

## DISTRICT COURT OF PRISHTINË/PRIŠTINA

P Nr. 97/2001

16 December 2009

### IN THE NAME OF PEOPLE

The District Court of Prishtinë/Priština, in a panel composed of EULEX Judge Arkadiusz Sedek as Presiding Judge, EULEX judge Angela Kaptain and Professional Judge of the District Court of Prishtinë/Pristina Zahide Gjonaj as members of the panel, assisted by court recorder Nexhmije Mezini in the criminal case against the accused **Besim Berisha aka Burim Dibrani** charged with criminal acts Murder, in violation with article 30 paragraph 2 item 3 of the Criminal Law of Kosovo, Unlawful detention in violation with article 63 paragraph 4 as read with paragraph 1 of the Criminal Code of Serbia and Exposure to danger in violation with article 42 paragraphs 1 and 2 of the Criminal Law of Kosovo read together with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1977), as in the indictment of the Public Prosecutor, filed with the court on 22 November 1999 and subsequently amended on 24 November, 26 November and 11 December 2009, previously in detention from 3 August 1999 to 20 March 2000, currently in detention since 27 August 2008 (when deported from France),

after a public main trial held on 28 July 2009, 5 August 2009, 31 August 2009, 7 September 2009, 7 October 2009, 19 October 2009, 10, 16 and 24 November 2009, 8, 11, 15 and 16 December 2009, in the presence of the Public Prosecutor Ms Laura Pula and EULEX Prosecutor Paul Scoggin, the Accused and his Defence Counsels Ymer Osaj and Mexhid Sylja, publicly announces on 16 December 2009 the following:

### VERDICT

The defendant **Besim Berisha aka Burim Dibrani** born on 1 February 1980, son of Ejup and Mihrije maiden name Kastrati, born in Prishtinë/Priština, his previous residence in "19 Nentori" street no.21/6, Prishtinë/Priština, has completed the first grade of the secondary school, unmarried, unemployed, Kosovo Albanian,

### IS GUILTY

Because:

On 2 August 1999 at around 20.45 hours the defendant Besim Berisha aka Burim Dibrani unlawfully entered, with the intention of gathering guns, with other unknown persons, the house of Momčilo Milenković located in "Gjurgjevdanska" street no. 138 in Prishtinë/Priština, placed him in a life threatening circumstance by attacking, beating him and tying his neck with a tablecloth and by these acts making him a helpless person and then



abandoning him. Momčilo Milenković exposed to this dangerous circumstance consequently died on the same day.

He thereby committed the criminal offence of

**Exposure to danger in violation with article 42 paragraph 2 of the Criminal Law of Kosovo read together with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1977).**

Pursuant to article 350 paragraph 3 of the Law on Criminal Procedure (Official Gazette No. 26/86) the defendant Besim Berisha aka Burim Dibrani is acquitted of the criminal acts of:

Murder from Article 30 paragraph 2 item 3 of the Criminal Code of Kosovo  
and  
Illegal Deprivation of Liberty, Article 63 paragraph 4 as read with paragraph 1 of the Criminal Code of Serbia.

Because it has not been proven that the defendant committed the acts that he was charged with.

He is herewith

### **SENTENCED**

Pursuant to article 42 paragraph 2 of the Criminal Law of Kosovo read together with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1977) **to six (6) years imprisonment.**

Pursuant to Article 351 Paragraph 6 of the Law of Criminal Procedure (LCP) and Article 50 Paragraph 1 of the SFRY Criminal Code (CCY), the time Besim Berisha aka Burim Dibrani spent in detention on remand from 3 August 1999 to 20 March 2000, and from 27 August 2008 (when deported from France) until the verdict becomes final shall be included in the amount of punishment.

### **COST**

Pursuant to Article 98 Paragraph 1 of the LCP, he must reimburse the costs of the criminal proceedings in the amount of two hundred (200) Euros for the criminal offence of exposure to danger.

### **REASONING**

#### **I. Procedural History**

On 22 November 1999 the Public Prosecutor filed an indictment at the District Court of Prishtinë/Priština against the defendant Besim Berisha for the criminal acts of Murder from Article 30 paragraph 2 item 3 of the Criminal Code of Kosovo and Illegal Deprivation of

Liberty, Article 63 paragraph 4 as read with paragraph 1 of the Criminal Code of Serbia. This indictment was subsequently amended on 24 November 2009, 26 November 2009 and 11 December 2009 to include the criminal act of Exposure to danger in violation with article 42 paragraph 2 of the Criminal Law of Kosovo read together with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1977). On 11 December 2009 the EULEX public prosecutor orally amended the indictment to reflect that the arrest date is 3 August 1999 and not 2 August 1999 as in the court decisions issued at the time that are in the case file.

The previous (first) main trial commenced on 20 March 2000 before a panel composed of five (5) judges with presiding judge Zef Prenaj. The same day the verdict was announced by the trial panel. The defendant was acquitted of the criminal acts as charged in the indictment and his detention on remand was terminated. On 23 February 2000 the presiding judge issued a decision to separate the Pejë/Peć KFOR documents and the VHS cassette from the case file pursuant to article 83 and 84 of the LCP.

On 17 April 2001 the Supreme Court of Kosovo, deciding upon the appeal of the District Public Prosecutor, ruled that the verdict of the District Court of Prishtinë/Priština, P Nr 77/1999 is annulled and case is returned to the first instance court for re-trial.

On 3 July 2001 the re-trial (P Nr 97/2001) commenced before a panel composed of five (5) judges with presiding judge Zef Prenaj and continued on 10 September 2001. On the same day the panel issued a decision that the main trial will be postponed for an indefinite time until the presence of the defendant Besim Berisha is secured by UNMIK Police and the whereabouts of injured parties are known.

On 7 November 2002 the presiding judge of the trial panel, Raif Emini, issued an order for arrest against the defendant. On 24 December 2004 the UNMIK Special Representative of the Secretary-General issued an international wanted notice against the defendant.

On 27 August 2008 the defendant was deported from France and taken into custody by UNMIK Police.

On 12 May 2009 the Vice-President of the Assembly of EULEX Judges issued a decision assigning the case to EULEX judges of the District Court of Prishtinë/Priština, upon a written request of President of the District Court of Prishtinë/Priština, Anton Nokaj dated 17 April 2009.

The re-trial commenced on 28 July 2009 before the newly composed panel of EULEX Judge Arkadiusz Sedek as Presiding Judge, EULEX judge Angela Kaptain and Professional Judge of the District Court of Prishtinë/Priština Zahide Gjonaj as panel members.

The re-trial continued on 5 August 2009, 31 August 2009, 7 September 2009, 7 October 2009, 19 October 2009, 10, 16 and 24 November 2009, 8, 11, 15 and 16 December 2009.

On 28 July 2009 the trial panel heard the testimony of witness- injured party **Valentina Alsentijević** and injured party **Budimir Milenković**. The court learned that witness-

injured party **Jorgovanka Milenković** died on 5 February 2002, the death certificate of Jorgovanka Milenković was provided by the family members to the panel.

On 5 August 2009 the trial panel heard the testimony of witness **Enver Kastrati**.

On 31 August 2009 the trial panel announced that the medical experts will be called to testify regarding cause of death of victim Momčilo Milenković and the defendant's physical condition.

On 7 September 2009 the trial panel heard from the medical expert Dr Marek Gasior. The panel appointment the medical experts **Dr Marek Gasior and Tefik Gashi**.

On 16 September 2009 the presiding judge attended the exhumation of the remains of Momčilo Milenković at the cemetery in Prishtinë/Priština.

On 7 October 2009 the trial panel had scheduled to hear the testimony of **Dr Jusuf Ulaj**, the witness did not appear before the court.

On 19 October 2009 the trial panel heard the testimony of **Dr Jusuf Ulaj**.

On 10 November 2009 the trial panel heard the testimony of **Dr Bedri Bakalli**.

On 16 November 2009 the trial panel heard the testimony of **Dr Marek Gasior and Dr Tefik Gashi**.

On 24 November 2009 the trial panel heard the testimony of **Dr Blerim Qosaj**.

On 8 December 2009 the trial panel heard the testimony of **Officer Gianluca Basso** (via video conference).

On 11 December 2009 the trial panel admitted as evidence the following documents and heard the closing speech of the public prosecutor.

1. Medical expertise of Dr Tefik Gashi and Dr Marek Gasior
  - a. Autopsy report MA 09 252 dated 11 October 2009,
  - b. Report of physical examination MP 09-056 dated 17 October 2009,
  - c. Forensic medical opinion for case number P Nr 97/01 (MP 09-056, MA 09-252) dated (handwritten English version) 29 October 2009.
2. Special investigation branch property receipt (with ref number 87679/99 and 149/99) dated 30/08/99 signed by Keshri Lan? (handwritten) from SIU Unit
3. KFOR letter and certified detention list (ref no. 0610/DOS KV101/09) dated 9 December 2009 from M Scholze and Istvan Kokics (English version 4 pages)
4. Letter and attached documents from Ministry of Internal Affairs (from Blerim Camaj) dated 27 October 2009, application form titled "Regjistrimi civil dhe i votuesve" (The civil registration and voting) dated 15/07/2000, photograph scanned and magnified, finger prints (2) and original birth certificate,
5. Letter and attached documents from University Clinical Centre of Kosovo dated 21 October 2009 (from Prof. Ass Faton Morina), photocopy of the administration book for the date of 6 July 1999,

6. Medical records of deceased Momcilo Milenkovic from the State Archive of Kosovo (2 pages),
7. Discharging list with epycrisis with number 1354 regarding Burim Dibrani signed by Dr B Qosaj,
8. KFOR letter dated 7 December 2009 with ref no 0610/LEG KV 103/09 from HIRSCH Christian,
9. Letter from Office on Missing Persons and Forensics (EULEX Kosovo) Alan Robinson dated 7 September 2009 with ref no. JC/OMPF/09/AR/049
10. Letter and attached documents (certified as a true copy of the original, 3 pages) from Bajram Zymberi dated 20 August 2009 with ref no 0973/09, namely Arrest and Detention Certificate, Section particulars of detainee and sentence and copy of photograph labeled P 443/99 Berisha, Besim dated 2/11/1999,
11. Cover letter from PP Paul Scoggin and 5 (five) photographs printed in color (from CDROM) labeled A, B, C, D, E.
12. Death Certificate of Jorgovanka Milenkovic with ref no 367/112, date and time of death: 5 February 2002 at 15:15 hrs.
13. VHS cassette of crime scene
14. Witness statements of the following witnesses:
  - a. Mr. Budimir Milenkovic heard on 28 July 2009
  - b. Ms Valentina Aksentijevic heard on 28 July 2009
  - c. Mr. Bedri Bakalli heard on 10 November 2009
  - d. Mr. Jusuf Ulaj heard on 19 October 2009
  - e. Mr. Blerim Qosaj heard on 24 November 2009
  - f. Mr. Gianluca Basso heard on 8 December 2009
  - g. Mr. Avdyl Dibrani read on 11 December 2009
  - h. Mr. Enver Kastrati heard on 5 August 2009
  - i. Mrs. Jorgovanka Milenkovic read on 11 December 2009,
15. Fingerprint expert report from Kevin J Miller Sgt Royal Canadian Mounted Police with finger prints attached,
16. Letter from KFOR with ref no Agricola/legal/318 dated 8 May 2000,
17. Letter from "Qendra Klinike Universitare, Instituti i Mjeksise Ligjore" dated 27 July 2009.

**The defence list:**

1. Request for Initiation of Investigation PP. no. 146/99, dated 13 August 1999,
2. Decision of Initiation of Investigation and Assessment of Detention on Remand No 96/99, dated 27 August 1999,
3. Decision of District Court of Prishtinë/Priština on Extension of Detention on Remand, No 80/99, dated 31 August 1999,
4. Main Trial Minutes P. No. 77/99, dated 20 March 2000,
5. Decision of District Court of Prishtinë/Priština regarding the separation of case of documents of KFOR, P. No. 77/99, dated 23 Feb 2000,
6. The minutes of questioning of witness Avdyl Dibrani, No 96/99, dated 31 August 1999,
7. Minutes of questioning before of Investigative Judge of witness Enver Kastrati, No 96/99, dated 14 October 1999.

**The prosecution list:**

1. The "Initial Case Report" dated 08.05.1999 authored by EJ Woolbridge,
2. The initial statement of Besim Berisha given 08.08.1999 given to Sgt Roberts and Float,
3. The initial statement of Enver Kastrati dated 05.08.1999, given to Sgt Roberts and Float,
4. The initial statement of Avdyl Dibrani dated 05.08.1999, given to Sgt Roberts and Float,
5. The initial statement of Jorgovanka Milenković dated 03.08.1999, given to Sgt Roberts,
6. The statement of Jorgovanka Milenković dated 04.08.1999,
7. The initial statement of Valentina Milenkovic dated 03.08.1999, given to Sgt Float And signed by Miljana Ristic,
8. The statement of Brendan Tanslen dated 03.08.1999,
9. The letter of 17.05.2000 authenticating and authorizing the release of 19 pages of reports by Capt. Paola Nardelli,
10. Five pages of arrest forms for Dibrani, Kastrati, Berisha, Sahit and Hasdari (labeled "Modulo Identificazione" in Italian),
11. Statement of duties Performed on the 3<sup>rd</sup> of August, 1999 by WO Gianluca Basso (two pages, English and Albanian),
12. Temporary Detention statement on the 3<sup>rd</sup> of August 3<sup>rd</sup>, 1999 by WO Gianluca Basso (three pages, English, Italian and Albanian),
13. Statement of Avdyl Dibrani dated 03.08.1999 @ 10.20 hours to WO Angelo Mini and Vincenzo Gullotto (three pages Italian, Albanian and English),
14. Statement of Hajdar Sahiti dated 03.08.1999 @10.30 hour to WO Angelo Mini and Vincenzo Gullotto (three pages Italian, Albanian and English),
15. Statement of Enver Kastrati dated 03.08.1999 @10.35 to Vincenzo Gullotto (three pages Italian, Albanian and English),
16. Statement of Besim Haydrai dated 03.08.1999 @ 11.35 to Vincenzo Gullotto (three pages Italian, Albanian and English),
17. Prison Log Authentication and turn over letter dated 04.05.1999 by Vittorio De Stasio and Emilio Della Sala (three pages Italian, Albanian and English),
18. Car Authorization, to Zeqir Braimi, (four pages Italian, Albanian, English and Serbian),
19. Document receipt dated 06.08.1999 by Besim Hajdari (marked translation page 15) (three pages, Italian English and Albanian),
20. Missing Person report dated 04.05.2000 by Vittorio De Stasio (marked translation Page 16) (three pages, Italian English and Albanian),
21. Prison record sheet Authentication and turnover; by Vittorio De stasio (marked translation page 17) (three pages Italian English and Albanian),
22. Prison Log dated 04.08.1999 (three pages, Italian, English, and Albanian),
23. The minutes of the first main trial (the original trial),
24. The statement of the OMPF statement concerning the status of Svetomir Milenkovic,
25. The Italian KFOR medical records concerning the defendant from 1999.
26. The cover letter of 16.05.2000 by Xhevat Halili attached to the appeal in this matter (two pages, English and Albanian),
27. The appeal certification by Capt Cook dated 08.05.2000.

On 15 December 2009 the trial panel heard the closing speech of defence.

On 16 December 2009 the trial panel announced the verdict.

## **II: Factual findings:**

Momčilo Milenković, 64 years old in 1999, lived together with his family in Prishtinë/Priština, in Gjurgjevdanska street, number 138. The members of this family were as follows: his daughter Jorgovanka Milenković, his son Svetomir Milenković and his granddaughter Valentina Aksentijević.

On Monday the 2<sup>nd</sup> of August 1999 at 18.00 hrs someone knocked on the door, Jorgovanka did not open the door, but she heard the conversation in Serbian Language between a man and her father. The number and the identity of the intruders were not identified at this time. One of these men told Momčilo Milenković to leave the house by 20.00 hrs. In response to this demand Momčilo Milenković answered that they have nowhere to go and nobody to go to. This man said that they would come later. The Milenković family decided not to leave the house hoping that the intruders would not appear again.

At 20.45 hrs, as promised they returned and started knocking at the door, they demanded that the door is opened or in contrary they would open the doors by force. As family of Milenković did not want to open voluntarily, four men broke in, among them, also the defendant Besim Berisha.

Jorgovanka Milenković and Valentina Aksentijević were separated in one of the rooms, while defendant grabbed Momčilo Milenković by the chest, and took him to the kitchen. Besim Berisha demanded from Momčilo Milenković to reveal the place where he kept the pistol and rifle. Besim Berisha called another intruder to the kitchen, unidentified and described by Jorgovanka Milenković in her statement as the second man. Momčilo Milenković was beaten up and his neck was tied with a tablecloth by Besim Berisha and another man.

Jorgovanka Milenković and Valentina Aksentijević stayed in one of the rooms guarded by one of the assailant, identified as the third man by Jorgovanka Milenković.

The men described by Jorgovanka Milenković as the second, the third, and the fourth man searched the house looking for money and gold.

Jorgovanka Milenković and Valentina Aksentijević left the room and they went to the terrace together with the intruders, but the first man and the second man ordered them to go inside house and not to scream.

The intruders found money in the amount of 2700 dinars, TV set and golden artifacts that they took away with them.

Then Jorgovanka Milenković found her father in the kitchen, his neck was tied with tablecloth. When Jorgovanka Milenković untied the table cloth, blood started running from his nose and mouth. Momčilo Milenković was leaning against the sink and out of sudden he felt down bleeding a lot.

After that Jorgovanka Milenković ran to an old house to see if her brother was there, but she could not find him. She went back to the house calling for him, but to no avail. During this incident Svetomir Milenković was hidden. It was not established beyond doubt if he had

escaped or had been kidnapped by the assailants. The assailants left the house at around 22.00 hrs.

Jorgovanka Milenković then called for help and KFOR appeared at the spot. The body of Momčilo Milenković was found and the scene of the crime was video recorded by KFOR. The body was conveyed to the mortuary of the University Hospital in Prishtinë/Priština. The autopsy was not carried out and the body of the deceased was handed over to the family for the burial. The same day Jorgovanka Milenković was interrogated and she supplied KFOR with the details of the incident together with the detailed account of the assailants.

Following day, on 3<sup>rd</sup> August 1999 in the morning around 9.00 a.m. five (5) Albanian men were apprehended by Italian KFOR in Deçan/Decane in the vicinity of Pejë/Peć -80 km west of Prishtinë/Priština, since some of them matched the description provided by Jorgovanka Milenković. These males were identified as Hajdar Sahit, Besim Hajdari, Avdyll Dibrani, Enver Kastrati and Besim Berisha. The fingerprints and the pictures of apprehended men were taken by investigators. On 4<sup>th</sup> August 1999 when the identity parade was organized, Jorgovanka Milenković was taken to a police station in Pejë/Peć. During the identity parade five (5) Albanian men were presented to her. Jorgovanka Milenković recognized the man, with the name Besim Berisha as a person who entered the house on 2<sup>nd</sup> of August 1999 and whom she described as the first man.

Besim Berisha used a false name during the identification, as per documents from Ministry of Internal Affairs his true name is **Burim Dibrani**.

At the time the crime was committed due to the injuries Besim Berisha's left arm was in plaster and that fact was noticed and remembered by Jorgovanka Milenković. Later on during the investigation, she used this distinctive feature as one of the factors to identify the defendant as one of the assailants who has beaten up her father.

According to medical records Momčilo Milenković suffered of heart disease and was hospitalized in the past. This is elaborated in the expertise of Dr Gasior and Dr Gashi, MA 09-056 MA09 252 dated 29 October 2009. Due to the fact that autopsy was not conducted, it was not possible to define the direct course of Momčilo Milenković's death. The expert witnesses presented the findings according to which the most probable reason of this tragic incident was arrhythmia of heart or cardio respiratory arrest associated with stress, struggle and positional restrain. As no evidence, even circumstantial, was submitted to determine that Besim Berisha acted with the intention to deprive Momčilo Milenković of his life, the fact that the deceased was beaten up by Besim Berisha and than left without any help shall be considered as leaving him in a life threatening circumstances, caused by Besim Berisha himself. It is evident that as a result of the above actions Momčilo Milenković died.

### III: Assessment of Evidence:

The facts established in this verdict are based on the evidence presented during the main trial. In the process of reconstructing the intention of the defendant and establishing who is guilty of the alleged crimes, one of the most important evidence is the statement given by the eye witnesses Jorgovanka Milenković and Valentina Alsentijević.

Jorgovanka Milenković was examined on 3<sup>rd</sup> of August 1999, by SSGT Roberts, after being informed both that the statements could be used as evidence and false testimony constitutes criminal offence. The witness confirmed also that the given statement is true to the best of their knowledge and belief.

Jorgovanka Milenković at the time of the alleged crime was the daughter of Momčilo Milenković and the sister of Svetislav Milenković. She gave a detailed and in-depth description of the situation leading to the death of her father. According to her statement: *"Yesterday, on Monday the 2<sup>nd</sup> August 1999, at 18.00, somebody came and knocked at the entrance which was locked. I did not see them, (...) I heard only one of them talking. It was male voice speaking Serbian. All what I have heard was that we have to leave the house by 20.00hrs. Later I heard my father saying that we have nowhere to go, we had nobody to go to. That man said later that they will come back(...). Our father came later and spoke to us. He told us that somebody is threatening us and asked what to do. My brother I told him that we will stay; perhaps they will not bother us. They came again around 20:45hrs and started knocking at the door. They demanded to open the door willingly or by force. I heard two voices talking through the door. My father told them that he would not open the door. They said: "Old man Momo open the door or we will break in". Later on four of them have broken the door."*

Then Jorgovanka Milenković gave detailed description of all four intruders. From court's standpoint, it is clear that this witness had an excellent environment to have a good look at all the assailant, as she was at the terrace all the time and it is common knowledge that in August the sun set very late. It is important to highlight the following detail as to description of one of mentioned men. The witness testified that: *"The first man, age around 30, height-average, around 1.70m., short brown hair, with fat, big belly. He had a white and blue striped shirt, black jeans and black snickers. This man had a plaster on the right arm as it seemed to me. Four of his fingers were tied together within the plaster, while thumb was within separate plaster. He had the plaster up to mid of arm. The plaster was very white and clean"*. The description of four intruders given by this witness was so accurate that essentially on the basis of this testimony, the next day KFOR apprehended five men. The credibility of this statement as for the fact that the defendant had his hand in a plaster was confirmed by other corroborative evidence and will be evaluated hereinafter.

According to the Jorgovanka Milenković's statement, the following chain of events took place: *"The first and the second one ordered a transfer of me and my girl to my room. The first one grabbed my father by the chest and said: "Stop. Get inside and tell me where are pistols and a riffle" The first one entered the kitchen with my father. I have seen that.(...) Then the second one went to kitchen as the first one called him. The third one got an order to stay with me and my daughter. He closed the door of the room where we were because my girl started to cry and scream. (...). The second, the third and the fourth men came to mine and my brother's room and searched everything, they pooled out and broke everything. Then they found money and gold in my room. The second man found money and gold. I was begging him to leave me some*

*money for a child. He grabbed me by my chin and said : "I will give you back money if you give me a pistol".(...). Then I entered the kitchen with my girl. They tied his neck ( of her father) with table cloth in order to struggle him , then I have left and he asked to untied him. He has tried by himself, I have tried as well but when we untied a little bit, blood started running from his nose and mouth. He was leaning against the sink and all of a sudden he felt down bleeding a lot. "*

The above mentioned chain of events presented by the witness Jorgovanka Milenković is clear and logical. The witness made the factual statement full of details based on her knowledge of the situation that took place. The statement of Jorgovanka Milenković wasn't found credible with reference to only on point, when she stated: "*They tied his neck (of her father) with table cloth in order to struggle him*". The rule of the witness in criminal proceedings is to give comprehensive and accurate account of what she saw, not to make assessments, as this is legal obligation of the panel.

Apart from presenting the chains of events, the witness Jorgovanka Milenković recognized the defendant Besim Berisha aka Burim Dibrani as the man she described as a suspect No.1 in the statement given on 03 August 1999 with the plaster on his arm.

The statements given by Jorgovanka Milenković during the investigation are of fundamental importance for the case as she was the main witness as to the history of the crime and she identified the defendant. The panel has no doubt as to credibility of this witness and the veracity of her statement. Evaluating these statements it is apparent that it is consistent and logical. It is clear that when Jorgovanka Milenković made these statements, right after the critical events occurred; she had been able to provide the KFOR with all possible details.

Unfortunately, the panel has not got the chance to examine Jorgovanka Milenković as she died on 5 February 2002 at 15:15 hrs, as a consequence her previous statements were read by the decision of the panel given in accordance with Article 333 par.1 point 1 of Law on Criminal Proceedings (Official Gazette No.26.86). It must be emphasized that the panel had sufficient legal grounds to admit the statements given by Jorgovanka Milenković during investigation as an evidence, to wit according to UNMIK Regulation No. 2000/17 on the admissibility of certain witness statements in preliminary investigations section 1 states: "*A witness statement made in writing by an officer serving with a relevant law enforcement authority in the course of his or her investigations shall be admissible in the preliminary investigations. This provision applies only where that same witness has not yet been examined by the investigating judge and cannot be examined by the investigating judge because he or she is inaccessible to relevant authorities, even after all necessary measures have been undertaken to locate him or her*".

Jorgovanka Milenković was examined by relevant law enforcement authority – SSTG Roberts British officer serving with KFOR military police (see section 2 of the above law) and although additional attempts were made to find and examine her, unfortunately Jorgovanka Milenković was not found( see letter dated 15 September 1999 signed by PJ Davies Capt addressed to judge Ramë Gashi). The investigation in this case was initiated on 27 August 1999, so after the deadline set in section 4 of previously mentioned regulation, namely all conditions imposed by the relevant law was observed to use the statement of Jorgovanka Milenković.

In addition the statement of Jorgovanka Milenković is fully corroborated by the statement of other witnesses Valentina Alsentijević. Valentina Alsentijević was eight (8) years old when the events took place. In the statement given before SGT Peters-Float the witness stated that on 2<sup>nd</sup> August 1999 four (4) young men came to their door and ordered them to leave the home, then they came back: *"asking us for automatic gun and pistol, threatening to kill us if we do not hand them over"*. After that Valentina Alsentijević provided description of the attacker and recounted the details of their behaviour in following way: *"(...) they have taken my grandfather to another room to maltreat him. (...) they have tied a cloth around grandfather's neck and they took him to a kitchen to maltreat him. The second, third and fourth men were maltreating him while the first one was guarding us not to observe all of that. (...) after a while they run away. We rushed into the kitchen to see grandfather still fighting for his life. My mother and I went to the neighbourhood to make a phone call and did not come back home any more. During all this time my grandfather remained in the house laying on the floor and splitting blood."*

The panel took into consideration also the statement given by Valentina Alsentijević during an investigation on the basis of UNMIK Regulation No. 2000/17 on the admissibility of certain witness statements in preliminary investigations.

Confronted with her previous statement, during the examination in the main trial on 28 July 2009, the witness provided to the panel with eyewitness account of 2<sup>nd</sup> August 1999 events. The witness recounted that on that day the assailants came into the house, they separated her and her mother from the grandfather who was kept in the kitchen. This witness frankly admitted that; *"I could not hear anything I was not able to see anything we were in the room"* and that room was separated by the corridor. Then she related as follows: *"He has a white table cloth on his neck (...) when my mum untied the table cloth he had blood coming out of his mouth and nose (...) it was to late to call the ambulance, there was no time, my grandfather spat out blood in the sink (...) he started moving towards me and my mother to hug us and we were standing by the trash-hold and that's where he remained(...)."* Later on the witness confirmed that her grandfather died and was buried in Prishtinë/Priština.

Evaluating these statements it is apparent that they are consistent to a very high degree. Also the accuracy of the statement is also impressive, given the elapse of 10 years since the crime occurred. It is obvious that this witness having experienced extreme stress, while being examined before the court was confused not only as to the fact whether she gave a statement during investigation, but also whom she and her mother recognized during the identity parade. It must be stressed that it is natural and commonly known that people better remember events shortly after they take place and not after 10 years. Additionally one cannot forget that Valentina Alsentijević was a small child, when this tragic incident took place, and she suffered severe psychological trauma that she recovered from, as she was very attached to her grandfather. As a consequence she even had lost the ability to speak for a certain period of time. Due to above mentioned circumstances the panel carried out the comprehensive analysis of the account provided by this witness taking into account all other evidence administered during main trial. The panel has no doubts as to the credibility of this witness and veracity of her statements, as they corroborate with the description of the events given by Jorgovanka Milenković. One remark must be made as to the leading questions put by the defence concerning identification parade and the person identified by both eyewitness. It was obvious for the panel that the statement given in a response to a question if Valentina Alsentijević and her mother recognized only one man and that man with long hair, can't be considered as reliable, as the only evidence in this respect is the statement given by

Jorgovanka Milenković on 4<sup>th</sup> of August 1999. It is highly inappropriate to challenge the knowledge of a witness by referring to the events that had been proved beyond any reasonable doubt, done with clear intension to undermine the veracity of that witness.

The other important evidence in this case was a statement of the witness Budimir Milenković. It must be mentioned that Budimir Milenković was not an eye-witness to this tragic and everything he knows about it, was transmitted by other family members that is Jorgovanka Milenković and Valentina Alsentijević. He confirmed that intruders came to the house looking for the weapons and maltreated Momčilo Milenković, after that attack Momčilo Milenković died and Svetomir Milenković disappeared. According to this witness, his sister Jorgovanka Milenković was examined after the event by KFOR and had pointed out on one of these assailants with a plaster on his hand as one of the intruders. According to these facts, the statement of Budimir Milenković corroborates with the statement given by Jorgovanka Milenković although it is not so full of details. This is evident since he was not present during the tragic event of 2<sup>nd</sup> of August 1999, the account was given to him 10 years ago, so he could simply forgot some minutiae details of the incident. But this is not at all reason to doubt the credibility and veracity of his statement, as it is natural that memory fades after a period of 10 years. The crucial point is that the essence of his testimony is absolutely consistent with the statement of Jorgovanka Milenković. Based on the clear picture drawn by the witnesses Budimir Milenković and Jorgovanka Milenković there is no doubts as to the fact that on 2<sup>nd</sup> August 1999 intruders broke into the house, beat Momčilo Milenković who later died and Svetomir Milenković disappeared without any trace.

The statement given by Budimir Milenković is of crucial importance, since he has shown a place where Momčilo Milenković was buried and more important he recognized the body of his father on VHS cassette taken at the crime scene.

All in all, the statements given by the above mentioned witnesses, allowed the panel to reconstruct the course of event that took place on 2<sup>nd</sup> August 1999. Further analysis, on the basis of evidence collected by KFOR lead to the obvious conclusion that the defendant Besim Berisha aka Burim Dibrani was arrested on **3<sup>rd</sup> of August 1999** so the days after the alleged crimes were committed. Before considering this body of evidence, general remark must be made on the admissibility. The Supreme Court of Kosovo by the decision dated 17<sup>th</sup> April 2001 quashed the judgement of the District Court of Prishtinë/Priština dated 20<sup>th</sup> March 2000 and returned the case for retrial. In the reasoning it is stated that the verdict of court of first instance contains fundamental violation of the provisions of the criminal procedure, pursuant to Article 364 par.11 of Law on Criminal Proceedings. It was expressly stated that the court informed parties that in separate ruling dated 23 February 2000, that could be subject to appeal, separated a number of case documents, however this decision was never distributed to the parties. One more time the court renders another decision on separation of case documents but it was not specified which documents were separated as reasoned on the judgment of the Supreme Court of Kosovo dated 17 April 2001. Additionally, the Supreme Court of Kosovo left clear instructions as to further proceedings. According to them during retrial all evidence have to be collected and examined individually and in corroboration with each other, bearing in mind to eliminate fundamental violation of the criminal procedure and taking into the consideration other arguments raised in the appeals.

In accordance with Article 390(3) of Law on Criminal Proceedings: *“The Court of the first instance must conduct all proceedings and examine all disputable issues which have been cited by the second instance court in its decision”*.

In the opinion of this panel there was no need to separate evidence collected by KFOR, on the grounds of Article 83 of Law on Criminal Proceedings for following reasons. It is stated in Article 83, item 1 that the investigative judge will exclude from the records the statements of the accused, of the witness, and of the expert witness on which according to Law on Criminal Proceedings the verdict cannot be based. The commentary of Momcilo Grubac & Tihomir Vasiljevic of the law on criminal procedure 1982, 2<sup>nd</sup> edition “Savremena Dministracija”, Belgrade must be quoted: *“Interrogation of the accused cannot be the basis for a court’s decision if the interrogation is carried out without the presence of the defense counsel. Defense counsel can be absent only if the accused explicitly waives this right and if the defense counsel is not obligatory or if the law prescribes that the defense counsel can not attend investigative procedure (Art. 168, Para 5), or if the defense counsel is not present although he has been notified about the investigation, or if at the accused has not engaged a defense counsel for the first interrogation within 24 hours after he has been informed about the legal remedy, except in case of obligatory defense counsel. Court decision cannot be based on interrogation of the accused if he has been subjected to force, threat or other similar means (Art. 259, Para 3) to give a statement or a confession, or if his statement regarding the presence of defense counsel has not been entered into the minutes (Art. 218, Para 9 and 10).*

*Court decision cannot be based on interrogation of a witness if the person who testified must not be heard as a witness (Art. 226) or if the interrogated witness who has been waived from obligation to testify but did not explicitly waive that right or if his statement on that has not been entered into the minutes or if the testimony of the witness was obtained with the use of force, threat or other similar means (Articles. 227, 228).*

*Court decision cannot be based on a statement by an expert witness, if the expertise has been done by a person who cannot be an expert witness according to the law (Art. 244, Para 1).”*

Taking into consideration the mentioned legal assessment, that this panel fully shares, there were not and still there are no legal grounds to separate from the case file the statements given by Jorgovanka Milenković, Valentina Alsentijević, Abdyl Dibrani and Enver Kastrati.

This panel has not found any legal grounds to exclude from the case file the records, information and official notes (mentioned in public prosecutor proposal to include documents in the record, dated 4<sup>th</sup> August 2009, items from 1 to 27) collected during the investigation as these documents were gather by law enforcement agency , in accordance with Article 151 of Law on Criminal Proceedings in conjunction with Section 1 of UNMIK Regulation No.1999/1 on the authority of the interim administration in Kosovo. These documents confirm actions that were taken during the investigation, resulting in apprehension of the defendant.

The “Initial Case Report” dated 8<sup>th</sup> of May 1999 authored by EJ Woolbridge, clearly states that about 8.00hrs on **Tuesday 3<sup>rd</sup> August 1999**, five Albanian men were apprehended by Italian KFOR troops in the vicinity of Pejë/Peć, 80 km west of Prishtinë/Priština ( exhibit No.1 from the prosecution list). This evidence, as to the date of the arrest, corroborate with arrest form for Dibrani, Kastrati, Berisha, Sahit and Hasdari (exhibit No.1 and 10 from the prosecution list), Prison Log Authentication and turn over letter dated 04.05.1999 by Vittorio De Stasio and Emilio Della Sala, (three pages Italian, Albanian and English), (exhibit No.17 from the prosecution list), Prison record sheet Authentication and turnover;

by Vittorio De stasio (marked translation page 17) (three pages Italian English and Albanian),(exhibit No.21 from the prosecution list), Prison Log dated 04.08.1999 (three pages, Italian, English, and Albanian), (exhibit No.22 from the prosecution list). As per the statement of duties performed on the 3<sup>rd</sup> of August, 1999 by WO Gianluca Basso (exhibit No.11 from the prosecution list, binder II, section 30) and Temporary Detention statement on the 3<sup>rd</sup> of August 3<sup>rd</sup>, 1999 by WO Gianluca Basso (exhibit No.12 from the prosecution list, binder II, section 30) that all of these men were arrested on 3<sup>rd</sup> of August 1999.

In addition to evidence proposed by the prosecution this panel has undertaken further evidentiary action in order to confirm the date on which the defendant was apprehended. As a result of the request, KFOR letter and certified detention list (ref no. 0610/DOS KV101/09) dated 9 December 2009 from M Scholze and Istvan Kokics (binder II, section 3) and Letter and attached documents (binder II, section 11) from Bajram Zymberi dated 20 August 2009 with ref no 0973/09, namely Arrest and Detention Certificate, Section particulars of detainee and sentence and copy of photograph labeled P 443/99 Berisha, Besim dated 2/11/1999 were received.

Based on this evidence the panel has no doubt that the defendant Besim Berisha was apprehended on 3<sup>rd</sup> of August 1999. The evidence gathered in this respect is logical, credible and self-explanatory. Moreover Gianluca Basso- one of Italian police officers, examined as a witness during the main trial session on 8<sup>th</sup> December 2009 confirmed that the defendant was arrested on 3<sup>rd</sup> August 1999. The panel has no reasons to doubt as to the credibility of this witness and veracity of his statement. Gianluca Basso recalled all important facts, even bearing in mind the lapse of the time that has occurred. This witness was examined via video conference, since he serves in Iran, as such he was unable to appear before the court- Article 284(1) of Law on Criminal Proceedings.

In the light of abovementioned evidence, the defense line of the defendant who claimed that he could not have committed the crimes as charged, since he was arrested on 2<sup>nd</sup> of August 1999, has to be seen as fruitless attempt to evade criminal responsibility.

The defense lawyers have come up with evidence numbered from 1 to 6 (see abovementioned list) with declared intention of proving that the defendant was arrested on 2<sup>nd</sup> of August 1999, in other words he couldn't have committed the offences as charged. This attempt must be considered as fruitless, as the evidence has no bearing in this respect. From legal point of view, proposed judicial writs shall not be considered as having probative power; simply they do not prove when the defendant was arrested, as they are not source materials. The only legal entity entitled to point out when the defendant was apprehended is law enforcement agency that arrested him and the detention center where he was detained.

The panel has so no doubts that Besim Berisha aka Burim Dibrani was among the intruders who on 2<sup>nd</sup> of August 1999 attacked the home of Momčilo Milenković beat him up and left him in life-threatening conditions. The decisive evidence in that respect was the statement given by the witness Jorgovanka Milenković who not only recognized him during an identity parade, but first has given comprehensive description of the culprit together with his distinctive feature that is to say a plaster on his hand. Moreover the photographs printed in colour submitted by the prosecution office on 23<sup>rd</sup> of November 2009 ( Binder No. II, section 5) among which photo B depicts the defendant, beyond shadow of doubts dispel any

challenge that the defendant Besim Berisha aka Burim Dibrani was apprehended by Italian KFOR police. The photographs were considered as reliable, as they were taken just after the apprehension by KFOR -international independent entity responsible for law enforcement.

The statements of the witnesses Jorgovanka Milenković and Gianluca Basso proved beyond reasonable doubt that the defendant Besim Berisha aka Burim Dibrani on critical day had his left hand in a plaster. This circumstance is also confirmed by other evidence to wit: discharging list with epicrisis with number 1354 regarding the defendant, signed by Dr. Blerim Qosaj, (binder II, section 30), statement of Dr. Blerim Qosaj examined as a witness on 24 November 2009 and letter and attached documents from University Clinical Centre of Kosovo dated 21 October 2009 (from Prof. Ass. Faton Morina), photocopy of the administration book for the date of 6 July 1999 (volume II, section 7). This objective evidence doesn't undermine the credibility of Jorgovanka Milenković's statement as to which hand the defendant had in plaster. Jorgovanka Milenković stated as follows: " *This man had a plaster on the right arm as it seemed to me. Four of his fingers were tied together within the plaster, while thumbs were within separate plaster. . He had the plaster up to mid of his arm. The plaster was very white and clean*". It has to be emphasized that on this critical day, the witness was exposed to extreme stress, in life threatening situation, so any possible confusion as the side of the injury is not crucial. This comprehensive account of this witness corresponds with medical records of the defendant that makes Jorgovanka Milenković's testimony even more credible.

Due to the fact that the discharging list together with the epicrisis was issued in respect of Burim Dibrani and not Besim Berisha this panel had to take further action to establish beyond reasonable doubt, if the submitted document was made out in accordance with the procedures in force at this time and if the defendant used two names – Besim Berisha and Burim Dibrani.

Having read, the letter and attached documents from Ministry of Internal Affairs (from Blerim Camaj) dated 27 October 2009, application form titled "Regjistrimi civil dhe i votuesve" (The civil registration and voting) dated 15/07/2000, photograph scanned and magnified, finger prints (2) and original birth certificate, the panel has no doubts as for the double identity of the defendant. It is clear the defendant obtained at birth the name of Burim Dibrani and during the course of life he also used the name of Besim Berisha. Applying for ID card, on 15<sup>th</sup> of July 2000 the defendant used his birth name of Burim Dibrani, what is obvious by simple act of comparing his recent image with the picture attached to his motion for ID. He also used the name of Burim Dibrani when seeking medical treatment.

After examination of the following witnesses Blerim Qosaj, Jusuf Ulaj, Bedri Bakalli and having analyzed the report on physical examination of the defendant and forensic medical report by the expert witnesses Dr. Marek Gasior and Dr. Tefik Gashi the panel came to the conclusion that the discharging list with epycrisis is reliable document that proves physical condition of the defendant at the time when the alleged crimes were committed.

Another issue that this panel had to consider was to examine whether the defendant with his left arm in plaster was able to beat up and maltreat Momčilo Milenković. The opinion of above mentioned expert witness together with the observation made by the presiding judge, noted in the minutes taken on 10<sup>th</sup> of November 2009, (English version 2<sup>nd</sup> page) that Besim

Berisha signed the document with his right hand, allowed the panel without the slightest doubt to arrive to the conclusion that the defendant even with the left arm in plaster was able to perform hostile action against the deceased victim. The panel found the statement given by the defendant that during the time he was wounded he was left-handed and due to this fact later on he started to use right hand for everyday activities as ungrounded and fruitless attempt to avoid criminal responsibility. Even if one can adopt the position of the defendant that he was left handed, it is a matter of logical reasoning and common understanding that such action as beating up doesn't require adequate precision and might be undertaken with right hand. Additionally, it shall be reminded that the defendant has not acted alone while beating up Momčilo Milenković, but along with other unknown person.

The most important factual issue that had to be established beyond any reasonable doubt, as per count 1 and 3 of amended indictment, was the cause of death of Momčilo Milenković. With reference to this matter the following evidence was taken into the consideration: VHS cassette taken at crime scene, statement of the witness Brendan Tanslen( binder II, section 27), information letter regarding Mr. Milenković's post-mortem examination from Headquarters Multi National brigade (Centre) Pristina( binder II, section 19), information about the corpse of Momčilo Milenković being withdrawn from the hospital ( binder II, section 12), Momčilo Milenković medical report dated 6<sup>th</sup> of November 1999 ( binder II, section 7), medical records (binder II, section 8), autopsy report dated 11<sup>th</sup> October 2009 ( binder III, section 21), forensic medical opinion number P. Nr.97/01 dated 29<sup>th</sup> October 2009 (binder III, section 17), examination of expert witnesses during main trial. The death of Momčilo Milenković as a result of incident described in count 3 of amended indictment is an undisputable fact. The statements of Jorgovanka Milenković and Valentina Aksentijević are clear, logical and comprehensive as to this fact. Additionally, the witness Budimir Milenković after presentation of the film taken at the crime scene confirmed that he had recognized the body of his deceased father Momčilo Milenković. It is clear that no real and logical doubts can exist as to the fact that Momčilo Milenković died in the circumstances described in count III of the amended indictment.

There is a good reason to believe that during the investigative actions taken shortly after the incidents on critical day, gross negligence of professional duties has taken place.

Firstly, the investigators did not take pictures depicting the crime scene and the body of the deceased victim, instead of this, a blurring recording was made. In the opinion of this panel the overall pictures of the Momčilo Milenković body could be helpful to establish, in detail, all the injuries he received, at the same time to uncover cause of the death.

Secondly, the body of Momčilo Milenković was handed over to family without post-mortem examination. Through lack of this crucial evidence, the expert witnesses were not able to supply the panel with the explicit opinion on the reason of Momčilo Milenković's death.

With the aim to establish objective truth – the reason of Momčilo Milenković's death, the decision to exhume the remains of Momčilo Milenković and to carry out the post-mortem autopsy was taken by the panel. Having taken into consideration the statements of eye-witnesses, in particular the part that relates to the table cloth that was tightly tied up around the deceased's neck, the panel wanted to have the remains examined in order to establish any evidence of ante mortem injures. As per autopsy report signed by expert-witness Dr. Marek Gasior: *"Since soft tissues are not present and examined bones show no evidence of ante mortem injures I*

*cannot state the cause of the death. There based on the examination of bones of the remains indentified to me as remains of Momčilo Milenković- cause of his death must remain unascertained". Further study of evidence collected during the main trial, particularly the statement of Budimir Milenković, brought the attention of the court that Momčilo Milenković had suffered medical problems for a long time prior to his death. The panel admitted as evidence medical records of deceased Momčilo Milenković, received from the State Archive of Kosovo. On the basis of abovementioned evidence the expert witnesses prepared a forensic medical opinion dated 29<sup>th</sup> of October 2009 in which they found: "state the cause of his death is very difficult. But taking under consideration his advanced diseases in his circular system and fact that he was bitten and died during or shortly after the riot most probably he might died due to mugging or stress related arrhythmia of heart. We can not exclude also death as a result of postural asphyxia. We have taken under consideration also cardio respiratory arrest associated with struggle, position restrain of person with advanced diseases in circulatory system."*

In addition the expert witnesses were summoned for the main trial in order to supply the panel with additional information in respect to Momčilo Milenković's death. It must be stated clearly that expert witnesses stood by their written opinion and repeated one more time that without the autopsy, as an appropriate laboratory tests, they could not determine with certainty the direct cause of death. All causes of death they put forward have to be considered as highly possible, but not certain. The opinion is also clear in relation to the issue if there is any nexus between actions of the defendant and the cause of the death. The experts stated that there was no nexus( casual link) of that kind and these actions might be considered only in this way that they did exacerbate or occur faster "accasio" and "conditio" mortis that were determined with certainty. Referring to the question if from medical point of view, the situation in which Momčilo Milenković was placed, can be assessed as life-threatening situation, the opinion was highly precise- in case one deal with the infarct as a consequence of situation Momčilo Milenković had to face- the situation of such kind is considered as life-threatening situation and medical assistance in this case should be quick, urgent and professional.

This panel fully recognize the forensic opinion, report on medical examination and autopsy report as explicit and credible. The expert witnesses delivered comprehensive and reliable opinion and reports based on vast and specialist knowledge of dedicated and experienced professionals.

As to the fingerprint report made out by Kevin J Miller Sgt from Royal Canadian Mounted Police, in the opinion of this panel there were no reasons to undermine the credibility of this evidence, as it was prepared in professional and plausible way. One comment must be made in the respect of this evidence, to wit according to Article 347 of Law on Criminal Proceedings the court has a duty to conscientiously evaluate each piece of evidence individually and in connection with each other and on the basis of this assessment, to frame a conclusion as to whether the fact has been proven. This very evidence taken individually out of the body of evidence shall not be used as the basis to acquit the defendant from all charges. This fingerprint opinion has to be considered in connection with other evidence admitted during the main trial particularly with the statements of Jorgovanka Milenković and Gianluca Basso. Furthermore, the highly unprofessional way the evidence were collected at the crime scene, as mentioned before, gives reasons to cast a doubt that not all possible fingerprints were collected.

The statement of Enver Kastrati dated 5<sup>th</sup> of August 1999, given to Sgt Roberts and Floats has not been taken into the consideration while deciding on the defendant's responsibility, as it was unclear at what capacity he was examined at given time. In the heading of the minutes taken during the examination the indication is made that the minutes contain the statement of the witness, but on the other hand the instruction as to the witness obligation is crossed out that suggests that could have been examined as a suspect. It has to be pointed out that as per Article 195 of Law on Criminal Proceedings, if there was founded suspicion that Enver Kastrati has committed a criminal act he should have been apprehended and brought without delay to the competent investigation judge in whose jurisdiction the criminal act was committed. The remark has to be made, that it is commonly known that the District Court of Prishtinë/Priština and the investigative judge of this court were operational. Moreover, the minutes do not contain any information if he was informed about his rights as a suspect. Due to presented ambiguity, in favor of the defendant, the panel could not and have not based its findings on this statement. It must be clearly emphasized that other evidence was used to establish factual situation at this critical day.

As to the statements given by Enver Kastrati on 14<sup>th</sup> of October 1999, during main trial on 20 March 2000 and most notably during the retrial on 5<sup>th</sup> August 2009 in the opinion of this panel they are completely inconceivable and biased. Enver Kastrati even went as far as to tell lies before the court. This witness lied as to the day they were apprehended and contended that it happened on 2<sup>nd</sup> August 1999. It is highly implausible to remember after 10 years the exact day they were arrested, as it is natural that people tend to forget when the time elapses. The explanation he presented is completely unreliable, as he discrepancies even occurred between his statements. It has to be underlined that during the examination dated 14<sup>th</sup> October 1999 given before investigating judge he stated: " *I cannot remember the exact date but surely it should have been sometime in the beginning of 8<sup>th</sup> month of the year since I was at short break home.*" Since during the interrogation conducted 2 months after the incident he did not remember the exact day of arrest, it is impossible to recall this date 10 years later. The panel is of the opinion that the witness Enver Kastrati lied intentionally so as to provide the defendant with cast-iron alibi for the 2<sup>nd</sup> August 1999. Such behavior is reprehensible for which Enver Kastrati should be prosecuted.

The statement of Avdyl Dibrani who was examined on 31 August 1999 and during main trial on 20 March 2000 contended that he along with Besim Berisha and other 3 men was detained on 2 August 1999 was evaluated as highly implausible and partial. The reason for this evaluation was the fact that Avdyl Dibrani and the defendant served together in KLA as soldiers, so it is evident that this witness had strong reasons to give the testimony in favor of the defendant. Moreover, the notice must be taken to wit that the statement of the witness Avdyl Dibrani as to the date of the arrest is in direct and obvious contradiction with other plausible evidence is further elaborated. Additionally it has to be boldly underlined that there is a discrepancy in the statements of this witness, since interrogated shortly after the incident he stated: " *As far as I remember, it was 2.08.1999 (...)*" comparing with blunt statement during first trial that he together with others was detained on 2.08.1999. It was distinct that that Avdyl Dibrani has changed his previous statements only for one reason – to supply the defendant with solid alibi.

The panel made necessary steps to summon this Avdyl Dibrani, so as to confront the statements he gave during the investigation and main trial. According to the information signed by Guido Oestreich from EULEX International Legal Cooperation Unit current whereabouts of Avdyl Dibrani are not known. Taking this fact into the consideration, on the basis of Article 333 paragraph 1 point 1 of the Law on Criminal Proceedings the panel came to the decision to admit statements dated 31 August 1999 and 20 March 2000. The remarks have to be made as for the statement of Avdyl Dibrani given on 5 August 1999. The panel was of the opinion that mentioned statement does not comply with requirements of Regulation No.2000/17 on the Admissibility of Certain Witness Statements in Preliminary Investigations, since Avdyl Dibrani was examined by the investigative judge on 31 August 1999.

The following evidence: statement reports of Avdyl Dibrani, Hajdar Sahiti, Enver Kastrati, Besim Berisha dated 3.08.1999 together with certified detention list dated 9 December 2009 submitted by KFOR constitute another chain of evidence, so as to confirm that the real date of the defendant and other men was 3<sup>rd</sup> of August 1999.

#### IV. Legal Assessment:

Having perused the above mentioned exhibits and having examined the witness during court proceedings, the Court found that Besim Berisha aka Burim Dibrani is guilty beyond any reasonable doubt of the criminal offence of Exposure to danger in violation with article 42 paragraph 2 of the Criminal Law of Kosovo read together with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1977), as it has not been proven that the defendant committed this act that he was charged with.

Pursuant to article 350 paragraph 3 of the Law on Criminal Procedure (Official Gazette No. 26/86) the defendant Besim Berisha aka Burim Dibrani was acquitted of the criminal acts of: Murder from Article 30 paragraph 2 item 3 of the Criminal Code of Kosovo And Illegal Deprivation of Liberty, Article 63 paragraph 4 as read with paragraph 1 of the Criminal Code of Serbia.

The general term of criminal act of murder is defined by the law as another person's life that is as taking or destroying the life of another person. Within the group of the criminal acts against life and body one should distinguish between: murders committed *with premeditation* and murders committed *out of negligence*.

Paragraph 1 of Article 47 determines the punishment for the basic form of murder committed with premeditation. According to mentioned article the action by which the criminal act of murder is committed is not particularly determined, so that the action of commission of this criminal act is any action by which it is possible to cause the death of another person. Since the law does not define special means or a special manner of commission, murder can be committed by any means or in any manner that can cause death of another person. Murder can be committed directly and indirectly and by doing and omission.

It is necessary to quote legal standpoint from commentary SRZENTIC, Nikola – STAJIC, dr. Aleksandar – KRAUS dr. BOZIDAR – LAZAREVIC, dr. Ljubisa – DJORDJEVIC, dr. Miroslav COMMENTARY ON THE CRIMINAL LAWS OF SR OF SERBIA, SAP

KOSOVO AND SAP VOJVODINA, 1981. "SAVREMENA ADMINISTRACIJA" BELGRADE:"

*The criminal act of murder is committed by omission also in some cases when the law, determining one criminal act as an omissive delict, foresees the death of a person as a qualifying consequence, but that consequence is not brought about by negligence **but with premeditation**. Thus, a criminal act will not be qualified as per Article 57, paragraph 2 (exposure to danger) or per Article 58, paragraph 2 (abandoning a helpless person), but rather it will be qualified as per Article 47 if the perpetrator has brought another person into a state or circumstances of danger to their life and then left them without help, or left without help a helpless person he had been entrusted with or whom he was otherwise obliged to take care of in situations of life danger, with premeditation that the person should lose their life, and the left person indeed loses its life."*

According to the legal definition of premeditation, the taking of life will be committed with the premeditation if the perpetrator is aware that he was undertaking an action by which it is possible to kill the person, that this action is directed against a living person (awareness of the casual link) and if the perpetrator wants to take the victim's life (direct premeditation) or consents to the foreseen consequence – the death of the person (incidental premeditation).

It is up to the court to draw a conclusion on the basis of all circumstances linked with the act and the perpetrator in determining whether or not the perpetrator wished this act to be committed or not.

In the opinion of the court supported by existing commentaries, it shall be deemed that the perpetrator wished for the act to be committed if the consequence of the act was the purpose, the goal of his activity. It involves cases when all circumstances point to the conclusion that the perpetrator has undertaken the act in order for circumstances to occur. It shall be also deemed that the perpetrator wishes for the criminal act also when the consequences of the act is not his fundamental goal, but a means of realisation of some other goal.

The act is committed with the incidental premeditation when the perpetrator was aware that as a consequence of his action or non-action a prohibited consequence may occur, and still accepted its occurrence. This form of guilt also contains awareness and volition, but with both elements there is a certain distinction in relation to the direct premeditation, because of the fact that it is somewhat more expressive of the voluntary attitude. For the element of the awareness the distinction is in that for direct premeditation there is awareness of the certainty of the act, and for incidental premeditation the awareness of the possibility of the act's consequence occurring, in the second case the perpetrator is aware of the action of commission and other characteristic of the criminal act but in relation to the consequences there is no assurance or certainty that it will occur or higher probability that it will occur. It is disputable, especially from the aspect of the practical application of the law, when it is deemed that the perpetrator is "accepting" the consequence occurring, as acceptance is also a voluntary attitude towards the consequence, and the only problem is how to determine its contents.

This panel considers that the rule of presumption of innocence is understood on the grounds of jurisprudence given by international criminal tribunals in this way that "*only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence*" (Co No. IT-96-21-A International

Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia), whereas *"mitigating circumstances need only be proven on the balance of probabilities and not beyond a reasonable doubt"*( IT-95-9/2-S par.40).

Having examined all evidence administrated during the trial in the light of above-mentioned remarks this panel came to the only logical conclusion that the Prosecution did not prove that the defendant is guilty of murder as described in the first count. Reaching this conclusion the panel based its findings on the evidence that contributed to the presumption as to the intention of the defendant and other co-perpetrators when they entered the house and started to maltreat Momčilo Milenković.

Having in mind all legal argument mentioned before in the judgement and after close examination of the evidence collected during main trial, the panel came to the conclusion that the defendant is guilty beyond any doubts of committing the crime of exposure to danger as per count 3.

In addition it has to be underlined that pursuant to Article 337 of the Law on Criminal Proceedings in case of amending the indictment, since the prosecutor found that the evidence presented had demonstrated a change in the status of the facts from ones that were presented in the indictment, there was a need to submit the indictment in writing. As the prosecutor by submitting a written indictment did more than it was expected, the defence cannot claim that there was a procedural law breach. A copy of the indictment was served on the accused and his defence councils, but no traverse of the indictment was allowed (Article 337, par.3). Additionally the panel allowed the defendant to make a statement in respect of this amended count, but he pleads not guilty and rejected to make any statement as to this count.

As to the second count, after examination of all evidence this panel also has come to the conclusion that the prosecution did not submit any conclusive evidence in this respect.

According to the indictment the defendant is accused of depriving Svetomir Milenković of his freedom of movement in an illegal and cruel manner that lasted more than 30 days, the victim has been taken to some unfamiliar location where he has been locked and still is being held (count 2 of the indictment).

The classification for the criminal act of illegal deprivation of freedom is foreseen in Article 63 paragraph 4 as read with paragraph 1 of the Criminal Code of Serbia.

It should be emphasized that according to the evidence collected during the main trial, one issue is evident that Svetomir Milenković disappeared shortly after this criminal assault, but it is was not proven beyond any reasonable doubt that the defendant and other unidentified persons are responsible for his disappearance . The plausible statement of Jorgovanka Milenković who stated:” *After that I ran to an old house to see if my brother was there. I did not find him. Later on I heard somebody starting the car and I am not sure but I think it was them. I went back to the house calling out my brother. I have seen that they have taken the TV but I did not find my brother*”.

This witness did not state that she had seen her brother being taken away by the intruders although she had perfect conditions to realize that the TV was stolen. By inference we can conclude that since she noticed the fact that the TV was stolen, she also would have detected the fact that Svetomir Milenković was kidnapped. Neither the statement of Valentina Aksentijević substantiated the course of event in favor of the prosecution. This witness provided the panel with following first-hand account:” *I also want to tell you about my uncle who was in the house when the young men arrived for the first time, but he was hidden when they came for the second, so they did not see him. We do not know if he has escaped or they have kidnapped him*”. This witness related about the incident, but she did not know the fate of her missing uncle.

The statement of the witness Budimir Milenković strengthened the conviction that Svetomir Milenković, beyond a shadow of a doubt, is a missing person. This fact is also confirmed by a letter from Office on Missing Persons and Forensics (EULEX Kosovo) Alan Robinson dated 7 September 2009.

Neither of this evidence examined alone and jointly, leads to the only possible inference that Svetomir Milenković was deprived of his freedom especially in cruel manner. In the opinion of this panel the term cruel manner shall be considered as causing of bodily and mental harm that oversteps regular consequences of deprivation of freedom. Such are different kinds of torture, lacking of water and food, humiliation and similar. All previously mentioned evidence has to be considered in terms of circumstantial evidence. Circumstantial evidence is evidence in a case which can be used to draw inferences about a series of events. It is also known as indirect evidence; the opposite is direct evidence. Circumstantial evidence usually accumulates into a collection, so that each piece corroborates the other pieces (the pieces then becomes corroborating evidence). Together they support more strongly the inference that the assertion is true. Circumstantial evidence must be carefully gathered and corroborated so that the evidence paints a clear and obvious picture. Should the prosecution fail to prove the case the defendant shall be acquitted. Meanwhile the above- mentioned evidence allows constructing the other possible scenario, to wit that Svetomir Milenković was kidnapped and than murdered and to date his body was not found.

#### **IV. Calculation of punishment:**

Deciding on punishment, the panel was bound by the provision of Article 2 paragraph 2 of the CCK, that imposes the obligation to apply the law more in favorable to the perpetrator in the case of a change in the law applicable to a given case.

Section 1 of the UNMIK Regulation No. 1999/24 establishes the applicable law in Kosovo as “the law in force in Kosovo on the 22<sup>nd</sup> March 1989”. For the purpose of this case Criminal Code of Kosovo (28 July 1977) and Criminal Code of Serbia (30 June 1977) are the applicable laws together with Criminal Code of the Socialist Federal Republic of Yugoslavia. The above mentioned regulation is deemed to have entered into force as of 10 June 1999, thus before the criminal act was committed (section 3 of the UNMIK Regulation No. 1999/24).

According to Article 42 paragraph 2 of Criminal Code of Kosovo (28 July 1977) the punishment of one to eight years of imprisonment may be imposed for committing this crime. Pursuant to Article 156 paragraph 4 of the CCK as reads with Article 38, that is the

equivalent of previous regulation, the defendant could be punished by imprisonment of at least five years to twenty years. By inference it can be conducted that the law in force at the time the crime was committed was more lenient than Criminal Code of Kosovo. This panel took into consideration the laps of statutory limitation on criminal prosecution, since the crime described in count 2 was committed on 2<sup>nd</sup> of August 1999.

Article 95 (1) point 3 stipulates that criminal prosecution is barred after the lapse: 10 years from the commission of a criminal act for which the law provides imprisonment for a term exceeding five years. Further it reads (Article 96) that the period of limitation to the criminal prosecution commences with the day on which the criminal act has been committed. The running of the period of limitation is interrupted by every act of proceedings which relates to the prosecution of the perpetrator on account of the criminal act committed. A new period of limitation begins with every interruption. There shall be an absolute bar to prosecution when twice as much time lapses as required, in accordance with the law, for the bar to prosecution. Procedural actions causing recess of the statutory limitation can be undertaken by the court in order to criminally prosecute the perpetrator for committing the criminal act. The procedural actions undertaken by the court are investigative actions such as issuing arrest warrant for the accused against whom the criminal proceedings were initiated, when the accused is at large (Ljubisa Lazarevic- Commentary of the Criminal Code of FRY 1995, 5<sup>th</sup> edition). Based on the documentation collected during the course of this case it is clear that the District Court of Prishtinë/Priština on 7 November 2002 issued an arrest warrant against the defendant. Therefore, this panel is of the opinion that the criminal proceedings against the defendant for committing the criminal act (count 2) cannot be barred, as statutory limitation would elapse on 7 November 2012.

Pursuant to Article 41 of the CCSRY the court when rendering a judgment has to take into consideration the purpose of punishment, all the circumstances that are relevant to the mitigation or aggravation of the punishment. The punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender.

1. As mitigating circumstances:

- The accused was a young man while committing this crime,
- The crime was committed a long time ago,
- He had to spend a long time in detention on remand,

2. As aggravating circumstances:

- High intensity of danger to the protected values to wit: life and body of another human being, as a consequence of the criminal act Momčilo Milenković lost his life,
- The attack late in the afternoon on the house that is considered as a safe place, additionally this attack brought about Valentina's long lasting traumatic stress and caused the family to move to a more secured place.

Taking all these circumstances into careful consideration this panel found that imprisonment of six (6) years will be appropriate and necessary to serve all purposes of punishment mentioned in Article 41 of CCSRY.

Taking into the considerations above mentioned circumstances the panel was of the opinion that the perpetrator did not deserve to be treated leniently. The actions of the defendant as presented must be strongly condemned. In this case only the punishment of imprisonment without suspension will guarantee that the purpose of the penalty against the offender will be achieved, and in particular he will not relapse into crime. This punishment will persuade the defendant that the law must be respected.

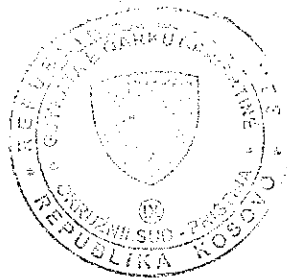
Pursuant to Article 351 Paragraph 6 of the Law of Criminal Procedure (LCP) and Article 50 Paragraph 1 of the SFRY Criminal Code (CCY), the time Besim Berisha aka Burim Dibrani spent in detention on remand from 3 August 1999 to 20 March 2000, and from 27 August 2008 (when deported from France) until the verdict becomes final shall be included in the amount of punishment.

#### V. Costs of the criminal proceedings.

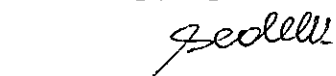
Pursuant to Article 98 Paragraph 1 of the LCP, he must reimburse the costs of the criminal proceedings in the amount of two hundred (200) Euros for the criminal offence of exposure to danger.

**Court Recorder**

  
Nexhmije Mezini



**Presiding judge**

  
Arkadiusz Sedek

#### LEGAL REMEDY:

Pursuant to Article 359 of the LCP, an appeal may be filed against this verdict through this court within fifteen (15) days of the service of the written verdict. An appeal shall stay its execution.