 3 and 12 of the indictment, had to be considered *res judicata*, whilst others were supposed to be dealt with in the re-trial *(P 526/05, p.11 of the English version)*. Thus, the 1st Instance Re-Trial Court has found itself limited to the re-adjudication on Counts 5, 8, 9 and 14 of the challenged verdict only.

69. The Supreme Court of Kosovo now establishes this interpretation of the 1st Instance Re-Trial Court as being in line with the applicable law. It finds justification also in the commentaries, which stipulate that *"[i]f the verdict is only partially nullified, the part of the verdict that is effective cannot be either discussed, or changed in the new proceedings (Supreme Court of Yugoslavia, Kz. 29/71 of 26th January 1972), but rather that part, if convicting, has to be taken into account and Article 48 of CC SFRY must be applied, even if the new verdict is also a convicting one" (Branco Petric; Commentary on the Law on Criminal Procedure 1986; 2nd Edition, Official Gazette of the SFRY; Belgrade; Article*

390; item I.3.) or that *"[t]he uncontested parts of the verdict acquire substantive legal effectiveness, same as the parts that are contested by an appeal, but for which the verdict has not been annulled. Those parts are not the subject to a trial at the new main trial, nor of an appeal against a new decision [...]" (Momcilo Grubac&Tihomir Vasiljevic, Commentary of the Law on Criminal Procedure 1982; 2nd Edition; Savremena Administracija; Belgrade; Article 385; item(22)).*

Despite the question whether or not the 1st Instance Re-Trial Court has properly and completely taken and evaluated the evidence on each of the counts (a question with which will be dealt at a later stage of the Judgment (see B.II., p.36-44)), the Supreme Court of Kosovo finds that the District Court of Pristinë/Priština has properly understood its formal limitation to the respective counts as intended by the Supreme Court in its decision Ap.-Kz. 139/2004.

The 1st Instance Re-Trial Court's reference to Count 11:

70. The same Defense moreover has challenged, which is also relevant in the context given, that the **reasoning of the Judgment would be inconsistent in itself,** since the 1st Instance Court had linked its stance in connection with count 8 not only with the decision of the Supreme Court, but also with **count 11 of the indictment,** which had to do with five murders, the accused had been acquitted from.

71. The Supreme Court insofar finds that the 1st Instance Court has just quoted the Supreme Court with its decision Ap.-Kz.139/2004 saying that the latter had found that no direct but only circumstantial evidence was available to the first panel on some crucial aspects of the respective count. Therefore, the District Court of Prishtinë/Priština in its Judgment P 526/05 has considered that the relevant part of the decision had to be taken as final, because *"[a] Judgment in the second instance which establishes that no guilt beyond reasonable doubt may be reached corresponds to a final acquittal on the case"* and that a different outcome would lead to the violation of the prohibition of double jeopardy or of the *ne bis in idem* principle *(p.14 of the English version).*

72. In the case at hand the question arises whether or not Article 142 of the CC SFRY needs to be read as one "extended criminal act", independent from the number of separate acts committed in the respective context and if – as a consequence - in this case the 1st Instance Re-Trial Court has been prevented from an interpretation of just a limited number of counts being "cancelled in their entirety" by the Supreme Court.

73. It was already established under item A.I.3., p.14 item 36 ff. of this Judgment that the 1st Instance Re-Trial Panel did not treat the different criminal acts committed by the respective accused as only one criminal act of War Crimes against the Civilian Population pursuant to Article 142 of the CC SFRY, but has imposed separate punishments for each act and then built an aggregate punishment. In the context given at hand, the question arises whether or not it is binding for the courts to handle several acts

as described in Article 142 of the CC SFRY as only one criminal act of War Crimes against the Civilian Population.

74. Not much can be found in the commentaries on the applicable Yugoslavian law, but only one passage, saying that "[t]*he incriminated activities have been alternatively put in the law, so that the act can be performed by each of the activities. However, if one person performs several identical activities or several different activities incriminated in this Article, this will be only one criminal act of war crime against civilian population, since in this case, it ensues from the very legal description of the criminal act that this is a unique criminal act, regardless of the number of the performed individual activities. According to the verdict of the Supreme Court of Serbia Kz-2539/56, there is one criminal act of war crime against the civilian population, in spite of the perpetrator performing particular acts in different places, against different persons, in longer time periods and in a different manner." (Ljubisa Lazarevic; Commentary of the Criminal Code of FRY; 1995; 5th Edition; "Savremena Administracija"; Belgrade; Article 142; item 3 paragraph 5).*

75. Although – which is noteworthy – the commentary does not refer to the respective wording, the Supreme Court understands that it interprets the criminal act of War Crimes against the Civilian Population as stipulated in Article 142 of the CC SFRY in the light of an "extended criminal act". At least, this was the reading as carried out by the first judge and by the Supreme Court in its decision Ap.-Kz. 139/2004.

76. The Supreme Court of Kosovo does not follow this argumentation in the case at hand. Reference is made to the commentaries on Article 48 of the LCP, as far as "extended criminal acts" are concerned. The respective commentary points out that "[t]*he third possible form of apparent actual concurrence is an extended criminal act. It is also the most important one, both from the theoretical and from the practical point of view. From the practical point of view, because it also often appears and in a larger number of criminal acts, and from the theoretical point of view because a single and sufficient definition of this form of apparent actual concurrence has not been made yet. The judicial practice has not been consistent in that regard either, but one standpoint was most often applied and that was the one taken by the Supreme Court of Yugoslavia in 1965. According to that standpoint, in order for an extended criminal act to exist, the following conditions have to be fulfilled: a) that the same person committed two or more simultaneous separate actions, out of which each individual action contains all legal features of the same criminal act i.e. its privileged or qualified form; b) that a certain continuity in time exists between individually committed criminal actions; c) that all the incriminated actions from the standpoint of common sense, real life and logical reasoning represent such a continued activity that clearly constitutes a single whole; d) that the application of the construct of extended criminal act to the concrete case is not in contradiction with the requirements of criminal policy expressed in positive criminal-legal regulations. According to one opinion, a condition for the existence of an extended criminal act is that there is only one injured party or that all the criminal acts were committed against the same physical or legal entity. According to some authors, a single premeditation is necessary or the existence of awareness of the perpetrator that he will commit more of the same criminal acts or the criminal acts of the same kind [...]"*

(Ljubisa Lazarevic; Commentary of the Criminal Code of FRY; 1995; 5th Edition; "Savremena Administracija"; Belgrade; Article 48; item 1 c)).

The Supreme Court at first finds that the prescribed conditions for an "extended criminal act" as one of the cases of actual concurrence do not exist in cases of War Crimes against the Civilian Population, because the single criminal acts that may constitute a war crime cannot be considered as creating an apparent actual concurrence between them in the present case. In general and considering the amount of unlawfulness and criminal energy as set free in a multiple criminal context, treating a number of similar but separate criminal acts legally as only one unique criminal deed deems doubtful, if not this would be unavoidable in order to properly evaluate the amount of unlawfulness and guilt realized by the respective perpetrator. This is not the case here. Each of the conducts foreseen in Article 142 CC SFRY has an autonomous value and equal importance in determining what can fulfill the requirements of a War Crime against the Civilian Population. The latter illuminates also from the commentaries, stipulating that *"[t]he incriminated activities have been alternatively put in the law, so that the act can be performed by each of the activities" (Ljubisa Lazarevic; Commentary of the Criminal Code of FRY; 1995; 5th Edition; "Savremena Administracija"; Belgrade; Article 142; item 3 paragraph 5, p. 161).*

Moreover, treating a number of acts of War Crimes against the Civilian Population as only one "extended criminal act" pursuant to Article 142 of the CC SFRY would privilege the perpetrators and thus give a wrong signal in the way that the more relevant acts are committed, the better it would be for the perpetrators, when at trial once. The latter can not be the intention of the Law, which aims to protect the civilian population in a most efficient manner. Additionally, handling war crimes as "extended criminal acts" would result in preventing prosecution from holding alleged perpetrators responsible for similar crimes, which also would amount to the level of war crimes, when these crimes are newly discovered after the respective perpetrators already have been found guilty for war crimes before (*ne bis in idem*).

77. This corresponds also with the adjudication of the International Criminal Tribunal for the former Yugoslavia (ICTY), where in a number of cases the defense has attempted to have various conducts amounting to war crimes considered as just one "extended criminal act". Although the ICTY has never explicitly addressed the issue of an "extended criminal act", it has referred to the fact that this would have been relevant in the sentencing. (see "Celebici case"; *ICTY Trial Chamber II, Decision on motion by the accused Esad Landžo based on defects in the form of the indictment, and Decision on motion by the accused Hazim Delic based on defects in the form of the Indictment Case IT-96-21-T (Prosecutor v. Zejnil Delaciç, Zdravko Muciç also known as "Pavo", Hazim Deliç, Esad Landžo also known as "Zenga", 15 November 1996*). There the Chamber particularly has determined that the matter of cumulative charges was *"relevant only to the penalty considerations, if the accused were ultimately found guilty of the charges in question"* and that the possible existence of a relation between the different crimes *"is a matter that can be addressed at the time of the sentencing"*.

78. Moreover, the ICTY Trial Chamber in its Sentencing Judgment in the "Celebici case" (P.I.S./628e) dated 09 October 2001 has considered *"that the present case is best resolved by way of a single and global sentence in the case of each accused, thereby reflecting, in each case, the total criminality and culpability of the accused"* and therefore has imposed only a unique, so to say aggregate punishment onto each of the accused. Nevertheless, reading through the reasons of the respective Judgment illuminates that the Trial Chamber has considered and weighed every single count related to each of the accused. The Trial Chamber particularly points out that it would be *"directed to consider what adjustment, if any, should be made to the sentence imposed on him as a result of the quashing of his conviction on counts 1 and 2. The counts related to the willful killing/murder of a detainee as a result of a beating. On the other hand, the accused remains convicted of one offence involving willful killing (by beating), an offence of willfully causing great suffering (again by beating), two offences of torture by way of rape and an offence of inhumane treatment of detainees involving the use of an electric device on prisoners".*

79. The Appeals Chamber in its Judgment dated 08 April 2003 (JP/P.I.S./743e) confirmed the sentences as imposed by the Trial Chamber on 09 October 2001 and upheld the convictions of all three accused under Article 2 of the Statute of the ICTY but held that where, as in the instant case, the evidence establishes the guilt of an accused based upon the same conduct under both Articles 2 and 3 of the Statute of the ICTY, a conviction should be entered under Article 2 of the Statute of the ICTY alone and the charges under Article 3 of the Statute of the ICTY should be dismissed.

80. Also, in the case "The Prosecutor vs. Dragan Nikolic" (IT-94-2-S) dated 18 December 2003 the Trial Chamber II of the ICTY established in its Sentencing Judgment that – although the accused was indicted for numerous counts containing different criminal acts – only *"a single conviction under count 1 of the Indictment, namely persecutions as a crime against humanity"* was entered, but exclusively because *"count 2 (murder as a crime against humanity, count 3 (rape as a crime against humanity) and count 4 (torture as a crime against humanity)"* had been incorporated already.

81. And in the case "The Prosecutor vs. Ranko Cesic" (CT/P.I.S./831e) dated 11 March 2004 the Trial Chamber II of the ICTY sentenced the accused with a unique sentence of 18 years of imprisonment, but found him guilty for the killing of 10 individuals, which included a number of maltreatments as beatings and other humiliating and degrading treatments, despite from other criminal acts, which did not lead to the death of the victims.

82. The Supreme Court of Kosovo understands the Judgment of the Re-Trial Court in this distinction.

Binding effect of the Supreme Court's legal opinions:

83. As an additional follow-up question it needs to be discussed whether or not the 1st Instance Re-Trial Court was bound to follow the legal views of the Supreme Court as laid down in its decision Ap.-Kz. 139/2004. However, Article 390 paragraph 3 of the LCP clearly points out that in case of a re-trial *"[t]he court of first instance must conduct all procedural acts and examine all disputable issues referred to by the decision of the court of second instance"*. Although this means that facts established in the nullified verdict cannot be taken as established, regardless of how clear and indisputable they are, it is also undisputed that *"[i]f the second instance court in its decision, in addition to certain instructions, also expresses a certain legal understanding, that understanding is not binding for the first instance court, because the first instance court is free also in the legal evaluation of the facts that it establishes in the proceedings, and it is not bound in that regard by either the legal opinions or legal understandings, i.e. principal opinions of the higher courts [...]"Branko Petric; Commentary on the Law on Criminal Procedure; 186; 2nd Edition; Official Gazette of the SFRY; Belgrade; Article 390; item III. 1 and 5)* and similar *(Momcilo Grubac & Tihomir Vasiljevic; Commentary of the Law on Criminal Procedure; 1982; 2nd Edition; "Savremena Administracija"; Belgrade; Article 390, item 13).*

84. The Supreme Court finds that this procedural action is also in line with international fair trial standards aiming to avoid delays (in the interested of also the injured party) in a retrial and focused also on what had been previously ascertained beyond any reasonable doubt.

III. Missing Instruction of the Right to Appeal

85. The Defence of R[redacted]M[redacted] moreover has stressed that the Judgment of the 1st Instance Court had been served without a warning on legal remedies, so that the accused had not been informed about their rights to challenge the Judgment.

86. The Supreme Court finds that indeed the written 1st Instance Judgment as such does not contain a warning on legal remedies and that the right to file an appeal against the first instance verdict is a constitutional category, provided by Article 359 of the LCP and the following provisions of the respective part of the Law. However, it is not only self-explaining that authorized persons need to be warned about their right to appeal, since appeal proceedings against a verdict are never carried out *ex officio*, but must be stressed by the appellant within the legal deadline given. Also Article 354 paragraph 1 of the LCP provides that *"[a]fter announcing the verdict, the presiding judge of the panel shall instruct the parties concerning the right of appeal and the right to answer the appeal"*. The latter was complied with according to the minutes of the last session dated 02 October 2009 *(p.2 of the English version).*
Only, as far as Article 356 paragraph 4 of the LCP provides that *"[i]nstruction as to the right of appeal shall also be sent to the defendant, a private prosecutor and an injured party as prosecutor"*, the Supreme Court of Kosovo finds that this was not complied with but at least that no evidence can be found in the case files that a warning on remedies in

writing was sent out, if not as part of the Judgment, then as separate information sheet. Nevertheless, the defendants were able to use their respective legal remedies.

87. It insofar can be understood from the commentaries as follows:

"If the accused, after having been wrongly instructed in the verdict on deadline to appeal, files an appeal against a verdict rendered in the first instance after the expiry of legal deadline, then the appeal should be taken into consideration by the first instance court also as a request for permission for restoration in previous state due to the omission of legal deadline for filing an appeal (Supreme Court of Yugoslavia, Kz 125/54 of 03 December 1954; Kz 100/56 of 01 August 1956)", (Branco Petric; Commentary on the Law on Criminal Procedure 1986; 2nd Edition, Official Gazette of the SFRY; Belgrade; Article 359; item II.3.).

88. It hereby is illuminated that the failure of the court to give a proper warning in writing does not harm the appellant, even if the appeal is belated.

89. In the case at hand, all Defense Counsels on behalf of their respective clients have timely appealed, allegedly without having received a warning on legal remedies. Therefore, this failure does not harm the Judgment at all.

B. Erroneous and incomplete determination of the factual situation

90. The Defence Counsels of all three accused have challenged that the 1st Instance Re-Trial Court had not correctly and completely determined the factual situation and that these failures had been to the detriment of the accused.

I. Alleged Failure of the 1ST Instance Court to compare Life Conditions of the Civilian Population and of the Detainees

91. All three Defense Counsels have challenged that the 1st Instance Re-Trial Court had not sufficiently compared the live conditions of the civilian population at the questionable time with the ones of the detainees.

92. The Supreme Court of Kosovo insofar finds that this allegation is without merits.

93. The relevant provisions of the International Humanitarian Law can be found in Protocol II Additional to the Geneva Conventions of 12 August 1949, dated 08 June 1977, which stipulates as follows:

"Part II. Humane Treatment
Art 4 Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:
(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Art 5. Persons whose liberty has been restricted

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the

armed conflict, whether they are interned or detained;
(a) the wounded and the sick shall be treated in accordance with Article 7;
(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
(c) they shall be allowed to receive individual or collective relief;
(d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population".

94. The 1st Instance Re-Trial Court in its challenged Judgment and with regard to the issue at question has elaborated - amongst others - as follows:

"The Supreme Court ... observes that it was incumbent upon the trial panel to compare the conditions of health and security of the civilian detainees with those of the civilian population at large. Only by doing this comparison the standard set out by Article 3 common of the Geneva Conventions and related provision of Protocol II, Article 5 (1) (a) is satisfied. Omitting the said comparison, the trial panel incompletely established the facts. ... It must be understood that this Court does not have now the possibility to have a direct knowledge of the conditions in which the detainees were kept in Llapshtica: ten years later it is simply unrealistic to hope that the premises are kept untouched and that they my give a genuine idea of the situation in which people deprived of liberty lived in the detention center. A visit to the crime scene has been ruled out by the panel to avoid false impressions." ... Therefore, the panel has decided *"... to use the knowledge and the description of the facts and the pictures produced by the previous trial panel in the course of its visit (which is in the file and has been exhibited in Court in the course of a session of this trial). ... The Supreme Court has relied on them, has not contested them and has taken them as a genuine and correct assessment of the conditions of the building in which the victims were detained."* ... The 1st Instance Re-trial Court particularly refers to p. 46 of the first Judgment dated 16 July 2003 saying that *"[e]ven in the middle of a summer's day once the entrance door was closed the interior was pitch black ... The room was damp and its dimensions estimated at 3 by 4 meters" (p. 221 and 21 of the English version).*

The respective 1st Instance Judgment continues elaborating on the findings as established through numerous witnesses from both, the former detainees and the former guardians side, stating that there was regular delivery of sufficient amounts of food as well as of water and that in case of sickness also medical treatment was provided for both, UCK/KLA members and detainees by the same medical doctor *(p. 22 and 23 of the English version).*

However, the 1st Instance Re-Trial Court found that the difference between the civilian population in freedom and the detainees in terms of living standards as requested by Protocol II Article 5, paragraph (1) (a) of the Geneva Convention *"can not be found in the conditions imposed on the victim of forced transfer or evacuation"* but that the latter, being "[s]*ubject to inhumane treatment ... are turned into objects of criminal action which degrade and humiliate the life of the victims and that therefore may not be taken to set the standard of minimum life decency for the detainees of Llapashtica..." (p.23 of the English version).*

After detailed reference to several witness statements, the 1st Instance Judgment continues counting the points of difference, which as to the consideration of the Court had made the life of the detainees more miserable than the ones of the civilian population in freedom. In particular, the latter had had sufficient freedom of movement and – if also not in abundance – access to heating, electricity and water as well as to public places for business purposes *(p.24 of the English version).*

95. Based on what was pointed out before it illuminates that the allegation of the Defense, the 1st Instance Re-Trial Court had not elaborated on the question whether the life conditions of the detainees had been considerably worse from the ones of the civil population in freedom, is pointless. That the elaborations of the 1st Instance Court are sufficient illuminates even more considering the related reasoning of the decision of the ICTY Trial Chamber II, "Prosecutor vs. Fatmir Limaj et al". The ICTY with regards to the detention center of Llapushnik/Lapusnik stated that "[i]*t is apparent from the evidence presented in this trial, and the Chamber finds, that the material conditions of detention [...] were appalling. In the Chamber's view, it clearly emerges from the evidence that food and water were not provided regularly, and that there were no cleaning, washing or sanitary facilities. Both the cowshed and the storage room were not adequately ventilated and at times were overcrowded, especially the storage room. Even though the detainees were allowed outside the storage room once in a while to be able to have some fresh air, the atmosphere and conditions in the room remained deplorable. There were no sleeping facilities [...] which was exacerbated by overcrowding particularly in the storage room [...] No medical care was provided, although readily available. [...]* [T]*he Chamber finds that the deplorable conditions of detention in both the storage room and the cowshed at the Llapushnik/Lapusnik prison camp, were such as to cause serious mental and physical suffering to the detainees, and constituted a serious attack upon the dignity of the detainees. Further, given the extensive period of time over which these conditions were maintained without improvement, the Chamber is satisfied that they were imposed deliberately. In the Chamber's finding, detention in either the cowshed or the storage room was in conditions which constituted the charged offence of cruel treatment [...]" (Ibid, supra footnote 37, at paragraphs 288-289).*

96. Moreover and as far as the responsibility of the accused is concerned, the analysis of the respective adjudication of the ICTY is helpful as well. Particularly in the case "Prosecutor vs. Milorad Krnojelac" (IT-97-25-A) dated 17 September 2003, the Appeals Chamber of the ICTY has clearly elaborated on the requirements concerning the responsibility for living conditions at the sides of alleged perpetrators. The accused had

challenged that the Trial Chamber had not specified which of his concrete acts and omissions significantly furthered the persecution based on living conditions at the respective place. The Appeals Chamber of the ICTY has pointed out that "[i]*t was enough that* [the accused] *consciously and significantly contributed to the maintenance of the living conditions" (p.24 of the English version).*

97. The 1st Instance Re-Trial Court insofar closes with the summary that *"the conditions of detention in Llapashtica were considerably lower than the living conditions of the population in Podujevo and surrounding area. ... The accused ... had direct responsibility over the detention center and the surrounding premises, N[redacted] M[redacted] should have reported to his superior (R[redacted] M[redacted]) that the premises were overcrowded and lacking basic conditions to keep people restricted. L[redacted] G[redacted] had direct and unrestricted access to the cell and visited and interrogated and beated the detainees, directly reporting to his superior, R[redacted] M[redacted]" (p.25 of the English version).*

98. The Supreme Court of Kosovo therefore finds that the 1st Instance Re-Trial Court sufficiently has elaborated on the differences between the life-conditions of the detainees and the civilian population in freedom.

II. Findings on Personal Liability of the Accused, particularly L[redacted]G[redacted]

99. The Defense has challenged the erroneous and incomplete determination of the factual situation particularly to the detriment of the accused L[redacted]G[redacted] Specifically a number of considerations of the 1st Instance Court regarding the forms of criminal liability of the accused would be questionable. L[redacted]G[redacted] had been found guilty under counts 5, 8 and 14 of the indictment and the Court had found that he – like the two other accused – had acted with personal and superior responsibility for the War Crimes contrary to Article 142 as read with Article 22, 24, 26 and 30 of the CC SFRY. In particular, the respective findings of the Court would not be supported by any evidence administered during the Main Trial or obtained during the investigations period.

100. The Supreme Court of Kosovo in this regard finds that no erroneous and incomplete determination of the factual situation can be established regarding the conduct, taking and assessment of evidence as carried out by the 1st Instance Re-Trial Court in the context of Counts 5 and 14. However, the evidence regarding Count 8 of the challenged Judgment was not taken at all by the 1st Instance and therefore also an assessment was not done as needed.

101. As already pointed out before (A.I.3., p.14, items 36 ff. of this Judgment), the 1st Instance Re-Trial Court did not consider the verdict of the first judge, District Court of Prishtine/Pristina (P 425/01), being revoked in toto by the Supreme Court through its respective decision Ap.-Kz. 139/2004. Instead, the Court interpreted the intention of the Supreme Court to only partially revoke the first verdict of the District Court of Prishtine/Pristina. This interpretation was done despite the wording of the enacting clause

and considering the grounds of the latter verdict. Although the Supreme Court of Kosovo under a different – procedural – aspect has established that the 1st Instance Re-Trial Court was free to take a legal position different from the opinion of the Supreme Court as laid down in its decision Ap.-Kz. 139/2004 and that the interpretation of the 1st Instance insofar was in line with the law as well (A.II.5., p.29, item 83 of this Judgment), the interpretation of the latter to be limited to the punishment regarding count 8 has negative impact on the validity of the challenged Judgment insofar.

1. As to Counts 5 and 14

102. The Supreme Court of Kosovo, after careful analysis of the case files finds that there are sufficient grounds to find both superior responsibility of each of the defendants, at least with regards to count 5 and for personal responsibility of L[redacted] G[redacted] regarding count 14. No indication can be established to preclude a finding on either personal or superior responsibility of a certain person/persons or on both of them. Particularly war crimes are committed in a situation where the various types of responsibility may interact fluidly due to the abnormal situation created by the war.

103. National legal systems generally accord in holding that, where a crime involves more than one person, all performing the same act, all are equally liable as either co-perpetrators or principals. Only when it comes to the punishment of two or more persons participating in a crime, where these persons do not perform the same act but in one way or another contribute to the realization of a criminal design, the situation nation wise may be handled differently.

104. While many systems (inside the European Union for instance Italy, Austria and France, but moreover also the United States of America) do not provide for different categories of participants at all, and therefore do not attach different penalties to each of the classes of either principals or accessories under which a person may eventually fall, other national legal systems (inside the European Union for instance Germany, but moreover also Russia) draw a normative distinction between two categories, principals, and accomplices or accessories, and provides in terms that the persons falling under the latter category must be punished less severely. Nonetheless, a distinction is usually drawn in all systems between three categories of participation, namely perpetration on the one side and accomplice liability on the other, which the latter is split in instigation and aiding and abetting. This distinction is based either on the difference between *actus reus* and *mens rea*, deriving from the common law systems, or – in its normative version – from the civil law systems.

105. In the area of international law (which could be relevant in order to ascertain the guiding principles governing a proceeding for War Crimes, where appropriate) neither treaties nor case law make any legal distinction between the various categories, at least as far as the consequent penalties are concerned. This lack of distinction follows from: i) the absence of any agreed scale of penalties in international criminal law and from ii) the general character of this body of law, that is, its still rudimentary nature and the ensuing lack of formalism.

106. However, in Kosovo, traditionally a distinction is made as described before. It *de lege lata* is reflected in the Criminal Code of Kosovo (CCK), which does not foresee any substantial changes in case of "Co-perpetration" (Art. 23 of CCK) and "Incitement" (Art. 24 CCK), but rules that "Assistance" (Art. 25 of CCK) and "Criminal Association" (Art. 26 of CCK) are now punishable more leniently.

107. The responsibility of the accused **L[redacted] G[redacted]** in the crimes for which he was convicted – like for all the other accused as well - must be assessed in the light of the aforementioned provisions and, in particular, due to the peculiarity of the crime envisaged by Art. 142 of CC SFRY, in the light also of his eventual superior and personal responsibility, in the latter case also taking into account the theory of the joint criminal enterprise as developed by the ICTY as a specific form of co-perpetration.

108. In the case at hand, where the old Yugoslav law is still applicable, the result in terms of sentencing could be the same for the perpetrator and for the accomplice, according to the CC SFRY. It is noteworthy that pursuant to Article 22 of the CC SFRY (Complicity) as well as pursuant to Article 23 paragraph 1 of the CC SFRY (Incitement) both forms of criminal participation are *"punished as prescribed for the act"*, whilst for Aiding pursuant to Article 24 of CC SFRY the old law foresees the possibility to reduce the punishment, which of course is not mandatory.
Article 26 of the CC SFRY, named as *"Criminal Responsibility and Punishability of the Organizers of Criminal Associations"*, which the challenged 1st Instance Judgment also has referred to, does not foresee any discount but, rather, extends the responsibility of those *"creating or making use"* of the criminal group for any criminal acts resulting from the criminal design of the group.
Finally, Article 30 of the CC SFRY established the possibility of being criminally liable by a positive act or by an omission. This latter provision could be one of the relevant rules to be considered as triggering the responsibility for War Crimes as a form of command responsibility, but not the only one.

109. As far as the **command responsibility of the accused** is concerned, reference is made to the adjudication of the ICTY in the case "Prosecutor v Vladimir Kovacevic" *(ICTY Referral Bench, Decision on Referral of Case Pursuant to Rule 11bis, Case IT-01-42/2-I (Prosecutor v. Vladimir Kovacevic), dated 17 November 2006, paragraphs 43 through 47 (http://webcache.googleusercontent.com/search?q=cache:qDN6iHYXo00J:www.icty.org/x/cases/kovacevic_vladimir/tdec/en/061117e.pdf+referral+to+serbia+%2B+11+bis&cd=2&hl=en&ct=clnk).*

110. The ICTY has stipulated that it is the competent court *"[...] that must determine whether the concept of command responsibility applies either through provisions of the SFRY CC, the current Criminal Code, or as a norm of customary international law [...] The concept of "direct" command responsibility in the SFRY CC appears largely confined to the notion of "ordering," "organizing" or "instigating" crimes, which in the*

(ICTY – n.o.a.) *Tribunal's jurisprudence falls within the scope of Article 7(1)* (of the ICTY Statute – n.o.a.) *rather than of Article 7(3)* (of the ICTY Statute – n.o.a.). *For example, Article 142 of the SFRY CC made it a crime not only to commit war crimes against the civilian population, but also to order such crimes. Article 145 made it a crime to organize a group for the purpose of committing war crimes against the civilian population, or to call on or instigate the commission of such crimes. However, there were other provisions in the SFRY CC which appear to address parts of the field covered by Article 7(3)* (of the ICTY Statute – n.o.a.). *Article 11(2), for example, provided that offenders are liable for criminal acts committed negligently, insofar as the act in question is punishable by law. Article 30 provided for the criminalization of an act committed by omission if the offender abstained from performing an act which he or she was obligated to perform" (paragraph 43 of the said decision).*

111. The command responsibility of the accused in the case at hand illuminates additionally in the light of a legislative tradition in the area also of Kosovo as reflected as well by particularly Article 384 of the current Criminal Code of the Republic of Serbia (CC RS) as by Article 129 of the current CCK. In both cases the law clearly and in large parts using the same wording provides that a military commander or a person effectively acting as such shall be criminally liable for the commission of crimes similar to what Article 142 of the CC SFRY provides for, as committed under his/her effective command and control, even if s/he only should have known that the forces were committing or planning them or in case s/he has failed to take all necessary and reasonable measures within his/her power to prevent or stop their commission. The same applies to superiors other than the ones defined by the respective paragraphs 1 of the provisions referred to.

Upon this background it needs to be underlined that the question of command responsibility in internal armed conflicts and the applicability of Customary International Law in Kosovo has been elaborated in detail by the Judgment of the District Court of Prishtine/Pristina dated 16 July 2003 (P 425/2001) and that this part of the decision was confirmed by the Supreme Court in its decision Ap.-Kz.139/2004, which the 1st Instance Re-Trial Court has referred to *(p.22 through 26 of the English version of the said decision).*

112. The first judge in the decision P 425/2003 particularly has weighed the arguments, whether or not Customary International Law as the source of applicability of the doctrine of command responsibility would be applicable in Kosovo in relation to the time period in question. Taking into consideration that Article 210 of the Constitution of the SFRY dated 1974 has excluded international law and that according to Section 1.4 of UNMIK Regulation 1999/24 moreover the 1974 Constitution of the SFRY was more favourable to the defendant and thus must be applied by the Court, the first judge came to the conclusion that nevertheless with regards to Article 142 of the CC SFRY Customary international Law would be applicable in the case at hand. Considering the fact that the SFRY had adopted and implemented *"[...] the essential Human Rights Conventions and the broadening of the definition of international law in Article 16 of the Constitution in*

1992 clearly would indicate that the intention of the legislature was to embrace and not to reject Customary International Law" (p.26 of the English version of the said decision).

The first judge also has made reference to the ICTY jurisprudence, which *" [...] has held that violations of the humanitarian law of internal armed conflicts amounts to war crime proper as a result of the evolution of customary rules in the international community with the rationale of a gradual passage from a State-sovereignty-oriented to a human-being-oriented approach".* Therefore, according to the first judge, it would be *"[...] logical to accept that the same gradual process has led to an acceptance of the principle of command responsibility to the point that it is now established as a customary rule of international law in internal as well as international armed conflicts" (p.24 to 25 of the English version of the said decision).*

Indeed, in its Judgment dated 2 October 2009 (P 126/05), the 1st Instance Re-Trial Court convicted L[redacted]G[redacted] for counts 5 and 8 of the amended Indictment of 30 June 2003 by referring to his personal and superior (read "Command") responsibility. The Court stated that *"[...] the point of the applicable forms of liability was considered by the trial panel when it assessed the responsibility of the accused for the committed criminal offences; the conclusions reached were not overturned by the Supreme Court [...]" (p. 17 of the English version of the Judgment P 526/05)* and that, in addition, the participation of the defendant *"to a joint criminal enterprise [...] simply identifies the specific modality of co-perpetration of the crimes" (p. 17 of the English version of the Judgment P 526/05).*

113. The Supreme Court of Kosovo so far agrees to the general line of argumentation as drawn up before.

With regards to the single Counts, of which the accused have been found guilty , the following assessment is made:

114. Referring to the crimes committed under count 5, the 1st Instance Re-Trial Court has stated that "[t]*he expression 'joint criminal enterprise' [...] indicates in the given circumstances a shared knowledge and will, or acceptance, of the situation; a psychological state that mutually foster and corroborates amongst those who share it and beyond them, in the community of the soldiers, tolerance towards illegality and lack of discipline and responsibility" (pg. 25 of the English version of the Judgment P 526/05).*

In this regard, it needs to be outlined that the "joint criminal enterprise" as addressed by the 1st Instance Re-Trial Court is a form of perpetration, commission or co-perpetration firmly established in Customary International Law, which acknowledges three different categories of the offense: (1) a 'basic' form of joint criminal enterprise being represented by cases where all co- perpetrators, acting pursuant to a common purpose, possess the same criminal intention; (2) the 'systemic' form, a variant of the first form characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps and which requires personal knowledge of the organized system and intent to further the criminal purpose of that system *(ICTY Appeals*

Chamber, Prosecutor vs. Vasiljevic, supra footnote 36, at paragraph 98; ICTY Appeals Chamber, Prosecutor vs. Tadic, supra footnote 36, paragraphs 202-203; ICTY Trial Chamber II, Prosecutor v. Fatmir Limaj et al., supra footnote 37); and (3) a form that entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.

In the latter case, the requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise *(ICTY Appeals Chamber, Prosecutor vs. Kvocka et al., supra footnote 35, at paragraph 83; see also ICTY Trial Chamber II, Prosecutor vs. Fatmir Limaj et al., supra footnote 37, paragraph 511 (similar)).*

115. The three forms of "joint criminal enterprise", as a form of co-perpetration firmly established under Customary International Law as already elaborated by the Judgment of the first judge dated 16 July 2003 (P 425/2001) (p. 22 through 26 of the English version of the said decision) is an additional form of liability and as such is taken into account by the Supreme Court of Kosovo in the case at hand to better identify the responsibilities of the three defendants for some of the crimes for which they have been convicted.

116. It in the context given moreover is important to note that although **L G** has always denied his participation in the Zone command of the Llapi area in the relevant decisions concerning the fates of the persons kept in the various detention camps, he has stated during the court session dated 8 July 2009 that *"[...] operational zone Llapi functioned as one HQ"* and that *"this zone had a vertical and direct line between various sectors, a deputy and then a commander"*. He further stated that *"*[t]*he circumstances imposed on the HQ to take a decision"* to detain some people suspected of being collaborators of the enemy but he always spoke as if it was decision taken by the HQ *"not to deal with them"* in which his involvement was marginal if not absent at all. (Minutes dated 08 July 2009, p. 8, 10 and 11 of the English version)

117. However, defendant **N M** who was responsible to maintain the detention facility at Llapahstica, during the court session dated 9 July 2009, when asked who was in the Zone command, replied *"R M [...] K K : [...] N I [...]"* and *"[t]hree commanders of the brigade of the zone and [...] the deputy commanders of the brigades"* 151, 152 and 153, including *"*[t]*he Head of information service"*, meaning **L G** himself (Minutes dated 09 July 2009, p. 21 of the English version).

2. Count 14 in particular: Lacking credibility and liability of witnesses positively considered by the 1st Instance Court

118. With reference to Count 14 of the amended indictment of 30 June 2003, the Supreme Court of Kosovo notes that the 1st Instance Re-Trial Court has evaluated the statement of the victim M S as credible and reliable. After discussing the Supreme Court decision Ap.-Kz. 139/2004 to this extent and after weighing the importance of count 14 of the indictment in relation to the responsibility already ascertained on the part of the accused L[redacted] the 1st Instance Re-Trial Court comes to the conclusion that *"[c]ount 14 is an autonomous charge" ... including "a unique history of brutalities"*. The challenged Judgment points out that although the witness M S *"[...] was not able to identify L[redacted] in Court [...] this does not impinge on his credibility"*. The Court, after bringing reasons for its evaluation on the credibility of M S , which refers to his approach of being a simple and straight forward oriented person, moreover states that "[i]*n the opinion of the panel his testimony was* [also] *reliable and sufficiently clear, given that 10 years have passed"*. Also this evaluation of the statement of the witness is undermined by detailed reasoning thereafter, underlining that his speech was concentrated around some points on which his memory still was vivid as well as that his testimony would match the statements given in 2002 before the investigating judge and in 2003 given before the first main trial judge and the fact that the witness did not show serious uncertainty also during the cross examination by the Defense (p.28 of the English version).

119. The Supreme Court of Kosovo therefore finds nothing to object with regards to this latter part of the challenged Judgment as well, thus particularly referring to the evidence taken and its evaluation.

120. As to the taking and assessment of evidence by the 1st Instance Re-Trial Court, reference is made to the respective adjudication of the Supreme Court of Kosovo as laid down in several decisions in cases where the appellate panel had chosen not to take any new evidence. In all these cases the Supreme Court has established that the findings and assessments of the trial panel must be considered as binding for the next instance. In particular in the case of **R[redacted] A[redacted] and D[redacted]** (Supreme Court of Kosovo, AP-KZ 477/05, 25 January 2008) the Supreme Court clearly stated that *"Appellate proceedings in the KCCP rest on the principles that it is for the trial court to hear, assess and weigh the evidence at trial [...] Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact, or where its evaluation has been 'wholly erroneous' " (p. 20, English version).* Also in the case of **V[redacted] U[redacted], R[redacted] S[redacted] and S[redacted] I[redacted]** (Ap-Kz 428/2007, dated 28 May 2007) the Supreme Court has clarified that "[t]*he Supreme Court of Kosovo must defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so [...]" (p.24 of the English version).* Finally, this adjudication was repeated in the case of **J[redacted] K[redacted]** (Ap.-Kz. 84/2009, dated 03 December 2009), in which the Supreme Court of Kosovo found that *"[...] it is neither under the competence of the appeal panel nor possible in fact to replace the*

findings of the First Instance Court by its own, especially not without taking all the evidence again" (p. 19 of the English version).

121. In addition, reference is made to relevant commentaries on the old law as applicable in the case at hand, according to which *"the second instance court does not have the power to, on the basis of the case file, in a session of the panel, through its own evaluation of the evidence that were presented by the first instance court, establish a different state of facts and by modifying the first instance verdict to acquit the accused from the charges (Supreme Court of Yugoslavia, Kz 24/61 of 29th March 1961; KZ 93/62 of 21st November 1962; Supreme Court of Macedonia Kzz 7/82 of 7th April 1982)." (Branko Petric; Commentary on the Law on Criminal Procedure; 1986; 2nd Edition; Official Gazette of the SFRY; Belgrade; Article 387; item II. 8), p.223).*

122. This adjudication needs to be considered regarding the assessment of the testimony of the various witnesses heard by the 1st Instance Re-Trial Court and, in particular, to the findings of the trial panel after the hearing of the injured party M S

After all, the Supreme Court of Kosovo agrees to the general assessment of the evidence as carried out by the 1st Instance Re-Trial Court, which has led to the conviction of L G for the conducts outlined in Counts 5 and 14 and of N M and R M under Count 5 of the challenged verdict.

3. As to Count 8

123. With regards to Count 8 of the challenged Judgment, the Supreme Court of Kosovo finds that the 1st Instance Re-Trial Court indeed has not at all taken the evidence and therefore not properly carried out its assessment.

124. The 1st Instance Re-Trial Court states that *"[t]he responsibility of the three accused has been asserted and confirmed through the previous stage of the trial" (g. 26 of the English version)* and that the retrial panel took notice of it.

It in this context is worth mentioning that during the court sessions dated 8 and 9 July 2009 all three accused of course have confirmed their responsibilities within the KLA and what they said during the previous stages of the previous investigation and trial.

However, the 1st Instance Court has defined its role in terms of count 8 of the indictment as being *"limited to the sentencing that the Supreme Court found to be precluded to itself, based on the interpretation given to Article 385 LCP in the last page of its decision. The unification operated by the trial panel of all facts in a single war crime has been seen by the Supreme Court as a limit to the application of article 367 LCP and to the pronouncement of a decision determining the appropriate sentencing for the facts described in the surviving part of Count 8 (beatings and torture of Llapashtica [...]" (p. 13 of the English version).*

125. This interpretation as carried out by the 1st Instance Re-Trial Court is deemed legally unacceptable. The Supreme Court of Kosovo of course understands that the respective panel of the Supreme Court, when rendering the decision Ap-Kz 139/2004 on annulment of the first District Court Judgment (425/2001) was led by the interpretation of the first judge of the District Court of Prishtinë/Priština of Article 142 of the CC SFRY describing an "extended criminal act" and therefore has annulled the whole respective Judgment, and as a consequence sent back the entire case for retrial. The Supreme Court on this point particularly, has stipulated that *"[t]he trial verdict treated the various counts in the amended indictment of 30 June 2003 as one singular war crime to each defendant. [...] having treated them as one singular war crime and having imposed sentences accordingly, the Kosovo Supreme Court has no choice but to remand the entire case for retrial based on Article 385, Paragraph 1 of LCP [...]" (Supreme Court decision Ap-Kz 139/04, last page of the decision).* It is also clear that the 1st Instance Re-Trial Court was not bound by this legal interpretation of the Supreme Court and therefore was free to handle the different acts of the accused as separate incidents of war crime, each of them punishable by its own, a position which is shared by the Supreme Court of Kosovo in the case at hand. The Supreme Court of Kosovo also agrees to the findings of the 1st Instance Re-Trial Court, which found itself limited to the re-trial of only those counts, being left alive by the Supreme Court decision Ap-Kz 139/2004, since *"the decision of the Supreme Court in relation to the facts charged in counts 1, 2, 3, 12 is a res judicata and for this reason the facts there described can not be subject to further judicial examination" (p.11 of the English version).*

126. However, the decision of the Supreme Court can not be interpreted in contradiction to the very clear wording of the enacting clause, saying that the decision of the first judge is *"ANNULLED AND CANCELLED IN ITS ENTIRETY and the case is remanded for retrial" (p.2 of the English version of the Supreme Court decision Ap-Kz 139/2004.* Having this in mind, the 1st instance Re-Trial Court was prevented to just rely on the findings of the first judge on count 8 – although the evidence was properly taken and assessed.

III. Failure of the 1ST Instance Court to separate Statement of Witness '4' from the Case File

127. The Defense moreover has challenged that the testimony of anonymous witness "4" should have been separated from the case file, pursuant to Articles 83 and 84 in connection with Article 333 paragraph 3 of the LCP instead of having been read out by the 1st Instance Re-Trial Court.

128. The Supreme Court of Kosovo finds that the allegation of the Defense is without merits.

Anonymous witness "4" has stated before the Investigating Judge on 18 October 2002, within which s/he has referred to the role of L[redacted]G[redacted] after the witness was brought by him to the Llapashtica detention facility and that there witness "4"had been beaten up by

the Military Police. After that, the accused L[redacted]G[redacted] had told to the Military Police that *"[t]his is the person who stays together with Serbs" (pg 3 of the English version of the Records of the Witness hearing of 18 October 2002).*

129. Article 83 of the LCP as relevant in the case at hand stipulates as follows:

(1) When this law specifies that a court decision may not be based on the testimony of [...a...] *witness [...], the investigating judge shall make a decision ex officio or on the petition of the parties on removing the transcript of such testimony from the record immediately but no later than until the end of the investigation or until the consent is given by the investigating judge that the indictment may be brought without the investigation being conducted (Article 160 paragraph 1). [...].*

Article 84 of the LCP in its relevant part reads as follows:

(1) Exceptionally, records and information which have been removed as per the provisions of Article 83 of the Law, may be used in the trial [...] solely in the following:

1) If the defendant him/herself asks for the reading of the material removed from the record [...]

2) If, in the course of the trial, after the questioning of the principals, the panel of judges decides to allow the use of records of the examination of the defendant, which have been removed solely because of a violation of the provision of Article 218 paragraph 9 of this Law in the proceedings, as well as the information provided by the defendant to the law enforcement agencies. [...].

Art. 333, par. 3 of LCP states that *"Records of the prior hearing of witnesses (Article 227) may not be read if those persons have not been summoned to the main trial at all or if they have declared in the main trial that they refuse to testify as witnesses [...]"*

130. It should be underlined that the provision clearly refers exclusively to the persons listed in Article 227 of LCP, namely the spouse, blood relatives or relatives in the lateral line including the third degree, relatives by marriage including the second degree, adopted children or adoptive parents, but all related to the accused, within which Witness "4" is not included. Therefore, the 1st Instance Re-Trial Court has not violated Article 333, paragraph 1 of LCP by reading out the statements of Witness "4".

Alleged wrongful conduct of witness interrogation:

131. The appeal of the Defense on behalf of L[redacted]G[redacted] moreover challenges that on 14 May 2002 the witness was interrogated by the investigating judge in the presence of a policeman who led the investigation and that on 18 December 2002 in the course of an interrogation by the investigating judge the witness had read the minutes from the interrogation dated 14 May 2002, despite the fact that during the Main Trial before the first judge in a session on 20 March 2002 he had denied the respective previous statements as being untrue *(p. 10-11).*

132. Reference is made to what was elaborated before on the question concerning evidence, which needs to be taken and assessed by the Main Trial Court and as a rule can not be reassessed by the Appeal Court based on the files only (B.II.2., p. 41-42, item 122. of this Judgment). Therefore, the Supreme Court of Kosovo takes no stand as to the evaluation of evidence carried out by the 1st Instance Re-Trial Panel.

It however is noteworthy that between 20 March and 8 May 2003, thirteen (13) prosecution witnesses have testified in front of the first judge during the main Trial in the case P 425/01, out of which three of them were enjoying protective measures as anonymous witnesses in accordance with UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings (as amended by UNMIK Regulation 2002/1), which grants trial panels in Kosovo the power to restrict the disclosure of a witness's identity where it is perceived that otherwise that witness or his/her family may be subjects to possible physical harm. Without exceptions all witnesses were heard in nonpublic sessions.

As to a possible concern of the Defense that no sufficient opportunity was given to them interrogating witness "4" face to face, reference is made again to the aforementioned UNMIK Regulation 2001/20 (as amended by UNMIK Regulation 2002/1). The interest of the respective witness and his/her family as protected by this UNMIK Regulation, however, must be balanced with the right of the accused and the Defense to cross-examine prejudicial witnesses. Also, for the purpose of determining the credibility of a witness, it is important for a court to be able to assess the witness's approach - and therefore to be able to physically see the witness. Thus, the application of protective measures of course requires careful consideration. However, the Supreme Court of Kosovo insofar is satisfied that the 1st Instance Re-Trial Court has weighed both interests properly. It is the usual procedure to interrogate an anonymous witness, but not face to face, which is in the interest of the protection of the respective witness.

However, even if the first judge at that time should not have applied the most appropriate procedure in hearing anonymous witnesses from the remote booth, thus the panel itself not being able to see the witnesses and properly evaluate on their credibility, it needs to be ascertained that the relevance of the respective statement moreover was limited by the fact that the evidence given by this (and other) anonymous witnesses, if at all, was relied upon in conjunction with other witnesses, but that it did not form the sole basis for proof of any particular Count.

IV. Alleged erroneous Determination of the Time served in the KLA by Accused N[redacted] M[redacted] as well as of his Role in the Detention Center

133. With regards to the accused N[redacted] M[redacted] the Defence challenged that contrary to the 1st Instance Judgment M[redacted] had not joined the KLA from *"October 1998 until the end of April 1999"*, but that he attended the KLA exactly on 30 October 1998. The 1st Instance Court moreover had not considered the fact that M[redacted] – within his

possibilities – visibly had improved the conditions of the premises, where the detainees were kept. Finally, the Court – concerning Count 8 of the indictment – never heard any statement by any witness that the accused N[redacted] M[redacted] had ordered or participated in the beatings or torture of the Albanian detainees.

134. As for the time of the accused to join the KLA, the Supreme Court of Kosovo finds that the argument is irrelevant. Also the 1st Instance Re-Trail Court indeed did not define the respective time period as starting from 01 October 1998. It needs to be also mentioned that the 30th of October 1998 is still part of the month of October and therefore the findings of the 1st instance Court are correct despite the fact that a more precise definition of the respective time period would not have brought about any difference in the evaluation of evidence and the established responsibility of the accused.

As to the challenges raised by the Defense in regards to alleged lack of role (or marginal role) of N[redacted] M[redacted] in the detention camp system, reference is made to the minutes of the Main trial, in particular to the minutes of 9 July 2009 (p.6), according to which the accused himself has stated that he at the time in question had selected somebody (the witnesses G Z and K H) as guardians for the detainees.

V. Alleged erroneous Determination of the Facts due to political Character of the Criminal Proceedings against Accused R[redacted] M[redacted] in Relation to the Existence of a Detention Center in Llapashtica

135. The Defence of R[redacted] M[redacted] challenged that in relation to count 5 of the amended indictment dated 30 June 2003, it never was verified by the Court that criminal proceedings against his client had been started seven months after the ones against the other two accused and that the reasons for this, which particularly would be the fact that R[redacted] M[redacted] had been a Commander of ZOILL, thus publicly announcing that in the zone of his responsibility there had been no war crimes against civilian population. Therefore, the criminal procedure against him would be of political nature. Moreover, there had been no prison or detention facility in Llapashica, as stated by the accused, but not considered by the 1st Instance Court. Plenty of witness statements, that R[redacted] M[redacted] had ordered the release of detained persons, had been ignored by the 1st Instance Court.

136. The Supreme Court of Kosovo finds that the allegations of the Defense are without merits and therefore unfounded. Reference is made to what was said before in the context of a detention center in Llapashtice/Lapastica and the life conditions of the detainees there (item A. III. 4. 1), p.34-35). Based on the findings elaborated there, the Supreme Court of Kosovo does not have any doubts that a detention center in the respective area during the particular time period existed. This moreover was confirmed by R[redacted] M[redacted] himself, who has stated that *"[i]t is very true that [...] we accepted in our area there was some cases of isolating people, preventing them from liberty and the internationals were aware of this [...]" (Interrogation minutes dated 13 August 2002, pg. 4-5 of the English version)*.

137. The challenged 1st Instance Judgment insofar clearly states that *"[a] visit to the crime scene has been ruled out by the panel to avoid false impressions. It is true that the previous panel had paid a visit when four years had already elapsed from the time of the events and so may have formed its own judgment on an already modified condition. But this argument, in case, weighs in favour of the decision not to visit the detention centre again, and to use the knowledge and the description of the facts and the pictures produced by the previous trial panel in the course of its visit (which is in the file and has been exhibited in Court in the course of a session of this trial) [...]".*

138. It is clear that the retrial panel used, as evidence (and as exhibits), the documentary evidence produced in the course of the proceeding 425/01. It did not simply rely on the findings of the previous stages of the proceedings. That documentary evidence became part of this proceeding, part of the file, during the various court sessions. And the court assessed the evidence and reached its conclusions correctly.

C. Substantial violation of the Criminal Law

139. The Defense Counsels of all three accused have stressed that the 1st Instance Judgment violateed the criminal law. In particular, L[redacted] G[redacted] had been found responsible in the capacity as co-perpetrator as well as pursuant to Article 26 of the CC SFRY (criminal responsibility of the organizers of criminal associations), although, according to the opinion of the Defense, co-perpetration would absorb the latter responsibility. At the same time, the 1st Instance Court had not found a single word of reasoning related to the conditions for co-perpetration as set up by Article 22 of the CC SFRY. Moreover, the accused had been declared guilty for the Criminal Offence of War Crimes pursuant to Article 142 of the CC SFRY, but they were sentenced each for two, respectively three criminal offences, for which in the end an aggregate punishment was pronounced. Last but not least the 1st Instance Court had violated the criminal law when obliging L[redacted] G[redacted] to pay a compensation of 5.000,- € to the injured party M S , but without relying on any relevant evidence. The Defense Counsels of N[redacted] M[redacted] and R[redacted] M[redacted] have declared that in general the criminal law was violated because their clients, although not guilty, have been convicted for War Crimes pursuant to Article 142 of the CC SFRY.

I. Alleged Violations of the Material Law by finding the Accused guilty

140. As to the accused being found guilty under Article 142 of the CC SFRY as read with Articles 22, 24, 26 and 30 of the CC SFRY and to the interpretation of Article 142 of the CC SFRY, reference is made to what was said before (A.II.5., p. 25-29, items 72 ff.). Therefore, the Supreme Court of Kosovo finds that no violation of the criminal law can be established in the case at hand.

II. Alleged Arbitrariness by imposing a Compensation Claim to L[redacted]G[redacted]

141. The Defense of L[redacted]G[redacted] additionally has challenged that the compensation of 5.000,00 (five thousand) Euro to be paid to the injured party M . S as imposed to the accused by the 1st Instance Re-Trial Court was not based on any relevant evidence.

142. The Supreme Court of Kosovo finds that the 1st Instance Re-Trial Court has correctly decided, when imposing the questionable compensation amount and that therefore no violation of Article 103 of the LCP can be established.

It must be noted that the court imposed a compensation for non-pecuniary damages, because of the suffering that the injured party had to bear because of the beatings and because the behavior of the accused has violated one of the fundamental rights of the injured party, namely that of the integrity of own body and health.

143. Reference is made to a legal idea as stipulated by the Law on Contract and Torts of the SFRY, which of course is not directly applicable in the case at hand, knows two kinds of compensation and thus may give assistance regarding the procedure in the criminal case in question as well.

Pursuant to Article 195 of the respective Law, aiming to the compensation of pecuniary damages, the amount of compensation is calculated according to the medical expenses and the loss of salary, the compensation claimant in fact has had. It indeed can not be read from the challenged Judgment, whether or not the Court taken these issues into consideration. At least, no documentation on real expenses of the injured party is contained in the case file, which is why the Supreme Court of Kosovo believes that the respective compensation sum was not imposed on this background.

However, despite the requirements of Article 195, Article 200 of the same Law rules on the compensation of *"non-material damage"* and stipulates that equitable damages are awarded *"independently of redressing the property damage [...]"* as referred *"[f]or Physical pains suffered, for mental anguish suffered due to reduction of life activities [...] as well as for fear suffered [...]"*.

144. This deems also in line with the obligation to provide redress to persons subject to human rights abuses (in this case through that specific provisions envisaged by the law that empowers the injured party to request compensation for non-material damages), which the latter derives from International Law and under Human Rights International Conventions, to which the Kosovo authorities have committed themselves Article 22 of the Constitution.

145. As to the imposed compensation sum of 5.000,00 Euro for the complete loss of all teeth and the pain and fear as suffered by the injured party, the Supreme Court finds that no appeal or motion was filed either by the injured party or by the Prosecutor and therefore this aspect remains unchallenged.

D. Decision on the punishment

146. The Defense Counsels of all three accused have challenged that the Judgment of the 1st Instance Court would be unjust and not fair and lawful at all. Since the Judgment would contain essential violations of the criminal procedure, had erroneously and incompletely established the factual situation and also had violated the criminal law, the only lawful decision would be acquitting the accused pursuant to Article 350 paragraph 1, sub-paragraph 3 of the LCP.

147. The Supreme Court of Kosovo finds this request of the Defense without merits and therefore unfounded. After what was elaborated before in the course of this Judgment, it goes without saying that there is no reason for the acquittal of the accused. This Court has established that this is not the case.

148. As for the remaining part, the decision on the punishment is far more than fair; it is even close to being feeble and weak. The 1st Instance Re-Trial Court in particular has considered that *"[t]he diminishing circumstance consists of the extraordinarily long time of the trial. From 21 July 2005 until the beginning of the re-trial (07.07.09) the binders rested somewhere without any action being taken. The accused [...] subjected to measures limiting their freedom of movement, had to wait four years to see their responsibility and to have the possibility to state their cases. This is an extremely long period of time during which [...] only inconclusive if not elusive initiative were taken to restart the trial by UNMIK International Judicial Support Division" (p.31 of the English version).*

It should be noted that the first judge by the Judgment C. 425/2001 dated 16 July 2003 has imposed punishments of ten (10) years of imprisonment to **L[redacted]G[redacted]**, whilst **N[redacted] M[redacted]** has received thirteen (13) years of imprisonment and **R[redacted] M[redacted]** got seventeen (17) years of imprisonment.

149. The Supreme Court of Kosovo finds it quite questionable, whether the delay addressed can justify such a serious lowering of the punishment as conducted by the 1st Instance Re-Trial Court, *"in the maximum of the spectrum" (p.31 of the English version).* Since the decision of the 1st Instance Re-Trial Court finally is based on the principle of fair trial as stipulated by Article 6 paragraph 1 of the European Convention on Human Rights and Basic Freedoms (ECHR), which for each trial includes the need for a reasonable duration, it needs to be underlined that the adjudication of the European Court of Human Rights has not yet found a clear definition of reasonable time for certain categories of court cases. Therefore, guidance can be found only based on some kind of case law and considering the specificities, difficulties and complexity of each case in the lights of the behavior of the respective parties *(Meyer-Ladewig, Jens; Europaeische Menschenrechtskonvention; Handkommentar; 2. Aufl.; Baden-Baden 2006; Artikel 6; Rz.77ff.).*

150. According to the adjudication of the ICTY, Trail Chamber II in the case "Prosecutor vs. Dragan Nikolic" (IT-94-2-S), where the accused was well informed about the indictment already in 1994 but apprehended by the respective international forces (SFOR) only in 2000, it was found that *"[...] disproportionate length of a procedure may be considered as a mitigating factor in the lights of Article 6 paragraph 1, sentence 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR)"* and that *"[...] the violation of the accused basic right to a fair and speedy trial should only be remedied [...] if the perpetrator was not himself responsible for the delay of the proceedings"*.

151. The Trial Chamber in particular referred to a decision of the German Federal Supreme Court (1 StR 538/01) in which it was emphasized that due to the seriousness of crimes committed in 1943-44 by a now 90 years former camp commander, extraordinary circumstances mitigating the accused guilt were not applicable and the accused, being found guilty, was sentences with life-long imprisonment. In the referred case the accused, who suffered circulatory disturbance, a prostate carcinoma and as a result of its medical treatment osteoporosis with the consequence of dysphagia and the need to live on liquid food, was found mentally able to stand trial. The German Federal Supreme Court made full reference to the findings of the Court of Appeals on the criminal liability of the accused at the time when the crimes were committed. As to the punishment, the German Federal Supreme Court found that no mitigating circumstances had been applicable in the respective case. Considering the long time of 56 years that had passed between the commission of the crimes and the trial, the Court under reference also to the German Federal Supreme Court's and the Federal Constitutional Court's adjudication has pointed out that the "reliable time" of court procedures as required by Article 6 paragraph 1 of the ECHR regularly leads to consequences in favor of the accused, whenever the delay of procedures was caused under the responsibility of state authorities. However, as far as these consequences may lead to mitigating circumstances, which also might be the case when the procedural delay was based on rational grounds, there would be always a need to have a proper and exact calculation on the respective reduction of punishment *(p. 10 and 11 of the German version of the respective decision)*.

152. The ICTY Trial Chamber therefore found that in the referred case *"neither the length of time between the criminal conduct and the judgment nor the time between arrest and judgment* [could] *be considered as a mitigating factor"*.

153. Although the case at hand might be slightly different and indeed some of the delay was caused without the accused having had any influence onto the procedure, it needs to be taken into consideration not only the specific brutality of the crimes committed and the defenseless position of the victims in an armed conflict situation at the time and circumstances of their commission, but also the fact that the accused, who have not even been detained all the time, but have been freed by the Supreme Court, have created plenty of obstacles to the judiciary between the very first trial and the re-trial.

154. The Supreme Court of Kosovo insofar finds that the 1st Instance Judgment lacks any kind of calculation regarding the mitigation of punishment. Also the seriousness of the

crimes committed has not been analyzed or taken into consideration at all at this point. The allegedly polite approach of the accused during the sessions of the 1st Instance Re-trial Court as addressed in the challenged Judgment is of no relevance in this context.

155. The 1st Instance Re-Trial Court has imposed separate punishments of altogether nine (9) years of imprisonment to **L[redacted] G[redacted]** six (6) years of imprisonment to **R[redacted] M[redacted]** and 4.5 years of imprisonment to **N[redacted] M[redacted]** and then built an aggregate sentence of six (6) years imprisonment for **L[redacted] G[redacted]**, three (3) years imprisonment for **N[redacted] M[redacted]** and four (4) years imprisonment for **R[redacted] M[redacted]**. Of course, insofar the 1st Instance Court has decided in accordance with the framework of possible punishments given by the relevant laws and no serious mistake can be established.

156. However, the Supreme Court of Kosovo realizes that due to the fact that the 1st Instance judgment was appealed solely by the Defense but not by the Prosecutor and therefore was the appeals were filed only in favor of the accused, the issue has become a matter of the prohibition of *reformatio in pejus* as stipulated by Article 378 of the LCP, saying that "[i]*f an appeal has been filed only on behalf of the accused, the verdict may not be modified to his detriment in view of the legal assessment of the act and the penal sanctions.*"

157. The latter principle in addition is an integrated part of the international law as well, which is recognized by Kosovo. It particularly is worth mentioning that whilst the ICTY Statute in its Article 25 has not explicitly recognized the prohibition of *reformatio in peius* but the latter is applied as a general principle of law to imposing penalties by the ICTY as highlighted in the "Separate Opinion of Judge Schomburg on the individual criminal responsibility of Mila Martić", paragraph 1 of that opinion (case IT-95-11-A), the principle of *reformatio in pejus* is set forth by the International Criminal Court's (ICC) Statute, which in it's Article 83 paragraph 2 at the end reads: *"When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment."* Moreover, also the International Criminal Tribunal for Rwanda (ICTR) refers to the prohibition of *reformatio in pejus* as a principle deriving from the *principle of fairness (ICTR Appeals Chamber, ICTR-00-55A-A: Prosecutor vs. Tharcisse Muvunyi, Judgment 29 August 2008, paragraph 170, footnote number 382).*

158. Of course, according to the relevant commentaries there is one exception in case the appeal was submitted only to the benefit of the defendant, and the verdict is overruled [...]. The commentaries particularly stipulate: *"When the activity of the defendant for which he was found guilty of was qualified by an effective verdict as several criminal acts in either ideal or real concurrence, and the supreme court [...] adopts the state of the facts that was established in the earlier proceedings, but it modifies the previous verdict by establishing that only one criminal act is in question – the supreme court is bound only by the integrated sentence imposed by the effective verdict, and not by individually determined sentences for the acts in concurrence. In such case, the sentence from the verdict of the Supreme Court may be harsher than individually determined sentences by lower instance courts, but it cannot be harsher than the integrated sentence that was imposed by the effective verdict" (Federal Court* (of the SFRY), *Kzs 18/79 dated 26 April*

1979; quoted after Branko Petric; Commentary on the Law on Criminal Procedure; 1986; 2nd Edition; Official Gazette of the SFRY; Belgrade; Article 378; item 12; p.199).

159. The case at hand subsumed under this, there could be a possibility for the Supreme Court of Kosovo increasing the separate sentences as imposed to the accused by the 1st Instance Re-Trial Court, given that the criminal offence of War Crimes against the Civilian Population pursuant to Article 142 of the CC SFRY would be seen as only one (extended) criminal act irrelevant how many separate acts have been committed and as recommended by the commentaries of Ljubisa Lazarevic as discussed earlier in this Judgment. However, despite the fact that this Court does not share the respective view on the legal quality of Article 142 of the CC SFRY as an extended criminal act, the increasing of the separate punishments imposed to the accused by the 1st Instance Judgment would be effective at all, since no changes can be done with regards to the integrated punishment as imposed by the previous instance.

E. Conclusion of the Supreme Court of Kosovo

160. For the abovementioned reasons, the Supreme Court concludes that the Appeals against the Judgment of the 1st Instance Re-Trial Court (P 526/2009) is partially founded and therefore it is granted and the case sent back for re-trial as to Count 8 of the respective Judgment.

161. Reference is made to what was said before on the weaknesses of the challenged Judgment regarding formalities of the introduction and the enacting clause.

Materially, the Re-Trial Court particularly shall take and assess all relevant evidence as related to Count 8.

162. As to the punishment, the Supreme Court of Kosovo finds itself bound by the principle of prohibition of *reformatio in pejus* due to the fact that only the Defense has filed appeals on behalf and in favor of the accused.

In this regard it is underlined that the separate punishments as imposed to the accused by the Re-Trial Court for the commission of crimes under Counts 5 and 14 of the challeneged Judgment are upheld, which is imprisonment terms imposed on L[redacted]G[redacted] for the crimes committed under Count 14 of 2 (two) years and under Count 5 of another 2 (two) years, on R[redacted] M[redacted] for the crimes committed under Count 5 of 2 (two) years and on N[redacted]M[redacted] for the crimes committed under Count 5 of 1 (one) year and 6 (six) months.

Therefore, the Re-Trial Court now – considering its findings as to Count 8 of the challenged Judgment – shall build and impose a new aggregate punishment onto each of the accused, which can not be higher than the previous one, due to the prohibition of *reformatio in pejus*. However, the requirements on calculation of punishment and

mitigating circumstances as pointed out under chapter E. of this Judgment shall be taken into consideration to the highest amount possible.

163. Consequently, the Supreme Court of Kosovo decides on the Appeals of the Defense as in the enacting clause.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
Ap.-Kz. No. 89/2010

Panel Member
Charles L. Smith III.

Presiding Judge
Gerrit-Marc Sprenger

Panel Member
Martti Harsia

Panel Member
Nesrin Lushta

Panel Member
Emine Mustafa

Court Clerk
Sampsa Hakala