

## **BASIC COURT OF MITROVICË/MITROVICA**

P.nr. 13/2013

17 April 2013

### **JUDGMENT**

#### **IN THE NAME OF THE PEOPLE**

**THE BASIC COURT OF MITROVICË/MITROVICA**, in the trial panel composed of EULEX Judge Timo Vuojolahti as Presiding Trial Judge, EULEX Judge Mariola Pasnik and EULEX Judge Dariusz Sielicki as panel members, with EULEX Legal Officer Karen Kort as the Recording Officer in the criminal case against:

1. **JD**, father's name J, born on 11.09.1954 in ....Municipality, residing in ....neighbourhood, .... Municipality, Mitrovicë/Mitrovica,

#### **Indicted with:**

*Count 1: War Crime against the Civilian Population*, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK)<sup>1</sup>,

*Count 2: Unauthorized Ownership, Control, Possession or Use of Weapons* pursuant to Article 328 of the Criminal Code of Kosovo (in force until 01.01.2013), currently criminalized under Article 374 of the Criminal Code of the Republic of Kosovo (CCRK);

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<sup>1</sup> The name and abbreviation of the present Criminal Code of the Republic of Kosovo (Law 04/L-082) has been corrected in this judgment. The abbreviation used in the verdict announced on 17 April 2013 was CCK, although it should have heard CCRK.

**And**

2. **DB**, born on 13.11.1940 in .... municipality, Prishtinë/Priština, residing in ...;

**Indicted with:**

*Count 1: War Crime against the Civilian Population*, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK),

*Count 2: Unauthorized Ownership, Control, Possession or Use of Weapons* pursuant to Article 328 of the Criminal Code of Kosovo (in force until 01.01.2013), currently criminalized under Article 374 of the Criminal Code of the Republic of Kosovo (CCRK);

*After* having held the main trial hearing from 4 until 11 April 2013, and on 15 April 2013, in the presence of all the Defendants, their Defense Counsel, and SPRK Prosecutors Diana Wilson and Erik Larson. The Main Trial sessions were open to the public, with the exception of the witness testimony of the injured party V.K on 4 April 2013. During this witness hearing the public was excluded, except for the officials/representatives of the Humanitarian Law Centre Kosovo, pursuant to Article 295 CPC<sup>2</sup>;

*After* having given the order, pursuant to Article 222 Paragraph (1.1) of the Criminal Procedure Code (CPC), that the name of the injured party shall be referred as “V. K.” throughout the Main Trial proceedings and that her name shall be referred as “V. K” in the court record and in the judgment;

*Following* the trial panel's deliberation and voting held on 16 April 2013;

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<sup>2</sup> The name and abbreviation of the present Criminal Procedure Code (Law No. 04/L-123) has been corrected in this judgment. The abbreviation used in the verdict announced on 17 April 2013 was CCKK, although it should have heard CPC.

*Pursuant* to Articles 359 and 366 of the CPC, pronounced in public and in the presence of the Accused **DB**, Defense Counsel Ljubomir Pantovic for **JD**, and the SPRK Prosecutor;

*In accordance with* Articles 360 – 368 CPC;

*Renders* the following:

## **VERDICT**

### **I. AGAINST DEFENDANT **JD****

#### ***Count 1***

1. The defendant **JD** was charged 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 (CC SFRY), currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK), because, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949, and of Articles 4 and 5 (1) of Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions, all rules of international law effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present indictment, the defendant, in his capacity as a **Serbian** police officer, raped V. K, a Kosovo Albanian female civilian: more precisely the defendant, who was armed with a rifle, drove the victim to an unknown location near ..., and forced her, by threatening her with a knife to have various types of sexual intercourse against her will inside his car, in ... on 14 April 1999.
2. The Court finds it is proven that on 14 April 1999 in, the injured party V. K was abducted from her home and driven to an unknown location near .. by an armed person and that she was forced by this person to have various types of sexual intercourse against her will

inside a car.

3. However, the Court does not find it proven beyond reasonable doubt that the person who abducted and raped the victim was the Accused **JD**.
4. Therefore, pursuant to Article 364 Paragraph (1) Subparagraph (1.3) of the CPC, the defendant **JD** is found **not guilty** and **acquitted** of the count 1.

### ***Count 2***

5. The defendant **JD** was charged with Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328 of the Criminal code of Kosovo (in force until 1 January 2013), currently criminalized under Article 374 of the Criminal Code of the Republic of Kosovo (CCRK), because the defendant, without a valid Weapon Authorization Card, illegally possessed 9 rounds of calibre 9mm ammunition weapons, found during the search at his residence, in ..., on 27 September 2012.
6. It is proven that defendant **JD** possessed nine calibre 9mm rounds in his house. The Court assesses that Article 3 Paragraph 3 of the Law on Weapons states: “As a weapon are also considered the ammunition and main parts of the weapon, unless otherwise defined under this Law”. Therefore, these rounds are also considered as weapons.
7. However, is not proven beyond reasonable doubt that he possessed the above mentioned rounds without authorization.
8. Therefore, pursuant to Article 364 Paragraph (1) Subparagraph (1.3) of the CPC, the defendant **JD** is found **not guilty** and **acquitted** of the count 2.

## **II. AGAINST DEFENDANT **DB****

### ***Count 1***

9. The defendant **DB** was charged 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 (CC SFRY), currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK) because, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949, and of Articles 4 and 5 (1) of Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions, all rules of international law effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present indictment, the defendant raped V. K, a Kosovo Albanian female civilian, who had been abducted by the **Serbian** police officer **JD**; more precisely the defendant, who had a gun on him, took the victim to an unfinished house in ..., he threw her on the floor and forced her to have sexual intercourse against her will, in .... on 14 April 1999.
10. It is proven that on 14 April 1999, in ..., the injured party V. K, after she was abducted and raped by an armed person, was taken against her will by another man, armed with a gun, to an unfinished house, where she was thrown on the floor and forced to have sexual intercourse.
11. However, the Court does not find it proven beyond reasonable doubt that the person who raped the injured party the second time was the defendant **DB**.
12. Therefore, pursuant to Article 364 Paragraph (1) Subparagraph (1.3) of the CPC, the defendant **DB** is found **not guilty** and **acquitted** of the count 1.

### ***Count 2***

13. The defendant **DB** was charged with Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328 of the Criminal Code of Kosovo (CCK, in force until 1 January 2013), currently criminalized under Article 374 of the Criminal Code of the Republic of Kosovo (CCRK), because the defendant, without a valid Weapon

Authorization Card, illegally possessed one AK-47 assault rifle, three magazines and 69 rounds of ammunition, ..., on 27 September 2012.

14. The Court finds it is proven beyond reasonable doubt that the defendant **DB** acted as described in the indictment.

15. By doing so, the defendant **DB** is **found guilty** and is found criminally liable for Unauthorized ownership, control or possession of weapons<sup>3</sup>, pursuant to Article 374 paragraph (1) of the CCRK (Code no. 04/L-082), formerly criminalized under Article 328 of the Criminal Code of Kosovo (CCK), in conjunction with Article 3 Paragraph (2) of the CCRK.

16. Therefore, the accused **DB**, pursuant to Article 374 Paragraph (1) in conjunction with Article 3 Paragraph (2) of the CCRK, in accordance with Article 43 Paragraph (1) Subparagraph (1.2) and Article 45 Paragraphs (1) and (2) of the CCRK, is sentenced to 1 (one) year and 6 (six) months of imprisonment. Pursuant to Article 51 Paragraph (2), Article 52 Paragraph (1) and Article 53 Paragraph (1) of the CCRK, the sentence is hereby suspended for a verification period of two (2) years. The Court hereby orders that this punishment shall not be executed if the convicted person does not commit another criminal offence during the verification period.

17. The time spent in house detention since 27 September 2012 until 17 April 2013 is to be credited pursuant to Article 365 paragraph (1) Subparagraph (1.5) of the CPC.

### III. CONFISCATION

18. Pursuant to Article 115 Paragraph (1) and (2) of the CPC in conjunction with Article 38 and Article 2 Paragraph (1.42) of the Law on Weapons, the Court orders that the nine calibre 9 mm rounds, found during the search of the house of defendant **JD**, shall be confiscated and handed over to the Ministry of Internal Affairs.

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<sup>3</sup> The name of the criminal offence is corrected as a clerical error.

19. Pursuant to Article 374 Paragraph (3) of the CCRK, the automatic gun M-70 AB2 (copy of an automatic gun AK-47), magazines and 69 rounds of ammunitions, found during the search of the house of defendant **DB**, shall be confiscated.

#### IV. COSTS OF CRIMINAL PROCEEDINGS

20. In relation to the accused **JD**, pursuant to Article 454 of the CPC, the costs of criminal proceedings shall be paid from budgetary resources.

21. The accused **DB** shall reimburse 100 (one hundred) Euro as part of the costs of criminal proceedings, but he is relieved of the duty to reimburse the rest of the costs, pursuant to Article 453 Paragraphs (1) and (4) of the CPC.

### REASONING

#### A. PROCEDURAL BACKGROUND

1. On 12 November 2012 the Special Prosecution Office of the Republic of Kosovo (the Prosecutor) filed the indictment PPS nr. 89/2012, dated 7 November 2012 against the accused with the (then) District Court of Mitrovicë/a.
2. On 26 November 2012 the District Court of Mitrovicë/a issued a ruling to amend the indictment. On 30 November 2012 the Prosecutor filed an amended indictment, dated 29 November 2012.
3. On 14 December 2012 a hearing on the confirmation of the indictment, as prescribed by the old procedure law (Kosovo Code of Criminal Procedure, KCCP), was held. However, the Court did not render any ruling to confirm the indictment, since the new procedure

law (Criminal Procedure Code, CPC) entered into force on 1 January 2013 before the ruling could be rendered. In the CPC there is no provision on the confirmation of indictment.

4. On 5 February 2013 the Court issued a decision in which it rejected the Defence request to dismiss the indictment and the Defence objections on admissibility of evidence. In a decision dated 6 March 2013 the Court of Appeals rejected the appeals filed by the Defence Counsel of both defendants against this decision.
5. The Main Trial sessions were held on 4, 5, 8, 9, 10, 11 and 15 April 2013. The verdict was announced on 17 April 2013.

## B. COMPETENCE OF THE COURT

6. Having regard to Article 11 and Article 9 Paragraph (2) of the Law on Courts, Mitrovicë/a Basic Court is the competent judicial body to adjudicate this criminal case.
7. EULEX has competence over the case pursuant to the Law and Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03/L-053).
8. The Trial Panel was composed of EULEX Judge Timo Vuojolahti, acting as Presiding Trial Judge, and EULEX Judge Dariusz Sielicki and EULEX Judge Mariola Pasnik, acting as panel members.
9. None of the parties objected to the competence of the court or to the composition of the Trial Panel.

## C. APPLICABLE LAW

10. At the beginning of the main trial the presiding trial judge informed the parties that based on the transitional provisions of the CPC (Articles 539-545) the applicable procedure law

during the main trial is the CPC. However, the procedural acts carried out at the time of the previous criminal procedure code would be assessed on the basis of this code.

11. Moreover, the presiding trial judge informed the parties that on 1 January 2013 the new Criminal Code of the Republic of Kosovo (CCRK) had entered into force. Pursuant to Article 3 of this Code, the law in effect at the time a criminal offense was committed shall be applied to the perpetrator. However, in the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply. The presiding trial judge stated that the question of most favorable law would be assessed in the judgment but the parties should state their opinions on the question during the main trial.

#### D. THE MAIN TRIAL

12. The Main Trial sessions were held on 4, 5, 8, 9, 10, 11 and 15 April 2013. The verdict was announced on 17 April 2013 in the premises of the Mitrovicë/a Basic Court. All sessions were open to the public, except for the hearing of the witness V. K on 4 April 2013, during which the public was excluded in accordance with Article 294 Paragraph (1.4) of the CPC. The hearings were held in the presence of all the Defendants, their Defense Counsel and SPRK Prosecutors Diana Wilson and Erik Larson. The verdict was pronounced in public and in the presence of the Defendant **DB**, Defense Counsel Ljubomir Pantovic for **JD**, and the SPRK Prosecutors.
13. During the Main Trial session on 4 April 2013, the Court decided that, pursuant to Article 222 Paragraph (1.1) of the CPC, the name of the Injured Party shall be referred as 'V. K' throughout the main trial proceedings and that her name shall be referred as 'V. K' in the record of the main trial and in the judgment.
14. During the main trial session on 4 April 2013 both defendants pleaded not guilty to the charges against them.

15. During the Main Trial session on 8 April 2013, on the motion by the Prosecutor, the Court ruled that two police officers, HB and PH, who were present during the searches of the houses of the Defendants, shall be heard as witnesses.
16. On the same date, the Court also ruled on the request by Defence Counsel Brkljac for defendant **DB** to call TR and MR as witnesses. The Court decided that there was no need to present evidence on the question whether the defendant **DB** had had a sexual relationship with M, because this question is totally irrelevant to the case. Furthermore, the Court on 8 April 2013 rejected the request by the prosecutor on the presentation of the weapons and ammunition, found during the searches of the houses of the defendants.
17. Moreover, during the main trial session on 8 April 2013, the trial panel decided to hear ex-officio witness RM.
18. On 9 April 2013, the Prosecutor filed an application for Detention on Remand for defendant **DB**. This application was withdrawn during the Main Trial session of 10 April 2013.
19. During the main trial session on 10 April 2013 the prosecutor submitted an amended indictment, in which the references to the provisions of the old Kosovo Code of Criminal Procedure were replaced by those of the new CPC. The changes in the indictment are incorporated in the enacting clause of this judgment.

#### E. LIST OF EVIDENCE PRESENTED DURING THE MAIN TRIAL

20. During the course of the Main Trial the following witnesses were heard:
  - V. K (witness called by the prosecution) was heard through video-conferencing with the judicial authorities of the United States of America on 4 April 2013.
  - On 5 April 2013, the witnesses MK1, HK and MK2 (all witnesses called by the prosecution) were heard.

- The witnesses NK, ZG and KA (witnesses called by the prosecution) have given their testimony on 8 April 2013.
- On 9 April 2013, the hearing of the witness MK2 continued. Moreover, the witnesses IG, SK (both witnesses called by the prosecutor), RM (witness called by the court) and SM (witness called by the defendant **DB**) were heard.
- The witnesses HB and PH (witnesses called by the prosecutor) were questioned on 10 April 2013.

21. Parts of the previous statements of the above mentioned witnesses were read during the Main Trial, as recorded in the minutes.

22. The following documents were accepted as evidence and read into the record:

- Photo set, binder “witness statements” page 90, exhibit 1;
- Photo set, binder “witness statements”, page 164, exhibit 2;
- Photo set, binder “witness statements”, page 248, exhibit 3;
- Photo set, binder “witness statements”, page 194, exhibit 4;
- Sketch of the crime scene, exhibit 5;
- Work list in Serbian page 53-56, exhibit 6;
- Written statement in Albanian page 37-40, exhibit 7;
- Photo set, binder “witness statements”, page 249-250, exhibit 8;
- Photo set, binder “witness statements”, page 264, exhibit 9;
- Police report MN dated 30 September 2010, exhibit 10;
- Police report MN dated 17 September 2010, exhibit 11;
- A photocopy of two pictures (one with child), exhibit 12;
- Original search report defendant **DB** in Albanian, exhibit 13;
- Search report defendant **DB**, binder police reports. page 136-141, exhibit 15;
- Search report defendant **DB**, binder police reports, page 152-184, exhibit 16;
- Binder police reports tabs 1-3, exhibit 17:
  - Officers report dated 25 July 2012 with sketches of the crime scene
  - Officers report dated 5 October 2012 with two certificates for the

immovable property rights from the Kosovo Cadastral Agency.

Officers report dated 17 July 2012 with pictures of houses.

- Report of physical examination defendant **JD**, exhibit 18;
- Search report defendant **JD**, binder police reports, page 38-58, exhibit 19;
- Search report defendant **DB**, binder police reports page 150- 183, exhibit 20;
- Ballistic report, binder police reports page 252 – 260, exhibit 21;
- Search report defendant **JD**, binder police reports, page 64-113, exhibit 22;
- Original search report defendant **DB** in Albanian, exhibit 23;
- Police report on witness G, exhibit 25;
- Three documents dated 1 July 2003, 4 June 2003 and 3 June 2003, handed over by defendant **JD** exhibit 26;
- Initial report by UNMIK dated 18 January 2000, exhibit 27;
- Document about defendant **DB**'s dismissal from military service, exhibit 28;
- Report on seizure of official pistol Glock etc, exhibit 29;
- Map of S... and surroundings, exhibit 30;
- Request by defendant **DB** for admission to work, exhibit 31;

23. The DVD recordings of the searches of the houses of the defendants were also accepted as evidence (exhibits 14 and 24). Moreover, the DVDs were also shown during the Main Trial sessions of respectively 10 (**JD**) and 11 (**DB**) April 2013.

24. During the main trial session on 11 April 2013 both defendants gave their statements.

25. Evidentiary proceedings were concluded on 15 April 2013.

## F. FACTUAL FINDINGS

### I Defendant **JD**; count 1

26. In this passage the Court first assesses the question what happened to the victim on 14 April 1999 and after that the count 1 charge against Defendant **JD**.

## I.1. Events on 13 and 14 April 1999

27. In this paragraph the Court deals with the questions what happened at the V.K house on 13 April 1999, whether it has been proven that V. K was abducted and raped on 14 April 1999 and what she told to other people about the events.

### *I.1.1. 13 April 1999; the day before the abduction*

28. The Court finds it proven, based on the statements by V. K, HK and NK that on 13 April 1999 several men, dressed in uniform, came to the house in ..., where V. K lived with her mother and brother, and where at that time a lot of refugees were staying. These uniformed men ordered the refugees to leave.

### *I.1.2. 14 April 1999: abduction*

29. It results from the witness statements by V. K, MK1 and HK that the day after the abovementioned visit, one of the men, dressed in uniform, came back to the house next evening, on 14 April 1999. He was armed and made inquiries about the father and brother of V.K. It is confirmed by the witnesses V. K, HK, MK1, MK2 and IG that he then said he wanted to take V. K with him. The statements given by these witnesses prove that the situation was experienced by the Ks' very threatening. The mother of the victim, HK and her uncle MK1, who had just arrived in the scene from his neighbouring house, tried to intervene but the uniformed man threatened the uncle both verbally and by pointing him with the gun. Subsequently, this man forced V. K to come with him to a vehicle parked outside the gate of the house and then drove away. This abduction was witnessed by HK, MK1, XK, MK2 and IG or more detailed statements of the witnesses the Court refers below to paragraph I.2. Investigation.

### *I.1.3. Rapes*

30. The victim V. K testified that this uniformed man took her, driving a Zastava 101 car, to the village of ... After a stop in the village they continued driving, drove to a smaller dirt road and there the man took her to an empty house, but soon ordered her back into the car. The Court finds it proven that V. K was then raped by this man in uniform in that vehicle, in front of an unfinished house in ... She was raped vaginally, orally and anally.
31. V. K testified that after this first rape the uniformed man told her to get dressed and then took her back to the village of ... There the uniformed man went to a store and left her sitting and crying in the car. While sitting there a young Serbian army soldier came to her, took her out of the car, tried to kiss her but because of her crying and begging took her back to the car and left alone. However, after this incident, an older man dressed in civilian clothes came to the car and took her out from the car to a nearby unfinished two storey house. There this man ordered her, threatening with a pistol, to take off her clothes and raped her vaginally from behind. Thus, the Court finds it proven that on 14 April 1999, sometime after the first rape, V. K was raped a second time in an unfinished house in .., by an older man.
32. After this second rape both men, the ones who raped her, drove her back to her home to .. Village.
33. The statements by V. K on these rapes are corroborated by the statements of the witnesses HK<sup>4</sup>, MK<sup>5</sup>, NK<sup>6</sup>, SK<sup>7</sup> and RM<sup>8</sup>. They all describe the deplorable and shocked state in which they found the victim after the abduction: she was upset, crying and fainting. Moreover, she had scars on her body<sup>9</sup>, and bruises around her face<sup>10</sup>. Witness IG also testified that V. K completely changed after this day: she “would not speak much, she was thinking all the time, wondering all the time”<sup>11</sup>. The Court considers that this

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<sup>4</sup> Record of Main Trial session 5 April 2013, page 23.

<sup>5</sup> Record of Main Trial session 5 April 2013, page 6.

<sup>6</sup> Record of Main Trial session 8 April 2013, page 7.

<sup>7</sup> Record of Main Trial session 9 April 2013, page 21 onwards.

<sup>8</sup> Record of Main Trial session of 9 April 2013, page 39-40.

<sup>9</sup> Record of Main Trial session of 9 April 2013, page 23 (SK).

<sup>10</sup> Record of Main Trial session of 5 April 2013, page 23 (HK).

<sup>11</sup> Record of Main Trial session of 9 April 2013, page 12.

physical and mental state, which was discovered by several people, must have been real and thus together with her statements a sufficient proof to prove she was raped as she described.

34. Furthermore, the Court attaches importance to the fact that the statements by the V. K during the investigation stage, in their most essential points, don't contradict her statement given during the main trial session. She gave a detailed account of the events and she did not try to "fill in the gaps" when heard at the main trial. Her testimonies have always been consistent as to the chronology of the facts, the persons who committed the rapes and where the rapes were committed. The Court finds that the description of the places where the rapes took place is logical and can be set in existing environment (see sketch of the crime scene, exhibit 5). She has also been clear on the role of the third person and did not try to give more weight to her statement by claiming he raped her as well. For these reasons, the Court deems that the statement given by V. K during the Main Trial session on 4 April 2013 is credible.

35. It is a fact that in her statement to UNMIK investigators on 13 October 1999 the victim did not mention that she was raped by two men, but she did indeed mention this when she gave her statement to SK on 15 April 1999. Moreover, during the Main Trial hearing on 4 April 2013, when questioned about this discrepancy, V. K explained the Court that she was ashamed of the things that had happened to her and at that time she could not expose all what had happened. Also, she did not tell about the second rape because she feared that the police could not catch even the first perpetrator<sup>12</sup>.

36. The witness V. K in her first written statement, dated 13 October 1999, did not mention that the man who raped her came to their house also the day before, on 13 April 1999. The Court finds her explanation for this (she did not want to get her brother, who was also present in the house on 13 April 1999, involved) credible.

#### *1.1.4. Conclusion*

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<sup>12</sup> Record of Main Trial session of 4 April 2013, page 49.

37. The Court concludes that the statement by V. K about the abduction and the subsequent rapes is credible and corroborated by other evidence. It is therefore established beyond reasonable doubt that on 14 April 1999 V. K was abducted from her residence in Lower .. by one uniformed man and then raped in different locations in .. twice; first time by the abductor and soon afterwards in a different place by another man.

38. The question which now remains to be answered is whether it can be proven that the accused **JD** was the man who committed the abduction and first rape as described in the indictment.

## I.2. Investigation

39. The Court will now focus on the investigations that have been conducted, and the way they were carried out.

### *I.2.1. Police reports*

40. From the case file the Court finds that the following interviews and testimonies of the witnesses were conducted prior to the main trial:

41. The victim V. K was heard/interviewed:

- On 15 April 1999 she told to KLA police officer she had been raped. On the same day she was also interviewed by another KLA police officer. No reports in the case file.
- On 10 October 1999 she was shown some photos for identification of the possible perpetrator by KLA MP. No report in the case file.
- On 13 October 1999 she was interviewed by UNMIK investigator. There is a handwritten Victim Statement of this interview in the case file.
- (The victim moved out of Kosovo in 2001)
- On 24 August 2010 she was interviewed by EULEX police investigator.

Record of this interview, dated 26 August 2010, is in the case file. Also two summary reports, exhibits 10 and 11, are in the case file.

- On 30 December 2010 she was interviewed by KP investigators. A report is in the case file.
- On 15 December 2011 she was interviewed by KP/EULEX investigators. A report is in the case file.
- On 17 July 2012 she was interviewed by KP investigators. A report is in the case file. On the same day also a photo identification was conducted; a report on identification is in the case file.
- On 5 October 2012 she was interviewed by KP investigator by phone. A report is in the case file.

42. Witness HK was interviewed on 31 March 2003 by UNMIK police (a report is in the case file), on 16 November 2011 by KP investigator (a report is in the case file) and on 27 August 2012 by public prosecutor (a report is in the case file). She was also shown a photo line-up on 21 May 2012 (minutes of identification in the case file).

43. Witness NK was interviewed on 2 March 2003 by UNMIK police (a report is in the case file), on 21 March 2012 by KP investigator (a report is in the case file), on 16 May 2012 by KP/EULEX investigator (a report is in the case file) and on 27 August 2012 by public prosecutor (a report is in the case file). A photo identification was conducted on 16 May 2012 (minutes of identification in the case file).

44. Witness MK1 was interviewed on 26 April 2012 by KP/EULEX investigator, also a photo line-up was conducted then (a report and minutes of identification in the case file).

45. Witness IG was interviewed on 26 April 2012 by KP/EULEX investigator, also a photo line-up was conducted then (a report and minutes of identification in the case file).

46. Witness MK2 was interviewed on 1 April 2003 by UNMIK investigator (a report in the case file).

47. Witness SK was interviewed on 2 February 2011 by KP/EULEX investigator (a report in the case file).

*1.2.2. The Injured Party V. K*

48. It is established from the witness statements by V. K<sup>13</sup> and SK<sup>14</sup> that shortly after the events, on 15 April 1999, she reported to KLA that she was raped. According to SK she told him that she was taken by a man called P and two colleagues. Her description of the first perpetrator was: Of average age, with a body of a sportsman, built as a sportsman, and standing erect.

49. Six months later, on 10 October 1999, V. K went to the KLA, where she was shown some pictures. She identified the policeman who raped her from two photos. She was told that this person was from ...<sup>15</sup>. There were two pictures of a man, one in uniform and one in civilian clothes together with kids<sup>16</sup>. It was a kind of gallery with a lot of photos which was shown to her. Later on she had given these photos to the UNMIK investigator.<sup>17</sup>

50. The Court establishes that there is no written statement recorded at that time. The photos of the person the Injured Party had identified cannot be found or identified as recorded from the case file. However, the Prosecutor submitted just before the main trial a black and white photocopy of two photographs (exhibit 12), one picture of a man with a child, and one picture of two persons.

51. On 13 October 1999, a victim statement was taken from the Injured Party by UNMIK investigator. In this statement she only talks about one rape that had occurred, and she

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<sup>13</sup> Record of Main Trial session 4 April 2013, page 34.

<sup>14</sup> Record of Main Trial session 9 April 2013, page 22 onwards.

<sup>15</sup> Statement V. K 13 October 1999.

<sup>16</sup> During the Main Trial session of 4 April 2013, this witness confirmed her statement: she had identified the man in the police uniform. On one picture he was with a child, she does not remember if he was alone or with somebody on the second picture.

<sup>17</sup> Statement V. K 24 August 2010.

denies that she had been raped anally by the man in uniform. Her description of the perpetrator is: tall, short black hair, green-brown eyes and thin. His right arm was bandaged. In this statement V. K also mentions that someone was called P, but that she could not know who this P was.

52. On 24 August 2010 Eulex Police took a witness statement from V. K. Her description of the first offender was: ‘Tall 1,75 – 1,80, short dark hair, medium colour skin, his left hand injured and he had a bandage around it, medium to skinny built, between 29-35 years old, spoke Serbian. He was in a dark blue uniform, with some kind of sign on his shirt sleeve, which showed that he was from the Serbian police.’
53. Eulex investigation officer Michael Nelson issued on 17 September 2010 a supplement report (no 2) reporting on the victim interview conducted on 24 August 2010<sup>18</sup>. According to this report the victim stated she heard someone called ‘P...’, the one which was the police officer who had come to her house and later raped her in the car’.
54. Officer Michael Nelson issued another supplement report (no 3), dated 30 September 2010, where he summarized the statement given by the Injured Party on 24 August 2010<sup>19</sup>. According to this report V. K also stated that the first suspect was armed with a machine gun, possible an AK47, and a knife, which were visible to her.
55. On 30 December 2010, V. K was questioned by the Kosovo Police. She stated that the first person who raped her was called P. The interview had to be stopped, because of the bad health of the witness.
56. On 15 December 2011, V. K gave a witness statement to EULEX investigator. She was asked if she could identify the perpetrator from a photograph and she replied that the photos that were shown to her were of poor quality and photocopies. She stated: ‘I doubt regarding the photo no 1 and no 9, but again I think it is not them.’ The photos that were shown to her during this interview are not included in the police report.

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<sup>18</sup> Exhibit 11.

<sup>19</sup> Exhibit 10.

57. Kosovo Police questioned the Injured Party on 17 July 2012. She described the first person who kidnapped her as follows: ‘They called him P, he was 175-180 cm tall, and he was thin and had a dark complexion and short black hair; he was wearing a camouflage police uniform with Serbian insignia on his arm written “Milicija”. He had the wrist of his left hand bandaged with gauze; he was about the age of 27-33; he had an automatic rifle with wooden butt; on his waist he had a long knife of the automatic rifle; he spoke a little Albanian.’

58. On 5 October 2012, the Injured Party was questioned through the phone by Kosovo Police investigators. She told them that the person who abducted her had been to their house the day before.

59. During the main trial session on 4 April 2013, the witness described the person who abducted her as being tall, with short hair. He wore a dark blue and light blue coloured police uniform with the text ‘milicija’ and he had a knife and a machine gun<sup>20</sup>. His left arm was in bandage.<sup>21</sup>

### *1.2.3. Other witnesses*

60. Witness HK was questioned for the first time by UNMIK investigator on 31 March 2003. She testified about the police officer, who came to their house and took her daughter V. K with him, allegedly to the police station. She stated that she could not describe the man, but that she may be able to point him out from a photo. She remembers the man was camouflaged in a military uniform, she thinks that he was driving a police car.

61. In her statement to the Kosovo Police on 16 November 2011 HK stated that her daughter V. K does not want to be contacted about the case.

62. On 27 August 2012, when questioned by the (then) Public Prosecutor, HK confirmed that

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<sup>20</sup> Record of Main Trial session 4 April 2013, page 25.

<sup>21</sup> Record of Main Trial session 4 April 2013, page 35

her statement dated 31 March 2003 was correct. She didn't remember whether the person who took her daughter V. K away had already been to the house before.

63. During the Main Trial session of 5 April 2013 witness HK didn't give a description of the man who took her daughter from the house. Having been shown the photoset on page 164 (exhibit 2), she stated that the person she saw then was the person on photo number one. She was able to identify him when he returned and faced her frontally, she remembered the image she saw.
64. Witness NK first statement was recorded on 2 March 2003 by UNMIK. He described the events on 13 April 1999, when he was in the house while the police came. He also described the events on 14 April 1999, from what he had been told by his sister and mother. He informed the investigators that he had given a statement to French KFOR in March 2000. Moreover, he gave a description of the Serbian who kidnapped his sister: 'He had seen this person the day before, uniform was military Serbian, ap. 180 cm tall, weapon AK 47, also pistol at his belt, called TT-pistol, looked very big because we were all scared.'
65. In his statement on 21 March 2012 to Kosovo Police NK described the Serbian person who had been to the house the day before as: '...tall about 185 cm, approximately about 30-35 years of age, normal body weight, brown greyish colour of the hair, he had a military hat on the head, his left hand was bandaged.' He was not sure whether he could identify this person, considering that a lot of time had passed, but he believed that if he would see him again, he could identify him.
66. On 16 May 2012 NK informed the investigators that his sister told him she would be able to identify the suspects in photographs if the pictures would be similar to those from the time of the offence.
67. On 27 August 2012 NK only confirmed to the prosecutor that his statement on 21 March 2012 was correct.

68. During the Main Trial session on 8 April 2013 witness NK described the Serbian police officer, who came to their house the day before the abduction as: ‘... larger than me, maybe 10-15 years older than me, with a camouflage uniform, predominantly blue in color, average weight, maybe a little thinner but bigger than me<sup>22</sup>. He told he was not sure but he believed that the right hand was bandaged.<sup>23</sup>
69. Witness NK also testified to the Court during the Main Trial session on 8 April 2013, that in 2008 his sister told him everything that had happened. She described two people. The witness pointed out on a sketch (exhibit 5) the two locations that his sister showed to him as the places where she was raped.<sup>24</sup>
70. Witness MK1 was interviewed by EULEX police on 26 April 2012. She stated that on 14 April 1999 she was present, together with her mother and sister IG, in the house of her uncle, the father of V. K. She remembered that a Serbian person with a reservist military uniform told V. K to come with him. She described this Serbian person as being a tall man, medium built, short black hair. She thought he was around 30 years old. She also informed the police officers that in 2010, she saw the same man in RM’s shop. It seemed that she knew this person, however she heard him speaking Serbian and her mind went to the person who took her cousin<sup>25</sup>.
71. During the Main Trial session of 5 April 2013 witness MK1 described the person who took V. K as being skinny, tall, wearing a Serbian army uniform<sup>26</sup>. She also declared that she had seen this man again in 2010 in RM’s shop. According to the witness’ statements, when visiting this shop, she heard a voice talking in Serbian and it resembled straight away of a voice she had heard when she was a little girl. She turned and saw the person who was speaking. He looked very tall to her and was wearing a Kosovo Police uniform.

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<sup>22</sup> Record of Main Trial session on 8 April 2013, page 6.

<sup>23</sup> Record of Main Trial session on 8 April 2013, page 9.

<sup>24</sup> Record of main Trial session on 8 April 2013, page 21.

<sup>25</sup> During the Main Trial session on 9 April 2013 it has become clear that there is an error in the English translation of this part of her statement. The translation (page 236 of the binder “witness statements”) mentions that she did not hear the man speak Serbian. However, in the original Albanian version, as translated during the trial session (page 4 of the record), she declared that she heard him speak Serbian.

<sup>26</sup> Record of Main Trial session 5 April 2013, page 31.

It went through her mind that this person might be the one who had taken her cousin in 1999.

72. Witness IG was questioned by EULEX police on 26 April 2012. She stated that on 14 April 1999 she was present when V. K was dragged outside the compound of the house and put in a vehicle by a person in a Serbian reserve police uniform. She described this man as follows: around 30 years of age, medium built, around 175-180 cm tall, short black hair, black eyes and black eyebrows.

73. During the Main Trial session on 9 April 2013 witness IG described the man in the police uniform as looking young, around his thirties. He looked tall to her and his hair was upwards. He was medium build <sup>27</sup>.

74. Witness SK was questioned on 2 February 2011. He testified that in the end of March or beginning of April 1999<sup>28</sup> V. K and her mother came to him, as a KLA military police officer, to report that V. K was taken by force by a Serbian police officer named P, who had been with two or three other Serbian police officers. She was taken from her house by a man called P and two-three of his colleagues to ..., where she was sexually raped by P and by an elderly man.

75. During the Main Trial session on 9 April 2013 witness SK stated that the victim came to him with her mother and younger brother about 10-20 hours after the abduction and the rape had taken place. As discussed above she described the first rapist as being of average age, with a body of a sportsman, built as a sportsman, and standing erect. She described the last perpetrator as a senile old man.

76. Witness MK2 was questioned by UNMIK investigator on 1 April 2003. He told the police that he was called to the house of his brother and witnessed the Serbian policeman taking V. K and putting her into a Zastava 101 car and driving towards Pristina. His description of this policeman was: ‘...more than 1.80 meters, thin, dark face, in a grey

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<sup>27</sup> Record of Main Trial session 9 April 2013, page 11.

<sup>28</sup> The trial panel deems there is an error in the records of this statement: it is clear from the content of the interview that the witness is talking about the month of April 1999 instead of 1998.

uniform, carrying an automatic gun.’

77. During the Main Trial session on 5 April 2013 witness MK2 described the police officer as ‘... taller than me and he had a dark complexion, he was wearing a uniform of the so called reserve forces.’ He also stated that after V. K was brought back to the village by the perpetrators, she and her mother were taken to .. by him and his neighbor RM. MK2 told that he believes that V. K told RM everything.

78. Witness SM was questioned by the Court on 9 April 2013. He told he moved to .. in April 1999. Asked if he knows anyone with the name of P, he stated that he knows P P, who is called P.

79. **RM** was heard as a witness by the Court during the Main Trial session on 9 April 2013. He was a neighbor of HK and her family. The witness also owns a shop in.... He informed the Court that on 14 April 1999 in the evening he was asked to accompany HK to her (married) daughter’s house in ... With HK was her daughter, her son and her brother in law M. He did not talk to V. K, but he heard that H asked her daughter and her reply was: ‘It happened the thing which it should not happen’<sup>29</sup>. Between the end of the war and the time the K family left the village in 2003-2004, defendant **JD** did not visit his shop, there were no Serbian clients at that time<sup>30</sup>. He knows defendant **JD**, but he has never heard him being called with a nickname. When the witness was asked if **JD** was present in the neighbourhood during the war time, he replied that he saw **JD** once with NH in a vehicle with an automatic weapon. He wore a jacket of the special Serbian police<sup>31</sup>. After the war he saw **JD** in a KP Uniform.

#### *1.2.4. Photo line-ups*

80. The Panel now assesses the photo line ups in a chronological order.

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<sup>29</sup> Minutes of Main Trial session on 9 April 2013, page 38-39.

<sup>30</sup> Record of Main Trial session on 9 April 2013, page 41.

<sup>31</sup> Record of Main Trial session on 9 April 2013, page 42- 43

81. As stated above (Paragraph I.2.2), in October 1999 some pictures were shown to the victim V. K. She identified the policeman who raped her from two photos<sup>32 33</sup>. There were two pictures of the same man, one in a uniform and one in civilian clothes together with kids<sup>34</sup>. The question whether these pictures can be found in the case file is dealt with later on<sup>35</sup>.
82. On 26 April 2012 witness MK2, after she had given a description of the man who took V. K from her house, was shown a photo album containing 9 photos, marked “Exhibit A” (page 248, exhibit 3). According to the record of her statement of the same day, she pointed at photos number 3 and 9 and said that the person in the photo number 3 could be the person that she had seen in 2010 (meaning: the person she saw in RM’s shop, as mentioned in her statement above).
83. The binder “witness statements” contains another set of 8 photos (page 250, exhibit 8). There is no record of these pictures being shown to the witness. However, during the Main Trial session on 9 April 2013 witness MK2 was shown this set of photos and she confirmed that on 26 April 2012 this set was shown to her as well and she identified photo number 3. She was told by the police that these were pictures taken in 1999<sup>36</sup>. Photo number 3 is a picture of **JD**<sup>37</sup>.
84. Witness IG, also on 26 April 2012, was shown a set of 8 photos, called “photo line-up No.2” (page 264, exhibit 9). She stated that the persons in the photos 5, 6 and 8 seem familiar to her. The most familiar person is the one in photo number 6, because she recognizes him “based on his face and his chin”<sup>38</sup>. Photo number 6 is a picture of **JD**<sup>39</sup>.

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<sup>32</sup> Statement V. K 13 October 1999.

<sup>33</sup> See also officer’s report s dated 17 and 30 September 2010, exhibits 11 and 10.

<sup>34</sup> During the Main Trial session of 4 April 2013, this witness confirmed her statement: she identified the man in the police uniform. On one picture he was with a child, she does not remember if he was alone or with somebody on the second picture.

<sup>35</sup> See paragraph I.3.2.

<sup>36</sup> Record of Main Trial session on 9 April 2013, page 6 and 7.

<sup>37</sup> Binder witness statements, page 249.

<sup>38</sup> The Trial panel has noticed a translation error: in the original Albanian version of the record of the witness’ testimony she states that she identifies the person on photo number 6, referring amongst others to his chin. However, the English translation refers to a beard. Even more serious: the English translation wrongly mentions

85. It can be read from the record that, before IG was shown the picture set, she had given a description of the uniformed man who took her cousin away. According to the record of her police interview, the police officers also told her that in these photos there is a man who is suspected to be the Serbian. During the Main Trial session on 9 April 2013 the witness confirmed that she identified photo number 6, being a picture of **JD**.
86. On 16 May 2012, a set of 8 photos was shown to witness NK (page 201). He identified the person in photo number 2 as the person, who came the day before his sister was abducted and who was, according to his sister, the same person as the person who abducted her. According to the record of his witness statement of the same date, he was asked whether he would be able to identify the person. After his confirmation, he was asked: 'Could you look at these 8 photos and tell us which could be that person?'. Photo number 2 is a photo of **JD**<sup>40</sup>.
87. On 21 May 2012 an album of 6 photos (page 164, exhibit 2) had been shown to witness HK. After viewing the photos number 1, 2 and 3 in detail, the witness said that the person in photo number 1 is the person who took her daughter B from the yard of her house in ... village. No instructions to the witness about the identification process have been recorded in the case file. Photo number 1 is a picture of **JD**<sup>41</sup>.
88. On 17 July 2012 a photo identification had been conducted with witness V. K. According to the official memorandum/report on identification she was introduced to a photo log of 8 photographs. As soon as the witness saw the eight pictures, she indicated without hesitation the picture number 4 as the person who raped her in the car and number 7 as the old man who took her to an uninhabited house and raped her. Before the photos were shown to her, she was asked to describe the persons who raped her. No specific instructions to the witness concerning the identification had been recorded in the

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that the witness identified the person on photo number 8. See also page 17 of the Record of the Main Trial session 9 April 2013.

<sup>39</sup> Page 263 binder Witness statements.

<sup>40</sup> Page 193 binder Witness statements.

<sup>41</sup> Page 161 binder Witness statements.

identification reports. Photo number 4 is a photo of **JD**, photo number 7 is a picture of **DB** <sup>42</sup>.

*I.2.5. Defendant's statement*

89. Defendant **JD** has denied guilt to the charge of rape. In his statement on 22 October 2012 in front of the Prosecutor he declared that in April 1999 he was a member of a Police Reserve Unit. He was stationed in an area called ..., in a place called .., in Vushtrri municipality, where they were guarding. As for the injury on his right thumb, he explained that this injury was caused by a work accident in 1994 or 1995. He wore a bandage for around three weeks after the incident.
90. During the Main Trial session on 11 April 2013 he stated that in April 1999 he was with a group of reserve police force and military reservists at the frontline in the village of .., below .... When stationed there, they did not move anywhere and did not attack; their only task was to guard the mountains making sure that KLA would not attack. He did not patrol the area during that time. They went to ... in late February or early March 1999 and returned home on 16, 17 or 18 of April. He did not resume his duties anywhere after that. After he was drafted, he only visited his friend NHC, who lived in .., once. He only once visited his house in ... when he was in the village of .... He did not visit .... in April 1999. He also stated that he was or is not called P. The defendant also stated that his uniform was blue police uniform. At that time, because staying in the front line, he had a beard.
91. The defendant also stated that the photo used in photo line ups must have been taken about 10 years, at least five years before the war. That photo was from his ID card from the time before the war. In 1999 he was 45 years old. At that time he had a car, Zastava 101. He is 173 cm tall.

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<sup>42</sup> Page 91 binder Witness statements.

### *1.2.6. Medical examination*

92. On 3 October 2012, Defendant **JD** had undergone a physical examination by Dr. Carmen Barbu, Forensic Expert, Department of Forensic Medicine. The conclusions of this examination are that the Defendant has signs of an old traumatic event on the right thumb. The signs of the traumatic event are compatible with the way how the patient describes the producing of the injury (by crushing a finger between the edge of the door and the framework of a bulldozer). The described signs are the result of the healing process of an old injury: the time when the injury was produced cannot be established.

### *1.2.7. Sketch of the crime scene (exhibit 5)*

93. On 25 July 2012, with the help of the witness V. K, the police drafted a sketch of the crime scene (location of the rapes). The witness had indicated both places where the rapes took place and the investigators have also marked several places of reference in the vicinity.

## I.3. Assessment of the evidence: is it proven beyond reasonable doubt that Defendant **JD** is the perpetrator?

94. The defence argues that defendant **JD** had nothing to do with the alleged abduction and rape. The Court has to assess whether the information described above provides enough evidence to establish beyond reasonable doubt that Defendant **JD** is the person who abducted and raped V. K. Clearly, the photo-identifications constitute an essential element of the prosecutor's case. The Court will therefore first discuss the photo-identifications.

### *1.3.1. The legal provisions on and reliability of the identification procedure*

95. Article 255 of the KCCP, which code was in force at the time when the photo-identifications by the witnesses in 2010-2012 had been conducted, describes the

conditions for such an identification procedure as follows:

- The witness shall first be asked to provide a description of and indicate the distinctive features of the person;
- The witness shall then be shown the person with other persons unknown to the witness, or their photographs;
- The witness shall be instructed that he or she is under no obligation to select any person or photograph, and that it is just as important to state that he or she does not recognize a person or photograph as to state that he or she does.

96. It is commonly known in the criminal justice system that the eyewitness identification procedures are affected by psychological factors which must be taken into consideration when assessing the reliability and value of the eyewitness identification.

97. The studies in witness psychology support the conception, that the identification of a person can be conducted reliably only once. It is difficult or impossible to determine whether the subsequent identifications were influenced by the initial identification and if so, to what extent.

98. This means also that it is crucial that the first identification is conducted using methods that ensure accuracy and minimize the possibility of contaminating the memory of the witness.

99. There are several factors that can increase the evidentiary value of the photo line-up identification. The Court considers that the most significant ones are the following. At first the eyewitness shall, as prescribed in Article 255 of the KCCP, give a description of the suspect. The photograph of the suspect should resemble his or her appearance at the time of the offence and the other individuals used in the composition of the line-up ('fillers') should also resemble the witness's description of the perpetrator. There must be several fillers included in the photo line-up. Before showing the photographs it is of essential importance that the witness is instructed that the perpetrator may or may not be included in the line-up and that there is no obligation to make an identification. To insure

that the witness compares each individual to his own memory rather than comparing each line-up member to the rest (and thus choosing the one that most resembles the perpetrator), the photographs should be presented one at a time. In order to prevent any influence from the person who is conducting the line-up, this administrator should not know who the suspect is and who is not. The identification procedure should also be documented at all stages by the investigator, also all statements given during the procedure.

100. There is no unanimity in witness psychology research as to whether the witness's level of certainty of the identification correlates with the reliability of the identification. Therefore the Court finds that the personal opinion of the witness as to the certainty of his or her identification is of not much significance.

101. There are also several other factors which can affect the reliability of the identification, of which two should now be mentioned in this case. First, it is obvious that the time that has passed between the event and eyewitness's identification is an important element. It is common knowledge that the memory of a witness becomes blurred and distorted when time passes. Second, if there are several eyewitnesses and they have, prior to the identification proceeding, had an opportunity to talk with each other about the event and the perpetrator and his or her identity, it is not possible to prevent this information from influencing the identification.

### *1.3.2. Assessment of the conducted identifications*

102. As discussed above, several witnesses identified defendant **JD** (1,) as the person who abducted V. K from the house, (and 2,) respectively as the person who was at the house the day before the abduction. V. K herself identified defendant **JD** as the first rapist. The fact that several witnesses have identified the same person as the one who abducted V. K indicates the reliability of the identifications.

103. As stated in paragraphs I.2.1, I.2.2. and I.2.3. the first time the victim was shown

photographs for identification of the perpetrator was on 10 October 1999. There is no report of this identification process, and moreover, there is no certainty what photos were shown to the victim. Even though the Court understands the difficult circumstances in which the first investigative steps in this case had to be conducted, it deplores the fact that the original pictures with which the injured party V. K identified the first perpetrator in 1999 are no longer available. They could have provided critical information in this case. However, the Court emphasizes, that at that time she was shown a gallery of photos and that she picked out two photos<sup>43</sup>. The most valuable identification took place then.

104. First, there is no evidence as to how this first photo line-up identification was conducted. The police report (exhibit 11) also shows that witness SK at that time already suspected defendant **JD** of war crimes. It is unclear if SK was present during that identification. The Court finds that this creates a grounded question on the objectivity of the first identification.

105. Second, and this is more important in this case, the Court believes that the black and white photo copy of these pictures presented at the main trial (exhibit 12) probably presents the pictures selected by V. K in 1999 and given to UNMIK investigator. The Court points out that these photos were selected based upon the description given by the victim at that time. These pictures, rather a photo copy of these pictures, were examined at the main trial by the Court and the Court finds they depict individuals who bear no obvious resemblance to Defendant **JD**.

106. The Court finds that these two circumstances reduce the reliability of later identifications and are likely to contaminate the memory of the witness.

107. It must also be noted that on 15 December 2011 the victim was for the second time shown photographs for the identification. There is no information provided during the main trial what photos were shown to her. Taking into consideration that the victim didn't identify anyone, this cannot be excluded when assessing the reliability of the

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<sup>43</sup> See report 13 October 1999 and exhibits 10 and 11.

identification procedures.

108. The next photo-identifications were conducted in April, May and July 2012 (with the exception of the identification by MK2 of the police officer she saw in 2010, see below). The witnesses were asked to identify someone they didn't know before the event and whom they had seen only for a short period of time (with the exception of V. K) thirteen years before, and during a very traumatic period in their lives. Witnesses V. K, HK, NK, IG and MK2 belong to the same family and it is to be expected that they have talked with each other about the event, the perpetrator and his possible identity. The Court finds that the time that has passed since the incident and the opportunity that the witnesses had to discuss with each other the identity of the assailant are factors that reduce the credibility of the identifications made by V. K, HK, NK, IG and MK2. And what comes to the victim, her identification was already influenced by the previous ones; the value of the first identification was lost.

109. The Court also finds that the identification method used by the initial investigator has not been conducted in full compliance with article 255 of the KCCP. None of the witnesses were instructed that the picture of the perpetrator *may or may not* be included in the identification set and that they were under no obligation to select any person or photograph. Witness IG, before the identification, was even told that the Serbian man was one of the pictures in the photo set to be presented to her.

110. The investigators who drafted the report on the identification by V. K had also been present during the photo identification by witnesses HK, NK, MK2 and IG. There is a strong possibility that the investigators who drafted the report of the identification procedure of V. K also assembled the different sets of photographs shown to each of the other witnesses and that they were aware of the identity of the suspect at that time. At least, the investigators knew from the first positive identification on 26 April 2012 on, that Defendant **JD** had been identified as the suspect. Moreover, there is a clear imprint obviously left by a stable in the photograph of defendant **JD**, whereas the other photographs in the photo-line ups don't have this kind of signs. Therefore, it cannot be excluded that the witnesses were influenced by these above mentioned weaknesses in the

identification procedure. The Court reiterates that this gains now importance when the witnesses were asked to identify a person they have seen 13 years earlier and under very stressful circumstances.

111. With regard to the identification by MK2, the Court first points out that she was 11 years old when she witnessed her cousin being abducted by a Serbian policeman. In 2010, 11 years after that event, she heard somebody speak Serbian in a shop and associated the voice she heard with the person who abducted her cousin. The Court finds that this “recognition by voice” can be given some evidentiary value, but it is subject to the same problems as described above. When the photo line-up identification was conducted after that event, it cannot be excluded that the witness in fact identified only the man she saw in the shop in 2010.

112. There is no certainty on when the photograph of the defendant used in the photo line-ups was taken. The Court discovers that in each photo line-up the investigators used the same photograph. According to the defendant the photo was taken at least 5 years before the war, which means he is about 35 years old in that photo. The Court states that in April 1999 defendant **JD** was 45 years old. What then comes to the height of the perpetrator the victim and the witnesses present when the abduction took place have testified<sup>44</sup> that the perpetrator was a tall man; 175-180 cm or even taller. The Court notices that the only evidence presented of the height of defendant **JD** is his own statement; 173 cm tall. The Court finds that the factors above don’t support a conclusion that the perpetrator the victim and witnesses have described was defendant **JD**.

113. The Court cannot find either inculpatory or exculpatory significance concerning the descriptions by the witnesses and the victim on the hair colour and physique of the perpetrator.

114. That for the above-mentioned reasons, the Court concludes there are several factors which minimize or negatively impact the reliability of the identification of the

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<sup>44</sup> See above paragraphs I.2.2. and I.2.3.

defendant by the witnesses. The identification testimony of these witnesses therefore don't prove that it was defendant **JD** who abducted V. K and then raped her. It must be stressed that the Court does not believe that the witnesses intentionally pointed to the wrong person. The Court is just not in a position to establish beyond reasonable doubt whether these witnesses have been (unintentionally) influenced as to the identity of the assailant or if their memory has been distorted by the years that have passed since the tragic event.

### *1.3.3 Other evidence*

115. Among the other evidence presented by the prosecutor is the fact that it has been established in 2010 that the Defendant had an old wound on his right hand. Witness V. K has stated that the perpetrator had a bandage on one of his arms or hands, but her statements differ as to which arm or hand was bandaged. Even though the Court understands that several years later, taking into account the ordeal the witness had gone through, the witness might make a mistake about this kind of detail, these statements don't have significant evidential value against the defendant. The more so as the forensic doctor concluded that the wound on one of the right fingers is compatible with the Defendant's description of the cause of the injury, namely that he crushed his finger between the door and the framework of a bulldozer.

116. It has also been established that around the time of the events, Defendant **JD** was stationed as a military reservist not far away from the victim's residence. The Court finds **JD**'s statements that he did not move anywhere when he was stationed in ... and that he very rarely visited his friend, relatives and family in respectively ... (Lower) ..., ... and ..., not credible. However, there could be several reasons not to inform the court of his whereabouts during the war, for instance fear of being wrongly associated with the crime committed. Therefore, the implausibility of this part of his statement in itself does not imply that he visited the village of Lower ... in April 1999. However, it must be noted, that the defendant had a Zastava 101 car at the time of the internal conflict. Witness MK1 and victim V. K testified that on 14 April 1999 the abductor drove this kind of a vehicle.

This fact supports the charge, but because, as it is commonly known, the Zastava 101 car was a common car model in Kosovo at that time, this doesn't have significant evidential value.

117. Defendant **JD** stated that he was a military reservist during the war. Some of the witnesses described the uniform, worn by the perpetrator as a military reservist uniform. Some stated that it was a camouflage uniform. However, other witnesses also stated that it was a police uniform, so there is no certainty about the exact uniform the perpetrator was wearing. Furthermore, the Court deems that a lot of people, especially young people with no experience in the army or police, like witnesses V. K, NK, MK2 and IG, might find it difficult to make a distinction between a military (reservist) uniform and a police uniform. Moreover, a lot of Serbs wore some sort of uniform during the month of April 1999, so the uniform is not to be considered a distinctive feature of the perpetrator. The only fact that the Court could establish is that the perpetrator wore some kind of a uniform and that defendant **JD** also wore a uniform at that time. The prosecutor has not stated which kind of a uniform was sequestered from the defendant's home in 2003. For the above mentioned reasons the question of the uniform cannot contribute to the establishment of the guilt of defendant **JD**.

118. Finally, the Court discusses the issue of the (nick) name of the first perpetrator. The statements by V. K differ as to the question whether the perpetrator or one of the bystanders in ... was called P. The Defendant has denied that his nickname is P and no evidence has been produced to prove the contrary. Therefore, the Court deems that it has not been established that the culprit was called P and that the Defendant **JD** also has or had the nickname P.

#### I.4. Conclusion

119. After assessing all the relevant evidence, each item separately and in relation to other items, the Court concludes that there is, as discussed above, some evidence which can be considered as giving support to the charge. However, the Court concludes that

there are too many doubts that defendant **JD** is the person who abducted and raped the injured party V. K. Therefore, it has not been proven beyond reasonable doubt that defendant **JD** has committed the act with which he has been charged in Count 1.

## **II. Defendant DB; count 1**

120. Secondly, the Panel assesses the charge of rape against Defendant DB.

### II.1. Events on 13 and 14 April 1999

121. As has been elaborated above (Paragraphs I.1.1 – I.1.4) the Court has found proven that on 14 April 1999 victim V. K was abducted from her residence in Lower .. by one person and subsequently raped in different locations in ... twice; first time by the abductor and soon afterwards in a different place by another man. The Court will now discuss the question whether it can be proven that the accused **DB** was the man who committed the second rape as described in the indictment.

### II.2. Investigation and evidence

#### *II.2.1. Injured party V. K*

122. It results from the witness statements by V. K <sup>45</sup> and SK <sup>46</sup> that shortly after the events, on 15 April 1999, V. K reported to KLA military police that she was raped. There are no reports on this interview in the case file. However, according to SK's statement the victim described the second perpetrator as a senile old man.

123. In her following statement to UNMIK investigator on 13 October 1999 the injured party did not mention that on the critical day she was also raped by another man.

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<sup>45</sup> Record of Main Trial session 4 April 2013, page 34.

<sup>46</sup> Record of Main Trial session 9 April 2013, page 22 onwards.

124. On 24 August 2010 V. K firstly mentioned to EULEX investigator that she was raped by a second person in an empty house in .... She described the perpetrator: ‘... between 60 – 70 years old, limping a little, not so tall, somewhere between 1.67 -1.71 cm, he spoke Albanian but not as a native.’
125. On 30 December 2010 V. K, when heard by the Kosovo Police, told also about the second rape by an older man, but the interview had to be stopped because of her bad health.
126. In her statement of 17 July 2012 V. K described the second rapist as: ‘He was about 50-60 years old, he had a stout body, his hair had average length and was grey, he was about 165-170 cm tall and limped with one leg, and he spoke Albanian and had a weapon on his waist.’
127. During the Main Trial hearing on 4 April 2013, V. K also gave a description of the second rapist: ‘Above 60, a bit taller than herself, a little stocky and he had a beard like two days old. His hair was a bit bold, then it was long, but it was not short hair; the colour was dark with a bit of grey, brown and grey. He limped a bit and spoke well Albanian.’

#### *II.2.2. Other witnesses*

128. Witness NK, when heard by the Kosovo Police on 21 March 2012, stated that by the end of 2008 he went to ... and asked a shopkeeper who of the villagers was selling land and gave the description his sister have given him earlier of the second rapist: a little short, old and limps. The shopkeeper told him that it certainly was G.
129. During the Main Trial session on 8 April 2013, witness NK testified that in 2008 her sister had told him everything that had happened. Her description of the second man was: Old, around 60 years old, a little chubby, when he walked he limped a little. She also showed him the house where the second person had raped her. He went to the village

and there in a store asked around whether anybody was selling land, someone who was a little chubby, not tall and limping. He was told that it may be D and his house was pointed out at him. This house was close to the house his sister had showed him (where she was raped the second time)<sup>47</sup>. The witness also pointed out on a sketch (exhibit 5) the two locations that his sister showed him as the places where she was raped<sup>48</sup>.

130. Witness MK1 stated during the Main Trial session on 5 April 2013 that on 15 or 16 April 1999<sup>49</sup> when he was driving his car with the victim towards Pristina the victim pointed at one house and told him that that was the place where they had her last night. The witness explained that this house was not a complete house, it was like a power station or a house built with bricks and it doesn't exist anymore. The house was situated at the corner of the road going to .., 700-800 meters after restaurant ...<sup>50</sup>.

131. Witness SK stated during the Main Trial session on 9 April 2013 that the victim came to him with her mother and younger brother about 10-20 hours after the abduction and the rape had taken place. She described the last perpetrator as a senile old man.

132. Witness ZG testified on 4 October 2012 that when he worked in the ... from 1972 until 1989, his boss was **DB** (D) from ...village. According to the witness' statement, D had problems with lumbar vertebrae and he could never bend because of that. Often workers called him Q. He knows very well that G limped in one of his legs.

133. When ZG was interviewed during the Main Trial session on 8 April 2013, he stated that Defendant **DB** used to walk differently, like limping. According to the witness, C (the Court understands: Q) means limping in Albanian. On that time they did not communicate in the Albanian language, but in Serbo-Croatian<sup>51</sup>. He thought that **DB**

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<sup>47</sup> Record of Main Trial session on 8 April 2013, page 8.

<sup>48</sup> Record of Main Trial session on 8 April 2013, page 21.

<sup>49</sup> The date can be 15<sup>th</sup> April or 16<sup>th</sup> April 1999; see the witness statement on 1 April 2003, page 292 and Record of the main Trial session on 5 April 2013, page 17.

<sup>50</sup> Record of the Main Trial on 5 April 2013, page 17-18.

<sup>51</sup> Record of the Main Trial session on 8 April 2013, page 23-24.

knew only a dozen Albanian words, he did not speak fluent Albanian.<sup>52</sup> He also stated that the defendant used to live in the village of ..., then he was a resident of the neighbourhood called ... and after that he took an apartment in ...<sup>53</sup>.

134. Witness KA stated on 30 October 2012 that he had worked in the Mine of ...from 1975 until 1990. The supervisor of this sector was **DB** (G). He noticed that G did not like his report because it was in Albanian, even though he understood that G had a good knowledge of Albanian language. G was walking sideways, not very straight.

135. During the Main Trial session on 8 April 2013, KA stated that Defendant **DB** said to him that he understood the witness' report in Albanian. He also declared that G perhaps used to lean on one side, but not that much. People used to call him Q. According to the minutes of this Main Trial session, the court interpreter explained to the Trial Panel that Q means: "One, who limps"<sup>54</sup>.

136. Witness SM was questioned during the Main Trial session on 9 April 2013. He stated that in the beginning of April 1999, he moved his entire family to ..., but from the beginning of March 1999 he went there with his wife. However, later on in his statement, he declared that he thinks he moved to ...t in the first week of April 1999<sup>55</sup>. The first week he stayed with his in-laws, after that he moved to another house, across the street from the house, belonging to **DB**, approximately 7 meters away. He could see the defendant's house from his house. He did not see **DB** or his wife in the house in the month of April 1999.<sup>56</sup> At the end of July or the beginning of August 1999 **DB** came back to ... The witness did not see or hear anything unusual on 14 April 1999. During the month of April 1999, he went to Pristina several times, but he spent all his nights in ...<sup>57</sup>.

### *II.2.3. Photo line-up*

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<sup>52</sup> Record of the Main Trial session on 8 April 2013, page 28.

<sup>53</sup> Record of the Main Trial session on 8 April 2013, page 26-27.

<sup>54</sup> Minutes of Main Trial session on 8 April 2013, page 30-31

<sup>55</sup> Minutes of Main Trial session on 9 April, page 53.

<sup>56</sup> Minutes of Main Trial session on 9 April 2013, page 46-47.

<sup>57</sup> Minutes of Main Trial session on 9 April 2013, Page 49.

137. On 17 July 2012, witness V. Kr was introduced to a photo log of 8 photographs. As soon as the witness saw the eight pictures, she indicated without hesitation the picture number 4 as the person who raped her in the car and number 7 as the old man who took her to an uninhabited house and raped her. Before the photos were shown to her, she was asked to describe the persons who raped her. No specific instructions to the witness concerning the identification have been recorded. Photo number 7 is a picture of **DB**<sup>58</sup>.

#### *II.2.4. Defendants statements*

138. On 22 October 2012, Defendant **DB** was questioned by the Prosecutor. He confirmed everything he had said during the detention hearing. At that occasion he stated that he is totally innocent. He never lived in ... until expelled from Pristina three months after the international community arrived. First<sup>59</sup> he stated that during the period he lived in Pristina he did not go to .. to finish his house there, his brothers did. However, further on<sup>60</sup> he declared that during the bombings he went to .. from time to time, to spend half an hour or one hour and go back.

139. In addition to his statement during the detention hearing, the Defendant also declared that his brother's house, which is still unfinished, is close to his house.

140. During the Main Trial session on 11 April 2013, Defendant **DB** claimed that he knows nothing about the rape of a Kosovo-Albanian girl in April 1999. He stated that he started working in the ..mines in .. in 1965. After two months of military service in 1966 he was found incapable of doing the service and he went back to work in the same mines<sup>61</sup>. He retired in 1994, at that time he was living in Pristina. He started building a house in ... in 1976, but kept residing in Pristina. During the air raids in 1999 he stayed

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<sup>58</sup> Page 91 binder Witness statements.

<sup>59</sup> Binder Witness statements, page 18.

<sup>60</sup> Binder Witness statements, page 19.

<sup>61</sup> Minutes of Main Trial session on 11 April 2013, page 25-26

in Pristina and did not go to .... Before the air raids he came rarely to ...<sup>62</sup>. He moved to ... in August 1999. He was not in ... around 15 April 1999<sup>63</sup>. He was never in his entire life called C<sup>64</sup>.

141. With regards to the picture of defendant **DB** on the photoset (exhibit 1) shown to witness V. K he stated that this picture was taken in 2009<sup>65</sup>.

#### *II.2.5. Sketch of the crime scene (exhibit 5)*

142. On 25 July 2012, with the help of the witness V. K the police drafted a sketch of the crime scene. The witness had indicated both the places where the rapes took place and the investigators have also marked several places of reference in the vicinity. One of these places of reference is the house of the suspect **DB**, which is located next to the house where, according to the injured party, the second rape had taken place.

### II.3. Assessment of the evidence: is it proven beyond reasonable doubt that Defendant **DB** is the perpetrator?

143. The Court will now assess whether the information described above provides enough evidence to establish beyond reasonable doubt that defendant **DB** was the second person who raped V. K. The Court will first discuss the question of the age of the perpetrator and the photo-identification and then the other questions related to the identity of the perpetrator.

#### *II.3.1. The age of the perpetrator and the photo line-up*

144. Injured party V. K is the only witness who has been able to describe the second rapist, as the other witnesses have not seen this man. Therefore, she is also the only

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<sup>62</sup> Minute of Main Trial session on 11 April 2013, page 27.

<sup>63</sup> Minutes of Main Trial session on 11 April 2013, page 28.

<sup>64</sup> Minutes of Main Trial session on 11 April 2013, page 30.

<sup>65</sup> Minutes of Main Trial session, page 40.

witness who has been shown a photoset, from which photoset on 17 July 2012 she identified the defendant **DB** as the second rapist.

145. The Court states that defendant **DB** was at the time of the offence 60 years old and at the time of the main trial 73 years old. The picture used in photo identification (exhibit 1, picture 7) was taken in 2009 and is the same one as in his ID card issued in 2009. This means he is 69 years old in the picture.

146. There are some differences on the evaluations of the age of the perpetrator made by the victim in different times (senile old man, between 50-60 years, about 60-70 years, older man, above 60). However, from these statements it can be found out, that the victim considered the second rapist clearly as an old man. The age of defendant **DB** corresponds to this description.

147. What comes to the photo identification the Court refers above to paragraph I.3.1. where the Court has expressed remarks on the identification process in general. In this case the photo identification was conducted 13 years after the offence took place. The time passed is in itself a relevant factor to decrease the evidential value of the identification, especially if the identification process is not conducted paying special attention to the factors described in paragraph I.3.1. in order to increase the evidentiary value of the photo line-up identification. The Court establishes that these requirements are not fulfilled in this case.

148. It is true that the witness first gave the description of the suspect and it must have been totally obvious for the investigators that they are now dealing with an old man. However, from the report on identification it can be find out/stated/discovered that the witness was shown only eight photographs and at the same time. What is most significant, in the photoset presented to the witness (exhibit 1), only one person matches the description the witness had given of the second rapist and represents an older man around or above sixty years old. One of the basic rules for conducting an identification process is that the pictures shown to the witness should all resemble the witness'

description of the perpetrator. Now that this rule has not been obeyed establishes a grave violation of the good practices of photo identification. The Court concludes that the photo identification has lost most, if not all, of its evidentiary value.

### *II.3.2. Other evidence*

149. At first, the Court finds that in several parts defendant **DB**'s statement cannot be considered as trustworthy. This can be noticed when he was cross examined by the prosecutor. The Court comes to a conclusion that especially what he stated of his whereabouts during April 1999 and reasons why he was found incapable of doing the military service cannot be given significance.

150. One of the main distinctive features witness V. K described of the second man who raped her, was the fact that he limped. Both witness G and witness A confirmed that Defendant **DB** limped, respectively "walked sideways" in the years they worked with him (until respectively 1989 and 1990). Both witnesses also confirmed that he was called Q, which means "one who limps". During the Main Trial session on 11 April 2013, the Court asked the Defendant to walk up and down the Court room. Although the Court did not notice any obvious sign of limping, a special feature in his walking could be noticed. The Court concludes that defendant **DB** must have had this kind of a feature, walking in a deviant way, at the time of the offence. This is a fact that corresponds to the description given by the victim. However, it must be noticed, that it is not unusual that older people limp or have some other deviant way in walking.

151. The victim claims to have been raped in an unfinished house in ... First, there is no dispute that defendant **DB** had and has a house, at the time of the alleged crime unfinished, in .... This is a circumstance that connects defendant **DB** to the village of .... Second, in 1999 his brother also had an unfinished and uninhabited house close to his house. Based on the statements of V. K and NK, the sketch of the crime scene and the cadastral documents provided by the prosecutor, it is possible, that the house where the second rape took place was the house of the brother of the defendant. However, taking

into consideration the statement of witness MK1, which gives reasons to believe that the house the victim pointed out to him in April 1999 doesn't match to the sketch, it is not proven that the second rape took place in the unfinished house of defendant **DB**'s brother. However, the existence of the unfinished and uninhabited houses in the village must have been commonly known to the residents of the village, and such a house could even have been noticed by a casual passer-by for a place where to commit this kind of a crime.

152. The Defence presented an alibi-witness. The neighbour of the defendant, SM, stated that he never saw Defendant **DB** in ... in April 1999. The Court finds that the fact that witness M claims he did not see his neighbour defendant **DB** in ... in April 1999 does not constitute prove that defendant **DB** didn't visit ... at any time during that month. The more so, since defendant **DB** during his Main Trial statement declared that he did visit .. during the NATO bombings (even though for a short period of time). On the other hand, there is no evidence to ascertain that the defendant *was present* in ... on 14 April 1999.

153. It has been proven that defendant **DB** could understand and speak Albanian. However, there is not enough evidence to evaluate how good his knowledge of Albanian was. Nevertheless, the Court cannot find either inculpatory or exculpatory significance on this question.

#### II.4. Conclusion

154. After assessing all the relevant evidence, each item separately and in relation to other items, the Court concludes that there is, as discussed above, some evidence which gives support to the charge. However, the Court concludes that there are also doubts that defendant **DB** is the person who abducted and raped the injured party V. K. In particular, the Court finds that the conduct of the photo identification results that the identification has lost its evidential value. Therefore, it has not been proven beyond reasonable doubt that defendant **DB** has committed the act with which he has been charged in Count 1.

### **III Defendant JD; count 2**

#### III.1. Search

155. It follows from the report of the search of the house in ...where defendant **JD** lived and from the testimony of witness HB that a box containing nine pieces of 9 mm calibre rounds was found in the house <sup>66</sup>. The search report, photographs and video recording of the search show that the rounds were found in an unlocked drawer or shelf of a TV top/set which was in one of the rooms of the house (picture 19, Exhibit 13)<sup>67</sup>.

#### III.2. Statements

156. Defendant **JD** stated that the bullets found in his house did not belong to him. He claimed that his son told him he took the bullets with him from a wedding celebration they attended in Serbia, from which they returned two days prior to the house search.<sup>68</sup> He has also stated that he was working as a police officer until his arrest<sup>69</sup>. He was entitled to carry his official gun, a Glock 17 or 19, 24 hours per day.

157. Police officer HB was questioned as a witness during the Main Trial session of 10 April 2013. He stated that the bullets were found in the room where the TV set was placed<sup>70</sup>. Defendant **JD** was present during the search and he did not comment in any way when the ammunition was found.

#### III.3. Assessment

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<sup>66</sup> Binder police reports, page 82-83.

<sup>67</sup> Based on the testimony of witness HB it is unclear if the room where this TV top located was used as a living room or bedroom. However, this question is not relevant.

<sup>68</sup> Record of Main Trial session 11 April 2013, page 18.

<sup>69</sup> Record of Main Trial session 11 April 2013, page 17.

<sup>70</sup> Record of Main Trial session 10 April 2013, page 6.

158. First, the Court finds that there are no reasons to believe that the house search was executed and carried out in breach of the provisions of the old KCCP. What comes to the question of witnesses the handwritten report of the search (27.9.2012, page 3) shows there were witnesses present as provided in Article 243 of the KCCP.
159. There is no doubt that the set of nine bullets was found in the house, inhabited by and under the authority of Defendant **JD**. The Court finds it highly unlikely that, as **JD** stated, his son brought the bullets from Serbia to Kosovo after a wedding celebration they attended just two days earlier and put the rounds in a room and place (a TV set) where everybody could find them. In order to do so, they should have passed a crossing point, and there would be a great risk of the bullets being apprehended there.
160. The Court finds it more plausible that the rounds belonged to the defendant's weapon and that he stored the rounds separately from the weapon in his residence. In all cases the search report and photographs prove that he used the room where the TV set was. The Court finds that defendant **JD** must have been aware of the presence of the rounds in his house. Therefore, the Court concludes, he was having the rounds in his possession.
161. Therefore, the Court finds it proven that defendant **JD** possessed nine pieces of 9 mm calibre rounds in his house in .. on 27 September 2012.
162. However, defendant **JD** stated that he was working as a police officer until the day of his arrest and that he was allowed to carry his weapon 24 hours a day. This claim has not been denied by the Prosecutor. Moreover, an official weapon, type Glock, serial number 4339, was found (and initially seized) during the search of the **JD** residence (exhibit 29). If the defendant was allowed to carry a weapon, he must also have been authorized to carry the corresponding rounds. There is no evidence presented that the rounds seized did not belong to his official weapon.

#### III.4. Conclusion

163. Therefore, there is no prove of the *unauthorized* possession of the rounds, which constitutes an essential part of the accusation against the defendant.

#### **IV Defendant DB; count 2**

##### IV.1. Search

164. It follows from the report of the search of the house in ..., where defendant **DB** lived, and from the testimony of witness Peter Henry that from a garage next to the house were found and seized an automatic weapon type M-70 AB2 (copy of an AK 47), a magazine with 25 rounds, a magazine with 30 rounds and 14 rounds without magazine. Moreover, one empty pistol magazine was found in the garage. The Court finds out that the garage was situated next to the house, within the closed premises of the garden. The search report, photographs and video recording of the search show that the weapon and ammunition were stored in a plastic wrapping put on top of a wall cabinet<sup>71 72</sup>.

##### IV.2. Statements

165. Defendant **DB** stated that he was not aware of the presence of the weapon and ammunition in his garage. He also declared that he had recently before the search painted the garage, including the ceiling and the space between the cabinet and the ceiling, where the items were found and that he had not noticed the plastic wrapping at that time<sup>73</sup>. Furthermore, he stated that he never kept the front gate or the garage door locked<sup>74</sup>. The garage was only used by him and his wife.

166. Police officer Peter Henry was questioned as a witness during the Main Trial session on 10 April 2013. He stated that he was present during the search of the garage

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<sup>71</sup> Binder police reports, page 153- 183.

<sup>72</sup> Minutes of main trial session 10 April 2013, statement by witness Peter Henry, page 16.

<sup>73</sup> Minutes of main trial session 11 April 2013, page 39.

<sup>74</sup> Minutes of main trial session 11 April 2013, page 41.

belonging to defendant **DB**. The house search was conducted by a team of EULEX police investigators and KP officers. He didn't see and found it impossible that someone from the search team could have carried with him this wrapping and put it in the garage. A relative of defendant **DB** and his wife were witnessing the search. The plastic wrapping could be seen from the doorway of the garage. To his recollection there was some dust on the wrapping. He believed that the wrapping had been in the place where it was found for some years <sup>75</sup>.

#### IV.3. Assessment

167. First, the Court finds that there are no reasons to believe that the house search was executed and carried out in breach of the provisions of the old KCCP.

168. The Court finds the defendant's claim that he never locked the door of the entrance gate and the door to garage untrustworthy. It is highly unlikely that, even if he went abroad, **DB** left the entrance to his premises unlocked. Moreover, it is contrary to his statement of 22 October 2012, in which the defendant declared that the gate to his property is locked. <sup>76</sup> Anyway, as the defendant himself stated, the Court concludes that the garage was only used by defendant **DB** and his wife.

169. The Court finds that there are no reasons to believe the seized items were placed in the garage by others. Moreover, it follows from the statement of witness Peter Henry that there was some dust on the wrapping, which means that it had been stored in the place where it was found for some time. Therefore defendant **DB** must have been aware of the presence of these items in his garage. This applies all the more since it results from the video of the search of the garage that the plastic wrapping with the weapon and ammunition could be noticed when entering the garage. Defendant **DB** was the occupier of the house and garage and had the authority on them. Therefore, the Court concludes, he was having the weapon and ammunition in his possession.

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<sup>75</sup> Record of Main Trial session 10 April 2013, page 23.

<sup>76</sup> Binder witness statements, page 21.

#### IV.4. Conclusion

170. For the above mentioned reasons, the Court finds it proven that defendant **DB** on 26 September 2012 illegally possessed one M-70 AB2 rifle (copy of an AK 47), three magazines and 69 rounds in his garage.

#### G. LEGAL FINDINGS

171. Based on the above elaborated facts, the Court comes to the establishment of the following legal conclusions.

#### **I Defendant JD**

##### I.1. Count one

172. As stated above it has not been proven beyond reasonable doubt that Defendant **JD** on 14 April 1999 abducted and raped the victim V. K and thus acted as described in the indictment. Therefore, he is acquitted of the first count in the indictment.

##### I.2. Count two

173. As stated above defendant **JD** had 9 pieces of 9 mm rounds in his possession on 27 December 2012. Pursuant to Article 3 Paragraphs (1) and (3) in conjunction with Article 1.36 of the Law on Weapons, rounds are also considered as 'weapons'. However, it has not been proven that defendant **JD** was not authorized to have the rounds in his possession.

174. Therefore, it has not been proven beyond reasonable doubt that Defendant **JD** on

27 December 2012 without authorization possessed 9 rounds of calibre 9 mm ammunition and thus acted as described in the indictment. Therefore, he is also acquitted of the second count in the indictment against him.

## **II Defendant DB**

### II.1. Count one

175. As stated above it has not been proven beyond reasonable doubt that Defendant **DB** on 14 April 1999 raped the victim V. K and thus acted as described in the indictment. Therefore, he is acquitted of the first count in the indictment against him.

### II.2. Count 2

176. As stated above it has been proven beyond reasonable doubt that defendant **DB** on 27 September 2012, without a valid weapon authorization card, illegally possessed one M-70 AB2 rifle (copy of an AK 47 rifle), three magazines and 69 rounds of ammunition. The Court will now assess the criminal liability and the intent of defendant **DB**,

177. There is no doubt as to the fact that defendant **DB** was fully mentally competent when he committed the offence as nothing in the case-file suggests otherwise and no such challenge has been raised by the Defence.

178. Pursuant to the provisions both of the old criminal code (Article 11 Paragraph (3) and Article 328 of the CCK) and the new criminal code (Article 17 Paragraph (2) and Article 374 of the CCRK) a perpetrator is criminally liable of the offence of unauthorized possession of a weapon if he/she committed this offence intentionally. The content of the legal definition of intent is the same both under the old criminal code (Article 15 of the CCK) and under the new criminal code (Article 21 of the CCRK). A person acts with direct intent when he or she is aware of his or her act and desires its commission. A person acts with eventual intent when he or she is aware that a prohibited consequence

can occur as a result of his or her act or omission and he or she accedes to its occurrence.

179. The Court states that four facts are now relevant. First, the wrapping, where the weapon was, must have been on top of the cabinet longer than just a few days. Second, Defendant **DB** stated that he had painted the whole inside of the garage just before the house search. Third, the garage was only used by defendant **DB** and his wife. Fourth, the location of the garage makes it untrustworthy that someone else would have concealed his or her property into **DB's** garage. The Court concludes that defendant **DB** has been fully aware of the presence of the weapon and ammunition in his garage, and as the possessor of the premises accepted this circumstance. Therefore, defendant **DB** has had the possession of the weapon and ammunition and acted with direct intent.

#### H. SENTENCE IMPOSED TO DEFENDANT **DB**

180. In order to consider the most favorable law the sentencing sanctions, levels and regime under both the Criminal Code of Kosovo (old law, CCK) and Criminal Code of The Republic of Kosovo (new law, CCRK) have to be considered and applied. Initially, the relevant parts of the two codes are set out and discussed. Then the Court assesses which of the codes leads to a more favorable punishment.

#### I Provisions of the law

##### I.1. Law in force at the time of the offence (CCK)

181. The sanction for possessing a weapon without a valid weapon Authorisation card under Article 328 Paragraph (2) and Article 39 Paragraph (1) of the CCK is either a fine from 50 euro up to a maximum of 7,500 euro or imprisonment of between one to eight years.

182. Pursuant to Article 64 Paragraph (1) of the CCK the Court shall determine the punishment taking into consideration the purpose of punishment, all the circumstances

that are relevant to the mitigation or aggravation of the punishment and, in particular, the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behavior after committing a criminal offence.

183. The CCK does not expressly restrict what can be considered an aggravating or mitigating factor.

### I.2. The new law (CCRK)

184. The sanction for possessing a weapon in violation of the applicable law relating to such a weapon under Article 374 Paragraph (1), Article 45 and Article 46 Paragraph (1) of the CCRK is either a fine from 100 euro up to a maximum of 7,500 euro or imprisonment from 30 days up to five years.

185. The general rules on calculating punishments under Article 73 of the CCRK are the same as under CCK. In addition, the CCRK expressly sets out non-exhaustive aggravating and mitigating circumstances which shall be considered (Article 74 Paragraph (2) and (3) of the CCRK). This is a change from the CCK and codifies some of the most commonly used factors.

## **II Assessment**

186. Defendant **DB** is convicted because of the possession of an assault rifle and ammunition. The weapon was concealed in his garage without signs that it has been used for a long time. The Court deems that the gun must have been in his possession for a longer time, maybe from the war.

187. The Court considers that there are no aggravating or mitigating circumstances as meant under the CCK or under Article 74 of the CCRK. The Court has considered the

age of the defendant but in relation to the offence doesn't find it establishes a mitigating circumstance.

188. The Court deems that having the possession of that kind of a rifle, although keeping it in a private place, has to be punished by imprisonment. Taking into consideration the punishment scales of imprisonment in both laws, old (Article 328 Paragraph (2) of the CCK) and new (Article 374 Paragraph (1) of the CCRK), the Court finds that the application of the new law leads to a more favorable punishment than the law in force at the time of the offence. Therefore, the Court decides to impose a sentence of one year and six months imprisonment. The Court considers as just that the sentence is suspended for a verification period of two years, pursuant to Article 51 Paragraph (2), Article 52 Paragraph (1) and Article 53 Paragraph (1) of the CCRK. This punishment shall not be executed if Defendant **DB** does not commit another criminal offence during the above mentioned verification period. The time spent in house detention is credited pursuant to Article 83 (1) of the CCRK and Article 365 Paragraph (1.5) of the CPC. **DB** has been held in house detention from 27 September 2012 until 17 April 2013.

## I. OTHER ISSUES

### I.1. Confiscation

189. The general rule is that objects that are temporarily sequestered shall, at the end of the criminal proceedings, be returned to the owner or possessor (Article 115 Paragraph (1) of the CPC). However, pursuant to Paragraph (2) of the same article, the Court shall order the permanent confiscation<sup>77</sup> if:

- The prosecutor describes in the indictment those objects that should be subject to permanent confiscation
- It is proven during main trial that the objects have facilitated the criminal offence

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<sup>77</sup> The panel notes a difference in terminology: in the heading of Article 115 the words "permanent confiscation" are used, while Paragraph (2) of Article 115 speaks of "permanent sequestration". The panel will use the term "confiscation", as this is in line with the terminology used in other provisions, like the ones in the Law on Weapons cited below.

or constitute a material benefit obtained from the commission of a criminal offence and

- Under the law they can be confiscated.

190. As stated above it has not been proven that defendant **JD** has committed the crime he has been charged with in Count 2. This conclusion was based on the finding that it was not proven that he possessed the rounds without authorization. As stated above the Court found that there exists an assumption that the rounds could belong to his official weapon, which means they were property of Kosovo Police. However, because the defendant is not any more allowed to carry an official weapon, there are no grounds to return the rounds to defendant **JD**. Therefore, the Court decides that the nine calibre 9 mm rounds, found during the search in the residence of **JD**, shall be confiscated.

191. Article 38 Paragraph (1) of the Law on Weapons determines that ammunition confiscated during a criminal procedure will be handed over to the competent body within fifteen (15) days from the day of taking of the final court decision. Pursuant to Article 2 Paragraph (1.42) of this law, the Ministry of Internal Affairs is to be considered as the competent body in this matter. Therefore, the Court decides that the nine calibre 9 mm rounds shall be handed over to the Ministry of Internal Affairs.

192. Any weapon, owned, controlled or possessed in violation of Article 374 of the CCRK shall be confiscated pursuant to Paragraph (3) of this provision. Therefore, the Court decides that the automatic gun M-70 AB2 (copy of an automatic gun AK-47), three magazines and 69 rounds of ammunitions, found in the garage of **DB** are to be confiscated.

## **I.2. Costs of proceedings**

193. With respect to the costs of criminal proceedings mentioned in Article 450 of the CPC, Article 454 Paragraph (1) of the CPC determines the consequences of a judgment which acquits the defendant. It prescribes that in those circumstances, the costs shall be paid from budgetary resources. Now that Defendant **JD** has been acquitted of all the

charges against him, he shall not be imposed to reimburse any of the costs of the criminal proceedings and that the costs of the criminal proceedings against him shall be paid from budgetary resources.

194. The above does not apply for **DB**, since the Court has found him guilty of the unauthorized possession of one M-70 AB2 rifle, three magazines and 69 rounds of ammunition. Pursuant to Article 453 Paragraph (1) of the CPC, the court shall decide that he must reimburse the costs of criminal proceedings.

195. However, according to Paragraph (2) of the cited provision, a person who has been charged with several criminal offences shall not be ordered to reimburse costs related to a criminal offence of which he or she has been acquitted if those costs can be determined separately from the total costs. Moreover, pursuant to Paragraph (4) of the same provision, the court may relieve the defendant of the duty to reimburse entirely or partially the costs of criminal proceedings if their payment would jeopardize the support of the defendant or of the persons whom he or she is required to support.

196. The Court deems that the main part of the costs of criminal proceedings as summoned up in Article 450 Paragraph (2) of the CPC consists of costs related to the charge he has been acquitted of. Moreover, referring to Article 453 Paragraph (4) of the CPC, the Court believes that there are grounds, especially the age of the defendant and thus his low income and his possibilities to increase his income, to relieve the defendant of his duty to reimburse entirely the remaining costs. Therefore, the Court decides that shall reimburse 100 Euro as a moderate part of the costs of the criminal proceedings against him.

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Timo Vuojolahti

EULEX Presiding Trial Judge

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Dariusz Sielicki  
Panel Member  
EULEX Judge

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Mariola Pasnik  
Panel Member  
EULEX Judge

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Karen Kort  
EULEX Legal Officer

*Authorized persons may file an appeal against this judgment to the Court of Appeal through the Basic Court of Mitrovicë/a within fifteen (15) days of the day the copy of the judgment has been served, pursuant to Article 380 Paragraph (1) of the CPC.*