

with the passage of time, memory failure and illiteracy, adding to have appreciated the explanations given by the witness as honest about what s/he "had actually seen".

This Court deems the testimony of this person, who defines himself as a shepherd of 47 years and illiterate, as credible inasmuch it is logic, consistent and finds external corroboration.

Certainly the cultural degree of this person, the inability to read his own statements in order to make eventual corrections, the time elapsed, the injuries suffered during the critical period (object of some photographic documents¹⁷), the difficulties connected with his quality of anonymous (and protected) witness, that means the fear to be "liquidated" ("too many people were killed" as quoted also by the first judge) play an important role in the explanation of these contradictions, as well as the way he tried to make clear not to be able to speak about people he did not know, way that the first judge correctly appreciated as honest.

In this case there are no traces of false testimony or of slander against the defendants: "E" has nothing to do with or against Bedri ZYBERAJ and Selim KRASNIQI and stated sincerely what he saw, heard and believed to have understood, as clarified further.

The statements of "E" appear to be logic and consistent as to the fact that he was detained in Drenovc, because he gave a description both of a wooden barrack, where he was at the first moment and of the school where he was kept for three days and he recognized the school in the pictures of the photo line up.

Also the conditions of the detention and the fact to have been beaten are convincingly stated: he was given nothing to eat and to drink, had to sleep on the floor in a room in which was kept the coal, had no toilet facilities and had to relieve himself in the same room where he slept, was not allowed to wash away his blood.

Corroborations about the difficult situation as to the food and hygienic conditions are to be found in the statements of witnesses examined in the previous chapters.

That "E" was beaten up during his detention is corroborated by the photos he brought to the attention of the Court and related to injuries to his back and his head: in both photos it is possible to see marks and scars.

"E" appears to be credible when states to have been examined by Bedri ZYBERAJ: he gives a physical description of ZYBERAJ which matches with the shape of the defendant; "E" describes the cloths of ZYBERAJ (plain cloths) in the same way of other witnesses; "E" recognizes the pictures of ZYBERAJ, adding that the defendant was a KLA member and also this detail is confirmed by other witnesses and admitted by the defendant himself as seen in other part of this judgment.

This witness is credible also when he says that in Drenovc were kept several detainees: this results also from other sources.

"E" states to have known of the abduction of Hysen from Denje.

Once he was in Drenovc "E" heard the names of other prisoners, among them also Hidaj POPAJ, but clarified not to have met these persons in prison.

The presence in Drenovc of Hidaj POPAJ and Hysen KRASNIQI is corroborated by other sources.

¹⁷ Photos admitted by the Court of First Instance with ruling 22 June 2006. See the in Confidential Binder no. 4, point I, pages 4009 and 4010.



As to the time he was arrested "E" told the Police it was mid June 1998, before the Investigating Judge confirmed this date, but later on spoke of 17 May explaining not to be literate and not to know, however it was before the starting of the bombing by NATO. At the main trial the witness spoke of 1999, but then confirmed 9 June 1998, adding not to be able to say the exact date.

To a question of the defense counsels "E" he mentioned spring as the time of his detention in Drenovc.

As to this point the contradictions seem to be linked with the modest culture and memory problems.

The first declaration to the Police, the nearest to the facts, appears therefore to be the most reliable.

As to the duration of his detention "E" stated to the Police to have been detained in Drenovc for three days, the same he said to the Investigating Judge and at the main trial.

On other points the testimony of "E" results sincere but not able to demonstrate what he says.

It is the point of the abduction and of the beating up by Selim KRASNIQI and Gani PAQARIZI, Celik and Rrezik.

"E" stated not to know these two persons before and to have heard their nicknames as being mentioned by the population.

Particularly he heard that Rrezik got killed and on that occasion he learned he was Gani PAQARIZI, while from people he heard that "Celik did this, Celik did that" and only after the war got to know that Celik was Selim KRASNIQI.

The witness appears to be sincere since he states how he reconstructed the identity of the persons he met, and on the other side there is no doubt that both PAQARIZI and Selim KRASNIQI were in Drenovc at that time.

Only, this Court deems that this is not enough to demonstrate with enough sureness that at the moment of the abduction Celik was present and beat "E" since the latter was not able to recognize the photo of the defendant.

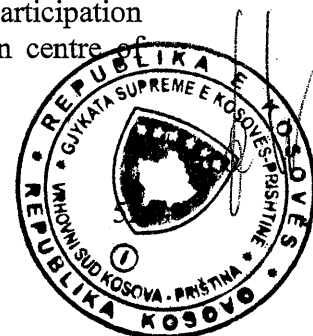
In this case the direct participation of Selim KRASNIQI in the arrest of "E" is likely to be a mistake, not of the memory but of the process of identification followed by the witness.

Other contradictions in the statements of "E" (particularly the fact that the Prosecutor withdrew the charge against Isuf GASHI because of a discrepancy in his testimony) don't seem to affect in a decisive way his credibility on the points listed above.

From the act of withdrawal from prosecution of 27 July 2006 results that "E" was at that moment the unique evidence against the accused and that evidence showed to be inconsistent when stating before the Police and the Investigating Judge that during the examination was Bedri ZYBERAJ to threaten "E" with a weapon, while Isuf GASHI incited the former to shoot, while at the main trial he stated that the weapon was in possess of GASHI.

This Court can not discuss the act of withdrawal from the prosecution, only notices that the other points listed above appear to be corroborated from other elements and thus reliable.

As to the responsibility of Selim KRASNIQI in the detention of witness "E" must be recalled the considerations developed at previous point **II.13** regarding his participation in the joint criminal enterprise related to the management of the detention centre of Drenovc in the period of time under consideration.



17. Anonymous witness "U".

The appeal firstly claims that the statements of this witness are in contradiction about the date of his arrest (June or 12 or 16 July), fact that should demonstrate a manipulation of the witness and secondly underlines the unreliability of the reasons alleged by "U" for his arrest (a private dispute against the components of a ZYBERAJ family) which are denied by the witness of the defense Halim ZYBERAJ.

The First Instance Judge gives importance to the testimony of witness "U" as to his abduction by KLA (Agron KRASNIQI and Zaim BAJRAKTARI), as to his examination by Selim KRASNIQI and as to the beating up ordered against the victim by the latter defendant.

The reason of the unlawful arrest was a private dispute between the witness and a KLA soldier.

The first judge explains two contradictions in the statements of "U" (as to the date of the arrest and of the length of his interrogation) as simple and "genuinely" mistakes which were "honestly" corrected, thus not affecting his testimony.

This Court shares the opinion of the first judge, since the reasons taken in the appeal don't seem to be decisive.

"U" had the status of anonymous witness and remained such type of witness.

In this case one point of the testimony was related to the sale of a real estate from the witness to other people and the defense was in condition to bring as a witness one of the purchasers.

Thus, despite of the anonymity of this witness the defendants were able to defend themselves.

Three statements of "U" are here interesting: the one before the Investigating Judge and the two at the main trial.

Before the **Investigating Judge** (6 August 2004) "U" stated to have sold a real estate to the brothers Qerim, Halim and Ragip ZYBERAJ, the price had not been paid completely and still at present he waited for 2525 DM.

In the year 1998 "U" was arrested twice: the first one in July and the second in the period of time between 10 to 16 December, this happened because of his credit.

First he spoke of the arrest happened in December when three armed men abducted him from his home in Drenovc and brought him to the basement of the school.

The three men were masked, but in front of the crying of the parents of "U" they took off the masks.

They were Nesemi ZYBERAJ, Qerim ZYBERAJ and Irfan BERISHA.

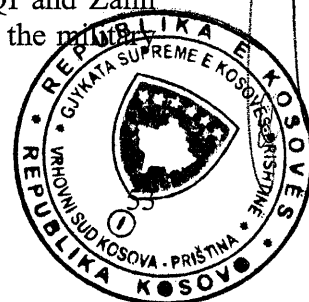
On the way to the school the three men asked "U" why are you asking money to Qerim and Nesemi told him: you will see how much money we will give you.

Qerim threatened "U" of death.

During the detention in December 1998 "U" was not questioned.

Questioning happened in July 1998, when the witness had been arrested because of the same issue.

About this arrest "U" stated to have been picked up by Agron KRASNIQI and Zaim KRASNIQI from Polluzhe and to have been brought to the headquarters of the military police where Selim KRASNIQI questioned him for about four hours.



Selim KRASNIQI asked "U" why he was asking for money from Qerim and his brothers Halim and Ragip.

"U" answered to have some debts and in order to pay them he had sold a property to those guys, who had still to pay some money.

Selim KRASNIQI ordered Agron and Zaim to take "U" to another room, where he was beaten up by Agron with a baton and by Zaim with a piece of steel.

The beating up lasted about 15 minutes till "U" lost his consciousness.

He was taken again before Selim KRASNIQI who asked him "do you ever dare to ask for your money back from Qerim and his brothers?" "U" renounced to the money and was released.

At home "U" decided with his parents not to ask any more for that money.

However later on he asked again for the money and in December he was abducted, threatened and detained, as seen before.

Answering to a specific question about how he learned the identity of Selim KRASNIQI "U" stated that some soldiers had told him that this person was the head of the office and other soldiers greeted him "hello Selim KRASNIQI how are you?".

Tafil ZYBERAJ, who later on during the war died, asked the witness what he was doing in that office and told him that the person who was interrogating him was Selim KRASNIQI.

The nickname of Selim KRASNIQI was Celiku, he wore a black KLA uniform.

During the questioning was present also Gani PAQARIZI, Rreziku, who wore a black uniform and did not ask any question.

Tafil ZYBERAJ gave him the names of Agron KRASNIQI and of the others mentioned by the witness.

"U" did not recognize the picture of Selim KRASNIQI or of other persons he had mentioned as involved in his arrest, however he recognized the headquarters and the detention centre of KLA and the pictures of other members of KLA he knew.

To a question of the defense counsel "U" was not able to remember the exact date when the Serbian army burned down his house and his village, that is Drenovc, he only could say it was two or three months before his departure from Drenovc, which was on 20 December 1998.

The first testimony of "U" at the **main trial** (14 December 2005) appears to be conditioned by the worry not to reveal his own identity.

"U" actually confirmed to have been arrested by Agron KRASNIQI and Zaim KRASNIQI, to have been brought to the military headquarters of Drenovc where he was interrogated by Selim KRASNIQI at the presence of Gani PAQARIZI.

Selim KRASNIQI asked "U" why he had bad relations with a KLA soldier.

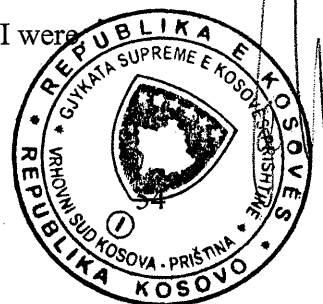
The questioning lasted about 40 minutes, present was also Gani PAQARIZI.

After the questioning Selim KRASNIQI ordered to Agron KRASNIQI and Zaim KRASNIQI to beat the witness.

The beating up took approximately half an hour.

After the beating up "U" was told by Selim KRASNIQI "if anything else happens we are going to waste you" and then released.

A friend of his indicated to "U" who Selim KRASNIQI and Gani PAQARIZI were.



As to the date of this arrest, "U" started his testimony saying to have met Selim KRASNIQI on occasion of his arrest on June 16, 1998.

This was the first time he had been in the headquarters of Drenovc.

About the "several" occasions he was there after the first one "U" did not want to speak for fear on this way to reveal his identity.

"U" was confronted with his statement before the Investigating Judge when he had indicated the month of July.

To this question "U" answered firstly with the date of 12 June, then corrected himself with the 16 June, saying that in front of the Investigating Judge he had got confused and now he could be precise thanks some notes he had brought with himself and which he had not when was examined by the Investigating Judge.

He explained also to have spent two months in prison during 2004 because of some unpaid debts. At his release he was interrogated by the Investigating Judge but he had not his notes.

The panel saw the notes of the witness where was reported 16 June, while another date had been erased.

As to the length of his interrogation by Selim KRASNIQI, "U" did not remember to have stated before the Investigating Judge that it had lasted four hours.

To the best of his knowledge and making use of his notes "U" could remember that the interrogation took approximately 40 minutes.

"U" recognized the photos of the school and, among the picture of persons, the photo no. 8 (that of Selim KRASNIQI) as that of a person he knew, adding not being in condition to say his name because he was afraid to reveal his identity.

Only after some insistence of the Court "U" indicated some other photos of persons he knew (no. 16 who is Bedri ZYBERAJ, 27 who is Islam GASHI and 32 who is Islam GASHI) whose names he did not want to pronounce.

To the question of the Presiding Judge, why before the Investigating Judge he had not recognized photo no. 8 (that of Selim KRASNIQI), which on the contrary he recognized at the main trial "U" answered that even at that time he had recognized that person, but he was afraid to tell his name, he was afraid for his life and that of his family.

For the same reason he did not want to repeat the names made before the Investigating Judge even though those persons were not related to the facts investigated.

At the **following hearing** (10 May 2006) "U" stated to know Agron KRASNIQI as a military policeman, to know his father, Shaban, and his family and his nickname as "Ninja".

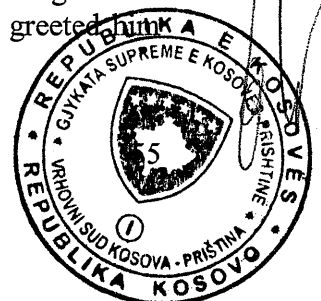
"U" had seen Agron KRASNIQI in Drenovc 4 or 5 times and had learned his name by a soldier who late died in the war.

The witness saw Agron KRASNIQI also two weeks after his release.

"U" was interrogated by Selim KRASNIQI about a problem he had with a KLA soldier approximately a week before the day of the interrogation.

Before that day he had never met Selim KRASNIQI, after that day "U" saw the defendant on the balcony of the office two or three times, without having any more problems with him.

Asked by the defense counsel to explain how he knew the defendant, if through some soldiers who told him that this person was the head of the office and who greeted



with the name of Selim KRASNIQI or through a friend who told him who the latter was, the witness confirmed both: at that time he did not know the defendant, heard that he was the head of the office, then a friend told him also his name.

At a hearing of 8 June 2006 was heard, as a witness introduced by the defense, Halim ZYBERAJ who confirmed to have bought a real estate from a co-villager at the end of 1997 for approximately 30.000 DM.

He said to have completed the payment in three installments within about a year.

The last payment happened after the war.

Present to payments were some witnesses, but no written contracts or receipt were done.

His relations with the seller were defined as not bad.

The witnesses stated that four brothers of his are abroad, he and another brother live in Kosovo.

Answering to questions of the Prosecutor, the witness confirmed to have paid in three installments: the first one was 2.000 DM, the second 12.000 DM, the third one 10,000 DM (that is 24.000 DM).

Asked if he paid the difference of 6.000 DM the witness replied not to be certain about the whole price, emphasizing not to owe anything.

He narrated that the seller was in hurry and wanted immediately the whole amount, but the witness had not all the money, thus paid in installments.

The seller complained to somebody not to be paid.

Neither he nor his brothers were members of KLA.

This Court deems this point of the appeal as ungrounded.

The narration of "U" is coherent, without decisive discrepancy, repeated.

As to the time of the interrogation made to him by Selim KRASNIQI, "U" has indicated in a convincing way the date of 16 June 1998.

During his three statements this witness showed not to have a particular good memory for the dates, since he was unable to situate correctly a big event, like the burning down of Drenovc and of his house by the Serbs, stating only that it had happened two or three months before December.

Also about the date of his interrogation he mentioned both July and June.

But the date of 16 June was confirmed by him after the confrontation with his previous statements and was precise thanks the notes he had taken.

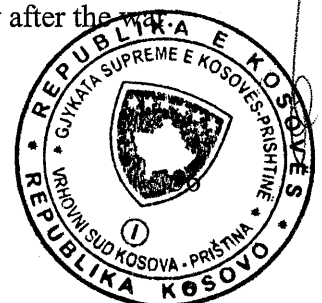
The panel checked those notes, but the witness preferred not to produce them for fear to reveal his identity.

On the question why he had not used before these notes he answered in a convincing way that before the Investigating Judge he had not these notes because he had just been released from the prison.

The length of the interrogation made by Selim KRASNIQI appears to be convincingly stated at the main trial (40 minutes) just on the base of the same notes of the witness.

Also the statement of "U" about his credit against the family ZYBERAJ for the sale of a real estate is credible.

Halim ZYBERAJ actually admitted that during 1998 (that is the time when "U" claimed his credit) he had not paid yet the whole amount, which he could pay only after the



Secondly, Halim ZYBERAJ admitted that the seller wanted to be paid immediately and complained about this.

“U” affirms to have needed the money because of some debts and in fact some time later during 2004 he was detained because of some debts.

Thirdly the price as admitted by Halim ZYBERAJ (30.000 DM) does not match with the amount of money he affirms to have paid (24.000 DM), lacking 6.000 DM.

Fourth, Halim ZYBERAJ shows to have an interest in denying his debt, even though the installments he paid don't match with the whole price he admits.

Fifth, “U” does not imply Selim KRASNIQI in his credit and no reasons appear why he should blackmail this or other defendant for this.

The explanation of “U” as to how he learned the identity of Selim KRASNIQI appears to be credible because in the military headquarters it is well possible that the soldiers greeted the defendant with his name, that some soldiers could tell the witness the important role played by this KRASNIQI and finally that a friend of the witness could reveal to him the names of the persons met by “U”.

It can not be forgotten that “U” lived in Drenovc where he could see Selim KRASNIQI also after the event of 16 June 1998.

It can not be forgotten that also other witnesses indicated Selim KRASNIQI as the deputy chief and later on as the chief of the Military Police of KLA.

“U” appears to have fear, his statements are full of worry to be recognized and about his life.

His anonymity in the proceedings could not represent a sufficient defense for him, since in a small centre it can not be difficult to learn to whom a real estate now belongs (to the family of Halim ZYBERAJ) and to whom it belonged till 1997 (to the family of the witness).

Nevertheless “U” took out from the photo line up just one picture: that of Selim KRASNIQI.

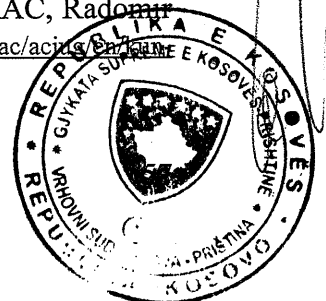
As seen before, this testimony represents only one of many pieces of evidence against the defendant, about his role in the management of the detention centre and about the inhumane treatment he adopted with the prisoners.

17.1 A last issue must be examined here, related to the nature of the conduct charged to the defendant and to the existence of the required link between this conduct and the armed conflict.

It must be noticed that the existence of the link between the conduct of the accused and the armed conflict in cases underlined by personal motives is confirmed by the jurisprudence of ICTY.

In its decision of 12 June 2002 in the case of the Prosecutor v. D. KUNARAC et al. the Appeals Chamber of ICTY¹⁸ has stated:

¹⁸ ICTY Appeals Chamber 12 June 2002, Prosecutor v. Dragoljub KUNARAC, Radomir KOVAC and Zoran VUKOVIC, see <http://www.icty.org/x/cases/kunarac/acjg/eng/t020612e.pdf>.



“58. 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 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. The Trial Chamber’s finding on that point is unimpeachable”.

This Court deems that, although the reasons which moved the defendant in this case and in that of Murat RRUSTEMI (see above point II.13) appear to be previous private disputes (a credit in this case, a previous dispute about the transit on a private real estate in the other case) it exists the required link between the acts of the accused and the armed conflict.

The conduct of the defendant, as reconstructed through the statement of “U”, can be defined as illegal arrest, inhumane treatment and violation of bodily integrity for the beating up and the threats suffered by him.

The reason of this conduct was related to KLA because “U” had this problem (“bad relation”) to somebody of KLA.

On the whole and also on this specific point “U” appears to be more credible than Halim ZYBERAJ, whose statements appear to be put in doubt because of his interest not to pay the whole amount.

The conduct of Selim KRASNIQI and of other KLA members towards “U” appears to be committed within a context of the perpetrator’s official duties as part of KLA structure as convincingly reconstructed by the challenged verdict on pages 53-56.

In other words they had the power to arrest, to question and to beat “U”, to threaten to inflict him a worse damage only because of the existence of the internal armed conflict.

Under those particular circumstances they as KLA members controlled the area, exercised the powers of the Police, had concrete powers also on civilians.

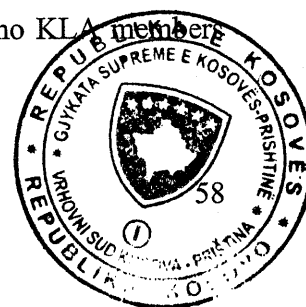
And the material conduct against “U” (as well as the conduct against Murat RRUSTEMI) was not different from that used against other victims: illegal arrest, taking the victim to the detention centre or to the headquarters, beating up, threats.

As in the KUNARAC case also in this case, and despite of any possible private reasons beneath, the existence of an armed conflict played a substantial role in the illegal actions because the perpetrators were able to commit them only because of the conflict and of the control of that area by a part in the conflict, that is KLA.

18. Anonymous witness “W”.

The appeal challenges the date given by this witness for the episode between him and Selim KRASNIQI and about the nature of war crime against civilian population of a modest fact (“hit of one slap” followed by the apology for the incident).

The date (28 July 1998) was ten days after the Serbian offensive and no KLA members were in Drenovc any more.



Moreover the defendant was in that period of time in Albania.

The defense counsel remarks that "W" could not identify Selim KRASNIQI in the photos he saw during the investigative stage, he identified him at the main trial when his picture had already been published by the media.

The First Instance Court made use of the statement of "W" to demonstrate that Selim KRASNIQI had questioned first his son and then the witness himself, accusing him to be a traitor for having provided food to Serbian, finally the defendant would have heavily slapped him.

This Court deems correct the assessment made by the first judge.

During the investigative stage "W" was interrogated by the Police (23/4/2002) and by the Investigating Judge (11/3/2004) and narrated that his son and his wife had gone to Xerxe to buy something for the tractor, had been abducted by the Serbian police, the son had been beaten up, then they had been released.

Once arrived at home the son of "W" had been picked up by KLA Military Policemen, among whom was Nazim Bajraktari who had brought him to the school of Drenovc in the basement, where he had been interrogated and beaten by Commander Celiku, that is Selim KRASNIQI.

The latter wanted to know what kind of information the young man had given to the Serbs.

Then the son of "W" was released and returned home, he told his father that KLA wanted to speak to him and that "W" had to go there the following morning.

"W" went to Drenovc and was introduced in the office of Celiku, on the ground floor of the school.

Celiku welcome him with the words "come, come traitor".

"W" was interrogated by Selim KRASNIQI about Hysen KRASNIQI and another one.

He was beaten by the defendant so hard that he fell, the beating up was on his nose which after that was bleeding.

To the Police "W" mentioned three to four slaps, to the Investigating Judge only one.

He was accused to have provided the Serbs with live and dead meat, Celik showed him a letter from the co-villagers of the victim who accused him to be a traitor and told him "I have not bring you here; it is your own people".

"W" could not read the letter because of the blood on his face.

He was released.

"W" stated not to be angry at Selim KRASNIQI but at the villagers who sent that letter.

At the main trial "W" repeated the same details precisely.

Selim KRASNIQI was angry because somebody had told him that "W" "gave to the Serbs both dead and alive meat" meaning "that you served your wife to them and give them to eat something".

"W" pointed out to have been beaten only once by Celiku, then the other officer, Isuf who later on was killed, stopped the defendant saying that "W" was not the man he was thinking of.

After the beating up Celik apologized to "W" and asked him not to tell anybody what had happened.



The Court deems the narration of "W" consistent, precise, constant, therefore fully credible.

As to the contradictions proposed by the appeal it is noticed as follows.

The date of the episode.

"W" indicated the Police the date of 19 August 1998 as the day when somebody (who later on was indicated as his son and his wife) went to Xerxe and were abducted by the Serbs and stayed in Orahovac over the night.

The following day the relatives returned home, then came UCK Military Policemen and brought the son to Drenovc.

When this returned, he told his father that he had to go to Drenovc the following day.

Before the Investigating Judge (in March 2004) "W" answered to a question of the defense saying to have forgotten the date of the fact, but it was August.

Asked by the defense to refer the date of his statements to the Police (which is dated 23 April 2002), "W" answered not to be able to locate precisely the date of this statement, adding that it was maybe two or three months before, then spoke about August or September 2003.

At the main trial he referred firstly to the 6th or 7th month of 1998, later on to the Prosecutor mentioned the date of 28 July 1998.

"W" describes himself as an old man, after that episode he was no more called by KLA.

It is comprehensible that he makes some mistakes as the date because of the age.

Anyway he recognizes the defendant, whom he did not meet in other occasions.

The identification of the defendant.

"W" did not know that man before, some soldiers called that man with the name of Celiku, the same day "W" asked his name to some soldiers who confirmed him that Celiku was Selim KRASNIQI.

"W" describes this man as 171 centimeters tall, thin.

"W" recognized the picture of Selim KRASNIQI in the photo line up (Exhibit A, photo no. 23) both before the Police and the Investigating Judge.

"W" recognized Selim KRASNIQI, Celiku, also at the main trial (photo line up Exhibit C, photo no. 8).

Thus it is not correct to state, as the appeal does, that the witness did not recognize the defendant in the photos during the investigating stage.

It can be added that before the Investigating Judge the defense counsel pointed out that "W" had just recognized photo no. 23 but not photo no. 2 (of Exhibit A), which depicts the same defendant.

On this point it must be noticed that the two photos are of different quality: no. 23 is clear, no. 2 is not so clear, seems to be the enlargement of a photo which on this way becomes indefinite.

In every occasion "W" recognized in the photo the man who had beaten him.

Here must be added that this episode, although limited in the time, confirms that the defendant was directly involved in the questioning of the persons, made some investigations (about "W" and about other people as Hysen KRASNIQI), used also violence, that is inhumane treatment both against the son of "W" and against "W".

"W" is reliable, has nothing against the defendant nor KLA, he has forgiven



19. The appeal finally examines and emphasizes the defense of Selim KRASNIQI and the testimonies about his alibi, consisting in his permanence in Albania during a part of the critical period.

The single points of this defense and the alibi were examined above and compared with the statements of the witnesses and the other evidence.

The result is that the defense of the defendant is not reliable because it is denied by many pieces of evidence which confirm the role and the involvement of Selim KRASNIQI in the criminal offences charged to him.

Here do not come in evidence the mistakes the defendant may eventually have done because of the lapse of time, the difficulties of his activity during the war, the stress or trauma as the appeal points out, difficulty, stress and trauma which are common to all the participants to those events.

Here comes in evidence that the statements of the defendant were contradicted by other, more reliable evidence; that Bedri ZYBERAJ before the Police stated that the defendant was working at the HQ in Drenovc and that he had heard of the existence of the detention centre in that town; that the statement of Selim KRASNIQI not to know anything about this prison appears not convincing and finally that he admitted to have been informed about factual elements which represent the constitutional elements of a detention centre (see above point II.5).

As to the alibi of this defendant it was already seen (point II.3) that it is not consistent and does not demonstrate that he spent in Albania a long and continuative period of time as he pretends.

The statements of the witnesses deny this.

Finally the criterion of the interest: the defendant has an interest to defend himself and for this purpose he is not obliged by the law to tell the truth.

The witnesses of the defense were comrades, friends or companions of the defendant, they may have made mistakes or even told lies in order to help him in this situation: this is a form of interest.

The witnesses of the prosecutor don't seem to have any interest against Selim KRASNIQI.

On the contrary some of them were members of KLA, other stated to have forgiven the defendant.

Selim KRASNIQI accused those witnesses to participate in a sort of plot against him and KLA, but he was not able to bring "any particular evidence" (22 June 2006 page 5) of this.

Those witnesses made some mistakes, sometimes fell in contradiction and all these points were remarked in the appeal, examined and solved as seen above.

The credibility of those persons was assessed every time and at the end confirmed.

A mistake in the memory of a witness, when it is clarified as it was in this proceedings, confirm the authenticity of his statement.

Finally, other witnesses made changes in their statements particularly due to fear or similar reasons but also these cases were investigated and assessed as seen above.

AD3 Violation of the criminal law



20. The verdict is challenged because the first judgment erroneously deemed present the constitutive elements of the criminal offence of war crimes, whereas in the facts as they were proven there is a lack of a central organization and of a commanding structure of the KLA in the critical region: there at that time and till October 1998 were present only rebellious groups.

This point was already examined above together with the similar arguments of other defendants (see point I.2)

AD4 The decision on the conviction

21. The sentence is deemed too heavy if compared to the jurisprudence of the Den Haag Tribunal.

The Court should take in consideration the circumstances of the liberation war and the age, family status, absence of other convictions and economic situation of the defendant, as well as his behavior during the detention.

In deciding the appropriate penalty the First Instance Court considered, according to the law, both factors connected to the elements of the crime (the degree of criminal responsibility, the motives of the committed criminal offence, the degree of injury or of danger to the protected object) and factors concerning circumstances of the fact and of the offender otherwise relevant for the purposes of the punishment.

The first judge took as a guide the ICTY case law as well as that of the Supreme Court of Kosovo which allows this kind of references to punishment decided by International Courts as far as “general factors governing punishment” identified by those Courts don’t differ from those defined in the law applicable in Kosovo (art. 41 CL FRY¹⁹).

Starting from these considerations the first judge grounded the sentencing for each defendant on the number of the victims (several), on the conditions in which they were abducted and detained (defined as inhumane treatment), on the manner of the conduct of the defendants (defined as humiliating and disregarding the fundamental rights of the victims, considering also the beating and the injuries they suffered).

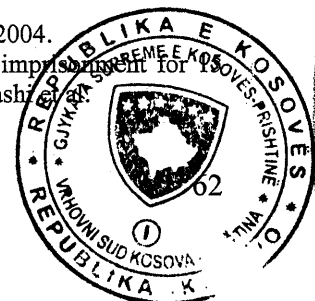
No mitigating circumstances were found in favor of defendants, whose attitude to the Court was defined as “defiant”.

Nevertheless the punishment was decided near the minimum provided by the law (from five to fifteen years²⁰).

This Court shares in general the considerations of the first judge, because the injuries and the humiliations inflicted to the victims by the conducts of this and the other defendants were very grave, as well as the conditions under which they were abducted and detained. However it seems to be appropriate to evaluate these elements together with some mitigating circumstances as the particular circumstances of the time when the crimes were committed and the personal conditions of the defendants (for Selim KRASNIQI the

¹⁹ Veselin Besovic case, Supreme Court of Kosovo 7 September 2004, no. AP-KZ 80/2004.

²⁰ The death penalty foreseen in the article 142 CL FRY was substituted with the imprisonment for 15 years, see Supreme Court of Kosovo 21 July 2005 in the case of Prosecutor v. Latif Gashi



familiar and economic ones, as well as his immunity from previous convictions), as well as the limits imposed by article 65 PCK for the participation in the criminal association. To these elements must be added the necessity to recognize to each defendant a sort of compensation for the unreasonable delay in the time of the proceedings, as seen above (point I.4).

All this put under consideration the Court of Second Instance deems correct and adherent to the legal criteria about sentencing to reduce the punishment for Selim KRASNIQI to six years imprisonment.

III

The appeal of Mr. Rexhep Hasani from Prizren as defense counsel of defendant Bedri ZYBERAJ was filed on 21 March 2008.

The judgment of first instance is challenged due to:

- essential violations of the provisions of the criminal proceedings,
- the wrong verification of the factual situation,
- violation of the criminal law and
- the ruling for the criminal sanctioning.

The defense counsel proposes:

- to change the verdict and to free the accused from the indictment.

The grounds of the appeal are as follows.

AD1 Substantial violation of the provisions of criminal procedure:

1. According to the appeal the enacting clause is unclear and contradictory, missing to specify on one side the relevant **facts** about the key aspects charged to the defendant, as the identity of the other persons who allegedly acted together with him, the time of the unlawful arrests and the identity of the arrested persons, the concrete conducts charged to him and on the other side the ground of the **subjective element** on the co-perpetration.

This point of the appeal is ungrounded.

The enacting clause is clear enough about the conducts of this defendant, the fact that he acted in complicity with other persons and within a joint criminal enterprise, the time of the facts and the identity of the arrested and detained persons.

It must be noticed firstly that the enacting clause must be read entirely and not only in the part regarding each defendant.

From the enacting clause it becomes clear that two of the persons held as having acted in complicity with Bedri ZYBERAJ are the co-defendants Selim KRASNIQI and Agron KRASNIQI.

This does not exclude the participation in the crime of other persons, whose identity is until now unknown.



The declaration of responsibility of a defendant in complicity with unknown persons is prohibited neither by the law nor by the logic.

As to the time it can be noticed that some of the criminal offences charged and particularly the unlawful detention are of a "permanent" nature, this means that they must last a certain time in order to exist.

In this case, during the unlawful detention happened the other episodes which form the object of the charge.

In the enacting clause it is clearly stated the period of time during which the unlawful conducts happened from 1 May to 31 August.

Although as to Bedri ZYBERAJ the indication of the month of May is a mistake as it will be seen further (see point III.4), the indication of the time of the facts for the remaining period is clear: during these months (from begin of June to end of August) the victims were unlawfully arrested, detained, maltreated.

Also the names of the victims are clearly stated in each single charge of the enacting clause, that means for each defendant.

The appeal claims the insufficient indication both in the enacting clause and in the reasoning of each unlawful conduct of the defendant in relation to any single victim: "which person was arrested by the accused"? which was detained, which was beaten up by him?

Theoretically the answer is in article 26 of the CC SFRY: who takes part in a joint criminal enterprise "is criminally responsible for all criminal acts resulting from the criminal design of this association and shall be punished as if he himself committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts".

This means that, if the victims indicated in the enacting clause were unlawfully arrested, detained, inhumanely treated by this joint criminal enterprise and if Bedri ZYBERAJ is a member of this enterprise then he is responsible for all its criminal acts even though he did not participate directly in some of these offences.

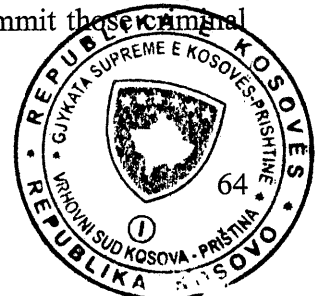
Practically for this case: it is not the enacting clause of a verdict the place where the defendant must look for the answer to the questions about the existence of this joint criminal enterprise and about his own participation to it.

The enacting clause contains only the result of the judicial assessment of the evidence: the joint criminal enterprise exists, Bedri ZYBERAJ took part in it and thus he is responsible for the acts of it.

It is the reasoning part of the verdict which has the task to answer to these questions and as to Bedri ZYBERAJ it contains every needed answer in the pages 89-91.

In those pages it is to read that this defendant was a clearly well known individual, he is mentioned by almost all the witnesses and had a key role to play in all the incidents which are averred in the indictment. He is defined as a fully fledged participant in the joint criminal enterprise. Moreover some evidence shows that he personally or jointly participated or was involved in the arrests, detention and inhumane treatment of Murat RRUSTEMI, Hidaj POPAJ and witness "E".

What is said in the reasoning part of the challenged verdict about the **facts** charged to this defendant is valid also for the **subjective element** of these conducts, which is clearly the **intention** to take part in the joint criminal enterprise in order to commit these criminal offences.



Each of these points will be examined in details further on (see point III.5), here it must be noticed that the enacting clause does not contain the violation of the procedural law claimed by the appeal.

2. A second point of the appeal regards the alleged violation of the provision of article 26 CC SFRY because of lack of any explanation about the participants and the aims of the group and about its exploitation.

This point was generally addressed above (see point I.3) and some details will be examined further on about the determination of the factual situation.

Here must be added that there is no doubt that Bedri ZYBERAJ was a member of KLA in Drenovc during the critical period: before the Police he stated to have joined KLA in March 1998.

It was admitted by Selim KRASNIQI that towards the Albanians who were suspected as collaborators of the Serbs the intention and the "policy" of KLA was to "correct" them, to put them in the right way, to give them the chance to collaborate for their own people and no more with the enemy".

The interrogation of these persons was a "vital" component of the fight of KLA.

Here are not under discussion the general goals of KLA within the armed conflict, but the concrete conducts and modalities through which some KLA members pursued those goals.

In this case the conducts of the defendants within the management of the Detention Centre of Drenovc had criminal modalities, which amounted to the charged offences.

Their conducts were made possible through the control of the region, through the organization and the power exercised during the armed conflict by KLA, whose "vital" aims the defendants wanted to reach.

On this way those persons made use of an existing organization "for the purpose of committing criminal acts".

This is the meaning of the use of article 26 CC SFRY in this case.

3. The defense represents the opinion that the judgment was given in violation of the law by a judge (the presiding judge Vinod Boolell) who according to article 40.2 no.1 PCPCK could not be part of the trial panel having been the President of the panel which during the pre-trial phase decided on the extension of detention on remand against Bedri ZYBERAJ and which had approved the request of the Public prosecutor for extending the period to submit an indictment (violation foreseen by art. 403.1 no. 2).

This point was discussed and found as ungrounded in the general part of this judgment (see above point I.1).

4. According to the appeal, the verdict does not respect the charge taken in the indictment because convicts the defendant Bedri ZYBERAJ for facts happened between the 1 may and the 31 August 1998, whereas the charge against him (differently from those against



Selim KRASNIQI) as stated in the amended indictment are referred to the shorter period from 2nd June²¹ to 31 August 1998.

This point of the appeal is grounded.

From the amended indictment filed by the Prosecutor on 27 July 2006 results that Bedri ZYBERAJ (Count 2) was charged with the criminal offence of war crime against the civilian population in the form of inhumane treatment and immense suffering or violation of the bodily health and application of measures of intimidation and terror against the civilian detainees of the Detention Centre in Drenovc on a date **between 2 June and 31 August 1998**, in violation of article 142 of the CC SFRY as read with articles 22, 24, 26 and 30 of the CC SFRY.

The verdict of first instance finds Bedri ZYBERAJ guilty of the charged criminal offences on a date between 1 May and 31 August 1998.

On this point the enacting clause contains a mistake, which is as more evident as the reasoning of the first judgment (page 12) clarifies that according to the indictment "all four defendants took part during the period between **2 June 1998 and 31 August 1998** (except that in the case of defendant Selim KRASNIQI the starting date is 1 May 1998) in a joint criminal enterprise" (emphasizing added).

In no other parts of the verdict is mentioned a possible participation of Bedri ZYBERAJ in the criminal offences for a period before 2 June 1998.

It is obviously a material mistake of the author of the enacting clause of first instance.

However through this mistake the verdict exceeds the charge taken by the amended indictment and violates article 386 paragraph 1 and article 403 paragraph 1 no. 10 PCPCK.

In this case, according to article 426 paragraph 1 of PCPCK the Court of Second Instance shall modify the challenged judgment.

In this case the modification of the judgment is limited to the time of the criminal offences committed, which is reduced to the period between 2 June and 31 August 1998.

Effect of this reduction will be considered as to the punishment.

AD2 Erroneous and incomplete determination of the factual situation

5. According to the appeal the Court of First Instance did not provide any piece of evidence about the illegal conducts charged to the defendant, but convicted him on the base of gossip of individuals.

This Court deems this point as ungrounded.

The evidence regarding Bedri ZYBERAJ can not be defined as gossip or supposition.

Mirsada SHALA and Sadbere SHALA witnessed about the disappearance of Shaban SHALA, whose details they learned by Haki MORINA.

According to these witnesses, MORINA told the components of the family that in Drenovc they could contact some persons in order to know something about the fate of Shaban, among those names was also that of Bedri ZYBERAJ.

²¹ In the Albanian version of the appeal it is quoted correctly the month of June, whereas in the English version it is erroneously written July.



Rexhep SHALA confirms this and narrates that he went twice to the headquarters of Drenovc looking for Bedri ZYBERAJ.

From Haki MORINA Rexhep SHALA had known that ZYBERAJ was the political commissar in Drenovc, but the latter did not want to meet him.

During his first visit to Drenovc, Rexhep SHALA was accompanied by Haki MORINA.

This indicates that the involvement of Bedri ZYBERAJ in the detention centre was actually one of the objects of the narration of Haki MORINA to the components of SHALA family so that the father of Shaban SHALA, Rexhep, went almost immediately together with Haki MORINA to Drenovc looking exactly for the political commissar Bedri ZYBERAJ.

Haki MORINA's denial at the main trial is not credible, because he first denies to have made any names, then after the confrontation with his previous statements admits to have made some nicknames. He admits also to have accompanied Shala family's members to Drenovc.

If Rexhep SHALA together with MORINA went to Drenovc looking exactly for Bedri ZYBERAJ it is because somebody (that is MORINA himself) had mentioned him this name before.

Rexhep SHALA did not know ZYBERAJ before that moment.

"A" spoke also about Bedri ZYBERAJ recognizing his photo and saying that the defendant was informed about everything the witness had narrated to the Investigating Judge (testimony of 26 February – 3 March page 10).

As to Bedri BERISHA it is worth noticing that anonymous witness "B" went more than 30 times to Drenovc looking for that person.

In Drenovc some persons near the headquarters told "B" that the people who could solve his problems were Bedri ZYBERAJ and Selim KRASNIQI.

Before the Investigating Judge, "B" stated to have been told by people in Drenovc that Bedri ZYBERAJ was in charge of the prison.

"B" succeeded in meeting Bedri ZYBERAJ on 16 July, while never met personally KRASNIQI.

Bedri ZYBERAJ told "B" that in three or four days KLA will come to Brestovc (the village of Bedri BERISHA) and "we will see what we can do there".

Thus "B" addressed Bedri ZYBERAJ thinking that he could help in obtaining the release of Bedri BERISHA.

ZYBERAJ did not deny his role, promising that KLA in a few days would be helpful on this matter.

"B" recognized the picture of Bedri ZYBERAJ both before the Investigating Judge and at the main trial.

As to Hysen KRASNIQI both witnesses "TT" and "N" stated to have been addressed among other people just to Bedri ZYBERAJ the "political commissar" who addressed them to Selim KRASNIQI.

The two witnesses wanted to visit Hysen and Selim KRASNIQI told them that the man who had competence on this issue was ZYBERAJ as "political commissar".

"TT" remembers to have spoken more than once to ZYBERAJ and to Selim KRASNIQI and to be invited by the two of them not to return any more.



ZYBERAJ threatened even to arrest "TT".

Both "N" and "TT" recognized Bedri ZYBERAJ in the photos.

"TT" was a soldier in Drenovc, thus he must have known very well KLA members and their role also as to the Detention Centre.

When he went to Drenovc in order to find Hidaj POPAJ witness "Z" received from Zaim BAJRAKTARI the advice to go to the headquarters and to ask for Bedri ZYBERAJ.

"Z" met actually ZYBERAJ who was dressed in military clothes and armed.

ZYBERAJ addressed "Z" to Gani PAQARIZI and the military police.

Some days later was paid a visit to Hidaj in the prison, even though Bedri ZYBERAJ was reluctant to allow it ("they can see Hidaj, but Hidaj can not see them").

"Z" recognized the picture of Bedri ZYBERAJ.

"D" remembered that during the detention of Hidaj POPAJ was found a corpse which was deemed that of Hidaj.

This corpse was taken to Hidaj's house, but later on it was clear that Hidaj was still alive.

At that moment Bedri ZYBERAJ, who was wearing a uniform, invited "D" in his office and took his statements about the circumstances related to the corpse.

Then ZYBERAJ issued an order that the body should be taken to Drenovc and then to the Police Station of Rahovec, where some investigations were undertaken.

"D" recognized Bedri ZYBERAJ in the photos.

Thus, as noticed in the first instance verdict, Bedri ZYBERAJ not only held a position of authority so that people asked him about the detainees, but was also in condition to conduct examinations of witnesses and give orders concerning an investigation.

Witnesses Nezim and Hazer RRUSTEMI went to Drenovc looking for their relative Murat, they met and spoke to Bedri ZYBERAJ.

The defendant explained firstly that "every single person fifty years and above is to be held responsible" (Hazer RRUSTEMI); then ZYBERAJ admitted to be responsible of the abduction of Murat RRUSTEMI ("I am the one who took your father away"), adding that the abduction was related to a personal dispute between Murat and his family and that "my time has come. I can do whatever I want".

The witnesses went several times to Drenovc and were in condition to realize that Bedri ZYBERAJ was "the one to decide there"(Nezim RRUSTEMI), was the "political commissar" (Hazer RRUSTEMI).

Eqrem RRUSTEMI narrated about a "group of Bedri ZYBERAJ", that is a group whose main guy was the defendant, to whom everybody obeyed "in the village and in the surroundings": ZYBERAJ was a commander of KLA not a soldier.

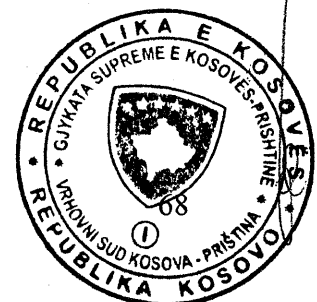
Eqrem and the brother of Murat were beaten up by the components of this group.

Eqrem stated that Murat had been taken upon Bedri ZYBERAJ's order.

Nezim RRUSTEMI stated to have heard the prisoners screaming.

Witness "X" narrated that he himself, Murat RRUSTEMI and Hazer TARJANI were detained and beaten up in Drenovc.

Witness "O" recognized the photo of Murat RRUSTEMI, adding that the detainees he met in Malishevo said that Murat had died due to the beatings.



Thus: Bedri ZYBERAJ admitted to the witnesses to be the responsible of the abduction of Murat RRUSTEMI, who according to other witnesses was beaten up and treated inhumanely in Drenovc.

ZYBERAJ acted on revenge for a personal dispute but made this within a context of his official duties as a part of KLA structure.

It was already seen (above point II.17.1) that both in the cases of Murat RRUSTEMI and of witness "U" the perpetrators could arrest civilians, beat and threat them to inflict a worse damage only because as KLA members they controlled the area (the free zone), exercised the powers of the Police, had concrete powers also on civilians.

And the concrete conduct was not different from that used against other victims.

Despite of the possible private reasons beneath, the illegal actions were possible only through the existence of the conflict and thanks the control of that area by a part in the conflict, which is KLA.

Through these illegal actions Bedri ZYBERAJ and the other defendants exploited for criminal purposes an existing organization, as KLA.

Also Muhamet BERISHA, who was looking for his father Avdi, confirms to have spoken with Bedri ZYBERAJ, who was known as the "political commissar" that is a "high official" in Drenovc.

6. A specific point of the appeal is dedicated to the testimony of witness "E" which is deemed as contradictory and unreliable.

This point of the appeal appears to be ungrounded.

As better described above (see point II.16) "E" appears to be credible among other points when he states to have been detained in Drenovc, where he was beaten²² and to have been examined by Bedri ZYBERAJ who accused him of being a spy of the Serbs against KLA. "E" remained detained in a storage room for coal fort three days and three nights, sleeping on the ground, without blankets, without eating or drinking anything, without the possibility to wash his blood or to go to a toilet outside his cell.

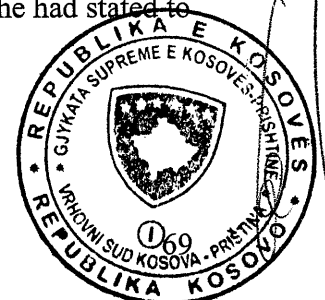
At the end Bedri ZYBERAJ released him.

"E" gives a physical description of ZYBERAJ which matches with the shape of the defendant; "E" describes the cloths of ZYBERAJ (plain cloths) in the same way of other witnesses; "E" recognizes the pictures of ZYBERAJ adding that the defendant was a KLA member and also this detail is confirmed by other witnesses and admitted by the defendant himself as seen in other part of this judgment.

There are no traces of false testimony or of slander against the defendant and the contradictions, included that regarding who threatened this witness with a weapon: Bedri ZYBERAJ (as stated before the Police and the Investigating Judge) or Isuf GASHI (as stated at the main trial) seem to be explainable with the difficulties faced by "E" listed above.

"E" was interrogated by Bedri ZYBERAJ as it was the case of witness "D" and at the end was released by ZYBERAJ because this could do whatever he wanted, as he had stated to Nezim and Hazer RRUSTEMI.

²² See the photos of his scares.



7. Another point of the appeal regards the alleged misinterpretation of the testimony of other witnesses, who actually did not state about inhumane treatment committed by the defendant.

All the above mentioned facts as stated by the witnesses contradict the thesis of the defense: as it was the case for Selim KRASNIQI, Bedri ZYBERAJ was part in the organization and the managing of the Detention Centre and of the inhumane treatment which was reserved to the detainees.

This is confirmed by the fact that he could "take" persons (as Murat RRUSTEMI), interview witnesses or suspects ("D", and "E"), had the possibility to interfere with the visits to the detainees (Hidaj POPAJ), he was the person looked for by the witnesses when these wanted to reach the detainees, he was influent as "political commissar".

ZYBERAJ is responsible for having "taken" and interviewed persons, thus participating directly to the management of the detention centre.

His responsibility is however grounded also on the principle of article 26 as seen before: as a conscious part of a joint criminal enterprise he made use of the existing organization "for the purpose of committing criminal acts".

The defendant is responsible of the crimes committed by this organization, "as if he himself committed them, irrespective of weather and in what manner he himself directly participated in the commission of any of those acts".

The conditions of the detention of "E", the beating up suffered by many victims are sufficient evidence of the inhumanity of the treatment in Drenovc.

AD3 Violation of the criminal law

8. Violation of the provisions related to the existence of a criminal group, to the co-perpetration and to the assistance given to the perpetrators.

This subject was examined and dismissed above (see points **III.1** and **III.2**).

9. Violation of the law on war crimes, in terms of lack of the basic elements of a war crime because nobody of the supposed victims belonged to the opposite party, being all Kosovo Albanians.

This subject was examined and dismissed above (see point **I.2**).

Here must only be added that the fact that both the defendants and the victims were Kosovo Albanians does not exclude in itself the existence of a war crime because this was an internal armed conflict, that is a conflict among people who lived in the same State and sometimes belonged to the same nationality.

In fact, the victims were suspected by KLA to be collaborators of the Serbs, which means traitors of their people in favor of the enemy.

AD4 Decision on the criminal sanctions



10. The appeal deems the imposed punishment as excessively severe and claims the alleged lack of reasoning about the punishment imposed to the defendant, especially did not take account of his economic and social situation.

It was already noticed in the part of this judgment related to the assessment of the sentencing decided by the first judge against Selim KRASNIQI (see above point II.21) that the District Court of Prizren considered factors connected to the elements of the crime (the degree of criminal responsibility, the motives of the committed criminal offence, the degree of injury or of danger to the protected object) and factors concerning circumstances of the fact and of the offender otherwise relevant for the purposes of the punishment, as well as the case law of ICTY.

The first judge grounded the sentencing for each defendant on the number of the victims (several), on the conditions in which they were abducted and detained (defined as inhumane treatment), on the manner of the conduct of the defendants (defined as humiliating and disregarding the fundamental rights of the victims, considering also the beating and the injuries they suffered), without finding any mitigating circumstance, however deciding the punishment near the minimum provided by the law (from five to fifteen years²³).

This Court shares in general the considerations of the first judge, because the injuries and the humiliations inflicted to the victims by the conducts of this and the other defendants were very grave, as well as the conditions under which they were abducted and detained. However it seems to be appropriate to evaluate these elements together with some mitigating circumstances as the particular circumstances of the time when the crimes were committed and the personal conditions of the defendants (for Bedri ZYBERAJ his economic and social situation), as well as the limits imposed by article 65 PCK for the participation in the criminal association.

Moreover the judgment of first instance has been partially modified in favor of Bedri ZYBERAJ through the reduction of the period of time of the criminal offences which now does not include any more the period from 1 May to 1 June 1998.

To these elements must be added the necessity to recognize to each defendant a sort of compensation for the unreasonable delay in the time of the proceedings, as seen above (point I.4).

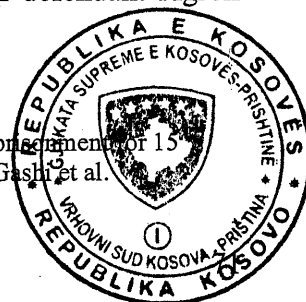
All this put under consideration the Court of Second Instance deems correct and adherent to the legal criteria about sentencing to reduce the punishment for Bedri ZYBERAJ to six years imprisonment.

IV

The appeal of Mr. Fazli Balaj from Prishtine as defense counsel of defendant Agron KRASNIQI was filed on 20 March 2008.

The judgment of first instance is challenged due to:

²³ The death penalty foreseen in the article 142 CL FRY was substituted with the imprisonment for 15 years, see Supreme Court of Kosovo 21 July 2005 in the case of Prosecutor v. Latif Gashi et al.



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- essential breaches of the criminal procedure Article 403 par. 1, item 10, 12 and par. 2 item 1 and 2 of the PCPCK,
- violation of the criminal law,
- erroneous and incomplete establishment of the state of facts and
- Verdict on the Punishment.

The defense counsel proposes:

- to change the verdict acquitting the defendant from the charges, or
- to dismiss and send the case back to the First Instance Court for a re-trial, ordering at the same time the termination of detention.

The grounds of the appeal are as follows.

AD1 Substantial violation of the provisions of criminal procedure

1. The appeal claims the alleged inconsistency of the enacting clause and contradictions between the enacting clause and the reasoning part.

Particularly, according to the appeal Agron KRASNIQI results both convicted and acquitted for the charge related to witness "X".

This point is ungrounded.

By reading the enacting clause and also the reasoning of the verdict of first instance (pages 9, 11 and 14) it is clear that this defendant was acquitted from the charge related to witness "X" because this witness was never cross examined by him and the statements of "X" could not be used against this defendant.

"X" was examined at the main trial on 30 November 2005, whereas Agron KRASNIQI was extradited from Switzerland on 9 December of the same year, the indictment against him was confirmed on 28 February 2006 and later on his proceeding was consolidated with the proceedings against the other defendants.

Thus there is no conviction of Agron KRASNIQI related to "X" and the enacting clause can not be defined as contradictory.

2. The appeal deems the enacting clause as unclear and contradictory, missing to specify on one side the **identity** of the other persons who allegedly acted together with the defendant and on the other side considering different periods of **time** for the commission of the same criminal offences by different accused.

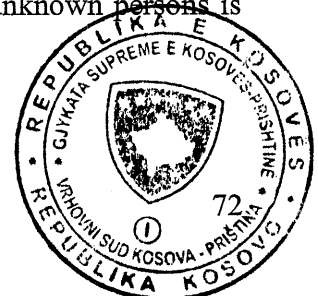
This point is ungrounded.

As it was already noticed in relation to analogues claims in the appeal for Bedri ZYBERAJ (see above point **III.1**), the three defendants Selim KRASNIQI, Bedri ZYBERAJ and Agron KRASNIQI were convicted because they acted in complicity among themselves and with other till now unknown persons.

This is logically and legally allowed and it is, above all, what is proven in the case file.

The declaration of responsibility of a defendant in complicity with unknown persons is not prohibited by the law nor by the logic.

Also the time of the facts is clearly stated: from 1 May to 31 August.



This temporal specification is not completely correct in relation to the conduct of Agron KRASNIQI, who was charged only for the period from 2 June to 31 August: on this point this Court will return further (see further IV.4.b).

Nevertheless the time frame ascertained by the first judge is correct: the facts lasted around four months, during this time frame each defendant joined the criminal enterprise for a specific period and was convicted only for this.

3. According to the appeal the verdict is contradictory as to the concurrence of articles 22 and 26 of CC SFRY, which are in fact incompatible to each other.

Also this point is ungrounded as it was already noticed above (see point I.3).

Here can be added that from the case file results the direct participation of Agron KRASNIQI in some illegal arrests and maltreatments of the victims: this means in some specific case his complicity in the perpetration of the crimes against civilians.

In other cases this defendant is responsible according to the principles of article 26 CC SFRY for having taken part in a joint criminal enterprise which performed the crimes deriving from the common criminal plan.

The contemporary application of two different legal provisions (articles 22 and 26 CC SFRY) to the facts is not prohibited because of the complexity, the duration of the charged crime and the different conducts and level of participation of each defendant to each segment of the crime.

Where as "segment of the crime" is to be intended the conduct of each defendant related to each victim.

4. The appeal claims that the challenged verdict exceeds the indictment for two different reasons: a) it takes the conviction of the defendant for conducts related to victims for whom the indictment had not been confirmed and b) the conviction is related to a period of time (from 1 May to 31 August 1998) different from the time indicated in the indictment (from 2 June to 31 August).

This Court deems the first point not grounded, whereas the point related to the time of the conducts is grounded, as already seen about the appeal of Bedri ZYBERAJ.

a) Article 376.1 PCPCK provides the Public Prosecutor with the possibility to amend the indictment according to the factual situation as proven by the evidence presented during the main trial.

This means the regularity of the amendments introduced by the Prosecutor against Agron KRASNIQI on 27 July 2006 both as to the identity of the victims and as to the applicable law (article 26 CC SFRY).

In this case it is not grounded the claim of having exceeded the indictment, since the First Instance Court decided according to the charge taken by the amended indictment

b) From the amended indictment filed by the Prosecutor on 27 July 2006 results that Agron KRASNIQI (Count 4) was charged with the criminal offence of war crime against the civilian population in the form of inhumane treatment and immense suffering or violation of the bodily health and application of measures of intimidation and terror against the civilian detainees of the Detention Centre in Drenovc on a date **between 2**

June and 31 August 1998, in violation of article 142 of the CC SFRY as read with articles 22, 24, 26 and 30 of the CC SFRY.

The verdict of first instance finds Agron KRASNIQI guilty of the charged criminal offences on a date between 1 May and 31 August 1998.

On this point the enacting clause contains a mistake, which is as more evident as the reasoning of the first judgment (page 12) clarifies that according to the indictment "all four defendants took part during the period between **2 June 1998 and 31 August 1998** (except that in the case of defendant Selim KRASNIQI the starting date is 1 May 1998) in a joint criminal enterprise" (emphasizing added).

In no other parts of the verdict is mentioned a possible participation of Agron KRASNIQI in the criminal offences for a period before 2 June 1998.

It is obviously a material mistake of the author of the enacting clause of first instance.

However through this mistake the verdict exceeds the charge taken by the amended indictment and violates article 386 paragraph 1 and article 403 paragraph 1 no. 10 PCCK. In this case, according to article 426 paragraph 1 of PCCK the Court of Second Instance shall modify the challenged judgment.

In this case the modification of the judgment is limited to the time of the criminal offences committed, which is reduced to the period between 2 June and 31 August 1998.

Effect of this reduction will be considered as to the punishment.

5. According to the appeal in the investigative stage came true a violation of the right of the defendant to be represented by a defense counsel, because the defendant was not represented during the first part of the investigation started on 15.04.2004.

This point of the appeal is ungrounded.

Article 73.1 PCCK provides the case of mandatory defense, among them come here in evidence: point no. 2) "at hearings on detention on remand and throughout the time when he or she is in detention on remand; 3) from the filing of an indictment, if the indictment has been brought against him or her for a criminal offence punishable by imprisonment of at least eight years".

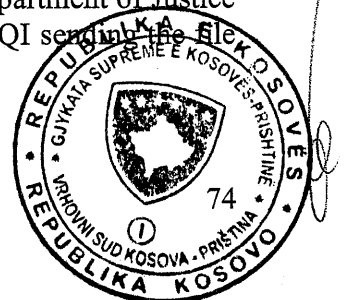
Article 70 of Law on Criminal Proceedings of SFRY (LCP) provided in the pertinent part the case of mandatory defense only "3) when the indictment has been brought because of a criminal act for which an imprisonment sentence of 10 years or a more severe penalty may be pronounced under the law".

In this case against Agron KRASNIQI the International Investigating Judge of Prizren District Court issued a decision, dated 20 February 2004, to conduct an investigation and the same day issued an arrest warrant.

On 15 April 2004 the International Investigating judge issued an amended decision to conduct investigation and impose detention against Agron KRASNIQI.

On the basis of this amended decision the International Investigating Judge issued a second arrest warrant and requested issuance of an international arrest warrant as the suspect was believed to live in Switzerland.

Upon the request of the Swiss Authorities of a formal extradition request the International Presiding Judge requested on 8 January 2005 legal assistance from Department of Justice and on the same day closed the investigation against Agron KRASNIQI sending the file



to the International Public Prosecutor pursuant to article 174 paragraphs 1 and 2 of the LCP.

Agron KRASNIQI was extradited from Switzerland on 9 December 2005 and at 16:00 hours of the same day was arrested on the basis of the arrest warrant dated 15 April 2004. Defense Counsel Fazli BALAJ was appointed in the interest of Agron KRASNIQI by his brother Shefqet Shaban KRASNIQI on 9 December 2005 (document 2 of binder 1 related to this defendant).

The International Public Prosecutor filed a proposal to impose detention on remand and on 11 December 2005 at 15:00 hours the defendant was presented to the hearing on detention on remand.

Agron KRASNIQI was assisted by his defense counsel Mr. Fazli BALAJ.

Since then Agron KRASNIQI was always assisted by the same defense counsel.

The indictment against this defendant was filed on 28 February 2006 and confirmed through a ruling dated 30 July 2006.

The Confirmation Judge addressed and rejected the claim of the defense against all the evidence gathered during the investigation in absence of his client or of a lawyer representing him.

Main point of his reasoning is that neither the LCP (article 168) nor PCPCK (article 237) requires the presence of the defendant and/or his lawyer at the questioning of witnesses during the investigation stage.

This Court shares the considerations of the Confirmation Judge.

The presence of the defense counsel was not mandatory according to LCP and to PCPCK during the investigation stage if not during the hearing on detention on remand and at the moment of the filing an indictment.

Agron KRASNIQI was assisted and represented in the proceedings since the hearing on his detention on remand on 11 December 2005.

No amended indictment with the name of this defendant dated 27 July 2005 were found, but an amended indictment, related also to Agron KRASNIQI dated 27 July 2006, when he was duly represented.

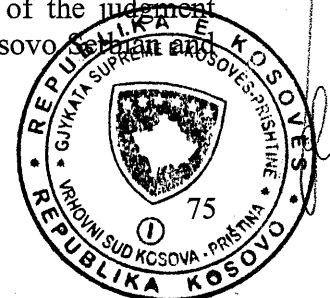
A different problem can be related to the admissibility of evidence, as the statement of witnesses collected not in presence of the defendant or of his defense counsel.

This problem is addressed and solved by article 156 paragraph 2 PCPCK which recognizes the admissibility of such a statement "when the defendant or defense counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings".

This possibility was given both to the defendant and to his defense counsel at the main trial.

The statements of witness who were not cross examined by Agron KRASNIQI (as seen before at point IV.1 anonymous witness "X", then also Haki MORINA, Fadil HOTI and Rustem BERISHA) were not used in the verdict against him.

6. The appellant claims that the reasoning (not the enacting clause) of the judgment mentions the unlawful arrest, detention, beating and torture of both Kosovo



Kosovo Albanian citizens whereas in the case file there is no trace of this conduct against Kosovo Serbians.

This point is ungrounded and irrelevant.

The enacting clause states clearly that each defendant is convicted because of his participation in the illegal arrest and detention, inhumane treatment, immense suffering or violation of the bodily health of **Kosovo Albanian civilians suspected of collaboration with Serbs**.

There is no judgment about conducts related to Kosovo Serbian civilian victims.

Thus there is nothing to appeal on this point.

What is written on pages 7 and 8 of the reasoning about the policy of KLA related to **Kosovo Serbian** citizens could be interpreted as a general remark about what may have happened in Kosovo during the war or related to the KLA communiqués where are stated both attacks against Serbian Forces and the liquidation of collaborators in January/February 1998 (see page 50 of the verdict of first instance).

Anyway it is irrelevant since no cases of Kosovo Serbian civilian victims are reported in the case file.

7. According to the appeal the statements given by witnesses to the Police should be ruled out as inadmissible, instead being used in the verdict.

This point is ungrounded.

As observed before (see point IV.5), article 156 paragraph 2 KCCP recognizes the admissibility of a statement given by a witness to the Police “when the defendant or defense counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings”.

With the exclusion of few witnesses (“X”, Haki Morina, Fadil Hoti and Rustem BERISHA) who were not cross examined by Agron KRASNIQI or by his defense counsel and whose statements were not used against this defendant, all other witnesses were cross examined by him.

Thus according to the procedural law also the statements given to the Police are admissible evidence.

AD2 Violation of the criminal law (art. 404 item 1, 4 and 6 PCPCK)

8. The appeal challenges the verdict as to the hypothesis of the existence of a war crime.

The appellant affirms:

- the non existence of an internal armed conflict in the critical time in the part of Kosovo interested by the criminal offences charged to the defendant;
- the non existence of a central organization and of a commanding structure of the KLA in the region of the facts,
- that the charged joint criminal plan is supposed but not proved;
- the erroneous application of provisions of International Humanitarian Law, as to Protocol II to the four Geneva Conventions;



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- the fact that a war crime against the civilian population can not result in conducts which are individual, not systematic and widely spread and are not based on discrimination
- in the verdict no evidence was presented about the violation of article 5.1 of Protocol II to the four Geneva Conventions: that means about the lack of food, drinkable water, safeguard of health and hygiene for the detainees, no comparison was made between the conditions of the latter and that of the civilian population of that territory.

The points regarding the existence of an internal armed conflict and as to the organization of KLA as well as the point related to the charged joint criminal enterprise have been already addressed in the first part of this judgment (see above points I.2 and I.3).

As to the other points it must be observed what follows.

8.1 The defense challenges the part of the enacting clause where it is stated that the accused “detained in inhumane conditions without access to due process” the victims. The right to a “due process” is foreseen by article 6 of the Protocol II to the four Geneva Conventions of 1949.

However article 2.2 of the same protocol sets forth that “at the end of the armed conflict, all the persons who have been deprived of their liberty ... for reasons related to such conflict ... shall enjoy the protection of articles 5 and 6 until the end of such deprivation or restriction of liberty”.

This should mean that the protection of articles 5 and 6 does not find application during the conflict, but only at its end.

Thus according to the defense, in the verdict any reference to the “due process” is wrong.

This point is ungrounded in fact.

The First Instance Judgment both in the enacting clause and in the reasoning is clearly referred only to the war crime of inhumane treatment and immense suffering or violation of the bodily health of the civilian detainees, constituting an application of measures of intimidation and terror in violation both of national (articles 142, 22, 26 and 30 CC SFRY) and international laws (article 3 common to the Geneva Conventions, CA3, and Additional Protocol II to the Geneva Conventions, APII).

Any reference to the due process is made only in order to clarify the material situation under which suffered the detainees, but has no influence on the legal provisions applied.

In other words the defendants were not convicted for not having respected the rights of the detainees to a due process of law but for having beaten, humiliated, cut them completely off from their families and kept them in degrading conditions also with regard to their health and hygiene.

The challenged verdict (page 62) recognizes that in case of an internal armed conflict the right to arrest and to confine civilians can be “implied from the language” used by CA3 and by Additional Protocol II. Nevertheless, the right to be treated humanely is expressly guaranteed.

Thus, there is no conviction for violation of the guarantees foreseen by article 6 of Additional Protocol II and there is no ground for this point of the appeal.



It can be added the observation that the Protocol II has the purpose to develop and to supplement article 3 common to the Geneva Conventions (CA3) and not to amend it, as wrongly deemed by the appeal in favor of Agron KRASNIQI.

Thus Protocol II does not modify or partially abrogate but simply integrates and increases the more general provisions of CA 3.

This is particularly the case of the “fundamental guarantees” (art. 4 APII) that is on one side the obligation to treat humanely in all circumstances all persons who do not take a direct part in hostilities and on the other side the prohibition of any 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... e) outrages upon personal dignity, in particular humiliating and degrading treatment... h) threats to commit any of the foregoing acts.

All these provisions are already contained in CA3, even though in a less detailed form.

In CA3 it is also contained the prohibition of “d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regular constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

This is the core of the due process of law and application of CA3 is not limited to the time “at the end of the armed conflict”.

Therefore any reference to the due process of law in the verdict of first instance can not be seen as inappropriate.

Any other consideration on this point could appear superfluous to the object of this judgment.

Nevertheless it could be doubt that the correct interpretation of the article 2.2 of APII is that given by the defense counsel and before him by the Supreme Court of Kosovo in the case Latif GASHI et al (AP-KZ 139/2004) according to which article 6 of APII does not apply until the end of the armed conflict.

The doubts are of two kinds: logical and literal.

Logically it can be doubt that an international convention, dedicated to protect unarmed individuals from the dangers of an internal armed conflict can in some parts not find application during the conflict but only after it, when the dangers and the reasons for the protection are or should be ceased or at least be minor.

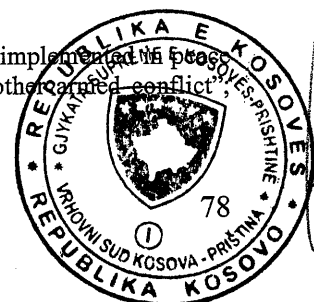
Literally, the last paragraph of article 6 contains a provision (about amnesty to persons who have participated in the armed conflict) which must find application expressly “at the end of hostilities”.

This means that, according to the text of article 6, the other provisions should find application also during the conflict.

Preferable seems to be an interpretation of APII article 2.2 which does not limit but extends the protection of individuals.

Since IHL, as the Geneva Conventions and their Additional Protocols are referred to the time of war or of internal armed conflict²⁴ it is clear that, without a specific provision, it could not be applied to the time after the conflict.

²⁴ Article 2 of Geneva Convention IV: “in addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict”, Article 1 of ADPII: “this protocol... shall apply to all armed conflicts”.



In this case article 2.2 examines the situation of deprivation of liberty of prisoners for reasons related to the conflict, situation generated by, but not finished during the conflict. In relation to these persons this provision extends the guarantees of article 5 and 6, which are in force during the conflict, for the period after the conflict and until their detention lasts.

Article 2.2 of APII must not be read in the sense that only at the end of the conflict but in the sense that also at the end of the conflict those guarantees find application.

This interpretation seems to be more consistent with the aims of humanitarianism on which ground both Geneva Conventions and their Additional Protocols.

In this sense it must be remembered the decision of the Appeals Chamber of ICTY in the case Prosecutor v. Dusko TADIC (paragraphs 67-69)²⁵.

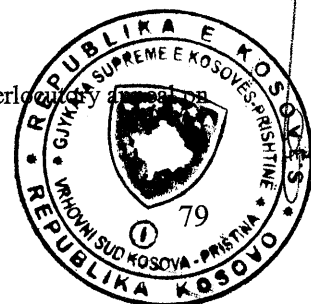
“67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated...

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

"[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

²⁵ Prosecutor v. Dusko TADIC, 2 October 1995 decision on the defence motion for interlo
Jurisdiction.



"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle".

8.2 According to the appeal a war crime against the civilian population can not result in conducts which are individual, not systematic and widely spread and are not based on discrimination.

The evidence collected in this case shows that the conducts charged to the defendants were not individual, but systematic and widely spread.

The number and the characteristics of the victims, the lengthy of their detention, the organization of the Detention Centre with the specific premise for it, the number of the perpetrators, the aims of the detention and of the questioning are all elements which deny the assumption of the defense.

Not simply individuals committed the crimes against other individuals, but members of an organization (KLA) against persons suspected to be members or at least collaborators of another organization (Serbian Military).

The managing of the Detention Centre lasted some months and was organized in specific premises, where any actor had specific roles as to the command, to the arrests, to the surveillance, to the questioning and to the beating up of the detainees.

This can be considered as having a systematic and wide spread character.

As to the discrimination can be here recalled what already observed above: the fact that both the defendants and the victims were Kosovo Albanians does not exclude in itself the existence of a war crime because this was an internal armed conflict, that is a conflict among people who lived in the same State and sometimes belonged to the same nationality.

In fact, the victims were suspected by KLA to be collaborators of the Serbs, that means traitors of their people in favor of the enemy.

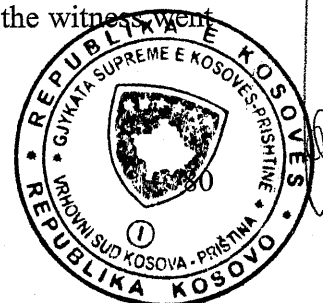
To be suspected to belong to the enemy is already a form of discrimination.

8.3 Finally as to the conditions of the detainees and the comparison with the condition of the civilian population it can be noticed as follows.

On 13 July 1998 "B" met Bedri BERISHA who was very skinny, held his trousers with a rope, was unshaved and very hungry, asked for food but "B" was not allowed to bring food, cried and asked to see his daughter, this also was not possible.

The shirt and the trousers of Bedri BERISHA were with bloodstains

"B" was no more allowed to visit Bedri BERISHA despite the fact that the witness went to Drenovc more than 30 times.



“N” and “TT” managed once to visit Hysen KRASNIQI in the Detention Centre of Drenovc.

Hysen was in a very grave condition, had lost a lot of weight, was unshaven, had unclipped nails, his cloths were very muddy, since he was sleeping in muddy stables for 5 weeks, and stained with blood: all the shirts had bloodstains on.

The visit happened in presence of three police officers who made it clear that the conversation with the detainee was allowed only about family matters.

“N” added to have known by Gani PAQARIZI that “N” and “TT” were the first people in the whole Kosovo to have the privilege to visit a detainee.

Isuf BERISHA told “TT” that the people inside the Detention Centre were being held like cattle and ill treated.

Although Hidaj POPAJ had done nothing wrong he was kept and proposed for an exchange with Nesim POPAJ, who notoriously was a collaborator of the Serbs.

This condition was communicated to “Z” by Rrezik and later on confirmed also by Selim KRASNIQI.

“Z” visited Hidaj only once and did not notice injuries on him. Hidaj however did not want to exchange his cloths.

“O” narrated to have met Hidaj POPAJ, Hazer TARJANI and another detainee in the detention centre of Malishevo in the days after 20 or 21 July 1998, where he spent six days.

The bodies of Hidaj, Hazer and of the third one appeared swollen and with bruises, they said to have been detained in the village of Drenovc and that they were beaten up many times.

“A” met Bedri BERISHA and Hidaj POPAJ in the Detention Centre: Bedri had his right cheek hugely swollen “like he was carrying two kilograms of material there”; Hidaj was covered in blood.

“A” met two other detainees Shaban SHALA and Hysen KRASNIQI, both were all in blood.

Of Shaban SHALA “you could barely see his eyes”, he was short but very strong and showed “a very high endurance even though they beat him badly”.

Also “A” was beaten up with a baton and kicked all over the body and got personal injuries, the floor was covered with his blood.

In the Detention Centre there was no water to wash himself, “A” and others were brought outside to some holes with water inside.

The toilet, “just for your personal needs”, was in the corridor.

No visits were allowed and bread and water were brought to “A” by Isuf BERISHA.

The relatives of Murat RRUSTEMI were not allowed to pay him a visit.

Nevertheless Nezim RRUSTEMI heard someone screaming within the detention centre.

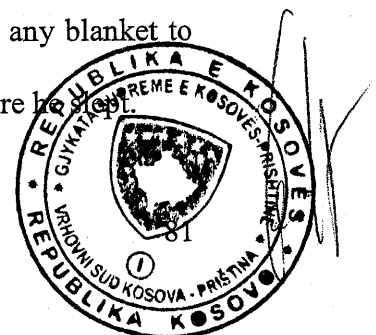
“O” recognized the photo of Murat RRUSTEMI adding that the detainees he met in Malishevo said that Murat had died due to the beatings.

“E” was detained and beaten up in Drenovc as showed by the photos of his scars.

He was detained for three days and nights during which he was given nothing to eat and to drink.

“E” had to sleep on the floor in a room in which coal was kept without any blanket to cover himself.

He had no toilet facilities and had to relieve himself in the same room where he



“E” was not allowed to wash away his blood.

“U” was arrested, taken to Drenovc and beaten up for the reasons already examined.

After he renounced to his credit “U” was released.

“W” was arrested, taken to Drenovc, questioned and beaten by Selim KRASNIQI so hard that he fell, the beating up was on his nose which after that was bleeding.

The previous day also his son had been abducted by KLA, then interrogated and beaten by the defendant.

All the above mentioned elements give an account of the conditions under which were kept the detainees in Drenovc, conditions which it is appropriate to define as “inhumane”. Those conditions had nothing to do with those of the civilian population of the same zone, that is Drenovc and the surrounding area.

It is out of doubt that the civilian population suffered under the difficulties and privations deriving from the conflict.

However those civilians were not in detention, were not beaten up or threatened by KLA, were in condition to look for food and other goods, were not separated from their families.

For these reasons the condition of the detainees was incomparably worse than that of the local civilian population.

9. The appeal claims the alleged violation of art. 22 SFRY because of the lack of evidence as to Agron KRASNIQI about his material participation to the crime and about his will to participate to it and
- the alleged violation of art. 26 CC SFRY because KLA was not a gang or a criminal grouping and the three defendants did not organize a joint criminal association.

As to the participation of Agron KRASNIQI to the charged criminal offences it is to be read in the First Instance Judgment (pages 94 – 98) that this defendant personally abducted Hysen KRASNIQI (witnesses “N” and “TT”) and Murat RRUSTEMI (witnesses Nezim and Hazer RRUSTEMI), abducted and beat “U”.

Agron KRASNIQI was seen by the witnesses acting as a guard in the premises of the Detention Centre of Drenovc, where he was a member of the Military Police (on this point see the statement of Selim KRASNIQI before the Investigating Judge on 18 February 2004 page 9).

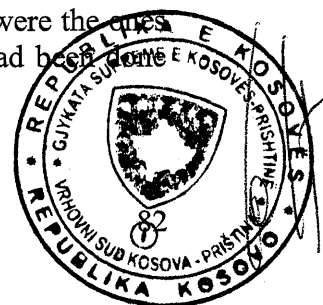
Agron KRASNIQI was directly involved, as a Military Policeman, in the management of the Detention Centre: to him “TT” asked the permission to hand over cloths to Hysen KRASNIQI and from him “TT” received back the dirty ones which were stained with blood.

A Police Officer, Isuf BERISHA later on killed during the war, told “TT” that the people inside the Detention Centre were being held like cattle and ill treated.

“TT” was a soldier in Drenovc, thus could observe what happened in the Detention Centre.

As seen before, “Z” went to Drenovc looking for Hidaj POPAJ.

From Isuf BERISHA he was informed that Agron KRASNIQI and Rrezik were the who dealt with the maltreatment and beating up of the prisoners if such had been done (testimony before the Investigating Judge on 8 September 2004 page 6).



In Drenovc "Z" saw Hidaj with the hands tied or handcuffed, escorted by Agron KRASNIQI.

"Z" went to Drenovc many times and every time met Agron KRASNIQI at the school or premises of the Military Police attending different tasks of surveillance and check of the visitors.

"U" stated to have been arrested by Agron KRASNIQI and later on beaten up with a baton by the same.

These elements ground the evidence of the direct and intentional participation, according to article 22 CC SFRY, of the defendants to the charged crimes.

He was a member of the Military Police and served at the Police Station of Drenovc, where the detainees were maltreated as he well knew (confront the episode of the cloths of Hysen KRASNIQI stained with blood, which were handed over by the defendant, confront what Isuf BERISHA told the witnesses "TT" and "Z" and the episode related to "U).

"Thus Agron KRASNIQI was part in the joint criminal enterprise charged according to article 26 CC SFRY to all defendants.

That KLA was not a criminal gang but was exploited by some of its members for criminal purposes was already observed before (see point I.3 and III.2).

AD3 Erroneous and incomplete determination of the factual situation

10. According to the appeal at the critical time defendant Agron KRASNIQI was in Pristine, studying at Law Faculty and not in the place of the criminal offences.

Only later on, around 21 or 22 June, he joined the young people guarding his village and went to Albania where he remained approximately three weeks from the end of June to 27 or 28 July in order to find weapons.

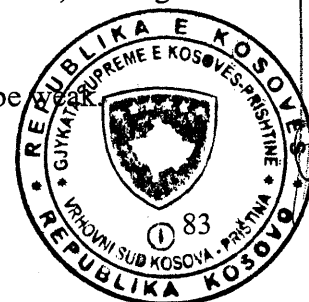
The First instance Judgment dealt with this point in the pages 95 – 98, where are examined the statements of the witnesses about the participation of the defendant in the criminal offences, the defense of Agron KRASNIQI and the statements of the witness of the defense Sinan Destan KRASNIQI.

This point of the appeal is ungrounded.

The witnesses of the prosecution state dates which are different from those indicated by the defendant: "N" and "TT" speak about the 4th of June as the date of the abduction of Hysen KRASNIQI by Agron KRASNIQI and other soldiers, Nezim and Hazer RRUSTEMI locate on the 10th of June the abduction of Murat RRUSTEMI by the same defendant, "U" indicates the date of the 16th of June for his own abduction by this defendant, "Z" indicates in the 16th of June the first day he met Agron KRASNIQI at the Military Police Station in Drenovc.

These witnesses don't show to have any reason to blackmail the defendant, nor Agron KRASNIQI was able to indicate this kind of reasons.

The alibi of the defendant as to the days before 20 June 1998 appears to be



He attended the studies in Law in Pristine, but the faculty was officially closed by the Serbs since 1990.

Thus he and the other Albanian students had to attend the courses secretly in private houses.

His attendance at the lessons in the critical period could not be proven as correctly observed by the first judge.

His narration of the travel from Pristina to Dejne does not demonstrate the date of this travel.

The defendant asserted to have spent in Albania three weeks, but he could offer as evidence only the testimony of Sinan Destan KRASNIQI saying that this person returned to Kosovo after two days.

The defendant heard of the arrest of the co-defendants during 2004 and found "more reasonable" to avoid Kosovo for his leave in 2005.

The testimony of Sinan KRASNIQI is deemed not reliable by the first judge.

This witness showed a contradiction saying to have had a particular interest in the studies of the defendants until he remained abroad, whereas since the end of April 1998, when he was in Kosovo was no more interested in those studies.

The witness can state to have met the defendant on 19 June and to have gone to Albania with him at the end of June, but can not assert where Agron KRASNIQI was before 19 June and in the days after the witness returned from Albania at the beginning of July.

As already seen for the alibi of Selim KRASNIQI the travel to and from Albania could last days or only few hours and there is no convincing evidence that Agron KRASNIQI remained away from Kosovo and from Drenovc all the time he pretends.

11. The appeal claims an erroneous assessment of the testimony of witnesses "Z", "N", "U", "X".

As to "X" it must be noticed that his testimony was not used by the first judge in relation to this defendant.

As to the other witnesses, whose testimonies were examined before (see points IV.9 and IV.10) it can be added as follows.

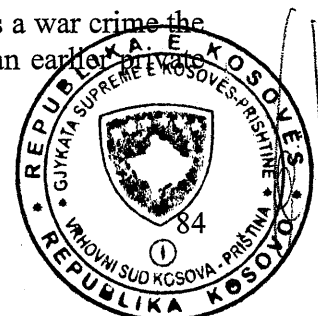
"Z" does not refer a "rumor" when he narrates what he learned by Isuf BEISHA but a testimony de relato, which is admissible and must be assessed with prudence as far as the person who narrated this facts can not be examined because of his death or other cause.

About Isuf BERISHA and his involvement in the Detention centre of Drenovc speak witnesses "TT", "Z" and Muhamet BERISHA, what Isuf BERISHA told them also in relation to the defendant appears to be logic and consistent and no evidence exists that he could tell "rumors" to the witnesses.

"N" and "TT" affirm that Agron KRASNIQI personally abducted Hysen KRASNIQI.

"U" stated to have been arrested by Agron KRASNIQI and later on beaten up with a baton by the same.

12. According to the appeal, erroneously the first judge has considered as a war crime the fact involving as a victim Murat RRUSTEMI, which was the result of an earlier private conflict.



This point was already examined and rejected before (see above point **II.17.1**).

This episode happened within a context of the official duties exercised by the defendants as a part of KLA structure.

In the cases of Murat RRUSTEMI and of witness "U" the perpetrators could arrest, beat and threaten them to inflict a worse damage only because as KLA members they controlled the area, exercised the powers of the Police, had concrete powers also on civilians.

And the concrete conduct was not different from that used against other victims.

Despite of the possible private reasons beneath, the illegal actions were possible only through the existence of the conflict, thanks the control of that area by a part in the conflict, that is KLA and through the misuse of this organization for criminal purposes by the defendants.

AD4 Decision on the criminal sanctions

13. The appeal claims that the verdict is unfair having sentenced three defendants with the same punishment of 7 years no taking into consideration the different conducts, ages and the degree of the criminal responsibility.

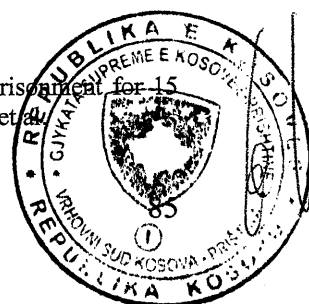
According to the appellant the verdict is unfair as to the sentence also in comparison with the judgments of ICTY which are quoted by the first judge: he refers to similar punishment which were pronounced for more serious crimes.

It was already noticed in the part of this judgment related to the assessment of the sentencing decided by the first judge against Selim KRASNIQI (see above point **II.21**) that the District Court of Prizren considered factors connected to the elements of the crime (the degree of criminal responsibility, the motives of the committed criminal offence, the degree of injury or of danger to the protected object) and factors concerning circumstances of the fact and of the offender otherwise relevant for the purposes of the punishment, as well as the case law of ICTY.

The first judge grounded the sentencing for each defendant on the number of the victims (several), on the conditions in which they were abducted and detained (defined as inhumane treatment), on the manner of the conduct of the defendants (defined as humiliating and disregarding the fundamental rights of the victims, considering also the beating and the injuries they suffered), without finding any mitigating circumstance, however deciding the punishment near the minimum provided by the law (from five to fifteen years²⁶).

This Court shares in general the considerations of the first judge, because the injuries and the humiliations inflicted to the victims by the conducts of this and the other defendants were very grave, as well as the conditions under which they were abducted and detained. The amount of the punishment can not be deemed disproportionate to the sentencing of other International Tribunals, which according to the Supreme Court of Kosovo can be useful only as a point of references and not as a leading precedent.

²⁶ The death penalty foreseen in the article 142 CL FRY was substituted with the imprisonment for 15 years, see Supreme Court of Kosovo 21 July 2005 in the case of Prosecutor v. Latif Gashi et al.



However for Agron KRASNIQI it seems to be appropriate to evaluate these elements together with his concrete role in the criminal offences.

According to the evidence this defendant was a simple agent of the Military Police, who executed unlawful orders to arrest and beat up the victims, within the subdivision of the roles and the participation of each defendant to the joint criminal enterprise above examined.

His role was relevant and important, however he was not the Senior Chief nor the Deputy Chief of the Military Police, nor a political commissar as other defendants.

To the consideration of this subordinate role played by Agron KRASNIQI must be added the consideration of some mitigating circumstances as the particular circumstances of the time when the crimes were committed and the personal conditions of the defendants (for him his young age and his familiar status), as well as the consideration of the limits imposed by article 65 PCCK for the participation in the criminal association.

Moreover the judgment of first instance has been partially modified in favor of Agron KRASNIQI through the reduction of the period of time of the criminal offences which now does not include any more the period from 1 May to 1 June 1998.

To these elements must be added the necessity to recognize to each defendant a sort of compensation for the unreasonable delay in the time of the proceedings, as seen above (point I.4).

All this put under consideration the Court of Second Instance deems correct and adherent to the legal criteria about sentencing to reduce the punishment for Agron KRASNIQI to four years and six months imprisonment.

V

The verdict of first instance was partially modified as to the period of time of the criminal offences committed by Bedri ZYBERAJ and Agron KRASNIQI and as to the punishment regarding all three defendants.

The Judgment of the Court of First Instance is affirmed in the remaining parts.

The partial modification of the First Instance Judgment has effect on the costs of the proceedings of Second Instance in the sense that the State Budget will have to bear them.

With a separate ruling it is decided about the detention on remand for each defendant, according to article 426 and 393 PCCK.



Dated this 10th day of April 2009.
Ap.-Kz No. 371/2008

Prepared in English, an authorized language.

International Presiding Judge
Emilio Gatti

International Judge
Maria Giuliana Ciminini

International Judge
Guy Van Craen



International Recording Officer
Annette Andersen

Kosovo National Judge
Miftar Hasiqi

Kosovo National Judge
Nesrin Lusha

Legal Remedy

No appeal is possible against this Judgment (art. 430 KCCP). Only a request for the protection of legality is possible, to be filed with the court which rendered the decision in the first instance, within 3 months of the service of this decision (art. 451 – 460 KCCP).