

BASIC COURT OF PRIZREN

P. no.249/12

01 February 2013

IN THE NAME OF THE PEOPLE

THE BASIC COURT IN PRIZREN, in a trial panel comprised of EULEX Judge Mariola Pasknik, as Presiding Judge, Judge Skender Çoçaj and Judge Teuta Krusha as panel members, with court recorder Joseph Hollerhead, in the criminal case against:

1.E.K, charged pursuant to Indictment PPS.no.75/2010 filed by the Special Prosecution Office of the Republic of Kosovo, dated 30.03.2011 and partly confirmed on 29.04.2011 (KA 76/11), with the criminal offence of **War Crimes against the civilian population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 153 paragraphs (2.1) and (2.14) of the Criminal Code of the Republic of Kosovo (hereinafter “the CCRK”) read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the 1949 Geneva Conventions (Additional Protocol II),

2. MU.H,

3. MI.H,

4. N.H,

5. N.B,

6. J.K,

all charged with **providing assistance to the perpetrator after the commission of criminal offence** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo, currently criminalized under Article 388 (1) and (2) of the CCRK.

7. SO.B charged pursuant to Indictment PPS.no.75/2010 filed to the District Court of Prizren by the SPRK on 31.05.2012 with the criminal offence of **War Crimes against the civilian population**, pursuant to Articles 22 and 142 of the CCSFRY, currently criminalized under Articles 31 and 153 paragraphs (2.1) and (2.14) of the CCRK read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the 1949 Geneva Conventions (Additional Protocol II),

after having held the main trial hearings open to the public on the 30 November, 4 December 2012, 10, 24, 25, 28 and 29 January 2013, in the presence of the SPRK Prosecutor Maurizio Salustro; the injured parties, the witnesses D.B and S.B(on 4 December 2012); and the

deliberate armed attack against Serbian households located in said village) to elude discovery by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 23 February 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

Therefore, pursuant to article 390 paragraph 3 of the KCCP the defendant **Mu.H** is acquitted of the charge of **providing assistance to the perpetrator after the commission of criminal offence** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo, currently criminalized under Article 388 (1) and (2) of the CCRK.

3. MI.H, father's name, mother's name, born on in,, finished,,,

Is

FOUND NOT GUILTY

- because it was not proven that he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opteresa village by taking part in a deliberate armed attack against Serbian households located in said village) to elude discovery by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 23 February 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

Therefore, pursuant to article 390 paragraph 3 of the KCCP the defendant **Mi.H** is acquitted of the charge of **providing assistance to the perpetrator after the commission of criminal offence** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo, currently criminalized under Article 388 (1) and (2) of the CCRK.

4. N.H, father's name, mother's name, born on in,,,,,,,

Is

FOUND NOT GUILTY

- because it was not proven that he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opteresa village by taking part in a

deliberate armed attack against Serbian households located in said village) to elude discovery by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 3 March 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

Therefore, pursuant to article 390 paragraph 3 of the KCCP the defendant **N.H** is acquitted of the charge of **providing assistance to the perpetrator after the commission of criminal offence** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo, currently criminalized under Article 388 (1) and (2) of the CCRK.

5. **N.B**, father's name, mother's name, born, in,,,,,

Is

FOUND NOT GUILTY

- because it was not proven that he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Optersusa village by taking part in a deliberate armed attack against Serbian households located in said village) to elude discovery by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Rogove village on 3 March 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

Therefore, pursuant to article 390 paragraph 3 of the KCCP the defendant **N.B** is acquitted of the charge of **providing assistance to the perpetrator after the commission of criminal offence** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo, currently criminalized under Article 388 (1) and (2) of the CCRK.

6. **J.K**, father's name, mother's name, born, in,,,

Is

FOUND NOT GUILTY

- because it was not proven that he assisted E.K (under investigation for the crime of War Crime against the civilian population, because in co-perpetration with other so far unidentified KLA-soldiers he applied measures of intimidation and terror against the

Serbian civilian population of Opterushe/Opteresa village by taking part in a deliberate armed attack against Serbian households located in said village) to elude discovery by giving false witness statement supporting E.K's alibi defence, more specifically, when heard in his capacity as witness by EULEX War Crimes Investigation Unit officers in Pristina on 8 March 2011, he falsely stated that E.K was wounded in the beginning of July 1998.

Therefore, pursuant to article 390 paragraph 3 of the KCCP the defendant **J.K** is acquitted of the charge of **providing assistance to the perpetrator after the commission of criminal offence** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo, currently criminalized under Article 388 (1) and (2) of the CCRK.

7. SO.B, father's name, born on in (.....),
.....,-, in detention on remand since 18 April 2012,

Is

FOUND NOT GUILTY

- because it was not proven that on the 17th and 18th of July 1998, in his capacity as member of the Kosovo Liberation Army (KLA), in co-perpetration with E.K and with other so far unidentified KLA soldiers, applied measures of intimidation and terror against the Serbian civilian population of Opterushe/Opteresa by taking part in a deliberate attack against the Serbian households located in said village.

Therefore, pursuant to article 390 paragraph 3 of the KCCP the defendant **So.B** is acquitted of the charge of **War Crimes against the civilian population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 153 paragraphs (2.1) and (2.14) of the CCRK read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the 1949 Geneva Conventions (Additional Protocol II).

COSTS

Pursuant to Article 103 of the KCCP this costs of criminal proceedings under Article 99 paragraph 2 subparagraphs 1 through 5 of the KCCP, the necessary expenses of all Defendants including the remuneration and necessary expenditures of defense counsels shall be paid from budgetary resources.

REASONING

I. Procedural background

On 20.12.2007 the district court of Belgrade dismissed charges against S. M. for the criminal offence of War crimes against the civilian population in Opterushe/Opterususa on 17.-21.7.1998. On 3.3.2009 the Supreme Court of the Republic of Serbia revoked the judgment and sent the case back to the first instance court for re-trial.

On 19.8.2010 the head of the Special Prosecution Office of the Republic of Kosovo (SPRK) issued a request to Serbia for an arrest warrant and related evidentiary materials in the case of S.M.

On 20.8.2010 the public prosecutor of the SPRK issued a ruling on initiation of investigation against S. M. for the criminal offence of War crimes against the civilian population in Opterushe/Opterususa on or about 18.7.1998.

On 29.11.2010 the deputy war crimes prosecutor of the Republic of Serbia informed the public prosecutor of the SPRK that due to well-known current political circumstances neither he, the court recorder or any other court staff is able to come and give evidence in Kosovo in the investigation against S. M. in their official capacity.

On 30.11.2010 the public prosecutor of SPRK issued a ruling on expansion of the investigation against E.K, So.B and H. M. for the criminal offence of War crimes against the civilian population in Opterushe/Opterususa on or about 18.7.1998.

On 01.12.2010 the public prosecutor of the SPRK issued a ruling on termination of the investigation against S. M.

On 14.12.2010 police officers of the War Crimes Investigation Unit (WCIU) arrested E.K and H. M.

On 14.12.2010 the EULEX pre-trial judge of the district court of Prizren issued a ruling for detention on remand against E.K and H. M. for one month until 14.1.2011. On 21.12.2010 the three-judge panel of the district court of Prizren rejected the appeals against the ruling.

On 15.12.2010 the EULEX pre-trial judge of the district court of Prizren, having received an application for an order of arrest from SPRK, issued the Order for arrest against So.B.

On 22.12.2010 the EULEX pre-trial judge of the district court of Prizren, deciding upon the application for issuance of a domestic wanted notice filed by SPRK, issued the order for the issuance of a wanted notice against So.B.

On 22.12.2010 the EULEX pre-trial judge of the district court of Prizren deciding upon the SPRK request for the issuance of an International wanted notice, filed to the department of legal affairs, division for international legal cooperation of the ministry of Justice a request for the issuance of an International wanted notice against So.B.

On 13.01.2011 the three-judge panel of the district court of Prizren issued a ruling of extension of detention on remand against E.K and H. M. for two months until 14.3.2011. On 21.1.2011 the Supreme Court of Kosovo rejected the appeal of E.K against the ruling.

On 08.03.2011 the public prosecutor of the SPRK issued a ruling on expansion of the investigation against Mu.H, Mi.H, N.H, N.B and J.K for the criminal offence of providing assistance to perpetrators after the commission of criminal offences.

On 14.03.2011 the EULEX pre-trial judge of the district court of Prizren issued ruling for extension of detention on remand against E.K and H. M. for one month until 14.04.2011.

On 30.03.2011 the public prosecutor of the SPRK filed indictment (PPS 75/2010) in the district court of Prizren against E.K and H. M. for the criminal offences of 1) War crimes against the civilian population in Opterushe/Opterususa on 17. and 18.7.1998 and 2) War crimes against the civilian population in Opterushe/Opterususa on 18.7.1998; and against Mu.H, Mi.H, N.H, N.B and J.K for the criminal offence of providing assistance to perpetrators after the commission of criminal offences.

On 04.04.2011 the three-judge panel of the district court of Prizren issued a ruling of extension of detention on remand against E.K and H.M. for two months until 04.06.2011.

On 29.04.2011 the EULEX confirmation judge, after having held a hearing, dismissed charge no. 2 against E.K and H.M. but confirmed the other charges. On 9.6.2011 the three-judge panel of the district court of Prizren rejected the appeals of E.K, Mu.H and Mi.H against the confirmation ruling.

On 13.05.2011 the public prosecutor of the SPRK issued a ruling on suspending the investigation against So.B on the grounds that his whereabouts were unknown.

On 02.06.2011 the three-judge panel of the district court of Prizren issued a ruling for extension of detention on remand against E.K and H.M. for two months until 4.8.2011.

On 28.06.2011 the first trial started in the district court of Prizren.

On 02.08.2011 the district court of Prizren after holding the open main trial on 28, 29, 30 June, 7, 26, and 27 July 2011 issued the Judgment P.no.134/11 whereby the defendant E.K was found guilty and sentenced to a term of five (5) years of imprisonment, the defendant H.M. was acquitted of the charges, the defendants Mu.H, Mi.H, N.H, N.B and J.K were found guilty and each of the defendants were sentenced with a suspended sentence in terms of six

(6) months of imprisonment in order not to commit another criminal offence within a period of one (1) year.

On 18.4.2012 the public prosecutor of the SPRK issued a ruling on resuming the investigation against So.B.

On 18.04.2012 the EULEX pre-trial judge of the district court of Prizren issued a ruling ordering detention on remand against So.B. The defendant So.B was extradited from Albania on 18 April 2012 and on the same day was brought before pre-trial judge.

On 04.05.2012 the EULEX pre-trial judge of the district court of Prizren acting upon the application for extension of the investigation, issued the ruling extending the investigation against So.B until 6 August 2012.

On 16.05.2012 the three-judge panel of district court of Prizren deciding upon the application for extension of detention on remand rendered the ruling whereby extended the detention on remand against the defendant So.B for additional two months until 18 July 2012.

On 31.05.2012 the SPRK filed to the district court of Prizren an Indictment PPS.no.75/2010 against the defendant So.B with criminal offences of War Crimes against the civilian population, pursuant to Articles 22 and 142 of the CCSFRY, currently criminalized under Articles 23 and 121 (1) of the CCK read in conjunction with Article 3 Common to the four Geneva Conventions of 12.08.1949 and of Article 13.2 of Protocol II of 08.06.1977, Additional to the 1949 Geneva Conventions (Additional Protocol II).

On 07.06.2012 the Three-Judge panel of District Court of Prizren deciding *ex officio* pursuant to article 306 (5) of the Kosovo Code of Criminal Procedure (hereinafter “the KCCP”) rendered the ruling extending detention on remand against So.B until 7.8.2012.

On 27.06.2012 the EULEX confirmation Judge of district court of Prizren after a hearing on confirmation of the indictment, rendered the ruling KA 97/12 whereby confirmed the indictment of the SPRK PPS.no.75/2010 dated 30.5.2012 against the defendant So.B.

On 06.08.2012 the EULEX Judge of district court of Prizren acting as presiding Judge, deciding *ex officio* pursuant to article 287 (2) of the KCCP rendered the ruling extending detention on remand against S. B. until 07.10.2012.

On 04.09.2012 the Supreme Court of Kosovo deciding upon the appeals of the defence counsels of the defendants E.K and N.H issued the ruling Ap-Kz 20/2012 whereby annulled the Judgment of the District Court of Prizren P.no.134/11, except the part related to the acquittal of H.M. which was not subject to the appeal and sent back the case against the defendants E.K, N.H, Mu.H, Mi.H, N.B and J.K to the first instance court for retrial.

On 04.10.2012 the EULEX judge of district court of Prizren acting as presiding judge, deciding *ex officio* pursuant to article 287 (2) of the KCCP rendered the ruling extending detention on remand against So.B until 07.12.2012.

On 07.11.2012 the trial panel of district court of Prizren deciding upon the SPRK's application for joinder of criminal proceedings, issued the ruling whereby joined the criminal proceedings in the criminal case against the defendants E.K, Mu.H, Mi.H, N.H, N. B, J.K charged pursuant to Indictment PPS.no.75/2010 and the criminal proceedings in the criminal case against the defendant So.B charged pursuant to Indictment PPS.no.75/2010. The court decided that this case to be led with the number P no. 249/12.

On 30.11.2012 the main trial started at the district court of Prizren.

On 05.12.2012 the EULEX Judge of district court of Prizren acting as presiding Judge, deciding *ex officio* pursuant to article 287 (2) of the KCCP, rendered the ruling extending detention on remand against So.B until 07.02.2013.

II. Competence of the Court

Under article 23 item 1 i) of the Kosovo Code of Criminal Procedure (hereinafter "the KCCP"), District Courts are to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of at least five years. The defendants E.K and So.B were charged, with criminal offence War Crimes against the Civilian Population, which carries a minimum sentence of five years (under Art.142 CC SFRY).

Therefore, the District Court is competent body to hear this criminal proceeding.

Under Article 3.1 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors ("Law on Jurisdiction"), EULEX Judges have jurisdiction and competence "over any case investigated or prosecuted by the SPRK" This case was investigated and prosecuted by SPRK prosecutors. The main trial panel was composed of EULEX Judge Mariola Pasnik, and local Judges, Judge Skender Çoçaj and Judge Teuta Krusha as panel members. There were no objections by the parties to the composition of the panel.

Joinder of criminal proceedings

Since, the new Criminal Procedure Code entered into the force on 01.01.2013, pursuant to the article 545 paragraph 1 of the CPC the panel with its ruling dated 11 January 2013 decided that the criminal proceedings in the criminal case P.no.249/12 against the defendants E.K, So.B, Mu.H, Mi.H, N.H, N. B. and J.K, to be continued under the old Criminal Procedure Code of Kosovo (KCCP).

III. Administered evidence

A. Witnesses

1. D.B (injured party)
2. S. B. (injured party)
3. H.M.
4. A. B.
5. F. M.
6. P. M.
7. N. M.
8. A. H.

B. Written evidence

The court admitted as evidence the following documents that were read out or considered as read out during the main trial:

1. Testimony given by D.B in the first trial dated 28 and 29 June 2011.
2. Testimony given by S. B. in the first trial dated 29 June 2011.
3. Testimony given by A.B. in the first trial dated 30 June 2011.
4. Testimony given by F.M.in the first trial dated 30 June.
5. Testimony given by P.M.in the first trial dated 30 June 2011.
6. Testimony given by N.M.in the first trial dated 30 June 2011.
7. Testimony given by A.H.dated 30 June 2011.
8. Application for membership in KLA for So.B.

C. Prosecutor

List of documents submitted by the Prosecution on 1 July 2011 and list of documents submitted by the Prosecution on 25 January 2013.

1. Procedure of showing pictures to the witness D.B 26.10.2010, page B 97/ B 137
2. Procedure of showing pictures to the witness S.B27.10.2010, page B 138/B 170
3. Police report 02.12.2010, page B 171/ B 185
4. Police report 9.12.2010, page B 186/ B 196
5. Police report 21.12.2010, page B 269/ B 270
6. Log book submitted by A.H. to WCIU on 21.12.2010
7. Records of witness statement of J.K on 08.02.2011 and on 08.03.2011, page B1/B23
8. Records of witness statement of Mu.H on 23.02.2011, page B 30 / B 39
9. Records of witness statement of Mi.H on 23.02.2011, page B 65 / B 74
10. Records of witness statement of N.B on 03.03.2011, page B 47 / B 58
11. Records of witness statement of N.H on 03.03.2011, page B 81 / B 90

D. Hearing of the defendants

1. E.K
2. Mu.H
3. Mi.H
4. N.H
5. N.B
6. J.K
7. So.B

E. The court admitted as evidence the following statements that were considered as read out during the main trial:

1. E.K's statements on 14.12.2010, 24.01.2011 and 07.07.2011
2. Mu.H's statements on 23.02.2011, 14.03.2011 and 07.07.2011
3. Mi.H's statements on 23.02.2011 and 14.03.2011 and 07.07.2011
4. N.H's statements on 03.03.2011, 17.03.2011 and 07.07.2011
5. N.B's statements on 03.03.2011, 17.03.2011 and 07.07.2011
6. J.K's statements on 08.02.2011, 08.03.2011, 15.03.2011 and 07.07.2011
7. So.B's statement on 18.04.2012.

IV. Summary of undisputed facts

1. That an armed attack happened on the night of 17th July, and into the early morning hours of 18th July 1998 in the village of Opterushe/Optersusa (district of Rahovec/Orahovac).
2. The attack was directed towards a house owned by the family of the witness D.B which was occupied at the time by most of the Serbs families living in the village. During the attack, the Serb males returned fire on the attackers.

V. Disputed facts

1. The defendant E.K denies being present and having taken part in the attack on the 17th and 18th July 1998 in Opterushe/Optersusa.
2. The defendant So.B denies being present 17th and 18th July 1998 in Opterushe/Optersusa, stressing out that he was in village Samadraxha at his uncle's.
3. To what extent the Serbians were under special status as civilians, especially because the men in the said household were armed and offered resistance during the attack.
4. The defendants Mu.H, Mi.H, N.H, N.B and J.K deny giving false statements when interviewed by EULEX investigators regarding the time the defendant E.K was wounded.

VI. Summary of Factual situation Proven

1. The group of unknown people attacked the civilian house of D.B and her family in the village of Operushe/Optersusa from various sides on the 17th and 18th July 1998 with

armed weapons. Present in the house during the attack were almost all Serbian inhabitants of the village, about 15 in total.

2. The Serbian males returned fire with rifles and pistols during the attack.
3. In the morning of the 18th July the Serbian families gave up their resistance and surrendered. Immediately afterwards the yard of the B. house were filled with unknown people.
4. Amongst the people filling up the yard were present as well the defendants E.K and So.B.
5. The defendants Mi.H, N.H, N.B, and J.K when interviewed as witnesses all gave false statements to the investigators as to the date the defendant E.K was wounded, in order to provide an alibi defense for K.

VII. Evidence related to the proven factual situation

General

Having concluded the main trial, the trial court finds the testimony of the witnesses and injured parties D.B and S.B in general trustworthy and credible because they have described the events in a similar way throughout the various statements given, and the court sees no reason why they should lie. Accordingly the court places a lot of significance on these testimonies, primarily given in court on 28 and 29 June 2011, but supplemented by their previous statements to the police/prosecution, in spite of incorrect factual statements on some minor parts, which the court considers normal, especially given that the incident happened 15 years ago.

The presence of E.K and So.B on the 17th and 18th July 1998 in Opterushe/Optersusa village

One of the major factual points to be considered by the court is whether the defendants E.K and So.B were present in Opterushe/Optersusa village during the attack on the 17th and 18th July 1998 and have they took part in the attack against Serbian households.

The testimony of the witness (and injured party) D.B

In her testimony of 28th June 2011 given in first trial (minutes from page 13 onwards), D.B describes that about 15 Serbian persons were gathered in their house, males and females, relatives and neighbors. Save for two other Serbian persons, all the Serbian persons in Opterushe/Optersusa were gathered in the B. house on the 17th July 1998.

In the question of public prosecutor: *Why did you all gather in your house?*

D.B: Because we didn't dare go out anywhere because we noticed from the yard we noticed pass by our gate, we then gathered there all of us.... On that day paternal

uncle B. B. let the sheep out to pasture in the mountain that is above our village. And he returned home when the shooting started.

Public Prosecutor: You said 'we saw them passing', who are 'them'?

D.B: I didn't know who they were, probably from the village.

D.B further stated that on 17th July 1998 about 12:30 or 01.00 after midnight the power went off. After electricity was stopped, short while after that someone called 'O D. mos dil', in Albanian, his name was M. but the abbreviation was D., everybody called him D..

Public Prosecutor: So, your husbands' name was M. but everyone called him D.?

D.B: Yes, everybody did., also us at home...

D.B: Do not go out. My husband immediately headed to the hall to open the door and I told him do not come out. I didn't let him go out and after a short while, meaning a minute or two, they started shooting at our house, at our roof, all over the roof.

Public Prosecutor: Was it a single shot, burst of shots or can you describe this shooting?

D.B: There was not only one shot, I don't know which rifle shots were fired shot but there were strong shootings.

Public Prosecutor: Now one step back when someone shouted 'don't go out', do you know who said that sentence?

D.B: I asked my husband who is calling you, he said: 'move away 'J.' is calling', page 19 of the minutes from 28th June 2011.

From the moment the shooting started it lasted until the morning. In her statement to the public prosecutor on 26th October 2010 the witness D.B stated that, the Serbian males in the house had rifles at their disposal and returned the fire after the shooting started. This was confirmed by her during the first trial. She further stated that when the shooting started her husband told to the women to go and get shelter in the basement. They were in the basement all night, so they don't know what was going on. Then when it calmed down a little bit in the morning, she came out of the basement and suddenly their yard got completely filled.

The witness furthermore stated in court that she knew the defendant E.K and So.B before the attack on the 17th July, because they were all member of the same village.

After the Serbs surrendered in the morning of the 18th July 1998, D.B stated that the yard of the house was filled with people who were some in civilian clothes, military, multicolor,

black clothes armed and with KLA insignia (page 22 of the minutes from 28th June 2011), among them E.K, dressed in black uniforms and armed with rifle (page 23 of the minutes from the 28th June 2011). Although the witness was somewhat unclear about the defendant being armed in her testimony in the main trial on 28th June 2011, after consideration she confirmed what she had stated to the prosecutor that the defendant was armed with rifle when present in the yard immediately after the attack.

D.B, when she was heard as a witness during the investigation on 26th October 2010, stated that she saw So.B in her house yard immediately after the shooting ceased on 18th July 1998.

At the trial session held on 28th June 2011, she confirmed that among people that entered in the yard, she recognized E.K and So.B.

In the testimony given in the retrial on 4th December 2012, D.B, in the question of Public Prosecutor that whether she saw So.B entering in the yard together with other people and if she remembers what kind of clothes So.B was wearing?

D.B stated:

D.B: As far as I can remember and I think I said the same in my statement, I said that he had multicolour green clothes on.

Public Prosecutor: You mean a sort of camouflaged uniform?

D.B: Yes.

Public Prosecutor: Did he carry anything in his hands or on his body?

D.B: They had rifles. I don't know the make but they had rifles with them.

Public Prosecutor: Do you remember if So.B was armed or was carrying a weapon?

D.B: I don't remember that. I was giving statements and the time has passed so I don't remember that now. As I said last time, I was looking at my son and I have him still in my eyes how he was gone. It is not easy to have watched my son and other villagers in that situation and pay attention to details.

The court finds the statements of the witness D.B trustworthy and credible as to her knowledge and identification of the defendants E.K and So.B and they were both present in the yard of the house of the witness in the early morning of 18th July 1998 immediately after exchange of fire ceased.

The witness D.B in her statements prescribed both defendants being present in the house yard in the early morning of 18th July 1998 armed with rifles and multicolor uniforms among others E.K dressed in black uniforms.

However, E.K's and So.B's presence in the B. house yard immediately after exchange of fire ceased, does not give sufficient evidence to the court that they took part in the attack launched on the Serbian households in Opterushe/Optersusa on 17th July, and into the early morning hours of 18th July 1998.

The witness D.B stated that during the attack between the night 17th and 18th July 1998 she with other Serbian females were sheltered in the basement of the house, where they stayed there until the morning of 18th July 1998. As a result the witness D.B in their statements was not able to give to the court any evidence with regards that who exactly attacked them.

In addition, the statement of the witness D.B that her husband heard the voice of "J." on the night of the 17th July and he warned her husband not to go outside, shortly before the shooting commenced, does not give sufficient evidence to the court that the person she heard was the voice of E.K, or even if she was correct with it, the court cannot find as proven that E.K took part in the attack launched on the Serbian households in Opterushe/Optersusa between 17th and 18th July 1998 because as stated above, the witness during the attack was all night sheltered in the basement of the house, therefore she was not able to give any evidence to the court who took part in this attack.

The testimony of the witness S.B

She testified to the public prosecutor on 27th October 2010 and her testimony in open court has to be evaluated with her earlier explanation to the prosecutor. It is understandable that not all of the details are clearly present regarding an incident that happened. In addition her present physical condition as a result of stroke, has affected her memory regarding the precise details.

S.B in her testimony given in the first trial, however, verified, just like D.B, that all Serbs in the village were gathered in the B. house during the attack; that the shooting started on 17th July 1998 at 6 in the afternoon and lasted all night. In the question of public prosecutor that if she remembers at what time the shooting stop? The answer of S.B. was: *I don't remember because we were sleeping in the basement.* She explained that in the morning a lot of people filed up the yard and took the Serbs in the center of the yard to be in a group.

Public Prosecutor: you said they put us who were "they"?

S.B: they a lot of people, we did not know them, some were from our village some were from outside.

Public Prosecutor: did they wear uniforms?

S.B: Yes

Public Prosecutor: were they armed?

S. B: yes

Public Prosecutor: do you remember having seen any insignia on their uniforms?

S.B: no out of fear we did not look, only they were green and black uniforms.

Public Prosecutor: to the public prosecutor, on the occasion you said they had KLA patches on the shoulders, some had a black arm stripe, do you remember?

S.B: yes but I cannot hear well, that is why, I cannot explain.

Public Prosecutor: among the soldiers or people in uniform that entered the yard, did you recognize anybody.

S.B: do you mean of the people of our village?

Public Prosecutor: from anywhere, people that you recognized and can identify?

S.B: only from our village.

Public Prosecutor: and can you tell us who did you recognize?

S.B: I recognized a lot but I did not know their names, I recognized son who was here, and So.B.

Public Prosecutor: anyone else

S.B: I used to know the names but I have forgotten them.

Public Prosecutor: to the public prosecutor on the same occasion, you said among others which I will not mention because they are not relevant to this trial, you said I remember one J., do you remember?

S.B: yes

Public Prosecutor: do you remember having seen him in the yard?

S.B: yes.

During the investigation on 27th October 2010 and at the main trial on 29th June 2011, the witness S.B, stated that as soon as she exited the B. house in the morning of 18th July 1998,

she saw So.B among the other people who were in the house yard. The witness has a reason to remember So.B vividly, because So.B's father, Mi., had bought some land from the witness.

When asked by prosecutor in the trial on 4th December 2012, S.B stated that, in the yard of the morning of the 18th July immediately after attack she saw people in the yard, she recognized So.B, he was dressed in green uniform carrying rifle.

The court finds the statements of the witness S.B trustworthy and credible as to her knowledge and identification of the defendants E.K and So.B and they were both present in the house yard of the house of the witness D.B in the early morning of the 18th July 1998.

The witness S.B in her statements prescribed both defendants being present in the yard in the early morning of 18th July 1998.

However, E.K's and So.B's presence in the B. house yard immediately after exchange of fire ceased, does not give sufficient evidence to the court that they took part in the attack launched on the Serbian households in Opterushe/Optersusa between 17th and 18th July 1998.

The witness S.B stated that during the attack between the night 17th and 18th July 1998 she with other Serbian females were sheltered in the basement of the house, stating that they were sleeping in the basement. They stayed there until the morning of 18th July 1998; therefore, the witness has not given any evidence to the court that who attacked them during the night of 17th and 18th July 1998.

Photo identification

In connection with her testimony to the prosecutor, the witnesses D.B and S.B. identified "J." in a photolineup, although the latter with some difficulty.

The witness D.B identified both defendants E.K and So.B in the photo identification done on 26th of October 2010.

The court finds it sufficiently proven that the witness D.B knew the defendants E. "J." K. and So.B before the attack and could on this background identify them.

The witness S.B. during her photo identification on the 27th of October 2010 did recognize the defendants E.K and So.B.

In the final finding of the circumstances proven, the court is considering the photo identification as a relevant piece of evidence.

The defendants E.K and So.B

Have in court both denied taking part in the attack on the night of 17th of July, and into the early morning hours of 18th of July 1998.

E.K

E.K has denied taking part in the attack on the 17th and 18th July 1998, as he was wounded in battle on 11 July 1998 and stayed 15 days in the hospital.

In his statement to the prosecutor on 14th of December 2010 which he upheld in first trial, he stated that he was a member of the KLA which he joined in March 1998 in Drenica. He got the position of company commander at the end of November 1998 and denies having this rank in July 1998. Although being from Opterusha/Opterusa, he denies being based with KLA in Opterusha/Opterusa, but rather being in the KLA Drenovac group. He further states that that he doesn't know about this attack in Opterusha/Opterusa towards the end of July.

E.K stated to the prosecutor on 14th December 2010, upheld in court during the trial on 7th July 2011 that he was "wounded on 11 July 1998 on the main road Gjakova-Prizren close to a village called Rugova e Hasit, Gjakova municipality".

Public Prosecutor: How did it happen?

E.K: There was a fight there which lasted 10-15 minutes. There were just two of us, J.K., who was driving, and me. We were in a white Golf I or II civilian vehicle and an armoured jeep came across us. They were uniformed Police and military. I opened fire against them with my AK-47 from a distance of 10 metres. Our car was moving as I fired. My friend did not shoot. I fired shots from the window; I leaned out of the car window and opened fire. There are two bridges at 150 metres distance. We reversed for those 150 metres until the junction to the village of Rugova. After a big exchange of fire with the people in the Jeep, we also came under fire from behind. A bullet hit our car and hit me in the back. When I got wounded, the car was still reversing. The bullet entered from the back door on the driver's side, it hit the back seat, the front seat and hit me. I could not see who shot me...

....

Public Prosecutor: Were you in the hospital?

E.K: I got first aid by a doctor in Rugova e Hasit. I don't remember his name but he died some time ago. I was treated in the house of a S. G. He still lives in Rugova. Few hours later, I went to the hospital in Gajrak. It's a village close to Pagarusha. There was a KLA military hospital there. There, a doctor named A.H.dressed and treated my wound. He now works at the Prizren hospital...I stayed for 15 days in the hospital. I don't remember the date, but at some point the hospital was moved because of an incoming Serbian offensive. Then I went to the house of my uncle's family in the village of Radbrava/Randobrava....I stayed there for 8 days. A doctor from Krusha e Madhe... was coming every day to my uncle's house to treat my wound...

.....

Public Prosecutor: Going back to the story of Opterusha, have you heard about an attack that was carried out by KLA on the village?

E.K: No.

Public Prosecutor: So you are telling me that although you are from Opterusha, you have not heard about an attack that happened there?

E.K: Correct.

Public Prosecutor: So according to what you are saying , there should still be Serbs living in Opterusha?

E.K: I don 't know.

Public Prosecutor: But do you know if they are still there?

E.K: They are no longer there but I don 't know why.

.....

Public Prosecutor: When you were wounded, were you wearing a uniform?

E.K: Yes.

Public Prosecutor: What color?

E.K: Black.

Public Prosecutor: Does this color bear any significance?

E.K: No, I purchased the uniform myself actually. We just had KLA patches. In other words, it was my choice to have a black uniform, because I like the color....

Public Prosecutor: Do you know anyone named B. from Opterusha?

E.K: Yes.

Public Prosecutor: Were any B. from Opterusha with KLA?

E.K: No.

Public Prosecutor: Other than you, was anyone from Opterusha a KLA member?

E.K: Sy. B. was among the first to join and he was all the time with me. Also.

Public Prosecutor: Are they alive?

E.K: No, they both died.

Public Prosecutor: So you just know these two who are now dead?

E.K: I know others but they were not with me.

Public Prosecutor: Tell me names of anyone from Opterusha who was a KLA soldier from Opterusha in July 1998.

E.K: I don 't know anyone else.

Public Prosecutor: I thought you said that when you were in Drenovac I Zadriqi there were other soldiers from Opterusha/Opterusa. Isn't this correct?

E.K: It's true but I did not know their names as they were young. Besides, I lived way from Opterusha for some time, I was in Switzerland for 5 years and in Pristina, so I got detached from the village life."

In the testimony given in the main trial on 28th of January 2013 E.K stated that he stands by the statements given before the Prosecutor dated 14th of December 2010 and 24th of December 2010 and in front of the court during first trial dated 7th of July 2011.

As the court sees it, it is very unlikely that E.K does not know about the attack in Opterusha/Opterusa. During the first trial E.K stated several times that he was proud of his involvement in KLA and the fight for freedom and independence for Kosovo.

On this background the court finds the statements of E.K of doubtful credibility.

The court finds as proven that E.K was present in the B. house yard immediately after exchange of fire ceased. But presence of E.K in the house yard of the witness D.B immediately after exchange of fire ceased does not give sufficient evidence to the court the defendant E.K took part in the attack during the night of 17th and 18th July 1998.

When considering the credible statements from the witnesses D.B and S.B and seen in connection with the statements of the other defendants, the court finds the statements given by the defendant E.K, not credible.

So.B

In the testimony given in front of the public prosecutor dated 18th of April 2012, So.B stated that he joined KLA on 27th of October 1998. He knew E.K before the war by sight and name, but he did not have relationship.

E.K was a friend of his brother. So.B's brother was with E.K in the war since the very beginning. When So. joined KLA, he had relationship with E.K. In the beginning So.B was stationed in the unit in village of Reti, under the command of Xhe. Ha., later during the war he stayed with E. and his brother. So.B stated that initially the commanders where his brother and E., but after E. got wounded his brother become the only leader. He Joined the KLA in October 1998.

So.B stated that at the end of the June or the beginning of July 1998 when the first grenade fell on the village, he took his extended family away and went to the village Samadraxha, where he stayed for the following four months at his uncle's Mu. B. He returned to Opterushe/Opterusa only after four months and afterwards he joined KLA. When he returned to Optarusha/Opterusa the entire village had been burned down by Serbian forces, and only KLA was there. There was no civilian population at all.

In the testimony given in the main trial on 28th of January 2013, So.B stated that he stands by the statement given to the Prosecutor on 18th of April 2012.

During the session of 28th of January 2013, the court admitted as evidence the motion of the defence counsel of So.B that shows that the defendant So.B was a member of the KLA from 27th of October 1998.

On this background, the court finds his statements of doubtful credibility.

When considering the credible statements from the witnesses D.B and S.B and seen in connection with the statements of the other defendants, the court finds the statements given by the defendant So.B, not credible.

The court finds as proven that So.B was present in the B. house yard in the morning of 18th July 1998 immediately after exchange of fire ceased. But So.B's presence in the B. house yard in the morning of 18th of July 1998 immediately after exchange of fire ceased, does not prove that he took part in the attack against Serbian households during the night between 17th and 18th of July 1998.

The defendants Mu.H, Mi.H, N.H, N.B and J.K all testified in support of E.K being injured before the attack in Oterushe/Oterusa happened.

The defendant Mu.H when giving his statement as witness to the prosecutor in Rogove village on 23rd of February 2011 stated that he has not heard of the attack on the Serbs in Oterushe/Oterusa village in 1998. He is also related to the defendant E.K.

When asked about the time E.K was wounded, the following appears from the signed witness statement:

...

Investigator: When did it happen?

Witness: I think it happened at daylight. It was before lunchtime.

Investigator: Is this 1998?

Witness: It was the summer of 98.

Investigator: Was it June, July, August or September?

Witness: I think it was July?

Investigator: Why do you think it was July?

Witness: The main reason I remember the time is that at that time we cut the wheat. It was the exact time around 10th of July.

Investigator: Can you explain why the wound of E.K has anything to do with cutting wheat?

Witness: Because it was the wheat cutting time, which is between 10th of July and 10th of August. And this happened in the beginning of that season and not in August. I

remember there were a lot of people around my house at that time because it was time to cut wheat.

... ”

He gave his statement as the defendant to the investigator on the 14th of March 2011. He then confirmed his statement of 23rd of February 2011 in the following manner:

“IPO: Do you confirm what you stated it in its entirety?

MH: Yes. But I just want to make a change because I don't know the exact day because a longtime has past. I know it was July because we were harvesting the crops. From the beginning and until middle of July.”

This statement given to the prosecutor was upheld in court during the first trial and thereafter retrial.

The court finds it highly unlikely that the defendant has not heard of the attack on the Serbs in Opterusha/Opterusa in July 1998, and understands his stated ignorance as a way of protecting the legacy of KLA and the right fight for freedom.

As a relative of the defendant E.K, the court further sees his statement as one trying to protect his relative.

Although not being sure of the exact date, the defendant is however sure that E.K was wounded before the middle of July, in other words before the attack, because it was early in the wheat cutting season. However this is an occurrence that happens every year, and the court finds this unlikely that he could remember when during the cutting season of 1998 — the wounding occurred.

In conclusion the court finds his statement on the timing of the injury of E.K not credible.

Considering the following, the impact of all the evidence given, the statements of Mu.H to the investigator as to the timing of when E.K was wounded, are found proven beyond reasonable doubt as false.

The defendant Mi.H gave his statement as a witness to the EULEX investigator in Rogove village on 23rd of February 2011, and stated that E.K is his uncle, but his statement was given voluntarily. He is also the brother of the defendant Mu.H. He further stated that he did not know if E.K has been a member of KLA when he was wounded, as this happened so long ago. He helped transport his uncle when he was wounded.

“Investigator: When did this happen?

Witness: As we have our own jobs, there was power-cut on 7th July 1998. The electric company told us that they will not put on the electricity unless we don't pay before 11th of July and we collected the money.

“E. was wounded on 11 July 1998. I am guaranteed of that. I remember the day because on the same day I should have handed over the money to the electric company collector. My friend then gave the money to the collector. That night 11th July we had the power of electricity.”

On 14th of March 2011 Mi.H confirmed his statement given as a witness to the EULEX investigator and this he confirmed in court during the first trial, confirming his statement as well in the retrial.

Considering that the defendant E.K is his uncle, the court finds it understandable that he wants to protect his uncle.

The stated reason why he remembered the time his uncle E.K was wounded, the court finds too peculiar and thus not trustworthy.

When considering the whole evidence, as stated above and in the following, the court finds the statements of Mi.H given to the prosecutor on 23rd of February 2011 in Rugove village, as to the timing when E.K was wounded, as false.

The defendant N.H, when giving his statement as a witness in Rogove village on the 3rd of March 2011 stated that he has heard rumors of the attack on Serbian civilian houses in July 1998 in Oterushe/Oterusa and that he was a member of KLA, but not under the command of E.K. He stated that he helped transport the wounded E.K to the school of Radobrava where they left him.

Investigator: When did this happen?

Witness: My birthday is 11 June and this happened on 11 July. I am sure about this. I remember that I discussed with the people there and I said it was only a month ago I had my birthday and now this.

Investigator: Was there any other special things that happened during 11th of July 1998 that you would remember?

Witness: That night we were guarding outside my house and I discussed there what was happened.

Investigator: Was there electricity during 11th July 1998 or not?

Witness: It is hard to tell, because I was in need of the power.

Investigator: Who did you meet at the school in Radobrava?

Witness: I don't know, because we just left him over there and we came back here.

As a defendant he confirmed his statements on 17 March 2011 and this he confirmed in court during the first trial, confirming his statement as well in the retrial.

The court finds the above statements too peculiar and doubtful as to why he remembered the exact date when E.K was wounded. When considering the total evidence given, the court finds beyond reasonable doubt that his statement to the EULEX investigator on 3rd of March 2011 in Rugove village, as to when E.K was wounded, as false.

The defendant N.B, when giving his statement as a witness to the prosecutor on 3rd March 2011, in Rogove, stated that he was a member of KLA from April 1998 and that he met the defendant E.K on the occasion that the latter was wounded, but after the war he has met E.K more often. When asked about the time when E.K was wounded, the following is taken from the statements given:

“Investigator: When did it all happen that E.K got wounded and you helped him?”

Witness: It was the first week of July 1998. It was the 10th or 11th of July.

Investigator: How come you remember the date that exactly?

Witness: I remember it because Rahovac got under the attack of the Serbs forces. That attack was on the 17th or 18th July 1998. I remember E. got wounded about 1 week earlier before the 17th or 18th July.

Investigator: How sure are you about this?

Witness: I am 100 % sure because I got wounded 2 or 3 days later than E.K got wounded.

Investigator: Has it in any way been registered that you got wounded.

Witness: This was under difficult circumstances so I don't think any registration was done. Anyway I was just treated by doctors 2-3 weeks after I got wounded.

Investigator: Do you know that you have to tell the truth. Otherwise you can get charged. Are you still sure about the date?

Witness: Yes I am. I don't lie. I kept a diary.

Investigator: Can I please see the diary.

Witness: No I do not have it.

Investigator: Where is the diary?

Witness: I kept the diary in my house and the house was burned down by the Serbs. It was in April 1999.

Investigator: Was E.K involved with the fighting in Opterusa?

Witness: I don't know.

....”

On the 17th of March 2011 N.B was interrogated as the defendant and confirmed his statements given as a witness. He confirmed his statements in court during the first trial, confirming his statements as well in the retrial.

The court notes that the defendant was a KLA soldier and is understood as wanting to protect the legacy of KLA and E.K whom he first met when “J.” was wounded and has since met more often. As the court sees it this diminishes the credibility of the statements. In addition the court finds it somewhat peculiar that he only remembers the timing of the injury of E.K when he is mostly uncertain when asked to give dates.

Considering the total evidence, the court finds as proven beyond reasonable doubt that the statements given by N.B to the EULEX prosecutor on 3rd March 2011 in Rogove as to when E.K was wounded, as false.

The defendant J.K when giving his statement to the prosecutor as a witness on 8th February 2011 in Pristina, admits that he has a very good relationship with the defendant E.K and that he disagrees that someone attacked the houses of the Serbs in July 1998 in Oterushe/Operusa. He also stated that he was a member of KLA from May or June 1998 and was kind of leader and that E.K was operating in his village, which was Oterushe/Operusa, and that he was involved in a battle together with E.K against Serb forces in Rogova village, and was with E.K when he was wounded and later drove the wounded E.K to the KLA hospital Garjak in Suhareka area.....

Furthermore he stated to the investigator *inter alia* the following:

.... I have difficulties with names and the dates. But it was in the end of July or beginning of August. When they started to fight each other it was at least 20-25 days after E. was wounded.

Investigator: When did you see E. again?

Witness: I think I saw him around Randubrave around 10 days after. I heard that he moved from Garjak village to Rundubrave.

Investigator: Which condition was he in?

Witness His condition was a little bit better than when I left him. He was laying in a bed but he tried to stand up to say hello.

Investigator: What date was this?

Witness: All those things happened in July. He was injured in the beginning of July. I met him in middle of July and the fighting was happened in the end of July or beginning of August 1998....”

On the 21st February the interview continued:

“...Investigator: What was the date when you were in a battle together with E.K and where E.K got wounded?

Witness: I don't remember the date. As far as I remember it was in the beginning of July 1998. I am not sure about the date.

Investigator: How sure are you about the dates?

Witness: I am more than 50 percent sure that E.K was wounded in the beginning of July 1998.

Investigator: How come you remember that it was beginning of July 1998?

Witness: In the end of June about 25-27th I was badly beaten by the Serb police. I believe that this incident with E.K happened about 1 week later. ...”

On the 8th March 2011 J.K. was interrogated again and confirmed his statements of 8 February.

On the 15th March 2011 he was interrogated as a defendant and confirmed his earlier statements, this he also confirmed in court during main trial and in the retrial.

The court does not find it credible as to the timing of the events. The defendant is sure it was in the beginning of July that E.K was wounded, but the reason given is not believable.

The court also points to his relationship with E.K and his membership in KLA. It is therefore understandable that he wants to protect the legacy of the KLA and his friend and fellow earlier KLA member.

On this background the court finds his testimony doubtful.

When considering the total evidence, the main parts of which are mentioned above the court finds as proven beyond reasonable doubt that the statements of the defendant J.K given to the EULEX investigator in Pristina on 8th February 2011 as to when E.K was wounded, false.

The testimony of the witness H.M.

In his statement to the court on 24th January 2013, H.M. stated that he was in Opterushe/Optersusa and that he was a member of KLA and had joined KLA after the attack in Opterushe/Optersusa, he further stated that before the attack on the Opterushe/Optersusa he was member of protective group in which his function was to help people with food, clothes and that he was the leader of one of the two groups in Opterushe/Optersusa, while E.K was the leader of the other group in the village. In the question of Prosecutor: *do you remember you said that were 2 KLA groups?* H.M. stated: *yes*. He further testified that in the KLA group led by E.K was as well the brother of So.B, whereas So.B joined later, after the first offensive, because S. brother of So.B was activist first, he was murdered, than So.B come to replace his brother. Till lately he did not know who So.was and who was S., all he knew was that they belonged to the same family.

He stated that the Serbs lived in Opterushe/Optersa village as anyone else, they had normal relationship, nothing bed amongst them and he was a carpenter and worked for everyone, he

personally and on his own initiative two-three weeks or month before the attack he went around to the Serbs families and discussed regarding the situation that was becoming threatening.

He warned the families that KLA from Drenica would come and knock on the doors of the Serb families and “do terrible things, and that we could do nothing to impede it” and continues with the following when asked by the Public Prosecutor:

Prosecutor: In July 1998 was there a Military action in Opterushe village?

H.M.: Initially it was self-protection and after midnight it became an attack.

Presiding Judge: What kind of attack?

H.M.: It was not by KLA, this was a group we could not identify, who did not want to go either to the Albanians nor to the Serbs. The entire civilian population was in the village, a group with masks came and attacked Serbian houses...

Prosecutor: Do you remember you told me the Commander of this group had a mask and you told him, “where are you going, what do you want to do”?

H.M.: Yes. Everything happened within 10 minutes.

Prosecutor: Did you tell him that?

H.M.: Yes. I also said, “you want to make Opterushe village same like Srebrenica.”

Prosecutor: What did you tell to the members of your group?

H.M.: Yes. I said my group did not have chance of doing such things.

Prosecutor: So, you said no.

H.M.: Yes.

Prosecutor: What did you personally do?

H.M.: I said in order that my group remains no one is going; I will go instead.

Prosecutor: Do you remember how the attack began?

H.M.: No, because I was not there when it started. I was going there and I was midway when the attack started.

Prosecutor: Do you remember saying that some KLA just opened fire against the Serbian houses, all of a sudden?

H.M.: Yes. I remember.

Prosecutor: Do you know if the Serbs from inside the houses returned fire?

H.M.: I don't know, because I was not there to know that.

Presiding Judge: I am confused, you told us KLA did not attack that night the Serbian houses and now you say KLA attacked, can you explain?

H.M.: Yes. The group you are calling KLA was not a KLA group.

Prosecutor: You said it was true at some point this group opened fire against the Serbian houses, my question is did you see if the Serbs returned the fire?

H.M.: I suggest putting the question properly, I said I was not there and I could not see.

Prosecutor: But you said at some point it was true that the group opened fire.

H.M.: If the tanks cross the river of Prizren the shaking could be heard in Opterushe village, the fire took place in the village at midnight; we heard the shooting but we did not know what happened.

Prosecutor: You said you told your men you would be the only one who goes, also you said all of the sudden the attackers opened fire.

H.M.: To clarify, the location of the people who gathered to protect the village was 1.5 kilometres from the village, we had no tanks or helicopters, we went on foot and we heard at midnight...

Prosecutor: Did you see E.K on the day of the attack?

H.M.: Where?

Prosecutor: You should tell me if you saw him.

H.M.: This could have happened in the house of a Serbian villager on the day of the attack.

Prosecutor: This is not an answer; did you see E.K on the day of the attack?

H.M.: Yes, between Zociste and Opterushe village.

Prosecutor: What was he doing?

H.M.: As everyone else.

Prosecutor: Meaning what?

H.M.: On the front line.

Prosecutor: Did you see him talking to the people who came from Drenica?

H.M.: No

Prosecutor: Do you remember you told me he spoke to the special unit from Drenica just before the attack?

H.M.: No. It was not like that.

Prosecutor: How was it?

H.M.: 10 minutes before, people gathered to organise. As to the event you refer to, this group arrived 10 minutes before the attack. I don't know what the time was 11-12- it was night time, they were masked; the order came from the sky or whatever.

Prosecutor: Did you speak to E.K before the attack?

H.M.: Yes. It was a short conversation.

Prosecutor: What did he tell you?

H.M.: That a group came to attack Serbian houses and I said I was not interested at all.

Prosecutor: During the attack you were where exactly?

H.M.: Mid way to two village of Zociste and Opterushe village there was this point of meeting of people who mobilised to protect the villages, this is in the outskirts of Opterushe village and on the way back to the village the shooting had started, we heard the shooting and I immediately went to my family to evacuate them.

Prosecutor: Were you armed?

H.M.: Yes...

Prosecutor: When you saw E.K, was he armed like you?

H.M.: I did not look for arms, it was at night, I was not interested to see if he had arms or not.

The witness H.M. said that he has seen E.K during the night between 17th and 18th of July 1998 between Zociste and Opterushe/Opterususa and that he himself when the attack started was in the mid-way between Zociste and Opterushe/Opterususa village, where was the point of meeting of people who use to mobilize to protect the village and going back to the village the shootings had started; where he immediately went to evacuate his family. Mobilization point for the protection of villages was 1.5 kilometres away from the village. As for So.B the witness did not give any evidence with regards to B.'s presence in the Opterushe/Opretusa village.

Considering the fact that the defendants Mu.H, Mi.H, N.H, N.B and J.K all testified in support of E.K being injured before the attack in Opterushe/Opterususa happened, on the other hand the witness H.M. testified to the court that he has seen E.K on the day of the attack between Zociste and Opterushe/Opterususa village, and when considering the credible statements from the witnesses D.B and S.B and seen in connection with the statements of the other defendants, the court finds the statement above given by H.M. credible, that is, that E.K was not wounded before the attack.

As the court sees it, the witness H.M. did not give any evidence to the court with regards to E.K's and So.B's presence and participation in the attack during the night between 17th and 18th of July 1998. Thus, with regards to M's testimony the court could not find any evidence that the defendants E.K and So.B took part in the attack on the night of 17th of July, and into the early morning hours of 18th of July 1998.

The Court is in the opinion that the previous statements of H.M. given in the capacity of the accused to the Prosecutor or in the Court, cannot be used as evidence in this trial, since these statements were taken by him in the capacity of the accused, whereas at the present M. H. is only the witness in this trial.

Therefore, the court has decided not to use the previous statements of H.M. given in the capacity of the accused either to the public prosecutor or in the court, as evidence, knowing that giving the statement in the capacity of the accused, H.M. had certain rights and obligations (article 356 par.2 of the KCCP), which differs with the rights and obligations herein being as a witness (article 164 par.2 of the KCCP).

The witness A.B.,

In first trial on 30th of June 2011 A.B. testified that, he was a teacher on 1998, and he was not member of KLA, he remembered the shooting in Opterushe/Optersa, and he stated that it

lasted from the midnight until morning but he did not know the date and what was happening, who was fighting against whom. He found out next day that the Serbs from village were fighting against KLA.

A.B. testified to the EULEX investigator on 31st of January 2011, stating that he was not member of KLA and there were no members from village Opterushe/Opterususa with uniforms or arms. He was at home on the night when fighting's started. It started after midnight and lasted until morning. He heard a lot of shootings and did not know who was fighting against whom.

A.B. testified to the EULEX investigator on 15th of May 2012.

In the question of Investigator that, where there any hostilities in Opterushe/Opterususa village prior to the night in June 1998 that the KLA removed the Serbs from their homes and transported them to the Suhareka?

The witness stated that there was a grenade thrown and exploded near a house near the center. The owner of the House was H. B. He was living in France at the time. The hose was empty.

He testified during the main trial on 25th of January 2013 and confirmed his earlier statement given in the first trial on 30th of June 2011.

The statements have been given by the witness do not provide any decisive evidence as to the timing of when E.K was wounded or whether he saw E.K and/or So.B participating in the attack against Serbian households on the night of 17th of July, and into the early morning hours of 18th of July 1998.

The witness F. M,

when giving testimony to the court in the first trial on 30th June 2011, he stated :

Public prosecutor: do remember if at certain point in your village there was a fight?

F. M.: I was not there at the time when the fighting occurred.

Public prosecutor: do you remember when it happened more or less?

F. M.: I don't remember because we moved from our village to another village.

Public Prosecutor: I am asking if you remember the year and month.

F. M.: 1998 in July, we were practically away from the house. We did not stay there.

In the testimony was given in the main trial on 25th of January 2013, the witness F.M.stated that he remembers that when the house of A.B. was hit by a grenade the entire population was still in the village both the Albanians and Serbians, and after the shelling the population displaced.

The statements given by the witness do not give any decisive evidence as to the timing of when E.K was wounded or whether he saw E.K and/or So.B participating in the attack against

Serbian households on the night of 17th July, and into the early morning hours of 18th July 1998.

The witness P. M., when the testimony was given to the EULEX investigator on 13th January 2011 stated that he was a KLA member from the autumn of 1998.

Investigator: Do you know if E.K was wounded during the war?

Witness: I do not know. I heard that he was injured but I do not know where or when.

Investigator: Could he have been wounded before the attack on the Serbs houses.

Witness: No he was not for sure. It must have been later...

He further stated that he knew So.B. They lived in the same village before the war. After the war So.moved to Rahovec/Orahovac. The witness was not sure if So.B was in KLA.

In the testimony was given in front the court on 30th of June 2011 he further stated that he was at Opterushe/Opterusa village in July 1998, and he moved away from his village after the war broke, before dawn, remembering that the shooting lasted all night, he stated that he knows E.K and he heard that E. was wounded, but he don't when E. was wounded and where he was wounded.

The statements given by the witness do not give any decisive evidence as to the timing of when E.K was wounded or whether he sow E.K and/or So.B participating in the attack against Serbian households on the night of 17th July, and into the early morning hours of 18th July 1998.

The witness N. M,

when testifying to the EULEX investigator on 19th January 2011, he stated inter alia the following:

“

Investigator: Do you remember any KLA members from Opterusa?

Witness: E.K was a commander.....

Investigator: Do you know when they joined the KLA?

Witness: I think they became KLA member one month before the attack on the Serbs Houses.

Investigator: Do you know E.K?

Witness: We are from the same village. I have known him since he was a boy. He is about 20 years younger than me.

....

Investigator: Was he having any rank?

Witness: He was the KLA commander of Opterushe at the time when the Serbs were expelled from their houses. He has a good education.

Was E.K involved with the fighting in Opterusa?

Witness: I do not know.

....”

Investigator: Do you know So.B?

Witness: I know him because he is from the same village. I never spoke to him.

....

Investigator: Was his commander E.K.

Witness: Yes because E. was the commander at that time in Opterushe.

He testified during the main trial on 28 January 2013 and confirmed his earlier statement given in the first trial on 30 June 2011.

His statements in open court are considerably modified and much more uncertain. The court understands this as the witness's effort to protect and aid the defendant E.K and therefore finds these statements less credible than his former statements cited above to the EULEX investigator.

However, the statements given by the witness do not give any decisive evidence as to the timing of when E.K was wounded or whether he saw E.K and/or So.B participating in the attack against Serbian households on the night of 17th July, and into the early morning hours of 18th July 1998.

The witness A.H.

After the Presiding Judge consulted with all the parties, including defence counsel and each defendant, it was agreed that the statement of Dr. A.H.dated 30 June 2011 could be read into the trial minutes.

Dr. A.H.worked as surgeon. Dr. H. treated the wounded defendant E.K. His statement in first trial was considerably more uncertain than his previous statement to the EULEX investigator on 21st of December 2010. The court finds his statement to the investigator more credible as it understands his statement in first trial was under pressure of reluctance when witnessing against the defendant E.K. The court finds no reason why he should state something to the investigator that was not truthfully. His statement to the court given on 30th of June 2011 is accordingly not considered as credible as his statement to the EULEX investigator on the 21st of December 2010.

To the investigator on 21st December 2010:

“.....

Investigator: Did you or your staff register every patient?

Witness: I can say that 95 % of the patients were registered. But when we were in very urgent cases we were not able to register everyone. This system that I used was one that I created myself.

.....

Investigator:Have you found him (E.K) in those records?

Witness: Yes. Even though I initially could not remember that I had a patient for 2 weeks but I found the only entry available for this patient. And you can easily determine that his log book is a copy of the original. This log book is a document which is the only available document to register basic information about patients. The record I have handed to you today, dates begin on 4th August 1998 and finishes on the 1st of September 1998. Each page is divided into 4 columns. The 1st column is the patient number. The 2nd column is the name and personal details of the patients. The 3rd is the diagnoses and the 4th column is the treatment. We could not keep any other note book.

Investigator: Can you describe the entry relevant to E.K.

Witness: The entry's date is 12th August 1998. The patient number or protocol is 1199. The name is E.K. Year of birth 1965. Place of birth is Opterushe/Opterususa. The diagnose is entered in Latin as: "Vulnus Sclopeteorium, Regio Lat. Dex", which means gunshot wound to the right side. If we are precise it seems that my assistant could not follow me correctly about the exact location on the body that the injury was. If I refer to what is written it is not exactly clear where the injury was. Column number 4, the treatment prescribed was for only 4 days of therapy, that is that he got medicine for 4 days. It was penicillin and 4 days of Gentamicin injection. I am more than sure using my common sense that if he would have been at the hospital for 2 weeks, I would have remembered him. If I refer to the protocol with his injuries he most probably stated at the hospital for maximum 1 or 2 days. But it is my belief from this record that he was just an out patient for 1 day. He was the 13th patient on that date.

Investigator: So for clarity, this entry for 12th August 1998. Is that the only record you have for treating E.K.

Witness: I am 99 % sure that this is the only entry I have for E.K. There could be an exception but I don't think so.

Investigator: In your best opinion did you treat E.K in July 1998 for a gunshot wound.

Witness: I do not have any other entry for him and I don't remember him. I can only refer to this official document.

Investigator: What hospital does this entry refer to?

Witness: It was Breshance. The distance between Breshance and Gajrak is approximately 7 or 8 kms.

Investigator: Do you know the village Rugova e Hasit?

Witness: Yes.

Investigator: If someone was injured in this village, where would they be taken?

Witness: Usually to wherever I would be, but only from there. There were no other places to go. People came from all over, even from far distances away.

Investigator: So even though you were moving between facilities, the injured would go to where ever you would be.

Witness: Yes, they would ask where I was and they would come to me. For some time I was the only medical facility operating in Kosovo. Some entries in this document even refer to some patients from Pristina.

Investigator: Do you have a similar record for July 1998?

Witness: Yes, I can provide it to you also. There is no record for E.K for July 1998 in it. But from looking at it I know that I was in Gajrak at that time.

Investigator: From looking at the record you have for E.K. Can you say when he received his injury?

Witness: No, I cannot say that, we were not in a position to keep that much detail. This record shows that he was most probably an outpatient that day. Since you are asking for specific details, I cannot say exactly when he received his injury, but as I have said I have no record for E.K on the 11th or 12th of July 1998.....”

According to the testimony of dr. A.H. he would most likely have remembered if E.K was at the hospital for 2 weeks. Refereeing to the protocol with K's injures, dr. H. stated that E.K most probably stayed at the hospital for maximum 1 or 2 days. However, dr. H. did not remember E.K being hospitalized when he was wounded.

During the first trial on 30th June 2011 dr. A.H.continued with the following when asked by the Public Prosecutor:

Public Prosecutor: Did you keep record for your patients?

Dr. A. H: Yes, but it does not mean I kept all records because of the movements; we used to buy notebooks and were taking records in these notebooks. We have data for 12.000 registered patients but it is for sure there were around 20.000 patients that we treated.

Public Prosecutor: were all yours patients registered I the record?

Dr. A. H: Not all of them, I said no.

Public Prosecutor: to the EULEX investigator on the 21 December 2010, you answered I can say 95% of the patients were registered.

Dr. A. H: Perhaps I have said this but it is in two or three places, the archive information had remained on the ground and because of the humidity and rain this

information was damaged or destroyed. So if we consider also this damaged information it could go this number that just mentioned. And I can give you the exact number 11.635 patients.

Public Prosecutor: did you keep a copy of the records?

...

Dr. A. H.: Yes, I made copies.

Public Prosecutor: Did you hand over any of these copies to any investigator?

Dr. A. H.: Yes, and it was not returned to me.

.....

Public Prosecutor: do you remember where you found his name in the records?

Dr. A. H.: If I am not mistaken on 12 August 1998.

Public Prosecutor: Can you look at this book?...

Dr. A. H.: Yes, this is my book, my facsimile, a photocopy of my original document.

....

Public Prosecutor: Can you show us if possible the entry for the patient in question?

Dr. A. H.: Here on 12 August with protocol 1199.

Public Prosecutor: Can you tell us the name of the person registered?

Dr. A. H.: E.K born on 1965 in Opterushe.

Public Prosecutor: In that book you have in your hands, have you found any other entry for the same person?

Dr. A. H.: No, I did not.

Public Prosecutor: Did you check also the record, or the copy of the record you made, refereeing to the month of July 1998?

Dr. A. H.: I think so, but I cannot be accurate about it.

Public Prosecutor: To the EULEX investigator on the same occasion you said, "There is no record for E.K for July 1998 in it".

Dr. A. H.: Even now I am saying in general I did not find any entry in the notes but I cannot exclude the possibility because of the great number of patients, as there were occasions when 150 patients were queuing to be checked.

Public Prosecutor: what you are saying is different, you are saying maybe he came and was not registered. I am asking you if you found his name in the records for July 1998.

Dr. A. H.: No, I did not.

Public Prosecutor: You did not find it?

Dr. A. H.: No, apart from what I said here in this book.

When considering the total evidence, the main parts of which are mentioned above the court finds the statement of the witness A.H. given to the EULEX investigator as to when E.K was wounded, more credible.

On 21 December 2010, Dr. A.H. handed over to WCIO investigator the copy of record (log book) that he kept at that time which contains the name of E.K, the entry's date 12th August 1998, the patient number or protocol, 1199. Year of birth 1965. Place of birth Opterushe/Opterusha. The diagnosis is entered in Latin as: "Vulnus Sclopetorium, Regio Lat. Dex", which means gunshot wound to the right side.

Based on the same abovementioned evidence by Dr. A. H, the court finds it that E.K was wounded in August 1998 that is after the attack.

The court notes however, that there are some uncertainties about the treatment that the defendant E.K received, in particular whether he was hospitalized or not.

VIII. Legal assessment for war crimes

The existence of an Internal armed conflict

An armed conflict exists whenever there is a resort to armed forces whether between states or protracted armed violence.

According to International Criminal Tribunal for former Yugoslavia (ICTY) Judgment 3 April 2008, pages 56-57 paragraph 100 (Case IT-04-84) the Trial Chamber "*is convinced that an armed conflict existed in Kosovo/Kosova from and including 24 April 1998 onward. The Trial Chamber received a voluminous amount of evidence relevant to armed conflict from May through September 1998.*"

In the ICTY judgment of 23 February 2011 par 1579 page 629 (Case IT-05-87/1-T) the Chamber concluded that "*as of the end of May 1998 an armed conflict existed in Kosovo between Serbian forces in particular forces of the VJ and the MUP, and the KLA. This armed conflict continued until at least June 1999.*"

As to Kosovo, it is considered that both an internal conflict (between Serbian forces and KLA forces existed) and an international conflict (between Nato and Serbian forces in Kosovo from 24 March 1999 until 10 June 1999).

Based on this, Court is satisfied that an internal armed conflict existed in Kosovo at the time of the attack in the village of Opterushe/Opterusa on 17th and 18th of July 1998.

The cited articles from the Geneva conventions (common article 3 and 13.2.) are applicable in internal armed conflicts and therefore in the Kosovo conflict.

The civilian (protected) status of the victims

The Article 3 Common to the four **Geneva Conventions of 12 August 1949 (Common Article 3)** and Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (**Additional Protocol II**).

Common Article 3 states *inter alia* that

- (1) *Persons taking no active part in the hostilities,, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, birth or wealth, or any other similar criteria. To this end, the following act are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
- (2) *(a) violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture.....”*

Article 13.2 of Protocol II states the following:

“2. The civilian population as such, as well as individual civilian, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Based on the earlier mentioned conclusions, the court finds as proven beyond reasonable doubt that the attack on the 17th and 18th July 1998 was directed towards the Serbian civilian population of Opterushe/Opterususa.

The Serbian House was on the 17th and 18th July 1998 occupied by Serbian civilian persons, the court finds proven beyond reasonable doubt. None of the persons mentioned that were gathered in the B. house had a status other than civilian.

Based on the witness' statements, the court finds it proven further that the Serbs gathered in the house of the witness had weapons, including rifles and pistols, at their disposal and that these weapons were used on the 17th and 18th July 1998.

The court has no indication during the main trial that these weapons were used for any other purpose than self-protection by the Serbian males gathered in the house when they were attacked.

On this basis – and seen in connection with all the other evidence given during the main trial - the court finds as proven beyond reasonable doubt that all the Serbians gathered in the house of the witness on the 17th and 18th July 1998 were civilians not taking part in the hostilities between the KLA forces and the Yugoslav (Serbian) Army that took place from April 1998 to mid July 1999. They were thus under the protected status as civilians in the above mentioned Common Article 3 and 13.2 of Protocol II.

The court finds that the armed attack forces on the 17th and 18th July 1998 against the Serbian civilian population of Opterushe/Opterusa gathered in the house of the witness D.B was in violation of the Common article 3 of the Geneva Convention and 13.2 of Protocol II, as both these articles deal with the protection of civilian persons not involved in or part of the armed conflict.

The armed attack on the 17th and 18th July 1998 was in violation of the Common article 3 (1) (a) which prohibits violence to life and person. The attack with firearms all through the night undoubtedly represented a serious danger to the lives of the Serbian civilian population inside the house that was thus attacked.

The attack on the Serbian houses on the 17th and 18th July 1998 where the Serbian civilian population of Opterushe/Opterusha was gathered and as described above, constitutes an armed attack on the civilian population as prohibited and punishable by Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 31 and 153 paragraphs (2.1) and (2.14) of the CCRK, and in violation of the common Article 3 of the four Geneva Conventions of 12 August 1949 and of Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (Additional Protocol II), all rules of international law effective at the time of the internal armed conflict in Kosovo.

IX. Conclusion

The question is: Did E.K and So.B, in co-perpetration with other unidentified people, participate in the attack on the Serbian civilian population on the 17th and 18th July 1998?

The court finds as proven beyond reasonable doubt that E.K was present and armed with a rifle in the yard of the Serbian house in the morning of 18th July 1998 after exchange of fire ceased.

As to the question of whether he participated in the attack, the court points the following:

The court finds as not proven beyond reasonable doubt the presence of E.K in the evening of the 17th until the morning of the 18th July 1998 during the attack on the Serbian household and his presence in the house yard in the morning of 18th July 1998 immediately after the Serbs surrendered and the attack was finished, is not sufficient to establish his participation in the attack.

The injured parties D.B and S.B in their testimonies either before the Prosecutor or in the court have not given any details with regards to E.K's movements, his actions, or if E.K has given any order, in the morning of 18th July 1998 in B. yard after the exchange of fire ceased. The court finds as proven that E.K was present in the house yard in the morning of 18th July 1998, immediately after the Serbs surrendered and the attack was finished. But the gathered evidential materials do not prove when E.K entered the house yard, what for and for what intent.

Consequently, the court is obliged to interpret all doubts regarding the existence of facts relevant to the case in favor of defendant.

Based on this, E. K. did not take part in the attack against Serbian household on the night of the 17th July until the early morning of 18th July 1998 and therefore he is found not guilty.

Did So.B participate in the attack on the Serbian civilian population?

The court finds as proven beyond reasonable doubt that So.B was present and armed with a rifle in the yard of the Serbian house in the morning of 18th July 1998, after exchange of fire ceased.

As to the question of whether he participated in the attack, the court points the following:

The court finds as not proven beyond reasonable doubt the presence of So.B in the evening of the 17th until the morning of the 18th July 1998 during the attack on the Serbian household, and his presence in the house yard in the morning of the 18th July immediately after the Serbs surrendered and the attack was finished, is not sufficient to establish his participation in the attack.

The injured parties D.B and S.B in their testimonies either before the Prosecutor or in the court have not given any details with regards to So.B's movements, his actions, or if So.B has given any order, in the morning of 18th July 1998 in B. yard after the exchange of fire ceased. The court finds as proven that So.B was present in the house yard in the morning of 18th July 1998, immediately after the Serbs surrendered and the attack was finished. But the gathered evidential materials do not prove when So.B entered the house yard, what for and for what intent.

Consequently, the court is obliged to interpret all doubts regarding the existence of facts relevant to the case in favor of defendant.

Based on this, So.B. did not take part in the attack against Serbian household on the night of 17th July until the early morning of 18th July 1998 and therefore he is found not guilty.

The court refers to the statements of the witnesses D.B and S.B, who both stated that they saw "J." E.K and So.B amongst the people in the house yard after the Serbs surrendered in the morning of the 18th July 1998.

The court finds the statements of the witnesses D.B and S.B credible on this issue. In this connection the court points to their similar statements in this regard, which the court also finds logical. Furthermore they have been consistent in their statements during the investigation and trial.

The court finds the statements of the witnesses D.B and S.B trustworthy and credible as to their knowledge and identification of the defendants E.K and So.B, and that the latter were both present in the house yard of the witness D.B in the morning of the 18th July 1998.

The court has no doubts from the statements given by the witnesses D.B and S.B that both defendants E.K and So.B were armed with rifles while they entered the yard. However, the court concludes that these circumstances are not high enough to conclude beyond a reasonable doubt that the defendants E.K and So.B are responsible and they took part in the attack against Serbian household on the night of the 17th July until the early morning of 18th July 1998.

The witnesses D.B and S.B did not give any evidence to the court that the defendants E.K and So.B took part in the attack during the night of 17th and 18th July 1998, since Serbian females together with the witnesses D.B and S.B, were gathered in the shelter of the basement from the time the shooting started on the night of the 17th July until the early morning of 18th July 1998 when all the Serbs surrendered.

Based on this background, the court finds as proven beyond reasonable doubt that E.K and So.B were present in the B. house yard immediately after exchange of fire ceased, but the presence of E.K and So.B in the house yard of the witness D.B immediately after exchange of fire ceased, does not prove that defendants E.K and So.B took part in the attack on the night 17th July, and into the early morning hours of 18th July 1998. The fact that the defendants were present in the house yard of the witness D.B immediately after exchange of fire ceased, does not provide a basis for a conviction.

On the other hand, the court finds the statements by E.K himself not credible as to his presence on the 17th and 18th July 1998 and the time when he was wounded. Based on the abovementioned evidence by Dr. A. H, the court finds that E.K was wounded in August 1998, that is after the attack.

Furthermore, the court finds the statements of So.B himself not credible as to his presence on the 17th and 18th July 1998 when he stated that from the end of June or beginning of July he was in Samadraxha village, where he stayed for the following four months at his uncle's. When considering the credible statements from the witnesses D.B and S.B and seen in connection with the statements of the other defendants, the court finds the statements given by the defendant So.B, not credible.

Based on the evidence presented to the court, the court is not able to prove the movements and the place of E.K and So.B during the night between 17th until early morning of the 18th July 1998.

The defendants E.K and So.B are acquitted from the charge because it has not been proven that they committed the act they are charged with.

The defendants Mu.H, Mi.H, N.H, N.B and J.K

In the court's opinion, the description or content of the criminal offence of providing assistance to the perpetrators after the commission of criminal offences prescribed in the article 305 of the Criminal Code of Kosovo and article 307 of the Criminal Code of the Republic of Kosovo (Code No. 04/L-082), are similar. Therefore, pursuant to article 3 of the Criminal Code of Republic of Kosovo the law in effect at the time criminal offense was committed shall be applied to the perpetrators.

The defendants Mu.H, Mi.H, N.H, N.B and J.K are charged criminal offence of providing assistance to the perpetrators after the commission of criminal offences, in violation of Article 305 paragraph 2 of the CCK, in that they aided E.K to elude discovery by giving false witness statements supporting E.K's alibi defense.

The term perpetrator means a person who committed a criminal offence and against whom criminal proceedings are conducted.

In the court opinion the guilt of an assistant can be ascertained, after the perpetrator is found guilty from the court – so it means firstly guilt of main perpetrator must be established and then an existence of assistance. Therefore, in the court's opinion responsibility of an assistant is directly connected to the result of main perpetrator's criminal proceedings.

Therefore, even though the defendants Mu.H, Mi.H, N.H, N.B and J.K were all warned before giving their statements that giving false statements may constitute a criminal offence and they were clearly aware of their obligation to tell the truth, they cannot be found guilty for the criminal offence of providing assistance to perpetrator after the commission of criminal offence, since the perpetrator E.K is found not guilty by the court.

On the other hand the court is in the opinion that false statements during an investigation should normally fall under crimes dealing with directly false statements. However, Article 307 of the CCK, which deals with false statements given by witnesses, is limited to court proceedings.

The court finds that court proceedings start with the indictment. In this case the indictment was filed on the 30 March 2011, after the statements in question were given, so article 307 of the CCK does not apply.

Taking into consideration the all abovementioned arguments and the content of the article 396 paragraph 9 of the KCCP, the court is obliged to point out in the reasoning the article 390 paragraph 3 of the KCCP as the direct reason of acquittal.

It has not been proven that the defendants had committed the act they have been charged with.

It is therefore decided as in the enacting clause of the Judgment.

Dated this 1 day of February 2013.

Judge Mariola Pasnik
Presiding Judge

Judge Skender Çoçaj
Panel member

Judge Teuta Krusha
Panel member

Joseph Hollerhead
Court recorder

LEGAL REMEDY: Pursuant to Article 398(1) of the KCCP, the authorized persons may file an appeal of this Judgment within fifteen (15) days of the day the copy of the judgment has been served.