

Basic Court of Mitrovicë/Mitrovica

Case № P. 58/14

27 May 2015

In the name of the people

The Basic Court of Mitrovicë/Mitrovica in the trial panel composed of EULEX judges Dariusz Sielicki as the presiding trial judge, Vidar Stensland and Anna Adamska-Gallant as panel members, assisted by the EULEX legal officer Agron Kelmendi acting as a recording clerk in the criminal case P. 58/2014 against the following accused charged by the indictment no PPS.no. 88/11 filed by the prosecutor of Special Prosecution Office of the Republic of Kosovo on 8 November 2013 against:

1. **A. D.**, father's name S.D.2., born on ____
_____;
2. **B. D.**, father's name S. D. 2., born on ____
_____;
3. **D. D.**, father's name S. D. 2., born on ____
_____;
4. **S. D. 1.**, father's name S. D. 2., born on ____
_____;
5. **F. D.**, father's name H. D., born on ____
_____;
6. **J. D.**, father's name H. D., born on ____
_____;
7. **N. D.**, father's name H. D., born on ____
_____;
8. **Z. D.**, father's name H. D., born on ____
_____;
9. **S. S.**, father's name Sh. S., born on ____
_____;
10. **I. Th.**, father's name A. Th., born on ____
_____;

after the main trial hearing held in public and in the presence of all accused and their defence counsel, respectively:

Imer Ahmetaj for **A. D.**; Shefqet Ibrahimi for **B. D.**;
Kadri Osaj for **D. D.**; Ruzhdi Maloku for **S. D. 1.**;
Vehbi Beqiri for **F. D.**; Mexhid Sylaj for **J. D.**;
Bashkim Mehana for **N. D.**; Bajram Tmava for **Z. D.**;
Gregor Guy Smith, Tome Gashi, and Ibrahim Dobruna for **S. S.**; Artan Qerkini for **I. Th.**;

on the days: 27 June, 9 and 10 July, 11 and 12 August, 15 and 16 September, 10 October, 17 and 24 November, 9, 10 and 15 December 2014, 13 January, 11 and 12 February, 20 March, 2 and 23 April, 11, 15 and 25 May 2015;

after the trial panel deliberation and voting held on 25 and 26 May 2015, on 27 May 2015, pursuant to Article 359 of the Criminal Procedure Code of the Republic of Kosovo (CPCRK), in the presence of the accused, their defence counsel, and EULEX Prosecutor of the Special Prosecution Office of Kosovo Charles Hardaway pronounces in public the following:

V E R D I C T

I. A. D., B. D., D. D., S. D. 1., F. D., J. D., N. D., Z. D., S. S., and I. Th. are guilty of the following criminal act: that, during the internal armed conflict in Kosovo, on an undetermined date in _____, acting as members of the _____, in co-perpetration with each other and with other so far unidentified _____ members, they seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949 because they intentionally perpetrated violence, cruel treatment, torture, and humiliating and degrading treatment against Witness A and Witness B, two _____ civilians

detained in the ___'s detention facility in ____/_____
(_____/_____ municipality), who took no active part
in hostilities, by beating them with fists and wooden
sticks, by ordering Witness A and Witness B to beat each
other, and by pinching Witness A's genitals with a metal
tool, and pursuant to the Article 33 Paragraph 1 of the
Constitution of the Republic of Kosovo this action is
hereby classified:

as a war crime under Article 31 and Article 152 Paragraph
1 and Paragraph 2 Subparagraphs 2.1 and 2.2 of the
Criminal Code of the Republic of Kosovo (CCRK), that
entered into force on 1 January 2013, and in violation of
Article 4 Paragraph 2 (a) of the Additional Protocol II
(AP II) to the said Conventions, and for this crime:

pursuant to Article 31 and Article 152 Paragraph 1 of the
CCRK and Article 45 Paragraph 1 of the CCRK modified by
Article 33 Paragraph 2 of the Constitution and Article 38
Paragraph 1 of the Criminal Code of the Socialist Federal
Republic of Yugoslavia (CCSFRY) in its wording as entered
into force on 1 July 1977 that was retained in force by
Section 1 Paragraph 1.1(b) of the UNMIK Regulation
1999/24 of 12 December 1999, **J. D.**, **Z. D.**,
S. S., and **I. Th.** are hereby sentenced:

- **S. S.** to 7 (seven) years of imprisonment;
- **J. D.** to 6 (six) years of imprisonment;
- **Z. D.** to 6 (six) years of imprisonment;
- **I. Th.** to 6 (six) years of imprisonment;

and pursuant to Articles 31 and 152 Paragraph 1 and
Article 45 Paragraph 1 of the CCRK modified by Article 33
Paragraph 2 of the Constitution and Article 38 Paragraphs
1 and 2 of the CCSFRY in its wording as entered into

force on 1 July 1977 that was retained in force by Section 1 Paragraph 1.1 (b) of the UNMIK Regulation 1999/24 of 12 December 1999, and Article 75 Paragraph 1 Subparagraph 1.2 and Article 76 Paragraph 1 Subparagraph 1.2 of the CCRK **A. D., B. D., D. D., S. D. 1., F. D.,** and **N. D.** are hereby sentenced:

- **A. D.** to 3 (three) years of imprisonment;
- **D. D.** to 3 (three) years of imprisonment;
- **B. D.** to 3 (three) years of imprisonment;
- **S. D. 1.** to 3 (three) years of imprisonment;
- **F. D.** to 3 (three) years of imprisonment;
- **N. D.** to 3 (three) years of imprisonment;

II. J. D., Z. D., S. S., and **I. Th.,** are guilty of the following criminal act:

that, during the internal armed conflict in Kosovo, on several occasions in _____ and _____, acting as members of the _____, in co-perpetration with each other and with other so far unidentified _____ members, they seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949, because they intentionally perpetrated violence, cruel treatment, torture, and humiliating and degrading treatment against Witness A, a _____ civilian detained in the _____'s detention facility in _____/_____ (_____/_____ municipality), who took no active part in hostilities, by beating him with wooden sticks and fists on various parts of his body, inside the detention cell, and this action, is hereby classified:

pursuant to the Article 33 Paragraph 1 of the Constitution of the Republic of Kosovo as a war crime in continuation under Article 81 Paragraph 1, Article 31, Article 152 Paragraph 1 and Paragraph 2 Subparagraphs 2.1 and 2.2 of the CCRK, and in violation of Article 4 Paragraph 2 (a) of the AP II, and for this crime:

pursuant to Article 31 and Article 152 Paragraph 1 and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and Article 38 Paragraph 1 of the CCSFRY in its wording as entered into force on 1 July 1977 that was retained in force by Section 1 Paragraph 1.1(b) of the UNMIK Regulation 1999/24 of 12 December 1999 they are hereby sentenced:

- **S. S.** to 6 (six) years of imprisonment;
- **J. D.** to 5 (five) years of imprisonment;
- **Z. D.** to 5 (five) years of imprisonment;
- **I. Th.** to 5 (five) years of imprisonment;

III. Pursuant to Article 80 Paragraph 1 and Paragraph 2 Subparagraph 2.1 of the CCRK for all of the offences attributed to **J. D.**, **Z. D.**, **S. S.**, and **I. Th.**, and having taken into account the individual punishments imposed for those offences they are hereby sentenced to aggregate punishments:

- **S. S.** to 8 (eight) years of imprisonment;
- **J. D.** to 7 (seven) years of imprisonment;
- **Z. D.** to 7 (seven) years of imprisonment;
- **I. Th.** to 7 (seven) years of imprisonment;

IV. Pursuant to Article 83 Paragraph 1 of the CCRK the period of deprivation of liberty of **Z. D.** and **J. D.** from 23 May 2013 and of **I. Th.** from 24 May 2013, respectively, until 31 May 2013 while in house detention, and from 31 May 2013 until 19 December 2014 while in detention on remand, shall be respectively credited for the aggregate punishment of imprisonment imposed on each of them;

V. Pursuant to Article 453 Paragraph 3 of the CPCRK, the cost of the criminal proceedings shall be partially reimbursed by:

- **J. D.**, in a scheduled amount of Euro 1000;
- **Z. D.**, in a scheduled amount of Euro 500;
- **S. S.**, in a scheduled amount of Euro 500;
- **I. Th.**, in a scheduled amount of Euro 500;
- **A. D.**, in a scheduled amount of Euro 300;
- **B. D.**, in a scheduled amount of Euro 300;
- **D. D.**, in a scheduled amount of Euro 300;
- **S. D. 1.**, in a scheduled amount of Euro 300;
- **F. D.**, in a scheduled amount of Euro 300;
- **N. D.**, in a scheduled amount of Euro 300;

while any remaining costs of the criminal proceedings shall be paid from the budgetary resources.

R E A S O N I N G

A. Procedural background and actions

I. The indictment

1. On 08 November 2013 the EULEX Prosecutor filed an indictment no PPS 88/11 dated 6 November 2013 against S. G., S. J., J. D., S. S., I. H., S. L., A. Z., I. Th., Z. D., A. D., B. D., D. D., S. D. 1., F. D., N. D..

2. A. D., S. S., I. Th., Z. D., F. D., N. D., S. D. 1., D. D., B. D., and J. D. were charged with the following (counts 1(1), 2(1), 3(1), 4(1), 5(1), 6(2), 7(1), 8(2), 13 (4), and 14 (2) of the indictment):

that in their capacity of members of the _____ (____), in co-perpetration with each other and with so far unidentified _____ members, they violated the bodily integrity and the health of Witness A and Witness B, two civilians detained in the _____/_____ detention centre, by:

- beating them with fists and wooden sticks;
- forcing Witness A and Witness B to beat each other;
- pinching Witness A's genitals with an iron tool and subsequently dragging him on the floor with it,

in _____/_____ (_____/_____ municipality), on an undetermined date in _____.

3. **J. D., S. S., I. Th.,** and **Z. D.** were also accused of the following (counts 6(1), 8(1), 13(3), and 14(1) of the indictment):

that in their capacity of members of the _____
_____ (___), in co-perpetration with each
other and other so far unidentified ___ members, on an
undetermined number of occasions they violated the
bodily integrity and the health of Witness A, a
civilian detained in the _____/_____ detention
centre, by beating him with fists and wooden sticks on
various parts of his body, in _____/_____
(_____/_____ municipality), on several
undetermined dates in _____ and _____.

4. Both of these counts were classified in the indictment as war crimes against the civilian population under Articles 22 and 142 of the CCSFRY currently criminalized under Articles 31 and 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of common Article 3 to the four Geneva Conventions of 12 August 1949 and of Article 4 of Additional Protocol II to the said conventions.

5. In the same indictment, **S. G., S. J., J. D., S. S., I. H.,** and **A. Z.** were charged with various war crimes against the civilian population that allegedly happened in _____ during the armed conflict in Kosovo. **S. L.** and **I. H.** were charged with a war crime that allegedly happened during the conflict but in other locations. All the accused were charged with violation of bodily integrity and health of civilians. Charges against **S. L., S. G.** and **S. J.** consisted also of murders. These charges were later severed with the ruling of the presiding judge dated 14 April 2014 in order to be heard in another proceeding.

II. Objections to the indictment

6. With the ruling of the presiding judge dated 8 February 2014 the objections to the admissibility of the evidence presented in the indictment filed by all defense counsel along with requests to dismiss the indictment were rejected as ungrounded. This ruling was upheld by the Court of Appeal on 8 April 2014.

III. Competence of the court and panel composition

7. Pursuant to Article 11 Paragraph 1 of the Law on Courts, Law No. 03/L-199, the jurisdiction to adjudicate all criminal offences at first instance belongs to the Basic Court.

8. The indictment indicated that the criminal offences that constitute the charges were committed in the region of _____/_ which is in the territory of the Basic Court of Mitrovicë/Mitrovica. For this reason, pursuant to Article 29 Paragraph 1 of CPCRK, this court has territorial jurisdiction to adjudicate the case.

9. The case was investigated by Special Prosecution Office of Kosovo, therefore according to Article 3.1 of the Law No. 03/L-053 on Jurisdiction Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo EULEX judges have competence and jurisdiction over this case.

10. According to Article 286 of the CPCRK the main trial should be held at the place where the court has its seat, and in the courthouse.

11. On 26 June 2014, the President of the Basic Court of Mitrovice/a rejected the motion for the change of venue filed by the defense counsel Gregor Guy Smith on 23 June 2014.

12. It is a notorious fact that since March 2008 until the day when the judgment was rendered because of specific security requirements in the north of Mitrovice/Mitrovica there has been firmly established practice that criminal cases in the Basic Court of Mitrovice/Mitrovica are tried by panels composed exclusively of EULEX judges. This practice has never been contested by courts of any instance. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 31 Paragraph 2 of the Constitution of the Republic of Kosovo provide for the right to the court not only for the defendants but also for the injured parties. The notion of "tribunal established by law" which is used in the said provision refers also to domestic legislation on territorial and factual jurisdiction. It appeared that exclusive participation of EULEX judges was the only way to observe the right to court.

13. This practice was also reaffirmed in the Agreement between the Head of the EULEX Kosovo and the Kosovo Judicial Council on relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts (the 'Agreement'), of 18 June 2014, whereby under section 5 (a), the Agreement states that:

"EULEX Judges will ensure that the Basic Court of Mitrovica remains operational, until the multi-ethnic court system in the North is implemented and operational."

14. No issue was raised by the parties regarding the composition of the trial-panel. Therefore it is presumed that according to Article 382 Paragraph 4 of the CPCRK they waived the right to challenge the composition.

IV. Main Trial

a. Duration of the main trial

15. The main trial commenced on 27 June 2014 and was concluded on 25 May 2015. It was heard on 23 trial days.

16. Because of the significant length of testimonies of witnesses for the prosecution, the duration of the main trial exceeded the period of 120 calendar days prescribed in Article 314 Paragraph 1.2 of the CPCRK. However, all subsequent adjournments ordered by the trial panel did not exceed 30 days and were always reasoned by indication of procedural actions to be taken during the next court session.

17. The parties did not raise objections to the duration of the trial. Therefore, pursuant to Article 382 Paragraph 4 of the CPCRK it has been presumed that they waived the right to challenge this matter.

b. The court facilities

18. Due to the significant number of participants and members of the public interested in observing the proceedings, special arrangements were made in order to accommodate the trial in a proper way. The courtroom was

properly furnished with pieces of furniture commonly used in Kosovo and it was air-conditioned. The size of the courtroom allowed for enough space for the parties, for around 80 seats reserved for the public, and also for room for TV cameras. The members of each defense team, meaning defendants, their lawyers, and persons assisting the lawyers were seated together; each defense team sat at a separate bench in order to allow for confidential communication within the team.

c. Measures taken to ensure public access to the courtroom

19. The access of the public was facilitated by announcing trial dates at the end of each court session and additionally on the EULEX Web page. Kosovo Police assisted members of the public in reaching the courtroom. There were no security incidents reported related to movements of members of the public in the North of Mitrovica/Mitrovica. No complaints on limitation or hindrance of the access to the courtroom were presented to the trial panel.

d. Security in the courthouse

20. There were normal security measures typical for the high profile cases in Kosovo applied during the whole trial. These involved bans on bringing large objects to the courtroom, and personal checks with a metal detector at the entrance to the courthouse. Kosovo Police officers were present in the courtroom. There were no security incidents in the courthouse reported.

e. Presence of the parties

21. The EULEX prosecutors of the Special Prosecution Office in Kosovo, the accused and their defence counsel were present during all trial days.

22. The injured parties Witness A and Witness B were duly informed about the trial and about their respective procedural rights, and that the main trial may be held in their absence. They both appeared in the courtroom only in capacity of a witness and they did not exercise their rights of a party during the trial.

f. Language of the proceedings, interpretation and court recording

23. Based on Article 16 of the Law on Jurisdiction and competencies of EULEX Judges and Prosecutors in Kosovo the language used in the court proceedings was English.

24. In accordance with Article 1 Paragraph 2 of CPCRK, interpreters translated the court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa. Most of the interpretation was performed in a consecutive manner. The speakers were asked by the presiding judge to make intervals in their utterance, usually every 1 to 3 minutes and as a principle at the end of complete thought, and then the interpreter rendered what was said into the target language. This method allowed parties to control the accuracy of interpretation of all evidence taken in the courtroom.

25. On some occasions the parties raised objections to the quality of translation. All the objections were immediately given consideration by the trial panel and the clarification was put in the record.

26. Closing arguments of the parties and the announcement of the enacting clause of the judgment were translated simultaneously into English, Albanian, and Serbian.

27. According to the decision of the presiding judge taken on 27 June 2014, pursuant to Article 315 Paragraphs 2 and 5 of the CPCRK, the record of the proceedings was made verbatim in writing and without audio, video or stenographic recording. It was explained that the time used for translation would allow court recorders to accurately capture and write down all words spoken in the courtroom. By this decision, the trial panel rejected the motion filed on 19 June 2014 in writing by the defense counsel Guy-Smith requesting audio and video recording of the proceedings.

28. Accuracy of the written record was controlled by the presiding judge in real time. The computer screen displaying the record was placed in front of him. This manner of recording made use of other recording methods redundant as it appeared unlikely to achieve any better accuracy of the semantic content of the record.

g. Protective measures

29. On 11 August 2014, pursuant to Article 222 Paragraph 1 and Article 339 Paragraph 3 of the CPCRK, the trial panel ordered the protective measures in relation to the witnesses proposed by the prosecution. It was decided that:

- 29.1. *the following witnesses, Witness A, Witness B, and the wife of Witness A, the brother of Witness A, and the wife of Witness B would be granted anonymity from the public and the wife of Witness A, the brother of Witness A, and the wife of Witness B would be given the following pseudonyms: respectively K, L, and M.*
- 29.2. *The names, addresses, places of work, or any other data that could be used to identify these witnesses should be expunged from all the documents related to this case.*
- 29.3. *Any records identifying these witnesses should not be disclosed.*
- 29.4. *The parties and any other persons who are in possession of information on identity of these witnesses were ordered not to disclose any material or information that may lead to the disclosure of this identity. This includes redacted copies of police reports and redacted statements of the witnesses.*
- 29.5. *The said witnesses would be heard via video link from a remote location; however, there would be no facial distortion.*
- 29.6. *Media and public would remain in the court room but without the possibility to see the faces of the witnesses and media and public would only be allowed to hear the testimony.*
- 29.7. *No audio or video recording of the said witnesses' testimonies would be allowed.*

30. Following the order personal data of the said witnesses was omitted and expunged from the court documents accessible to the parties, and the statements of witnesses for the prosecution were taken by video link with the witnesses being placed in a remote location and without exposing their faces to the public.

31. The identity of all the witnesses that were given pseudonyms was known to the parties.

32. Witness M did not appear for trial due to his unavailability. The panel learnt *ex officio* that Witness M was diagnosed as not being able to participate in judicial proceedings, as evidenced in the criminal case P 938/13.

33. The prosecutor resigned from hearing Witness L and therefore he was not summoned for the trial.

h. Public character of the trial

34. The trial was held in open court. Besides the exclusion of the possibility for the members of the public to see the face of witnesses heard by videoconference, there were the following exceptions to the public character of the trial:

34.1. on 15 September 2014 the session was closed for the part of Witness A's cross examination in order to protect the anonymity of the witness;

34.2.on 20 March 2015 the session was closed for the testimony of Dr. G. H. on Witness A's mental status in order to protect the privacy of the witness.

V. Principles applied for questionings of the witnesses

a. Leading, provocative, badgering and other similar questions

35. As a principle, leading questions on direct examination were not allowed by the presiding judge. The only exceptions were permitted when recollection of facts by the witness was obviously exhausted, when there was a need to focus the witness's attention on a particular matter, or when the question touched upon a matter being obviously of common knowledge.

36. Suggestive and repetitive questions were also not allowed at this stage.

37. Badgering a witness as well as misquotation of previous statements were not permitted during all examination.

b. Questioning by judges

38. The panel participated actively in the questioning of the witnesses at various stages of examination. However, the parties were always given an opportunity to challenge the answers given by the witness in response to the

judge's question. The panel based its activity in questioning on the conclusion that Article 7 Paragraph 1 of the CPCRK obliges judges to seek an objective truth. Therefore, a meticulous clarification of all factual matters that appear to the judges to be unclear was necessary. Article 299 Paragraph 1 of the CPCRK entitles the judges to pose questions to any witness but it does not indicate any particular stage of examination. It appears that the code does not impose any limitations in relation to the time of interrogation by judges.

c. Instruction given to the prosecutor on the scope of questioning

39. On 11 August 2014, after the prosecutor informed Witness A that for procedural reasons he would not be questioned about the facts related to the charges that were severed for separate proceedings, the presiding judge gave the following instruction:

"Mr. Prosecutor, you mentioned procedural issues. I understand that you refer to the separation of the proceedings. I know ex officio that in the other case you were asked not to go into details of the events that are subject of these proceeding, But it does not mean that the general outline of the other events is not of the interest in this case. There is nothing that precludes you from asking questions about the whole duration of the witness' stay in _____. Actually, it cannot be avoided. I already suggested chronological way of questioning It would be more helpful for the court. Therefore, I would rather ask you to clarify what happened during the three days, because otherwise we will never put information that we receive in logical order. So you may ask questions related to the whole duration of Witness's stay in _____ if it is important for your case."

40. Counsel Bajram Tmava argued that this instruction went beyond the prerogatives of the presiding judge to direct the examination. He was supported by defense counsel Artan Qerkini. Upon the defense counsel's objection the following reasoning was announced:

"This procedural code has implemented an adversarial system, which is different from inquisitorial system. It is based on direct examination and cross examination performed by the parties. But some basic elements of the inquisitorial system still remain. When we look at Article 7, the duty to establish completely the facts which are important for a decision is also put on the court. There are general provisions that say that judges may ask questions for clarifications, and there is a general principle in this code that judges must seek for an objective truth.[...]"

We can establish the facts completely in two ways. The one is to ask questions myself, the other is to ask the questioning party to clarify the issue which is of our interest. Therefore, sometimes I am saying that we need more information, or sometime we ask questions."

41. When the prosecutor addressed the witness:

"Upon the instruction of the Presiding Judge, I have to ask you several questions about the period of time during your first three days of your stay."

42. The presiding judge instructed the Prosecutor again:

"Only if it is important for your case. I didn't instruct you Prosecutor to do so, I just said that you are not banned to ask about that period of time."

d. Hostile witness

43. The trial panel allowed the prosecutor to declare Witness B as hostile and to examine him without limitations that are usually applied during direct examination in relation to asking leading questions and to the use of pre-trial statements. The parties were instructed that the witness's previous statement would, however, not be used as direct evidence. Following an objection by the defense counsel Artan Qerkini, the following explanation was given on 9 December 2014¹ in relation to the concept of hostile witness applied by the court:

"The concept is widely known in the common law jurisdictions where the adversarial system is in force. If the witness denies what he told to the party that sponsored him before the trial, if he contradicts the thesis the he was supposed to support by his testimony before the open court, then he showed hostility to the party's case. Usually the party that sponsored the witness is supposed to perform direct examination. There are very serious limitations that are imposed on a party doing direct examination. It is because the evidence presented during the direct examination serves as a direct basis for finding the facts by the trial panel. Therefore it is important that the witness testifies what he knows spontaneously without being led. That means no leading or suggestive questions are allowed. Kosovo lawmakers in its Article 334 Paragraph 4 allows to use the previous witness statement only to refresh his memory, so if the witness says "I don't remember the

¹ Minutes of the main trial; 9 December 2014 p. 19.

fact", his previous story on that fact can be read out at the court but what is read cannot be used as direct evidence. Only the witness's answers after his memory is refreshed can be used as evidence.

The Kosovo lawmaker put a very high standard for the statement that could be read in front of the court. According to Article 337 the statement must be preserved at least in the form of testimony, therefore pre-trial interviews cannot be read.

If witness not only does not remember the facts but he presents them in the different way that in pretrial stage, refreshing of his memory is not allowed. It puts the party that sponsored the witness in a situation that the witness credibility cannot be impeached or challenged in any way. This constitutes a violation of the principle of equality of arms because the evidence is presented and the party cannot fight against it. This is the gap that is not regulated by the Kosovo law, and we find it as not complying with the European Convention of Human Rights, namely with the article 6 which invokes the concept of fair trial. The concept of fair trial covers also the principle of equality of arms. In terms of European law, equality of arms involves giving each part the reasonable possibility to present its cause, in those conditions that will not put this part in disadvantage against its opponent. Constitution of Kosovo in its Article 22 provides for direct applicability of the European Convention of Human Rights. This is our duty to comply with the standards of the Convention. Therefore we find the concept of hostile witness to be the best solution.

A hostile witness is the one that denies what he said before. After the witness is declared hostile the sponsoring party can examine him without the limitations set for examination in chief. But such examination cannot be used for fact finding as direct evidence. It can be

used only to impeach the statements that could otherwise be considered as a basis for the facts to be established by the court. Whatever is given by the witness as answer to a leading question, confrontation with previous statement, or confrontation with any other piece of evidence which is not supposed to be used in direct examination cannot be used as direct evidence. It may serve only for impeachment of witness credibility."

e. Videoconference

i. rationale

44. The rationale for the use of videoconference was explained in the reasoning of the ruling imposing protective measures²:

"The court has assessed the right to public trial, the right to defense, and equality of arms, but also the personal rights of the witnesses to the personal safety. The rights of the defense weigh against the rights of the witnesses and their safety, and the duty of the state to do justice. The court recognized the right to confront the witnesses. Although it is an important component of a fair trial, it is not an absolute right since the safety and well-being of witnesses must be preserved.

We know ex officio some examples of public protests against proper administration of justice against former ___ fighters of _____ group. Such attitude could easily

² Minutes of the main trial; 11 August 2014 p. 3.

lead to hostility against persons who testified in this case. It brings a need to protect witnesses from any acts of hostility that might happen. The court assumes that the witnesses' personal data are already known to the defense. However, the disclosure to the public and giving the public opportunity to observe the witnesses would increase the risk of retaliation against them. Moreover, the risk of witness intimidation would be more concrete.

Due to the sophisticated nature of the video link the defense will be able to engage in the cross examination and directed examination of the witnesses and will be able to introduce evidence in the same way that it would take place in the court room. Placing the screen of the video screen in the way that only the court and the parties may see the witness would allow us to respect the right to a public trial. Although the public will not see the witnesses they will still be able to hear the testimonies. The presence of the judicial person or a member of a court staff in the remote location would guarantee correct identity of the witness, and his freedom to speak without duress or unlawful instructions."

ii. equipment

45. The equipment used for videoconference allowed the panel and the parties in the courtroom to see the witness sitting in the remote location from the waist upwards. The witness was able to see the person interrogating him with the camera zoomed on the face and upper part of the body of the person asking questions. Two-way audio communication in real time was maintained between witnesses and persons in the courtroom. The sound was synchronized with the image. There was a 54- inch screen

installed in the courtroom for the parties and for the panel. The screen was placed with its back facing the public so the public could not see the interrogated person but could only hear her.

iii. Assistance in the remote location

46. Each witness testifying in the remote location was assisted by a EULEX legal officer or a EULEX judge. Their role was exclusively to confirm the identity of the witness and to present the witness with an exhibit used in evidence if needed. Their presence was also meant to ensure that the witness testified without duress or other undue influence. No such occurrence was reported by any of the assisting persons.

47. The interpreter was present with Witness B in the remote location due to his hearing impairment. The other testimonies were taken with the assistance of an interpreter who was present in the courtroom.

f. Parties' objections to procedural actions taken by the trial panel

48. The defense counsel Bajram Tmava requested that an audio recording of Witness A's testimony be made. This motion was not approved by the panel with the following explanation given by the presiding judge³:

"There are moments when many people are talking at the same time and moments when we have difficulties to capture what the witness is saying. From my experience, audio recording does not solve the problem but this is a

³ Minutes of the main trial 15 September 2014 p. 2.

normal situation, even in the court room. If we cannot attribute certain utterance to a certain person in the moment he said it, we can't do it even if we have audio recording."

49. Artan Querkini and Kadri Osaj objected to the identification of **I. Th.** by Witness A ordered in the courtroom by the presiding judge on 17 November 2014. They argued that the identification itself did not comply with procedural rules set by CPCRK. The presiding judge responded to the objections in the following way:

"There is whole legal theory on so called "dock identification" and its application in various legal systems appears to be different. In-court (or 'dock') identification is where a witness identifies the defendant in the courtroom as being the perpetrator that the witness saw at the crime scene.

In some jurisdictions, the questioning of the witness starts from the question "do you recognize the person or not" in some other dock identification is very rarely acceptable. All the provisions that are put by lawmakers in the code must be understood and interpreted with the focus on its goal. The goal is to prevent misidentification. There should not be a situation allowed that the witness testifies "I never saw the defendant before" and he is shown in the court room the person for the first time. This would be obviously suggestive and leading, and might have prejudicial effect on the recognition. When we have a situation that the grounds for identification are laid down, and when it is done after direct examination took place, there is no reason to be afraid that the identification would have any prejudicial effect. We are not identifying the defendant only as a perpetrator. We are identifying him

as a person that was known to the witness for long time. Having in mind everything that happened in this court room so far this could only be to the benefit of the defendant. If there would be any doubts that the witness knew Mr. I. Th. before _____, I am sure it would be brought by defence counsels during their cross-examination. The provisions of the CPC that Mr. Qerkini is referring to are applicable only at the stage of pre-trial proceedings. The CPC does not regulate identification performed in the trial stage. It seems that as the law maker leaves allows trial panel to exercise its discretion in this matter."

50. On 20 October, the Defense Counsel Artan Qerkini requested to change the order of hearing witnesses and to hear Witness B before Witness K. He argued that it might have an impact on the assessment of grounded suspicion for the issues related to the measures to ensure the presence of the accused. The motion was rejected by the trial panel on 24 November 2014 with the following reasoned ruling:

"We have rejected that motion since first of all we are not allowed to make any final assessment of evidence. At this stage of proceedings the panel is entitled only to the so called prima facie assessment, which basically allows rejecting only intrinsically unreliable evidence without any prejudice to the final assessment. It is said now that there are pieces of evidence that incriminate the defendant as to the extent of the existence of the grounded suspicion. Even if we hear any witness that would deny what was presented in the pre-trial stage by the witness, this would not affect the general assessment of the grounded suspicion because Witness B's testimony is not the only incriminating evidence so far. So the motion is ungrounded".

g. Evidentiary motions rejected by the trial panel

51. On 28 January 2015, the Prosecution requested to summon witness C. S.. The prosecutor motioned to exclude the public from hearing the witness as he was an _____ officer dealing with war crimes. On 03 February 2015, the Trial Panel granted the motion, but rejected the request for the exclusion of the public and allowed instead the use of an opaque shield.

52. On 28 January 2015, the Prosecution presented a motion to have the pre-trial statement of Witness M read in the main trial as hearing the witness in the courtroom turned out to be impossible. On 11 February 2015, the trial panel rejected this motion based on the following reasoning:

"This pre-trial statement was taken in form that we should consider as interview, according to the new code. That means, the parties, the defence counsel, had no opportunity to challenge it by questioning. This kind of evidence cannot be used in the main trial for the purpose of establishing facts. This interpretation is in line with the jurisprudence of the Appellate Court in the case MTPT 1 (PN 577/2013, of 10 December 2013). The charges against the defendants in the court should be supported by evidence that they have the opportunity to challenge. This one does not meet this requirement".

h. Evidence examined during the main trial

53. The following exhibits were admitted by the trial panel:

- Exhibit 1: Exhibit 1 from case nr. P 938/13 (the medical certificate related to Witness A, submitted by Witness L during the hearing session of 23 July 2014) was introduced as evidence in this case on 20 March 2015;
- Exhibit 2: list of members of ___ brigade nr ___ submitted by the Witness I. Xh. during the session of 12 February 2015;
- Exhibit 3: document submitted by the Witness R. S. during the session of 02 April 2015 referring to the fact that he was a member of the ___ and when he was wounded;
- Exhibit 4: The Application for veteran status filed by Witness A was acquired ex-officio by the Court following the motion filed by the defense counsel Artan Qerkini on 30 January 2015;
- Exhibit 5: **Z. D.**'s request for veteran status was admitted during the session of 20 March 2015;
- Exhibit 6: **D. D.**'s request for Veteran status, submitted during the session of 23 April 2015;
- Exhibit 7: **A. D.**'s request for Veteran status, submitted during the session of 23 April 2015.

54. The following Witnesses were heard in the courtroom:

- Witness A on 11 and 12 August 2014, 15 and 16 September 2014, 10 October 2014, on 17 November 2014;
- Witness K on 24 November 2014;
- Witness B on 09 and 10 December 2014;
- Witness B. G. on 15 December 2014;
- Witness F. B. on 15 December 2014;
- Expert Witness Doctor C. B. on 13 January 2015;
- Witness C. S. on 11 February 2015;
- Witness D. R. on 12 February 2015;
- Witness B. V. on 12 February 2015;
- Witness I. Xh. on 12 February 2015;
- Witness S. M. on 12 February 2015;
- Witness Dr. G. H. on 20 March 2015;
- Witness R. S. on 02 April 2015.

All the defendants used their right to remain silent.

B. Determination of the factual situation

55. The facts relevant to the counts that the defendants were tried for in this case were established by the trial panel as a result of analysis and assessment of all pieces of evidence presented in the courtroom.

I. General facts related to Witness A's stay in ____/____

56. On ____ two ____ soldiers came with an off-road vehicle to Witness A's house. They parked the vehicle near the gate and entered the yard. He was in the yard. They wore camouflaged uniforms of the ____ and carried automatic rifles and handguns.⁴

57. They introduced themselves as military police and ordered Witness A to follow them saying that they had an order from **S. S.** to take him to ____/____ and that he should give a statement there. Witness A obeyed them.⁵

58. The soldiers asked Witness A if he knew where Witness B's house was. Witness A affirmed and they took him there by car. They parked near Witness B's house and got out of the car. Witness A was told to call Witness B to come to them and he did so. The soldiers ordered Witness B to go with them to ____/____ to give a statement. Witness B and Witness A were taken by the soldiers to ____/____.⁶

⁴ Minutes of the main trial; 11 August 2014 p. 9.

⁵ Minutes of the main trial 11 August 2014 p. 9.

⁶ Minutes of the main trial; 11 August 2014 p. 9.

59. In ____/_____, Witness A and Witness B were put in separate rooms in the building that was a former police station. At that time the ____ had its headquarters there. The building was damaged by bombs. There was no roof but a concrete slab.⁷ The room that Witness A was placed in had a small window secured with bars and a lock, and it looked like a detention cell. There was a wooden bed with chains attached to the legs. The door was made of wood. It was locked from the outside.⁸

60. On the same day, Witness A was interrogated by ____ soldiers R. S. and M. Xh.. R. S. was in favor of releasing Witness A but the other soldier opposed it.⁹

61. Around one hour later, other ____ soldiers came to Witness A's room. One of them was Sh. Sh.. They beat Witness A with punches and kicks and they asked him if he knew what I. B. had said about him. Witness A fell on the floor. At this moment four other soldiers entered. They had painted faces. They also beat Witness A until he lost consciousness.¹⁰

62. After the soldiers left, S. S. entered the room. He was in civilian clothes. He slapped Witness A until Witness A came around.¹¹

63. Witness A did not know S. S.. S. S. told Witness A that his name was "S_____". S. S. threw him on the bed and continued beating him.¹²

⁷ Minutes of the main trial; 11 August 2014 p. 10.

⁸ Minutes of the main trial; 11 August 2014 p. 10.

⁹ Minutes of the main trial; 11 August 2014 p. 17.

¹⁰ Minutes of the main trial; 11 August 2014 p. 17.

¹¹ Minutes of the main trial; 11 August 2014 p. 17.

¹² Minutes of the main trial; 11 August 2014 p. 17.

64. During the next days, **S. S.** used to come to Witness A's room almost every day and beat him with slaps and punches. It continued until Witness A was released.¹³

65. The details of beatings perpetrated by **S. S.** alone were subject of the count that was severed and tried in another proceeding.¹⁴

II. Repetitive beating of Witness A by S. S., J. D., I. Th., and Z. D.

66. Until the end of Witness A's stay in ____/____ almost every evening or night two soldiers escorted him to the big room in the same building, a room which apparently was used as a bigger detention cell. The room was about 6 by 8 meters big and it was not furnished. There was no electricity there so it was lit with 4 candles placed in the room's corners.¹⁵

67. In this big room Witness A was beaten regularly by group of soldiers composed of 6 and sometimes 8 persons. Four of them were **I. Th., Z. D., J. D., S. S.**¹⁶ Two other persons were **B. D.** and **D. M. D.**¹⁷ The remaining culprits were not identified during the trial.

68. Sometimes, some of the soldiers participating in these beatings wore masks. They were armed with handguns.¹⁸

¹³ Minutes of the main trial; 11 August 2014 p. 17.

¹⁴ Minutes of the main trial; 11 August 2014 p. 17.

¹⁵ Minutes of the main trial; 11 August 2014 p. 18.

¹⁶ Minutes of the main trial; 11 August 2014 p. 18.

¹⁷ Minutes of the main trial; 11 August 2014 p. 23.

¹⁸ Minutes of the main trial; 11 August 2014 p. 18.

69. The soldiers drubbed Witness A in turns; two of them maltreated him at one time, and then they were replaced by another two. They were punching and slapping him, and sometimes some of them used sticks looking like baseball clubs.¹⁹ They were calling Witness A a "spy".²⁰ The beatings lasted 2 and 3 hours.²¹ Once, **S. S.** told Witness A that he would take his soul out with a stick.²²

70. **S. S., I. Th., J. D.** and some other persons used to tell Witness A that they would kill him and take his wife and daughter.²³

71. **S. S.** used to tell the others to kill Witness A with the stick.²⁴

72. One of the soldiers said in Witness A's presence: "Call M. Xh. to take his head off just like he did to B _____".

73. The soldiers addressed **S. S.** as "_____" or "_____".²⁵

74. **S. S.** was dressed in civilian clothes. Other soldiers wore various uniforms.²⁶

¹⁹ Minutes of the main trial; 11 August 2014 p. 18.

²⁰ Minutes of the main trial; 11 August 2014 p. 28.

²¹ Minutes of the main trial; 11 August 2014 p. 22.

²² Minutes of the main trial; 11 August 2014 p. 24.

²³ Minutes of the main trial; 11 August 2014 p. 27.

²⁴ Minutes of the main trial; 11 August 2014 p. 28.

²⁵ Minutes of the main trial; 12 August 2014 p. 3.

²⁶ Minutes of the main trial; 12 August 2014 p. 9.

III. Simultaneous beatings of Witness A and Witness B

75. The last beating that Witness A sustained differed from the previous in a substantial way as he was beaten together with Witness B. It happened in the beginning of _____, around 10 days before Witness A was released.²⁷

76. Witness A was escorted to the same big room where he used to be regularly beaten on previous occasions. There were **A. D., B. D., D. D., S. D. 1., F. D., J. D., N. D., Z. D., S. S.,** and **I. Th.** present there. Also this time **S. S.** was in civilian clothes while the others wore various uniforms. There was a man known to Witness A as **S_____** lying on the floor in the corner and he looked to be severely beaten.²⁸

77. Some of the accused present in the room were beating Witness B with punches and kicks. They also used wooden sticks to hit him. When Witness A entered the room he was also beaten in the same way. **I. Th.** was the first who struck him. He also swore at Witness A's mother, and threatened him with death. One of the accused poured water from a bucket on Witness B.²⁹

78. At a certain moment, **I. Th.** gave a wooden stick to Witness B and ordered him to beat Witness A. **I. Th.** threatened that both Witness A and B would be executed if Witness B refused. Witness B hit Witness A in his back part of the body, several times.

²⁷ Minutes of the main trial; 15 September 2014 p. 16 and 17.

²⁸ Minutes of the main trial; 15 September 2014 p. 9.

²⁹ Minutes of the main trial; 15 September 2014 p. 9.

79. After that, **I. Th.** gave a stick to Witness A and commanded him to do the same to Witness B. Witness A refused.³⁰

80. Witness A and Witness B were beaten in the big room by all of the accused for around 3 hours.³¹ The accused were acting in turns; while some of them were beating the victims, the others were watching. Then, they would change roles.

81. As a result of the beatings, Witness A fell on the floor. One of the accused pinched him with an iron tool in his scrotum causing extremely strong pain and a wound. After that, Witness A was taken to his room and left there.³²

IV. Other facts related to charges referring to events that took place in _____/_____

82. Before the arrival of Witnesses A and B to _____/_____ _____ troops bombed the place with artillery shelling.³³

83. Witness A's village was attacked by _____ on ___ or ___ _____³⁴.

84. Witness A did not participate in the hostilities. After the war he applied for a status of a person supporting the ____.³⁵

³⁰ Minutes of the main trial; 15 September 2014 p. 12.

³¹ Minutes of the main trial; 15 September 2014 p. 8.

³² Minutes of the main trial; 15 September 2014 p. 15.

³³ Minutes of the main trial; 11 August 2014 p. 10.

³⁴ Minutes of the main trial; 24 November 2014 p. 25.

³⁵ Minutes of the main trial; 16 September 2014 p. 14.

85. In _____, **B. D.** served in the ___ Brigade no _____ together with B. V. and D. R.. The brigade consisted of three companies and each company consisted of two or three platoons. There were approximately ten soldiers in each platoon. The brigade was stationed in the village called _____ located at a distance of between 2 to 3 km from _____/_____. B. V. and **B. D.** served in different platoons. The soldiers lived in barracks. There was military discipline applied. They were not allowed to leave the barracks without permission and there were roll-calls every morning in order to check their presence.³⁶

86. In _____, **F. D.** sustained an injury to one of his arms, caused by a hand grenade. He was recommended by doctor F. B. to refrain from using the wounded arm for three months and to undergo rehabilitation.³⁷

87. As a result of the beatings that Witness A suffered from in _____/_____, he sustained various injuries: bruises all over the body including head, and fractured ribs. He sustained a wound in the scrotum during the incident when he was beaten together with Witness B.³⁸ Apart from this wound, there were no grounds to attribute particular injuries to the concrete action performed by the accused.

88. For some time there were other persons imprisoned in the same room with Witness A: F. M., and H. M., and G. V.. F. M., and H. M. stayed for some days and were released earlier than Witness A. G. V. stayed with Witness A until they were both released.³⁹

³⁶ Minutes of the main trial; 12 February 2015 p. 3 and 6.

³⁷ Minutes of the main trial; 15 December 2014 p. 27 and 28.

³⁸ Minutes of the main trial; 15 September 2014 p. 16.

³⁹ Minutes of the main trial; 17 November 2014 p. 22.

89. Besides the above mentioned persons, there were other people imprisoned in _____/_____ during Witness A's stay, for an undetermined period of time: three brothers from _____, a man from the village of _____ of _____, a man from the place called _____ of _____ and a teacher from _____.⁴⁰ There were no grounds to establish how long they stayed there and how they were treated.

90. Between ___ and ___ _____, the offensive of the _____ forces began, accompanied by shelling. At that time the ___ soldier R. S. opened the room where Witness A and G. V. were kept and let them go.⁴¹

91. Due to the _____ offensive a lot of people were injured as a consequence of shelling. Around 4000 refugees were seeking shelter.⁴²

C. Assessment of evidence

I. Evidence used as a basis for reconstruction of facts

a. Evidence fully reliable

92. The majority of factual findings made by the trial panel was based on testimonies of Witness A and Witness K.

93. It was apparent that they were not experienced in giving a precise and well-structured version of events.

⁴⁰ Minutes of the main trial; 17 November 2014 p. 22.

⁴¹ Minutes of the main trial; 15 September 2014 p. 17 and 21.

⁴² Minutes of the main trial; 15 December 2014 p. 10.

Therefore, their statements consisted of omissions and gaps which were attributed by the trial panel to the visible limitation in the witnesses' reporting skills and not to deliberate duping.

94. The testimonies of Witness A and Witness K complement each other and they did not contradict each other. The testimonies were mutually corroborating in relation to essential elements.

Witness A

95. The testimony of Witness A appeared as a decisive piece of evidence for the reconstruction of facts that happened in ____/____.

96. There was the issue of the presumed mental disorder that Witness A might suffer from. This was brought to the attention of the panel by a medical certificate dated ____ ____, and exhibited in P 938/13, and by the testimony of Dr. G. H..

97. After meticulous scrutiny of Witness A's statement, the panel had no doubts in relation to his competence to perceive, recollect and present facts that he witnessed.

98. The panel excluded the possibility of delusions being presented by Witness A as facts. Witness A's account of the events did not contain any elements that would be contradicted by general knowledge or common sense. It was cogent, logical, internally consistent and, therefore, it was credible. He understood the questions and gave answers that were strictly pertinent to the issues that he was asked about.

99. There were no discrepancies in his answers although he was asked about the same issues several times.

100. The defense lawyers presented some challenges to Witness A's credibility.

101. Witness A indicated various degrees of emphasis to actions of particular perpetrators. It showed proportion between the suffering he sustained and the attention he paid to individual perpetrators.

102. The panel gave meticulous consideration to the fact that Witness A denied having obtained a medical certificate that declared him unable to work. His testimony was contradicted by the medical certificate and by the testimony of Dr. G. H.. According to Dr. G. H., the Witness suffered from acute psychosis at the time when he got the certificate. It might result in disturbance in perception of facts. The panel concluded that the symptoms that Dr. G. H. presumably observed at the time of the examination of Witness A might prevent Witness A to understand the significance of the content of the document. The document was in possession of Witness A's brother, and it was not established that Witness A ever learned about its content, while the symptoms of acute psychosis ceased to exist.

103. None of the facts presented by Witness A was contradicted by any other piece of evidence that was found by the panel as fully credible, in particular: the testimony of Witness K, and the expert opinion of Dr. C. B..

Witness K

104. Witness K's statement corroborated the testimony given by Witness A in relation to the following facts: he was taken from his home by ___ soldiers, he stayed away from home for approximately a month and he returned home injured.

105. Her description of the injuries sustained by Witness A complies with his statement.

106. The way Witness K spoke in the courtroom indicated spontaneity. There were neither unrealistic facts of circumstances nor elements contradicting Witness A's story in her statement.

107. Witness K did not mention that the soldiers who took Witness A told him that they followed **S. S.**'s orders as reported by Witness A. This omission appeared as a result of time lapse and imperfection of human memory. Presumably, she and her husband attributed various degrees of importance to various circumstances of the arrest.

108. Witness K did not know **S. S.** neither did she know his position at that time. She did not communicate with the soldiers herself. Therefore, it seemed natural that the name did not stay in her memory.

109. This omission however convinced the panel that Witness K did not consult her testimony with Witness A and that she had no intention to inculcate **S. S.**.

Expert Witness C. B.

110. Observations and findings presented by expert witness Dr. C. B. were consistent with Witness A's statement.

111. Dr. C. B.'s expertise in the field of forensic medicine was firmly established by the presentation of her academic background and professional experience. Her findings were based on medical examination that she performed personally. Only the examination of the wound located in the genital area of Witness A's body was performed by Dr. M. G..

112. In his medical assessment as read in Court, Dr. M. G. presented a clear, precise and detailed description of his findings and there were no doubts as to his qualifications as a forensic doctor.

113. The panel had no doubts as to the credibility of Dr. C. B. and Dr. M. G.'s reports. The conclusions presented by Dr. C. B. in the courtroom were fully convincing.

114. The panel came to the conclusion that only the scar in the scrotum could be attributed to the concrete action of the accused. There was no conclusive indication as to which of the beatings resulted in any of the other particular injuries.

115. The general assessment that Dr. C. B.'s opinion corroborated Witness A's testimony was not impaired by her disquisition that the said scars might derive from events other than those presented by the witness. The corroboration in this case was neither conclusive nor decisive but the opinion did not discredit the witness in any way. Therefore, it was the logic, coherence and the absence of nonconformity with other credible evidence

that contributed to the positive evaluation of the probative value of Witness A's and Witness K'S testimonies.

116. It is a general observation that forensic expert opinions are often based on hearsay i.e. on the anamnesis coming from the injured party. The panel noted that in this case the anamnesis had been verified: the description of the scars and their origin given to Dr. C. B. by Witness A during the examination fully corresponded with Witness A's statement given in the court.

117. Another discrepancy was related to the characteristic of the wound in the scrotum. Witness A referred to the wound as an "open" one.⁴³ The examination that took place on 21 September 2012 showed that the wound was healed with a visible scar. This discrepancy was attributed by the panel to Witness A's low and limited linguistic skills. He expressed himself in a non-nuanced way.

Witness A's application for ___ veteran status

118. Witness A's application for ___ veteran status dated ___ _____ was properly authenticated. It was presented upon the court's request by the competent organ: *Government Commission for the recognition and Verification of _____ Veteran, invalid and internee status.*

119. Witness A confirmed in the courtroom that he filed the application himself claiming that he did it as someone who helped the ____.⁴⁴

⁴³ Minutes of the main trial; 15 September 2014 p. 16.

⁴⁴ Minutes of the main trial; 16 September 2014 p. 14.

120. The content of the application contributed to the finding that Witness A was not a ___ soldier and he did not participate in the hostilities.

b. Presumptions and notorious facts adopted by the panel

121. The panel accepted the presumption that Witness B neither served in the ___ nor participated in the hostilities. It was based on the assessment that no piece of evidence indicated that he was a soldier or that he was involved in combat or other form of hostilities related to armed conflict. It is a notorious fact that the majority of _____ were exposed to atrocities caused by the conflict. Not all of them actively participated in hostilities although many of them might have supported the ___ in various other forms.

122. The injury to one of his arms did not prevent **F. D.** from participating in the beating of Witness A. This conclusion was made on the basis of Witness A's account. Witness A did not give any details as to the description of the action performed by **F. D.** on that occasion that would involve using the arms. He just stated that **F. D.** participated in the beating.

123. It was accepted as a notorious fact that at the time when Witness A was kept in ___/_____ there was an armed conflict going on in Kosovo. There were numerous casualties, damage to property, and displacements of civilians. This notoriety was reinforced by the facts presented by Witness A and Witness K and also by F. B. and B. G..

124. Since the war all the accused have been living honest lives. **S. S.** serves as _____ to _____, **N. D.** is the _____ of _____/_____, and **F. D.** is a _____ of the _____. **I. Th.** provides _____ to a _____.

c. Evidence reliable but not conclusive

Witness Dr. G. H.

125. Dr. G. H. testified as a witness on the facts related to the issuance of the certificate on Witness A's health.

126. The panel found it credible that Dr. G. H. issued a certificate containing the diagnosis that Witness A suffered from acute psychosis and was unable to work. This evidence was not conclusive because the panel came to the conclusion that it did not prove that Witness A's competence to give credible evidence was impaired.

127. Dr. G. H. did not remember the examination of Witness A. He indicated that Witness A and some members of his family had been his patients before the war.

128. Dr. G. H. presented his understanding of acute psychosis in the following way:

"Acute psychosis is a mental disorder or one of the subtypes of schizophrenia which is manifested or defined according to the notion of DSM 4 and ICD 10.[...] it is known as a schizophrenic disorder and according to the ICD 10 as acute psychosis disorder or psychotic episode with psychogenic elements. For the diagnosis of the acute psychosis, the patient is disoriented with himself and his surroundings. In those patients, some of the mental areas are being affected, and in particular the mental area is being attacked and the cognitive one, then the area of thinking, of perception, of the will and entirely the person is disorganized. In the given case, the areas mostly affected are the areas of thinking; in this case, the person becomes delusional.

[...] Under the acute psychosis, the areas of thinking are attacked and mostly it induces delusional disorder. The person thinks that someone else directs his ideas, orders him to think, that someone else reiterates his ideas, and at the same time there is a feeling of grandiosity, or his feelings that he is n omnipotent/grandiose person. Then the feeling of persecution and also are present hallucinations which can be of different type, like those of auditive type, that he hears different voices, visual, meaning that he sees inexistent appearances, and also tactile, eligible and also that someone is damaging his body parts. So we have a personality disorder which does not fall with the real environment, external or internal.⁴⁵

129. It was explained that the definition presented by the witness did not refer to any concrete symptoms that the witness would find during examination⁴⁶:

⁴⁵ Minutes of the main trial; 20 March 2015 p. 7.

⁴⁶ Minutes of the main trial; 20 March 2015 p. 7.

"Presiding Judge: By saying in this case, do you refer to the particular patient?"

G. H.: I am just referring to the acute psychosis."

130. He also explained that acute psychosis usually happened for a limited period of time.

"As I said, the acute psychosis has a rather rapid development. That is why it is called acute psychosis. It can last approximately one month (4 weeks) but last evening I consulted some of the literature and it stated that this condition can last up to 6 months and during this mental state the delusions can be present at all times."

131. The panel rejected the certificate issued by Dr. G. H. on ___ _____ as proof that Witness A suffered from a mental impairment either when he witnessed the events in _____/_____ or when he testified because of the following:

132. Dr. G. H. admitted that the definition that he presented in the courtroom was partially based on the reading of some literature that he did in the evening before coming to trial. It made the original meaning of the diagnosis applied by Dr. G. H. on ___ _____ unclear. Therefore, the panel found no need to examine if Dr. G. H.'s understanding of acute psychosis complies with the common definition of this disorder.

133. Dr. G. H. did not present the circumstances of the issuance of the certificate. The certificate was

extremely laconic. It did not consist of any report on the medical history, treatment or even description of syndromes despite the very serious consequences it could cause, in particular Witness A's inability to work.

134. The panel believed that during the examination on _____, Witness A demonstrated some symptoms of acute psychosis as those described by Dr. G. H. as being typical for the diagnosis the doctor put in the certificate. However, the panel observed that during the trial Witness A did not manifest any such symptoms. The analysis of the intellectual content of Witness A's testimony revealed no indication of any impairment that would cause his capacity to understand, to perceive, to remember and to recollect the facts that he witnessed to be in any way diminished.

Witness C. S.

135. The panel found the testimony of witness C. S. as fully reliable but only as proof that Witness B reported to him concerns about his personal security and not as proof of the facts presented by witness B. His testimony consists of no elements that would be unrealistic.

136. Witness C. S.'s account corresponds with Witness B's behavior in the courtroom. Witness B was visibly agitated, insecure and frightened. However, there were no grounds to verify the veracity of Witness B's allegations and the credibility of his testimony was already discredited for other reasons.

Witness Dr. F. B.

137. The court accepted the testimony of Dr. F. B. as fully credible. He testified spontaneously and did not evade answering questions. However, he did not present circumstances that would deny or confirm the findings of the panel on the facts related to the charges. It appeared that he had no opportunity to make observations in the building of the ___ headquarters where the beatings took place.

138. He confirmed that there were serious armed clashes between _____ troops and the ___ and that many people needed medical assistance. He also confirmed that he saw **S. S., Z. D., J. D.** and **I. Th.** in ___/___ in ___; however he did not see them being involved in any incident that could be related to the charges.

139. He denied that he had seen other accused there. The fact that he had not seen them in ___/___ could not contradict Witness A's statement as it did not exclude their presence in the place only for a short time or even only in the night when they had beaten Witness A and Witness B.

Witness Dr. B. G.

140. Witness Dr. B. G. testified in a sincere and clear way. There were no grounds to deny his truthfulness. His statement contained no elements that would be directly related to the charges.

141. Dr. B. G. recalled the facts referring to the _____ offensive in the ___ of _____, when a lot of

people were injured and around 4000 refugees were seeking shelter.

d. Evidence rejected as a basis for reconstruction of facts

Witness B

142. The panel found the testimony of Witness B not reliable, with exception to the fact that he was brought to _____/_____ together with Witness A. Witness B denied his statements from the pre-trial proceedings almost in their entirety.

143. He began his testimony with the information that he felt threatened because of being a witness in the case. He said that witnesses' identity was exposed.

144. As the answer to the prosecutor's question related to the part of his statement:

"Is this an example of you changing the testimony because you are afraid?"

145. Witness B acknowledged it.⁴⁷

146. It was visible to the panel that Witness B was obviously afraid to tell the truth.

⁴⁷ Minutes of the main trial; 9 December 2014 p. 10.

147. Witness B's account of his arrest differed significantly from Witness A's statement. Witness B alleged that Witness A acted in cooperation with the two ___ soldiers and he wore a ___ uniform and was armed with a gun. These allegations were completely unrealistic as they were not supported by any other pieces of evidence and they contradicted witness A's and Witness K's statements.

148. On several occasions Witness B evaded answering the questions because he said he was afraid to do so.⁴⁸

149. The fact that Witness B was afraid to testify was corroborated by Witness C. S..

150. Witness B's indication of dates appeared to be erroneous. He determined that he was brought to ___/___ on ___ _____. Then he spontaneously said that it happened on ___ _____.⁴⁹ Witness A convincingly stated that he was brought to ___/___ together with Witness B on ___ ____.

151. Witness B's statements on the duration of his stay in ___/___ and his denial of being involved in the incident when he was maltreated together with Witness A were contrary to Witness A's testimony.

152. Witness B's allegations regarding the falsification of his pre-trial statement by the prosecutor were not convincing. Witness B denied even his statement given in open court in the case no P no.938/13, heard before the Basic Court of Mitrovica on 14 October 2014, in relation to his being beaten by **S. G.** He did not explain the

⁴⁸ Minutes of the main trial; 9 December 2014 p. 13.

⁴⁹ Minutes of the main trial; 9 December 2014 p. 9.

substantial change in his version of events in any way other than by simply denying that he had said something different.

R. S.

153. The panel assessed the credibility of the testimony that was given by witness R. S. and came to the conclusion that his testimony was not reliable.

154. R. S. denied Witness A's statement about the circumstances of his release from ____/____. According to Witness A R. S. was the soldier who opened the cell and let Witness A go. This denial was not convincing because R. S.'s testimony contained other elements which appeared to be unrealistic and did not comply with common sense which renders all of his statements unreliable.

155. According to the witness's narration, he met Witness A only twice in his life.

156. The first meeting happened around ____ before the war and it lasted for a very short moment. The two men just met on the street for the first time in their lives, introduced themselves to each other, and talked for a few minutes. Nothing unusual or significant happened during the meeting that would justify having it memorized to the extent that allows recognizing the interlocutor ____ later.

157. On the second occasion R. S. allegedly saw Witness A from a distance of 20 m while R. S. had an open wound being dressed. R. S. presented

quite dramatic circumstances of that second meeting; it happened during artillery shelling, when many refugees were fleeing. The wound that R. S. sustained was serious but it did not stop him from observing and recognizing the man whom he had allegedly met for a few minutes _____ earlier, although there were as he said maybe 50 or 100 people there. His memory seemed to be unrealistically selective as he did not remember any other bystanders. R. S.'s answer to the question how did he learn the name of Witness A was visibly evasive. He contradicted himself saying that he knew the name and then that he learned the name during the first meeting.

B. V. & D. R.

158. The panel believed that witness B. V., witness D. R. and **B. D.** served in _____ in the same _____ Brigade no _____, which was stationed in a place called _____ in _____ village⁵⁰.

159. However, the panel came to the conclusion that the facts presented by B. V. and D. R. did not exclude **B. D.**'s participation in the beatings of Witness A and Witness B.

160. Neither B. V. nor D. R. presented any particular facts related to their acquaintance of **B. D.**, although they said that they spent several months together. D. R. did not even remember if he served with **B. D.** in the same or different platoon. B. V. and D. R. based their conclusions that **B. D.** had no opportunity to be present in _____/_____ solely on their assumption that no soldier

⁵⁰ Minutes of the main trial; 12 February 2015, page 3.

was ever missing during roll-calls that took place in the morning.

161. It is a notorious fact that the village of _____ is located within a walking distance of _____/_____. According to **D. D.** it is between _____ km.

162. Having in mind the number of soldiers in the brigade, none of the facts presented by B. V. and D. R. convinced the panel that they would notice and remember the absence of **B. D.** during the evening and the night. The distance to _____/_____ obviously allowed the accused to get there.

I. Xh.

163. I. Xh. testified that **D. D.**, enrolled as a _____ soldier in the brigade no _____, left from _____ to _____ on _____, and returned only at the _____ of _____ or _____ of _____.

164. I. Xh. explained that he knew about **D. D.**'s absence in _____ at the time relevant to the charges because he consulted the registry of the soldiers of the brigade no _____.

165. He presented the registry to the panel. It turned out that it was a list of all members of the brigade, their personal data, the date when they joined the _____ and the date of the end of their service, _____ . In no way did it indicate that **D. D.** was in _____ at the critical time.⁵¹ Upon questions asked by the trial panel I. Xh. explained that he knew that

⁵¹ Minutes of the main trial; 12 February 2015 p. 13.

D. D. went to _____ because his relatives were in the same group of people who went there.

166. I. Xh.'s testimony did not correspond with the statement given by witness S. M.. S. M. testified that **D. D.** returned to _____ in _____ and participated in combat that took place in _____.

167. I. Xh. had no knowledge about the details of **D. D.**'s stay in _____. The trial panel came to the conclusion that the witness did not present facts that would actually convince the panel that **D. D.** could not have participated in the beatings in ____/_____.

S. M.

168. S. M. testified that he stayed with **D. D.** in a place called _____ in _____ for some time between _____ and _____. In _____ they also participated in combat in _____ which is in _____.

169. The panel noticed that the witness changed his version of events during the examination and therefore his testimony was considered as not convincing.

170. Initially the witness stated that he left _____ on _____ _____. Later, during cross examination he contradicted himself and said that he left _____ on _____ and he went to _____ in _____ and then on _____ he went to _____ while **D. D.** stayed in _____.

171. According to the witness there were around 1300 people from _____ staying in _____ but he saw **D. D.** every evening because they lived in the same building.

172. The precise date of the beating of Witness A and Witness B that was attributed to **D. D.** was not established. Witness A stated that the beating took place approximately 10 days before he was released and that he was released between ___ and _____. Therefore, the story told by S. M. did not in fact exclude **D. D.**'s participation in the beating. However, the panel found the story to be anyway not convincing.

173. The witness did not present any reasonable reason that would explain why **D. D.**'s continuous presence in _____ stayed in his memory after ___ years. The witness did not indicate any specific relationship between him and the accused and did not recall any event that would imprint **D. D.**'s actions in _____ in his memory. Having in mind the large number of people staying in _____ it appeared unrealistic to exclude the possibility that **D. D.**'s absence from the place for a time that would allow him to go to ____/_____ would remain unnoticed or would not be remembered by the witness.

D. Legal classification of the actions attributed to the accused

I. Subjective identity of the judgement over indictment

174. Pursuant to Article 360 Paragraphs 2 of the CPCRK the legal classification of charges presented by the prosecutor is not binding for the court.

175. Because of the principle of subjective identity of the judgement in relation to the indictment the crimes that were attributed to the accused in the judgement could not consist of material elements that were not present in the description of counts given in the indictment. For these reasons the panel did not attribute any concrete bodily injuries to the acts the accused were convicted of.

176. Any elements of the criminal acts committed by the accused that were not part of the charges presented to them in the indictment could not be considered for the purpose of the legal classification of these acts.

II. International humanitarian law

177. The actions attributed to the accused took place in the period of armed clashes between the regular _____ of the _____ of _____ and the fighters belonging to the _____.

178. The actions consisted of violence against individual civilian persons.

179. The savagery of warfare was the subject of efforts made by the international community in order to limit the effects of military operations by protecting persons who were not participating in the hostilities. The efforts contributed to the development of a branch of international law called international humanitarian law. Serious violations of this law became penalized as war crimes.

a. Definition of prohibited acts

180. Legal protection of civilians in situations of non-international armed conflict started with Article 3 common to the four Geneva Conventions adopted on 12 August 1949:

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

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

remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

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

181. The recital of acts to be prohibited was complemented by Article 4 Paragraph 2 of the Additional Protocol II. Penalization of following acts was recommended:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

182. The Federal People's Republic of Yugoslavia ratified the Geneva Conventions of August 1949 with their common

Article 3 on 15 September 1950.⁵² On 26 December 1978 the Additional Protocol II to the four Geneva conventions was ratified by the Republic under its new name, i.e. as the Socialist Federal Republic of Yugoslavia.⁵³

b. Existence of non-international armed conflict

183. The trial panel applied the functional definition of non-international armed conflict provided by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadic case⁵⁴. This definition has been commonly applied by the ICTY for the characterization of non-international armed conflict⁵⁵:

"An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence

⁵² Službeni vjesnik Predizijuma Narodne skupštine FNRJ broj 6/1950. od 15. rujna 1950 (The official gazette of the Presidium of the National Assembly of FPRY, no. 6/1950, dated 15 September 1950)

⁵³ Međunarodni ugovori at 1083 (International contracts at 1083)

⁵⁴ Prosecutor v. Tadic, case No. IT-94-1-AR72; Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

⁵⁵ Prosecutor v. Delalic , Mucic , Delic and Landzo , Trial Chamber Judgment, 16 November 1998, ICTY Case No. IT-96-21-T, para. 183; Prosecutor v. Furundzija, Trial Chamber Judgment, 10 December 1998, ICTY Case No. IT-95-17/1, para. 59; Prosecutor v. Kordic and Cerkez, Trial Chamber Judgment, 26 February 2001, ICTY Case No. IT-95-14/2-T, para. 24; Prosecutor v. Kordic and Cerkez , Appeals Chamber Judgment, 17 December 2004, ICTY Case No. IT-95-14/2-T, para. 336; Prosecutor v. Kunarac , Kovac and Vukovic, Trial Chamber Judgment, 22 February 2001, ICTY Case No. IT-96-23, para. 402; Prosecutor v. Kunarac, Kovac and Vukovic , Appeals Chamber Judgment, 12 June 2002, ICTY Case No. IT-96-23, para. 56; Prosecutor v. Naletilic and Martinovic, Trial Chamber Judgment, 31 March 2003, ICTY Case No. IT-98-34-T, para. 177; Prosecutor v. Staki, Case No. IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para. 568; Prosecutor v. Slobodan Milošević, Third Chamber Decision on Motion for Judgment of Acquittal (Milošević Rule 98bis Decision), ICTY Case No. IT-02-54-T, 16 June 2004, para. 16; Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para. 536; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, Trial Chamber II, 31 January 2005, para. 215; Prosecutor v. Limaj , Bala , and Musliu, Case No. IT-03-66-T, Judgment, 30 November 2005, para. 84; Prosecutor v. Ori , Judgment, Case No. IT-03-68-T, Trial Chamber II, 30 June 2006, para. 254;

between governmental authorities and organized armed groups or between such groups within a State".

184. It should be stressed that the provisions of common Article 3 to the Geneva Conventions should apply also outside the actual theatre of combat operations which means in the whole territory under the control of a party whether or not actual combat takes place.

185. The ICTY jurisprudence refers to two essential criteria of protracted armed conflict: the organization of the parties and the intensity of the violence.

186. It is presumed that regular or government-controlled forces meet these criteria. In relation to non-governmental armed groups, the following elements appear to be decisive: the existence of a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules.

187. The trial panel took judicial notice of the findings of the ICTY in the Prosecutor v. Limaj case:

"before the end of May 1998 the KLA already sufficiently possessed the characteristics of an organized armed group, able to engage in an internal armed conflict";⁵⁶

"KLA attacks were carried out against a variety of Serbian military, community and commercial targets over a widespread and expanding area of Kosovo";⁵⁷

⁵⁶ Prosecutor v. Limaj, Bala , and Musliu, Case No. IT-03-66-T, Judgment, 30 November 2005, para 134.

⁵⁷ Ibidem, para 169.

"many combat operations were carried out in the area of Drenica where the KLA developed earlier and was probably best organised."⁵⁸

188. The intensity of armed clashes at the critical time was assessed by the panel with consideration given to: the engagement of governmental troops, the use of artillery, the destruction of property, the displacement of local population, which were proven in the main trial and also the existence of casualties which is known as a notorious fact. The panel followed the concept applied by the ICTY in the *Prosecutor v. Milosevic* case (Prosecutor v Slobodan Milošević, Case No. IT-02-54-T, Rule 98 bis Decision, 16 June 2004, paras 26-32).

189. Therefore, the trial panel concluded that there was a non-international armed conflict in the meaning of common Article 3 going on in the Drenicë/a region at the time of actions attributed to the accused. The existence of such a conflict was not contested by the defense counsel.

c. Nexus

190. The panel followed the concept observed by the ICTY in relation to the necessity of a nexus between the accused's action and the war in order to classify a criminal act committed during the armed conflict as a war crime.

191. In the Tadic case, the ICTY expressed the opinion that:

⁵⁸ Ibidem, para 170.

"There must be an obvious link between the criminal act and the armed conflict [. . .] It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." (Prosecutor v Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.)

192. In the same case, the ICTY stressed the fact that a war crime can be perpetrated even if "substantial clashes were not occurring in the region at the time and place" where the crimes were allegedly committed. (ibidem)

193. A more detailed explanation on this issue was presented by the ICTY Appeals Chamber in the Kunarac case:

"What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment - the armed conflict - in which it is committed. It need not have been planned or supported by some form of plan or policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict."⁵⁹

⁵⁹ Judgment, Prosecutor V. D. Kunarac, R. Kovac e Z. Vukovic, Appeal Chamber, 12 June 2002, par 58 and 59.

194. The panel assessed that the actions that took place in _____/_____ were explicitly linked to the armed conflict going on:

194.1. All the perpetrators were members of an armed group that was well structured and which effectively controlled at least a part of the territory of Kosovo. The control disabled any activity of governmental agencies including state-run law enforcement which took a position of an enemy and persecutor of the _____ population. Therefore, civilians were deprived of any form of legal protection against arbitrary and offensive acts committed by _____. The culprits enjoyed temporary impunity;

194.2. The arrest of Witness A and Witness B and the maltreatment that they suffered in _____/_____ were possible because of a lack of legal protection that should be provided by the state in peace time. Such protection would normally provide for a system of competent organs and procedures to review complaints against unlawfulness and conditions of detention;

194.3. Additionally, the abuse that Witness A was exposed to was motivated by his presumed collaboration with the _____.

d. Gravity of violations of international humanitarian law

195. The wording of common Article 3 and Additional Protocol II does not set up any threshold of gravity of violations of the provisions that define these acts against civilians that should be prohibited during non-international armed conflicts. The provisions obligate the states to penalize the violations through domestic legislation.

196. It was only in 1977, at the occasion of the adoption of the Protocol Additional to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts (Additional Protocol I), that the international community agreed to accept an explicit clause according to which 'grave breaches of the instruments of international humanitarian law shall be regarded as war crimes.'⁶⁰

197. All pieces of domestic legislation relevant to crimes committed against civilians did not provide for any threshold of seriousness or gravity for the concrete violation of international humanitarian law. The Criminal Code of Kosovo (CCK) [The code entered into force on 6 April 2004 with the name Provisional Criminal Code of Kosovo (PCCK). According to the Law No. 03/L-002 on supplementation and amendment of the Provisional Criminal Code of Kosovo adopted by the Assembly of the Republic of Kosovo on 6 November 2008, the code was renamed as Criminal Code of Kosovo (CCK)] in its Article 120 Paragraph 2 and the Criminal Code of the Republic of Kosovo (CCRK) in its Article 152 Paragraph 2 stipulated that any breach of the provisions of common Article 3 constitutes a serious violation without reference to particular circumstances of a concrete crime.

198. The concept of 'war crimes' commonly accepted by the international community, i.e. crimes committed in the course of an armed conflict that require criminal

⁶⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3, 8 June 1977, entered into force 7 December 1979, art. 85 (5).

punishment of the culprit, refers to serious violations of the laws or customs of international or internal armed conflicts.⁶¹⁺⁶²

199. The ICTY jurisprudence established the following interpretation: violation of international humanitarian law is serious if it constitutes a breach of a "rule protecting important values, and the breach must involve grave consequences for the victim".⁶³

200. The panel fully accepted this interpretation and concluded that repetitive beatings of Witness A and the incident when Witness A and Witness B were beaten at the same time constituted a serious violation of international humanitarian law.

201. The scale of infringement of Witness A's bodily integrity and dignity met the threshold required for a war crime. Additionally, he was threatened with death and humiliated with accusations of being a spy. This abuse lasted for an extended period of time.

202. The same grading was given to the beating of the said persons at the same time. The panel found forcing them to beat each other as blatantly humiliating and degrading.

203. The scale of humiliation and infringement of bodily integrity of both victims was high. They still suffer the grave consequences of _____/_____ as they have to be

⁶¹ See article 8 of the ICC Statute, article 2 of the ICTY Statute, article 4 of the ICTR Statute, article 3 of the SCSL Statute and s 6.1 of Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (in East Timor), Doc No UNTAET/REG/2000/15 of 6 June 2000.

⁶² "to steal a loaf of bread in an occupied territory does not make a war criminal out of a member of the occupying force": in Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) dated 2 October 1995, Case No IT-94-1-AR/72 [ICTY Appeals Chamber] para 94.

⁶³ Kunarac, Kovac and Vokovic, June 12, 2002, para. 66

put under protection in order to testify in court about the events that took place there and they still have serious concerns about their personal security.

e. Application of domestic law

204. International humanitarian law does not provide for sanctions for the acts that this law prohibits and recommends that they be penalized by domestic legislation. The action committed by the accused consisted of elements of the prohibited serious violation of international humanitarian law that had to be classified by the application of domestic law.

205. The legal classification of the actions that were attributed to each of the accused resulted from the comparison of their deeds with the elements of particular crimes defined by various pieces of domestic legislation.

206. The trial panel took into consideration the change in the substantive law which occurred after the time of the commission of the relevant acts and before the time of sentencing. The panel collated the legal provisions provided by the law that was in force at the time of the commission of the incriminated action attributed to the accused.

i. Principle of legality

207. The Constitution of the Republic of Kosovo that entered into force on 15 June 2008 adopted the principle of legality which is considered by civilized nations as a fundamental rule of criminal justice. It stipulates that no one should be punished for any act or omission which did not constitute a criminal offence under the law in force at the time when it was committed.

208. Simultaneously the Constitution recognizes a substantial exception to this principle. The exception allows for the punishment of perpetrators of acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law. The principle of legality and the exception to the principle of non-retroactivity of substantive criminal law are expressed in Article 33 Paragraph 1 of the Constitution:

"No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law."

209. This exception to the principle of legality stays in conformity with Article 7 Paragraphs 1 and 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:⁶⁴

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor

⁶⁴ According to Article 22 Paragraph 2 of the Constitution of the Republic of Kosovo the provisions of European Convention for the Protection of Human Rights and Fundamental Freedoms are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

210. Pursuant to the exception to the principle of non-retroactivity of substantive criminal law provided for in Article 33 Paragraph 1 of the Constitution, not only the CCSFRY, that was in force at the time of the commission, but also subsequent pieces of legislation, i.e. both the CCK and the CCRK, might be considered for the legal classification of the relevant crimes.

ii. Application of the most favorable law

211. There has been a firmly established principle of mandatory application of the most favorable substantive law applicable in Kosovo in the period from the commission of the acts to the sentencing.

212. According to Article 4 of the CCSFRY:

"1. The law that was in power at the time when a criminal act was committed shall be applied to the person who has committed the criminal act.

2. If the law has been altered one or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied."

213. The same principle was repeated in subsequent legislation i.e. in Article 2 Paragraphs 1 and 2 of the CCK and in Article 3 Paragraphs 1 and 2 of the CCRK.

214. The law does not stipulate any criteria for indication of the most favorable law. The panel followed the interpretation that dictates consideration of the concrete situation of the accused. It made necessary a simulation of sentencing in accordance with both relevant pieces of legislation.

iii. Protection of individual civilians during non-international armed conflict in domestic law

215. The protection of individual civilians during the internal armed conflict in the domestic law that was in force in Kosovo from the time of the war in Kosovo until the time of sentencing in this case underwent a significant evolution.

216. Initially Article 142 of the CCSFRY, in its wording as introduced on 1 July 1977, criminalized as war crimes only those acts that were directed against a civilian population. The "socially harmful" acts that were directed against individual civilians were criminalized as ordinary crimes.

217. The amendment of Article 142 of the CCSFRY that entered into force on 30 August 1990 widened the scope of criminalization of acts against civilians. Besides numerous crimes against a civilian population, it also criminalized as a war crime an attack against individual civilians or persons unable to fight, which results in

the death, grave bodily injuries or serious damaging of people's health.⁶⁵

218. As a general rule introduced by the Regulation of 12 December 1999⁶⁶ issued by the United Nations Interim Administration Mission, that had retroactive effect from 10 June 1999, the law that entered into force in Kosovo after 22 March 1989 and before 10 June 1999 was not applicable. However, the war crimes against individual persons were not subject matter of any former provisions. Therefore, according to Paragraph 1.2 of the Regulation, the court could exceptionally apply relevant provisions that were introduced after 22 March 1989, as long as they were not discriminatory and in compliance with section 1.3 of the same Regulation.

219. Nevertheless, even the amended Article 142 in its wording introduced on 30 August 1990 did not criminalize the acts committed by the accused against Witness A and Witness B. As the consequence of the principle of subjective identity of the judgement in relation to the indictment it was concluded that these acts did not cause grave bodily injuries or serious damage to the victims' health.

220. Criminalization of the said actions was introduced into Kosovo's domestic legal order by Article 120 of the CCK. As referenced above, the code entered into force on 6 April 2004 under the name of Provisional Criminal Code of Kosovo (PCCK). Pursuant to the Law No. 03/L-002 on supplementation and amendment of the Provisional Criminal Code of Kosovo adopted by the Assembly of the Republic of Kosovo on 6 November 2008, the code was then renamed as Criminal Code of Kosovo (CCK), without however any changes to the wording of Article 120. Protected persons were defined not only as civilians but as persons not taking parts in hostilities.

⁶⁵ Sluzbeni List SFRJ 38/90 (The official gazette of SFRY 38/90).

⁶⁶ UNMIK/REG/1999/24 of 12 December 1999.

221. Article 120 Paragraph 1 of the CCK provided that:

"Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of at least five years to 20 or by long-term imprisonment."

222. Article 120 Paragraph 2 of the Code stipulated that:

"A serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those

placed hors de combat by sickness, wounds, detention or any other cause:

1) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

3) Taking of hostages;"

223. The Criminal Code of the Republic of Kosovo that replaced the CCK literally repeated the definition of the crime given in Article 120 of the CCK. It provided for the definition of protected persons but extended the

catalogue of prohibited acts. According to Article 152 of the CKRK:

"1. Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five (5) years to 15 or by life long imprisonment.

2. A serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

2.1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2.2. committing outrages upon personal dignity, in particular humiliating and degrading treatment;

2.3. taking of hostages;

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

224. The panel assessed that the actions that the accused performed in relation to Witness A and Witness B fully corresponded with the characteristics of the crime

defined in Article 120 Paragraph 2 Subparagraphs 1 and 2 of the CCK, and at the same time in Article 152 Paragraph 2 Subparagraph 2.2 of the CCRK.

225. Therefore, it was necessary to analyze the facts in the case under both of the said pieces of legislation in order to determine what kind and how many crimes were committed and to assess which piece of legislation was the most favorable one.

iv. Co-perpetration

226. On all occasions when repetitive beatings of Witness A and the incident when Witness A and Witness B were beaten at the same time took place there were several culprits acting simultaneously. Their actions met the definition of co-perpetration given in Article 23 of CCK. The same definition was repeated in Article 31 of the CCRK:

"When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense."

227. Each of the defendants fulfilled the elements of *actus reus* required for crimes consisting of a violation of the common Article 3 by active participation in the beatings. Each of them inflicted strikes to the victims. Each individual action taken by individual persons was done in the presence of other perpetrators. Each perpetrator took advantage of the actions performed by the other as they deprived the victim of the will to resist. Each individual action taken by an individual culprit coaxed the other to do the same.

228. In this context the culprits who did not threaten Witness A and did not accuse him of being a ___ benefited from the actions of the others who actually did it. It means that they joined the threatening culprits *cum animo socii* which means that they supported them in a significant way.

229. The same concept was applied to the action of commanding the victims to beat each other although only **I. Th.** issued the command. All the perpetrators by their presence and inflicting strikes on the victims expressed their approval and support for the actions.

230. This support extended the scope of merely aiding and abetting as they also manifested their will to support the other culprits by taking part in the beating.

231. All of the accused were aware of the participation of the others because they just saw them being present at the crime scene and performing criminal actions. Their activity proved that they knowingly and willingly acted together. Therefore, their actions were classified as committed in co-perpetration.

v. Concurrence of criminal acts

232. Because of the identical *modus operandi* and the same opportunity used every time by the perpetrators, it was concluded that **J. D., Z. D., S. S., and I. Th.** acted with the same general intent to maltreat and humiliate Witness A.

233. A similar conclusion applies to the acts committed by all the accused against Witnesses A and B at the same time.

234. If taken separately, each of the beatings and humiliating of Witness A that took place in the room where he was kept could be classified as a single criminal offense.

235. The beating and humiliating of Witness A and Witness B that took place at the same time in a big room must be considered as one criminal act because of exactly the same time frame, and physical identity and cohesion of the perpetrators' action.

Analysis of concurrence under the CCK

236. The CCK did not define the rules of classification of concurrent criminal acts even if committed with the same intent.

237. The panel applied the teleological approach and considered the element of the same intent to be decisive for the classification of all actions against Witness A that took place in the room where he was kept as one offence, if classified under that code.

238. The action consisting of simultaneous beatings of Witness A and Witness B was considered as a separate criminal act because its criminal content was different from the beatings of Witness A when he was alone. The difference relied on the number of victims and on the modus operandi: the element of infringement of human dignity was in this case dominant.

Analysis of concurrence under the CCRK

239. The CCRK introduced the concept of crime in continuation. According to Article 81 of the CCRK:

"1. Criminal offense in continuation is constituted of several same or similar offenses committed in a certain time period by the same perpetrator, and that are considered as a whole due to the existence of at least two (2) of the following conditions:

1.1. the same victim of the criminal offense;

1.2. the same object of the offense;

1.3. the taking advantage of the same situation or the same time relationship;

1.4. the same place or space of commission of the criminal offense; or

1.5. the same intent of the perpetrator."

240. The actions committed by **J. D., Z. D., S. S.,** and **I. Th.** against Witness A should be classified as one crime in continuation because these actions met all the requirements as indicated above.

241. Simultaneous beatings of Witness A and Witness B were not included in the crime of continuation for the same reason that they were classified as a separated crime under the provisions of the CCK, but in the first place

because of the rule expressed in Article 81 Paragraph 2 of the CCRK:

"Criminal offenses perpetrated against personality may be considered as criminal offenses in continuation only if they are committed against the same person."

242. The panel knows *ex officio* that in another case **S. S.** was convicted of war crimes against Witness A committed in co-perpetration with other persons in _____/_____ in a similar manner and at the same time as the crime in the present case. Article 81 Paragraph 6 of the CCRK allows for separate adjudication of the criminal offence that was not included in the criminal offense in continuation.

Determination of the most favorable law

243. The sanction prescribed by Article 120 Paragraph 1 of the CCK was imprisonment of at least five to twenty years or long time imprisonment.

244. According to Article 37 Paragraphs 1 and 2 of the CCK the punishment of long-term imprisonment could be imposed for the most serious criminal offences committed intentionally either under particularly aggravating circumstances or causing especially grave consequences. This punishment could last for a term of twenty-one to forty years.

245. According to Article 44 Paragraph 1 of the CCRK the punishment of life-long imprisonment could be imposed for the most serious criminal offenses committed under

especially aggravating circumstances or criminal offenses that have caused severe consequences.

246. The panel concluded that the circumstances of the case did not justify imposing against the accused either long-term imprisonment or life imprisonment as the crime that they committed could not be considered as the most serious criminal offense, nor did it cause sufficiently severe consequences.

247. Under both of the codes at hand the actions committed by **J. D., Z. D., S. S., and I. Th.** were to be classified as two separate crimes in real concurrence. The rules of imposing an aggregate sentence provided by these codes are the same.

248. Because of these premises, the sanctions that could be considered by the panel were *in concreto* and the concrete punishment imposed under the CCK would be higher: namely, imprisonment of five to twenty years under the CCK or imprisonment of five to fifteen years under the CCRK. Therefore the CCRK appeared as the most favorable law as it prescribed a milder sanction.

249. The maximum punishment of 15 years of imprisonment stays in conformity with the principle expressed in Article 33 Paragraph 2 of the Constitution:

"No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed"

250. The panel noted that the phrase "the penalty provided by law" can only refer to the type of punishment and not to

the particular penalty prescribed by law at the time of commission. Following the rule of Article 33 Paragraph 1 of the Constitution, war crimes should be punished even if they were not criminalized at the time of commission and there was no penalty prescribed for them at that time.

E. Determination of the punishments

251. While determining the punishments for the accused the panel kept in mind the goals listed in Article 41 of the CCRK. The priority was given to the need to express the judgment of society for criminal offenses, increase morality and strengthen the obligation to respect the law. The panel was also governed by the principle of general prevention having in mind that the judgment should discourage other people from committing criminal offenses.

252. The panel followed its obligation to evaluate all mitigating and aggravating factors, as required by Article 73 Paragraph 1 of the CCRK.

I. Aggravating factors

253. As the aggravating circumstances in relation to the crime committed by **S. S., J. D., Z. D.,** and **I. Th.** against Witness A alone the panel took into consideration that they carried on their criminal actions for an extended time and with persistence.

254. In relation to the crime committed simultaneously against Witness A and Witness B the panel kept in mind

that humiliation of both of the victims was outrageous as by commanding them to beat each other the perpetrators were forcing them to renounce human dignity.

II. Mitigating factors

255. As the mitigating factor the panel kept in mind that during the war in Kosovo all the accused were fighting for their nation against the regime that is considered by the international community as criminal and for this reason is condemned.

256. In relation to all of the accused the panel took into account that after the war they lived honest lives.

257. **S. S., F. D.** and **N. D.** served the society by holding important political positions. **I. Th.** also performed work of prestigious nature.

III. Mitigation of punishment

258. The panel took into consideration that the criminal actions attributed to **A. D., D. D., B. D., S. D. 1., F. D.,** and **N. D.** were limited to one incident. None of them was the initiator of the crime. Nothing indicated that they actually knew that they contributed to the suffering sustained by Witness A due to the previous beatings. Therefore the panel assessed that their degree of persistence to carry on with criminal intent and their malice were moderate.

259. This assessment was considered by the panel as a particularly mitigating circumstance that indicated that the purpose of punishment can be achieved by imposing a lesser sanction.

260. Therefore the panel imposed punishments below the limits provided for by law against **A. D., D. D., B. D., S. D. 1., F. D.,** and **N. D.** as allowed by Article 75 Paragraph 1 Subparagraph 1.2 and Article 76 Paragraph 1 Subparagraph 1.2 of the CCRK.

IV. Aggregate sentence

261. While calculating the aggregate sentence against **J. D., Z. D., S. S.,** and **I. Th.** the panel took into consideration individual punishments imposed for each of the crimes that they committed.

262. These crimes were strictly linked to each other by the following elements: the same place, the same period of time, the same opportunity. It dictated moderate aspiration of punishments which is a commonly used term for docked cumulation.

F. The Costs

263. The trial panel based its decision related to the costs of criminal proceedings on legal provisions quoted in the enacting clause.

264. The extent and proportion between scheduled amounts that the accused are obligated to reimburse and the total

cost of the proceedings has been determined with consideration to the gravity of the charges against them and the number of investigatory and evidentiary actions that were taken in order to prove these charges, as well as the expenses related to the expert's opinion on their health status.

265. It was known *ex officio* that the cost of the expert opinion on **S. S.** health status was credited as a cost of proceedings in another case.

Dariusz Sielicki

EULEX Presiding Judge

Agron Kelmendi

Recording Clerk

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.