# COURT OF APPEALS

**Case number:** **PAKR Nr 456/15**

**Date:** **14 September 2016**

**THE COURT OF APPEALS OF KOSOVO** in the Panel composed of EULEX Judge Roman Raab as Presiding and Reporting Judge, EULEX Judge Jorge Martins Ribeiro and Kosovo Court of Appeals Judge Hava Haliti as Panel Members, with the participation of Adam Viplak, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

1. **A.D.;**
2. **B.D.;**
3. **D.D.;**
4. **S.D.;**
5. **F.D.;**
6. **J.D.;**
7. **N.D.;**
8. **Z.D.;**
9. **S.S.;**
10. **I.T.;**

charged under the Indictment no PPS 88/11 dated 6 November 2013, filed by the EULEX Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) on 8 November 2013, from which two counts were severed for a separate procedure;

adjudicated in first instance by the *Basic Court of Mitrovica with the Judgment P. Nr. 58/14*, dated 27 May 2015;

deciding upon the following appeals, filed against the Judgment of the Basic Court of Mitrovica P. Nr. 58/14 dated 27 May 2015

- **appeal of the Special Prosecutor, filed on 6 August 2015;**
- **appeals of defense councel I.A. on behalf of defendant A.D., filed on 6 August 2015;**
- **appeals of defense councel S.I. on behalf of defendant B.D., filed on 06 august 2015;**
- **appeals of defense councel K.O. on behalf of defendant D.D., filed on 5 August 2015;**
- **appeals of defense councel R.M. on behalf of defendant S.D., filed on 5 August 2015;**
- **appeals of defense councel V.B. on behalf of defendant F.D., filed on 3 August 2015;**
- **appeals of defense councel M.S. on behalf of defendant J.D., filed on 5 August 2015;**
- **appeals of defense councel G.G.S. on behalf of defendant S.S., filed on 7 August 2015;**
- **appeals of defense councel B.M. on behalf of defendant N.D., filed on 1 August 2015;**
- **appeals of defense councel B.T. on behalf of defendant Z.D., filed on 3 August 2015;**
- **appeals of defense councel A.Q. on behalf of defendant I.T., filed on 5 August 2015;**

*having reviewed* the motion of the Appellate State Prosecutor filed on 28 October 2015;

*after having held* sessions on 16, 17 and 19 May 2016;

*having deliberated and voted* on 9 August and 14 September 2016;

*pursuant to* Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (hereinafter "CPC");

*renders the following*

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**JUDGMENT**

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**I. The appeals of**

**SPRK Prosecutor filed on 6 August 2015,**

**Defense councel A.Q. on behalf of defendant I.T. filed on 5 August 2015,**

**Defense councel G.-S. on behalf of defendant S.S. filed on 7 August 2015,**

**Defense councel B.T. on behalf of defendant Z.D. filed on 3 August 2015,**

**Defense councel M.S. on behalf of defendant J.D. filed on 5 August 2015,**

**Defense councel I.A. on behalf of defendant A.D. filed on 6 August 2015,**

**Defense councel S.I. on behalf of defendant B.D. filed on 6 August 2015,**

**Defense councel K.O. on behalf of defendant D.D. filed on 5 August 2015,**

**Defense councel R.M. on behalf of defendant S.D. filed on 5 August 2015,**

**Defense councel V.B. on behalf of defendant F.D. filed on 3 August 2015,**

**Defense councel B.M. on behalf of defendant N.D. filed on 1 August 2015,**

**<u>are rejected as unfounded</u>.**

**II. Pursuant to Article 394 paragraph 1 subparagraph 1.4 of the CPC the Judgment of the Basic Court of Mitrovica P 58/2014 dated 27 May 2015 is modified in its enacting clause.**

**The verdicts of guilt in counts I and II of the impugned judgment are hereby affirmed.**

**With regards defendants S.S., I.T., Z.D. and J.D. on the grounds of Article 81 paragraph 1 of the CCRK the counts I and II are considered parts of a criminal offence in continuation.**

**Item III of the first instance judgment shall be amended as follows:**

**Pursuant to Article 31 and Article 152 paragraph 1 of the CCRK in conjunction with Article 33 paragraph 2 of the Constitution of the Republic of Kosovo, read together with Article 45 paragraph 1, and Article 81 paragraph 1 of the CCRK the defendants are sentenced**

**S.S. to 7 (seven) years of imprisonment,**

**I.T. to 6 (six) years and 6 (six) months of imprisonment,**

**Z.D. to 6 (six) years of imprisonment,**

**J.D. to 6 (six) years of imprisonment,**

**Pursuant to Article 31 and Article 152 paragraph 1 of the CCRK in conjunction with Article 33 paragraph 2 of the Constitution of the Republic of Kosovo, read**

**together with Article 45 Paragraph 1, Article 75 paragraph 1 subparagraph 1.2, and Article 76 paragraph 1 subparagraph 1.2 of the CCRK the defendants**

**A.D. to 3 (three) years of imprisonment,**

**D.D. to 3 (three) years of imprisonment,**

**B.D. to 3 (three) years of imprisonment,**

**S.D. to 3 (three) years of imprisonment,**

**F.D. to 3 (three) years of imprisonment,**

**N.D. to 3 (three) years of imprisonment.**

**III. The verdict of the impugned judgment in Item IV concerning the calculation of the detention periods is amended as follows:**

**The periods of deprivation of liberty of S.S. from 23 May 2013 until 31 May 2013 while in detention on remand, from 31 May 2013 until 19 December 2014 while in house detention and from 27 May 2015 until the delivery of the written judgment of the Court of Appeals while in detention on remand shall be credited in the punishment of imprisonment imposed on him.**

**The periods of deprivation of liberty of I.T. from 24 May 2013 until 31 May 2013 while in detention on remand, from 31 May 2013 until 19 December 2014 while in house detention and from 27 May 2015 until the delivery of the written judgment of the Court of Appeals while in detention on remand shall be credited for the punishment of imprisonment imposed on him.**

**The periods of deprivation of liberty of J.D. from 24 May 2013 until 31 May 2013 while in detention on remand, from 31 May 2013 until 19 December 2014 while in house detention and from 27 May 2015 until the delivery of the written judgment of the Court of Appeals while in detention on remand shall be credited for the punishment of imprisonment imposed on him.**

**The periods of deprivation of liberty of Z.D. from 23 May 2013 until 31 May 2013 while in detention on remand, from 31 May 2013 until 19 December 2014 while in house detention and from 27 May 2015 until the delivery of the written judgment of the Court of Appeals while in detention on remand shall be credited for the punishment of imprisonment imposed on him.**

**IV. The verdict of the impugned judgment in Item V concerning the costs of criminal proceedings is amended as follows:**

**The costs of criminal proceedings shall be partially reimbursed by J.D. in a scheduled amount of Euro 500.**

**V. In the remaining parts the judgment is affirmed.**

REASONING

## I. RELEVANT PROCEDURAL BACKGROUND

### A. The Indictment

On 08 November 2013 the EULEX Prosecutor of the SPRK filed the Indictment no PPS 88/11 dated 6 November 2013. Two counts were severed for a separate procedure as follows:

**I. A.D., S.S., I.T., Z.D., F.D., N.D., S.D., D.D., B.D. and J.D. were charged with the following acts:**

In their capacity of members of the Kosovo Liberation Army (KLA), in co-perpetration with each other and with so far unidentified KLA members, they violated the bodily integrity and the health of Witness A and Witness B, two civilians detained in the Likoc/Likovac detention centre, by:

- beating them with fists and wooden sticks;

- forcing Witness A and Witness B to beat each other;

- pinching Witness A's genitals with an iron tool and subsequently dragging him on the floor with it,

in Likoc/Likovac (Skenderaj/Srbica municipality), on an undetermined date in September 1998.

**II. J.D., S.S., I.T., and Z.D. were also accused** that in their capacity of members of the Kosovo Liberation Army (KLA), in co-perpetration with each other and other so far unidentified KLA members, on an undetermined number of occasions they violated the bodily integrity and the health of Witness A, a civilian detained in the Likoc/Likovac detention centre, by beating him with fists and wooden sticks on various parts of his body, in Likoc/Likovac (Skenderaj/Srbica municipality), on several undetermined dates in August and September 1998 .

Both of these counts were classified in the indictment as war crimes against the civilian population.

## B. <u>The Judgment</u>

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

The case was adjudicated in the first instance by the *Basic Court of Mitrovica with the Judgment P. Nr. 58/14*, dated 27 May 2015 as follows:

I. **A.D., B.D., D.D., S.D., F.D., J.D., N.D., Z.D., S.S. and I.T.** were found *guilty* of the following criminal act: that, during the internal armed conflict in Kosovo, on an undetermined date in September 1998, acting as members of the KLA, in co-perpetration with each other and with other so far unidentified KLA members, they seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949 because they intentionally perpetrated violence, cruel treatment, torture, and humiliating and degrading treatment against Witness A and Witness B, two Kosovo Albanian civilians detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality), who took no active part in hostilities, by beating them with fists and wooden sticks, by ordering Witness A and Witness B to beat each other, and by pinching Witness A's genitals with a metal tool, and pursuant to Article 33 Paragraph 1 of the Constitution of the Republic of Kosovo this action was classified:

as a war crime under Article 31 and Article 152 Paragraph 1 and Paragraph 2 Subparagraphs 2.1 and 2.2 of the Criminal Code of the Republic of Kosovo (CCRK), that entered into force on 1

January 2013, and in violation of Article 4 Paragraph 2 (a) of the Additional Protocol II (AP II) to the said Conventions, and for this crime:

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

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

and pursuant to Articles 31 and 152 Paragraph 1 and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and Article 38 Paragraphs 1 and 2 of the CCSFRY in its wording as entered into force on 1 July 1977 that was retained in force by Section 1 Paragraph 1.1 (b) of the UNMIK Regulation 1999/24 of 12 December 1999, and Article 75 Paragraph 1 Subparagraph 1.2 and Article 76 Paragraph 1 Subparagraph 1.2 of the CCRK **A.D., B.D., D.D., S.D., F.D. and N.D. were sentenced:**

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

II. **J.D., Z.D., S.S. and I.T.**, were found *guilty* of the following criminal act:

that, during the internal armed conflict in Kosovo, on several occasions in August and September 1998, acting as members of the KLA, in co-perpetration with each other and with other so far unidentified KLA members, they seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949, because they intentionally perpetrated violence, cruel treatment, torture, and humiliating and degrading treatment against Witness A, a Kosovo Albanian civilian detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality), who took no active part in hostilities, by beating him with wooden sticks and fists on various parts of his body, inside the detention cell, and this action, was classified:

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

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

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

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

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

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

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

- J.D., in a scheduled amount of Euro 1000;
- Z.D., in a scheduled amount of Euro 500;
- S.S., in a scheduled amount of Euro 500;
- I.T., in a scheduled amount of Euro 500;
- A.D., in a scheduled amount of Euro 300;
- B.D., in a scheduled amount of Euro 300;

- D.D., in a scheduled amount of Euro 300;
- S.D., in a scheduled amount of Euro 300;
- F.D., in a scheduled amount of Euro 300;
- N.D., in a scheduled amount of Euro 300;

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

### C. The Appeals

On 6 August 2015 the Special Prosecutor appealed against Judgment.

On 1 August 2015 defense councel B.M. on behalf of defendant N.D. filed an appeal. On 3 August 2015 defense councel V.B. on behalf of defendant F.D. and defence councel B.T. on behalf of defendant Z.D. appealed against the judgment.

On 5 August 2015 defense councel K.O. on behalf of defendant D.D., defense councel R.M. on behalf of defendant S.D., defense councel A.Q. on behalf of defendant I.T. and defense councel M.S. on behalf of defendant J.D. filed appeals against the impugned judgment. On 6 August 2015 defense councel I.A. on behalf of defendant A.D. and defence councel S.I. on behalf of defendant B.D. filed appeals. On 7 August 2015 defense councel G.G.-S. on behalf of defendant S.S. appealed against the judgment.

The case was transferred to the Court of Appeals on 23 September 2015.

On 28 October 2015 the Appellate Prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 16, 17 and on 19 May 2016.

The Appellate Panel deliberated and voted on 9 August and on 14 September 2016.

## II. SUBMISSIONS OF THE PARTIES

### A. The Appeal of the SPRK Prosecutor:

The special prosecutor on 6 August 2015 filed an appeal with the Basic Court.

According to the appeal of the SPRK the judgment of the basic court is challenged because of the erroneous determination of the punishment to apply.

The SPRK Prosecutor requests to modify the impugned judgment of the Basic court by adequately increasing the sentence against all the Defendants.

He states that all sentences applied are disproportionate to the seriousness and nature of the offence.

He emphasizes that the basic court applied three mitigation factors to impose more lenient punishment within the limits set forth by the court on all the Defendants instead of recognising the existence of aggravating circumstances and application of a more severe punishment on all the ten defendants.

**B. The Appeal of defense councel A.Q. on behalf of defendant I.T.:**

Defendant I.T. was found guilty in both counts.

Defense councel A.Q. on 5 August 2015 filed an appeal with the Basic Court on behalf of defendant I.T..

Defense councel A.Q. requests the Court of Appeals to hold a hearing in order to admit pieces of evidence; to alter the decision of the first instance and pronounce defendant I.T. and other defendants not guilty or to annul the appealed decision and remit the case for a retry in front of a different trial panel of the same first instance court.

He challenges the composition of the Trial Panel referring to the Law on Jurisdiction of EULEX Judges and EULEX internal Regulation of this issue.

He objected violation of Article 7 CPCK and breach of the principle *in dubio pro reo*. Moreover opined that the conclusions of the trial panel did not fit the provisions of Art. 262 CPC. He opposes the trial panel´s conclusions based solely on the statement of one witness.

He challenges the judgment due to the violations of the provisions of CPC. Namely he objects the application of the theory of "hostile witnesses" which has no ground in the CPC. Opines that the trial panel breached the principle of equality of arms and in the consequence assisted the prosecution in an inadmissible way. Objected the way how the defendant I.T. was identified by Witness A as it was contrary to Article 120 CPC. Finally, opposed the assessment of the statements of expert witnesses Dr. B. and Dr. G. as violation of the principle in dubio pro reo.

On the grounds of erroneous and incomplete determination of factual state raises his objections concerning assessment of the evidence namely in a detailed way analyzes statements and general credibility of Witness A. Points out that his version is in contradiction to the version of Witness B. Mentions Witness A's application for KLA veteran status and his mental illness. Emphasizes the contradiction of the Witness A's statement in comparison to witnesses Dr. H., Dr. B. and S.. Concludes that the evidential value of Witness A as a crucial witness was overestimated in detriment of the defendant.

Challenges the credibility of Witness K who was clearly coordinated with her husband, Witness A. Moreover, points out there was no relation of Witness B beating and the conflict in Kosovo.

In relation to the punishments he objects the court has not considered as relevant the time elapsed from alleged actions of the defendants and the punishment of seven years is considered to be exaggerated

### C. <u>The Appeal of defense councel G.-S. on behalf of defendant S.S.:</u>

Defendant S.S. was found guilty in both counts.

Defense councel G.G.-S. on behalf of the defendant S.S. filed an appeal on 7 August 2015.

Defense councel G.-S. in his appeal explained his point of view in relation with the failures of the first instance procedure and the verdict.

The defense councel in the appeal states that the verdict violated Art. 7 par. 1 of the CPC and contains numerous affirmatively false statements and conclusions which are not supported by the evidentiary record.

He emphasizes that the evidence was insufficient to identify defendant S. as a perpetrator of the charged crimes and to sustain the verdict. He notes that any ambiguity or doubt arising from the evidence had to be resolved by the Trial Panel in favor of Mr. S. in accordance with the principle of *in dubio pro reo*. If the standard *"beyond a reasonable doubt"* was not met as to each element of a crime and each element of the mode of liability alleged to that crime, defendant S. was entitled to a judgment of acquittal for that crime.

He also notes that the evidence was insufficient to establish commission of a war crime as the random abuse that Witness A claimed he endured, even if it had been proved, was not closely related to the armed conflict in Kosovo at the time.

Defense councel G.-S. mentions as well that the Trial Panel presiding judge's refusal to provide the parties with a verbatim record of the proceedings violated the law. He requires reversal of Mr S. conviction and dismissal of the charges.

He points out the contradictory and unreliable statements of Witness A and Witness B. In the assessment of the evidence the first instance trial panel unlawfully and repeatedly shifted the burden of proof onto the accused including defendant S.. He also challenges the evidential value of Witness K. Moreover, he objects the pre-trial statements of the witnesses on a basis of inaccurate recording of their statements by the Prosecutor in charge.

He states that defendant S. conviction must be dismissed either in this case or in Drenica 1 as he has been convicted twice for the same conduct and the punishment imposed is exaggerated.

The defense councel also emphasizes that the first instance panel was itself illegally constituted. Furthermore, the trial panel violated its obligation of determining and considering all the evidence and to provide defendant S. with a fair trial when it failed to include the exculpatory evidence of Witness L from the Drenica 1 case in the evidence of the Drenica 2 case, namely the evidence that Witness A was mentally ill and that defendant S. was misidentified by him as being present at Likoc.

Defense councel underlines that the trial panel also engaged in numerous other errors, both substantive and procedural all of which denied defendant S. a fair trial and resulted in an unsafe, unreliable verdict. He moves that defendant S. convictions must be reversed and all charges dismissed.

### D. The Appeal of defense councel B.T. on behalf of defendant Z.D.:

Defendant Z.D. was found guilty in two counts as well.

Defense councel B.T. filed an appeal on behalf of the defendant Z.D. on 3 August 2015.

Defense councel B.T. in his appeal proposes to annul the impugned judgment and to release the defendant from detention on remand.

In his appeal the defense councel provides a detailed reasoning for his arguments in particular about the unclear conviction and the unspecified criminal activity of defendant Z.D.. He challenges the credibility of the Witness A due to the mental status and his internally inconsistent and contradictory testimony. He also opposes the way of sentencing, specifically not individualized and aggravated punishment for the defendants.

### E. The Appeal of defense councel M.S. on behalf of defendant J.D.:

Defendant J.D. was found guilty also in two counts.

Defense councel M.S. filed an appeal on behalf of defendant J.D. on 5 August 2015.

In his appeal the Councel proposes that the Court of Appeal to approve the appeal and amend the judgment of the Basic Court so that defendant J.D. be acquitted of the charge, or cancel the judgment and return the case to the basic court for retrial and – on this occasion – terminate the detention on remand against defendant J.D..

He provides a detailed reasoning for his arguments, such as the unlawful composition of the first instance trial panel, composed of three EULEX judges in contradiction to the law;

the unclear conviction of the defendant J.D., as the enacting clause does not give the precise description of which actions he apparently has undertaken; moreover, the description given exceeds the indictment;

application of two different criminal codes and the inadequate imposition of the aggregated sentence for an offence that should be characterized as one criminal offence in continuation;

several violations of the criminal procedure during the taking and assessing of the evidence, including the violation of Article 7 of the CPCK or the application of the theory of hostile witness;

the defense claims that in the situation Witness A and Witness B did not raise any claim with regards to damages it is obvious they do not consider themselves damaged - so they did not suffer any bodily injuries;

the inadequate assessment of the statements of Witness A, pointing out the allegations raised up by the other defense councel as mentioned above.

Defense councel M.S. also notes that the imposed sanction against his client is not reasoned in a proper way.

## F. The Appeal of defense councel I.A. on behalf of defendant A.D. and the Appeal of defense councel S.I. on behalf of defendant B.D.:

Defense councel I.A. on behalf of defendant A.D. and defense councel S.I. on behalf of defendant B.D. filed the appeals on 06 August 2015. Their appeals were in fact identical.

In their appeals the defense councel claim that the factual situation in the judgment was built only on the statement of Witness A and Witness K, whose testimonies were contradictory. The Trial Panel ignored the exculpatory evidence, such as the statements of witnesses A.T., I.S. or Dr. G.H..

They challenge the credibility of Witness A emphasizing his psychological disease, inconsistencies in his testimony, statements about his bodily harm suffered from the beating in relation to the medical assessment of them and his application for the veteran status.

In the appeals the defense councel dispute whether it is possible to commit war crime against the own population.

## G. The Appeal of defense councel K.O. on behalf of defendant D.D.:

Defense councel K.O. filed an appeal on behalf of defendant D.D. on 5 August 2015.

In his appeal the defense points out the contradictions of the enacting clause in comparison with the reasoning.

He challenges the credibility and admissibility of the Witness A's testimony concluding that Witness A was never beaten during the war, as he did not seek any medical treatment during that time. Moreover he mentions the property dispute with the D. family before the war. He refers to the mental illness of Witness A and contradictions of his testimony with the statements of other witnesses.

He emphasized that D.D. was not present in Kosovo in time the alleged crimes took place. Moreover there is no precise description of particular actions taken by the defendant.

Also he appeals the committed breaches of the criminal law and the legal qualification applied. He concludes there were no elements of any criminal offence fulfilled.

## H. The Appeal of defense councel R.M. on behalf of defendant S.D.:

Defense councel R.M. filed an appeal on behalf of defendant S.D. on 5 August 2015.

The defense submits that the anonymous witnesses and their contradictable statements are inadmissible. He disputes the credibility of Witness A as well and emphasizes that his client, defendant S.D., never was a KLA member.

The defense states that the enacting clause of the first instance judgment contains contradictions.

## I. The Appeal of defense councel V.B. on behalf of defendant F.D.,

Defense councel V.B. filed an appeal on behalf of defendant F.D. on 3 August 2015.

The defense notes that the statement of Witness A was inconsistent and contradictory due to which his statement is inadmissible. Furthermore the first instance judgment is contradictory, namely in the assessment of the injury of the defendant F.D. and his ability to use his hand in time the action charged took place. He also points out the defendant was not present in the due period in Likoc.

The defense states that the basic court violated Article 262 of the CPC when it assessed the evidence as a basis of guilt.

## J. The Appeal of defense councel B.M. on behalf of defendant N.D.:

Defense councel B.M. filed an appeal on behalf of defendant N.D. on 1 August 2015.

The councel finds contradictions in the statements of Witness A. He challenges the credibility of the Witness A on the basis of his mental disorder, application for the KLA veteran status and inconsistency of his statements. He notes that the basic court incorrectly assessed the evidence and came to an inappropriate conclusion due to the violation of Article 262 of the CPC. Furthermore, the witness statements were not supported with any other relevant single piece of evidence. On the contrary, the basic court ignored the testimonies of witnesses Dr. F.B. and Dr. B.G..

The defense points out the contradictions in the enacting clause and he states that the basic court when it assessed the evidence as a basis of guilt.

All defense councel find excessive the imposed punishment in the light of the practice of the ICTY and in their appeals they propose to annul the impugned judgment and to return the case for retrial to the Basic Court of Mitrovica.

## K. Responses to the appeals:

The SPRK Prosecutor responded all the ten appeals of the defendants. In his responses he proposes to reject all the appeals against the judgment of the basic court.

The responses of the defense councel are repetitive and express the following: the Prosecution´s appeal, claiming that various aggravating factors exist or should have been considered by the Trial Panel, is not based on a correct analysis of the facts of this case or on the law and should be rejected in its entirety.

The defendants in their responses request the appellate court to reject the appeal of the SPRK prosecutor as ungrounded.

## L. Motion of the Appellate Prosecutor:

The Appellate Prosecutor of Kosovo in his motion moves the court of appeals to grant S.S. appeal in part and:

- correct the impugned judgment to give him credit for the period he spent in detention prior to the delivering of the verdict in the present case;
- correct the impugned judgment insofar as it considers “humiliation” by forcing the victims to “renounce human dignity” as an aggravating factor in addition to considering it in the assessment of the gravity of the crime.
- to reject the remainder of the defense appeals;

- to grant the appeal of the SPRK Prosecutor and enter harsher sentences for all the defendants.

The Appellate Prosecutor in his motion provides a comprehensive analysis of the appeals before he explains his opinion.

The Appellate Prosecutor agrees with the vast majority of submissions of the SPRK Prosecutor regarding the appeals of the defendants.

The Appellate Prosecutor notes the unique character of the present case insofar as its outcome to a large extent depends on the assessment of credibility of one witness – Witness A.

He concludes that the Trial Panel decision to trust his testimony is well reasoned and all the intricate matrix of factors taken into account can be found in the impugned judgment.

The Appellate Prosecutor also notes that the defense had a possibility to cross-examine Witness A and in fact did so. His identity was known to the accused and at no stage of the proceeding was Witness A declared as a cooperative witness.

The Appellate Prosecutor emphasizes as a consequence that there was nothing inherently erroneous in relying on the evidence provided by witness A to enter convictions in the present case.

With regards the allegations related to the burden of proof, the Appellate Prosecutor notes that the defense's argument is of purely semantic nature. There is nothing to believe that the burden of proof was in fact shifted onto the defense. None of the evidence relied on by the defense raised a reasonable doubt to that conclusion.

On the issue of the *hostile witness theory* as applied by the Trial Panel the Appellate Prosecutor points out the importance of the possibility to cross-examine the witness by the party who called him in the situation the witness changes his statement significantly.

It can be briefly summarized that the Appellate Prosecutor concurs with the conclusions of the Trial Panel. In relation to procedural allegations by the defense he does not observe any grave breaches disqualifying the judgment in its entirety. The Appellate Prosecutor thus moves the Appellate Court to act as described above.

## III. FINDINGS OF THE APPELLATE PANEL

### A. <u>Competence of the Panel</u>

Pursuant to Article 472(1) CPC the Panel has reviewed its competence. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX

Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of two EULEX judges and one Kosovo judge.

## B. Admissibility of the appeals

The impugned Judgment was announced on 27 May 2015. All appeals were filed within the 15-day deadline pursuant to Article 380 (1) CPC. The appeals were filed by the authorized persons and contain all the information pursuant to Article 376 *et seq* CPC. They are therefore admissible.

## C. Findings on the merits

The Appellate Panel will first examine the procedural legal issues of the Judgment. Secondly, the Panel will turn to discuss the challenges raised in the appeals concerning the substantive legal issues of the Judgment.

### 1. Applicable Procedural Law

The indictment was filed with the Basic Court of Mitrovica on 8 November 2013. At this time the Criminal Procedure Code No. 04/L-123 (CPC) was in force. Pursuant to its Article 540.

*For any criminal proceedings initiated prior to the entry into force of the present Code, but without the indictment filed, the provisions of the present code shall be applied mutatis mutandis.*

The investigation was initiated on 19.01.2012, before the CPC entered into force; the indictment was filed on 8 November 2013 when the CPC was in force, so the above cited provision is to be applied.

### 2. The Trial Panel Composition

The most important procedural issue raised in the appeals consisted of objections against the Trial Panel composition. The objections were based on different grounds. The Panel is fully aware of the importance of this issue as a basic guarantee of a fair trial. For this reason it will be paid a careful attention to it.

The assignment of three EULEX judges to the panel was objected in reference to the Law No. 03/L-053. The Trial Panel has explained the situation in a detailed way in points 12 and 13 of the impugned judgment. The Appellate Panel fully concurs with this reasoning and does not see the need to add any comments.

Another objection was based upon the fact that one of the panel members was not adjudicating in the Basic Court of Mitrovica. With the reference to the law and EULEX Regulation the judge adjudicating at Basic Court of Prishtina could have been assigned to the case at the Basic Court in Mitrovica only as a substitution judge. The Panel notes that the issue was never mentioned before the appeals were filed. The allocation of judges to the courts is not a secret, such as the legal grounds for their assignment to the cases. The objection was not raised during the first instance procedure, although there were no obstacles to do so. Pursuant to Article 382 paragraph 6 of the CPC it is thus belated.

The following objections were raised upon the assignment of a panel member bypassing the position on the roster of EULEX judges within the case allocation system. Allegedly it was required by the presiding judge in order to support the professional career of his colleague.

The Panel observes the allegations were raised after the publication of news in media after the judgment was announced. This point of the appeal cannot be deemed belated, as the grounds were not known to the parties during the proceedings in front of the first instance court. The Panel, however, concludes that those objections are ungrounded.

In contrast to the allegations, no roster for assignment of EULEX judges was kept in 2013. Also, the assignment of the panel member to the case at hand was performed in an official way by the acting President of EULEX Judges, who was authorized for such a decision. The appellants have emphasized the phone call between the presiding trial judge and the acting President of EULEX Judges few minutes before the assignment decision was signed. The content of such a phone call is not, and cannot be known, so the clear conclusion that the particular judge was requested – as a panel member – cannot be reached. The e-mail exchange as referred in the complaints does not include such a request either. In consequence there are no grounds to conclude that the panel assignment violated the rules and could have eroded the trial panel´s impartiality. In addition the Panel does not observe any irregularities in the work of the Trial Panel mirrored in the record of the trial sessions.

### 3. Witnesses in remote location

The appellants object to the witnesses testifying from a remote location trough video link during the first instance procedure.

The Appellate Panel is of the opinion that the videoconference equipment with the two-way audio communication in real time worked properly and functioned fine during the procedure. All technical issues were solved promptly during the first instance procedure. The fact that the

witness testifying took place in a remote location had no influence on the procedure. There were no complaints against the functionality of the system during the main trial.

## 4. Recording of Main Trial

Another allegation challenged the way of recording the main trial. The defense states that the first instance presiding judge refused to provide the parties with a verbatim record of the proceedings. It was outlined that according to Article 315 paragraphs 1 and 2 of the CPC, *a record of the proceedings of the main trial must be made in writing. The entire course of the main trial in its essentials must be entered into the record. In addition, the main trial shall be either audio- or video-recorded or recorded stenographically, unless there are reasonable grounds for not doing so.*

The Panel observes that pursuant to Article 315 paragraph 5 of the CPC, *the decision on how the main trial shall be recorded shall be taken by the single trial judge or presiding trial judge.*

Pursuant to Article 316 paragraph 1 of the CPC *when the main trial is recorded only in writing, the single trial judge or presiding trial judge may order, upon a motion of a party or ex officio, that testimony which he or she considers particularly important be entered in the record verbatim.*

Having regarded to the above cited provisions the Panel is of the opinion the first instance presiding trial judge made an appropriate decision on how the main trial was to be recorded. The result is a verbatim – word to word – record of the Main Trial. The lack of an audio- or video-record was reasoned by protection of the witnesses. The Panel deems such reasoning compliant with the requirements of the law.

The use of court recorders who type the records directly in a Microsoft Word format instead of shorthand writing is a widely used and accepted method of recording court hearings in the Kosovo Judiciary. The screen in front of the presiding judge gave him the adequate opportunity to follow and correct the record during the main trial. As a consequence, he did not draft it but was able to guarantee the statements were recorded exactly as said. Furthermore, all parties were able to request the record to be read immediately and also could have raised objections against the content of the record (Art. 316 par. 2). The presiding trial judge during the first instance trial dealt with all the objections promptly and solved the arisen problems.

The Panel thus finds the challenge of the way the record was obtained ungrounded. It is to be noted, that the objections concerning the record, raised in the appeals, were only general, not pointing out any particular part of any statement, recorded in an erroneous way.

## 5. Hostile witness concept

The defense has objected to the use of the hostile witness concept for interrogation of witnesses, as such a concept is not included in the CPC. These objections were rejected by the first instance panel during the proceedings. The defense councel repeat their objections in their appeals.

The Trial Panel allowed the prosecutor to declare the Witness B, proposed by the prosecution, as hostile. Consequently the Prosecutor was given a right to examine the witness without limitations that are usually applied during direct examination with relation to asking leading questions and to the use of pre-trial statements. The parties were instructed that witnesses' pre-trial statements would, however, not be used as direct evidence.

There is an exhaustive explanation of the hostile witness concept, as applied by the trial panel, in the impugned judgment in its point 43.

The Panel has to admit that the hostile witness concept is unknown and unregulated in the CPC. However Article 9 of the CPC embeds the equality of the parties as one of the principles of the criminal procedure. This legal provision clearly refers to the adversarial system of law. Article 7 paragraph 1 stipulates the General Duty to establish a full and accurate record, namely the truthful and complete establishment of the facts which are important to rendering a lawful decision.

The legal rules of the witnesses' examination are mentioned in Articles 332 – 335 of the CPC. None of these provisions addresses a complete switch of the statements of the witness. The Panel considers it as a gap in the law. The lack of a lawful reaction to a principal turnover of the witness statement is in a direct contradiction with the general duty of the criminal proceedings, as stipulated in Article 7 of the CPC.

The application of the hostile witness concept is a tool how to ensure the establishment of the facts important to rendering a lawful decision, also because in contrast to other systems it is not possible in Kosovo to the party sponsoring a witness to withdraw from having the witness examined once has been proposed. Comparing theoretical articles originated in the countries where the adversarial system is in force[1] and the jurisprudence of the ICTY[2] the Panel concludes, the hostile witness concept is an integral part of adversarial proceedings. Consequently the Panel

[1] Available at http://www.alrc.gov.au/publications/5.%20Examination%20and%20Cross-Examination%20of%20Witnesses%20/cross-examination-witnesses

Or further at http://www.duhaime.org/LegalDictionary/H/HostileWitness.aspx

[2] Can be checked at
ttps://books.google.com/books?id=JaLlSni6OQwC&pg=PA897&lpg=PA897&dq=concept+of+hostile+witness+and+ECHR&source=bl&ots=rq4nteIl0h&sig=RDHGTka6izLDyaEpqHFN1aYqj14&hl=en&sa=X&ved=0ahUKEwjq1aDhz7bNAhWhJJoKHbXLA6oQ6AEIQzAF#v=onepage&q=concept%20of%20hostile%20witness%20and%20ECHR&f=false

concurs with the first instance court's application of this concept and affirms the legal grounds of its use, as elaborated in point 43 of impugned judgment.

## 6. Pre-trial interrogations

The Defense challenges the admissibility and the evidential value of the pre-trial witness statements, referring to the interrogation method of Prosecutor Maurizio Salustro, who held the pre-trial interview sessions in the case at hand. It emphasizes the statements of multiple witnesses describing the inaccurate recording of their testimony in the pre-trial stage. This objection is backed up by the record of pre-trial testimony obtained by Prosecutor Salustro in another case, where only a part of the interview was recorded verbatim, while the rest of the conversation between Prosecutor Salustro and the Witness was out of record. Having considered the circumstances of the pre-trial interviews the defense contests the general admissibility of the pre-trial statements.

Pursuant to Article 123 paragraph 1, 2 of the current CPC *during the investigation stage, the evidence from witnesses and expert witnesses may be taken in one of three kinds of sessions: pre-trial interviews, pre-trial testimony or special investigative opportunity.*

*The pre-trial interview is conducted by the state prosecutor. A record of the interview will be made and shall be placed in the file. Evidence obtained during the pre-trial interview may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Evidence obtained during the pre-trial interview may not be used as direct evidence during the main trial, but may be used during cross-examination to impeach witnesses if the witness has testified materially differently from the evidence given by the witness during the pre-trial interview.*

*The pre-trial testimony shall be conducted by the state prosecutor in accordance with Articles 132-133 of this Code […].*

According to Article 131 (*Pretrial Interview*) paragraph 1, 2, 3, 4 and 5 of the CPC:

*1. during the investigative stage, the state prosecutor may summon witnesses, victims, cooperative witnesses, protected witnesses and experts to provide information in a pre-trial interview relevant to the criminal proceedings.*

*2. The state prosecutor may permit the defense attorney, victim or victim advocate to participate in the pre-trial interview.*

*3. The state prosecutor may ask the person being interviewed about documentary or physical evidence during the interview. The documentary or physical evidence shall be identified clearly in any recording, transcript or report of the interview.*

*4. The pre-trial interview may be audio-or audio-video recorded, transcribed verbatim or summarized into a report. The recording, transcript or report shall comply with Chapter XI and shall be included in the case file.*

*5. A person being interviewed under this Article may later testify in pre-trial testimony or in a Special Investigative Opportunity.*

Pursuant to Article 132 paragraph 6 of the CPC, *The state prosecutor shall give 5 (five) days written notice to the defendant, defense councel, injured party and victim advocate of the date, time and location of the pre-trial testimony. A copy of the notice shall be placed into the files.*

Bearing in mind the provisions of the CPC as cited above, the Panel gets to the conclusion that the interrogation of the witnesses in the pre-trial stage in the case at hand was carried out as pre-trial interview, as nor the defense councel neither the defendants were notified. The same form was used in the case presented by the defense in the appeals. Article 131 paragraph 4 of the CPC allows summarizing pre-trial interview statements into a report. Thus the summary report presented by the appellant does not prove any violation of the procedural law, indeed does not disqualify the pre-trial witness statements in the case at hand. However the use of the pre-trial interview as evidence is strictly governed by Article 123 paragraph 2 of the CPC. The panel observes that the Trial Panel in its evidence assessment did not exceed the limitations stipulated in Article 123 of the CPC.

## 7. Article 262 of the CPC

The appellants emphasized, and the Panel concurs, that the conviction of the defendants is based mostly on the statements of a single witness, namely Witness A. Referring to Article 262 of the CPC the appellants argue that in such a situation the verdict of guilt violates the law.

Article 262 of the CPC reads as following:

*Evidence as a basis of guilt*

*1. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defense councel through questioning during some stage of the criminal proceedings.*

*2 The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the state prosecutor.*

*3. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defense councel and the accused.*

*4. The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.*

The Panel notes that none of the circumstances addressed in the above mentioned provision did occur. The evidence of Witness A was given in front the court in the hearing and defendants, such as defense councel had a full opportunity to provide his questioning. The defendants themselves stayed silent, so no conclusions were based on their statements. The identity of Witness A was known to the defendants and defense councel and he was not pronounced a cooperative witness.

The Panel however opines that if a single witness gives a decisive evidence, the requirements for his credibility in general – and specifically with regard to his testimony – are higher and must be thoroughly examined.

## 8. Credibility of Witness A

The Trial Panel heard Witness A in multiple sessions, including cross-examination by the defense teams. After a final assessment of his testimony he was found credible and fully reliable (as from point 95 of the impugned judgment).

The Panel fully concurs with such an assessment.

The Panel is aware that the criminal procedure in Kosovo is based on the principle that it is up to a trial court to hear, assess and weigh the evidence at trial. Therefore the appellate court is required to defer to the assessment of the credibility of the witnesses by the trial panel, unless the evidence relied upon by the trial panel could not have been accepted (for example, in the case of inner or logical contradictions…) by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous.

Firstly, the Panel reviewed the general credibility of Witness A, his personal reliability. There were several objections raised up in the appeals. The Trial Panel has dealt with them in its reasoning, however the Appellate Panel deems appropriate to describe own observations.

Three principal circumstances where pointed out in the appeals in order to disqualify in general the credibility of Witness A. Namely, it was his A.P. diagnosis, his KLA veteran status application and his neighborly disputes with some of the defendants from the pre-war times.

In concern of the A.P. diagnosis, it was determined in 2003, without any record of recidivism. Witness Dr. G.H, who has certified such a diagnosis, stated he did not remember the medical examination of Witness A. He was not able to individualize specific symptoms, suffered by Witness A. His description was thus merely general. The panel fully concurs with its assessment as not conclusive. On the contrary, the only medical proof of such a disease was dated 2003,

without any subsequent treatment, medication or observation. The diagnosis was of acute nature, not of a chronic one, what corresponds to a lack of any recidivism. Despite repetitive and exhaustive interrogation of Witness A in front of the court, no symptoms of any mental disease were noted. The Panel opines that the unique occurrence of A.P. does not undermine general credibility of Witness A.

The same conclusion was adopted in relation to the KLA veteran status application. It is notorious fact that the KLA veteran status brings the holder some material benefits. There are different grounds for such a status being granted. It is not only direct participation in the fight, but also any kind of support of the fighters. Witness A's application was not based on participation in the military actions, but rather on support of the fighters[3], who appeared in his village. None of his activities described in the application, including the arms maintenance, do not demonstrate his involvement into the direct combat. On the other hand his support to the KLA members in his village was authentic. His application does not indicate his attempt to obtain unearned benefit, rather the endeavor to improve his material situation on the basis of undisputed help provided to the KLA in the wartime.

In concern of the neighborly disputes, no evidence in this regard was obtained and no evidence was proposed by any of the parties. This issue was raised only in the appellate stage of the procedure without any further explanations. In a consequence such an appeal objection cannot be considered relevant.

Based on above mentioned conclusions the Panel fully shares the Trial Panel assessment of Witness A as a credible witness.

A special attention was paid to the reliability of the specific statement of Witness A with regard to each of the defendants.

It is to be noted that the interrogation of the witness took place after a significant period of time has elapsed since these extremely traumatic and rather long lasting events were experienced. It is clearly understandable that many details and particularities can be unclear, recalled without full accuracy and their reproduction can suffer from deficit of retention. The Panel is of the opinion that all so called contradictions pointed out in the exhibit list presented as a supplement of the appeal, as well as inconsistencies concerning details, such as uniforms or civilian clothes worn by the perpetrators and other minor particularities are of this nature.

The overall description of the events that took place during his captivity is consistent despite numerous repetitive questions concerning many details asked within whole proceedings. Witness A several times in front of the court repeated all the names of the perpetrators/defendants[4], and confirmed that all of them participated in his beating. He knew all the perpetrators personally, so

[3] Record of the main trial of 12 August 2014 page 11

[4] Record of the main trial of 15 September 2014 page 10 in concern of count I
Record of the main trial of 11 August 2014 page 18, 12 August 2014 page 14 in concern of count II

he was able to identify each of them without any doubt. The alibi statements given by some of the defendants cannot be considered relevant.

Neither the defendants, nor the witnesses, supporting those statements, gave specific determination of time they refer to. The accurate dates of captivity of Witness A are unclear. The general statements approving presence of some of the defendants out of Kosovo during summer 1998 do not exclude the presence of the defendants in Likoc as described by reliable testimony of Witness A. The Panel thus fully concurs with the first instance court's conclusions concerning witnesses B.V. and D.R. (point 159 of the impugned judgment), I.X. (point 167) and S.M. (point 172). Also the Trial panel's assessment of the evidence given by witnesses Dr. F.B. and Dr. B.G. is logical and reasonable. Concerning the statement of witness R.S., the Panel fully shares the doubts of the Trial Panel regarding his reliability and consequently stands behind the assessment of his testimony as presented in points 153-157 of the impugned judgment.

The Panel fully concurs with the conclusion presented in the impugned judgment, that Witness A's statement is corroborated by those of Witness K and expert witness C.B..

## 9. Corroboration of Witness A's testimony

*Witness K* was able to provide consistent evidence about the captivity of her husband, Witness A, the condition of the detention centre in Likoc and the personal physical condition of Witness A following his discharge. Witness K said her husband had a good physical status when he was taken by the KLA soldiers and he was in a terrible physical condition when he was released. In her statement she did not repeat the details of the statement of Witness A; rather described what she perceived herself. Her testimony corroborates the time and duration of her husband's captivity and his physical and mental conditions after his release. Witness K tried to visit Witness A in the Detention Centre of Likoc. She thus proved the existence of the detention centre there. She was not allowed to visit her husband, Witness A, in the Detention Centre which proves the fact that Witness A did not stay there voluntarily and also confirms the detainee's deprivation of the contact with his family.

The expert witness C.B. has examined the health conditions of Witness A. It must be noted, this examination took place 15 years after the injuries allegedly were suffered. She clearly stated that because of such a long time has elapsed, the examination could not determine the exact time, when the injuries were suffered, neither their mechanism. However, she detected broken ribs and other bones, as well as the scar in the scrotum area.

The Panel concurs with the assessment of her testimony as presented in point 115 and 116 of the impugned judgment. Concerning point 114 of the impugned judgment the Panel observes, that other injuries of Witness A cannot be without doubt attributed to the specific beating suffered in Likoc, but they are result of beating which took place during Witness A's captivity there.

The Witness A's description of "open wound" in the scrotum, objected by the appellants, is more understandable in context of overall description of injuries with visible scar as "open", as was used repetitively in Witness A's statements.[5]

Concerning the way the evidence – given by Dr. G. – was performed by the first instance court, the Panel observes that Dr. G. was involved in order to provide the witness examination of the intimate part of his body by a person of the same gender. Dr. G. after the examination described his observation, including photography. Subsequent evaluation was provided by Dr. B.. Her testimony at the court is fully reliable with regards all injuries.

## 10. Credibility of Witness B

Witness B is another principal witness, who allegedly suffered beating together with Witness A. His testimony in front of the court was rejected as a basis for reconstruction of the facts. This conclusion was based on the Trial Panel's observation that Witness B was visibly afraid to tell the truth.

The Panel concurs with the assessment of the first instance court and amends own assessment.

It was noted that witness B in front of the court significantly changed his stance in comparison with the pre-trial stage. For the reasons mentioned above his pre-trial statements were not admissible as direct evidence. His testimony at court was not credible and not reliable. The reasons of such an assessment can be found not in the contradiction of his statement with the statements of witnesses A and K as stated in point 147 of the impugned judgment, but rather in contradiction of his statements themselves. Witness B gave repetitive testimonies in the case at hand. He was asked to clarify contradictions, that occurred, but instead of clarification he denied the statements that had been recorded during his previous interrogation in front of the court. During his whole performance in front of the court he expressed his apprehension for safety of himself and his family on the grounds of his testimony[6]. He also pronounced the defendants as his enemies. This stance clearly illustrates his reluctance to give complete and honest testimony and comply with the task to seek the truth.

## 11. The findings of the facts

After the assessment of the evidence on the basis of the appeals the Panel concludes that the events that took place in Likoc during detention of Witness A are proven by the testimony of Witness A in corroboration with the testimony of Witness K and expert witness Dr. C.B.. The

[5] The Main Trial Record of 11 August 2014 page 22,
The Main Trial Record of 17 November 2014 page 6
[6] The Main Trial Record of 9 December 2014 page 3, page 4, page 10

Panel points out that the standard of corroboration does not require each part of the statement of the principal witness to be corroborated. In situation his testimony is corroborated by other witnesses in parts, the whole statement of such a witness can be a basis of conviction. The Panel concurs with the establishment of Witness A as credible and reliable and his statement as sufficient basis for the conclusions of the court.

On this basis it was proven that the defendants have perpetrated the acts described in both counts in the enacting clause of the impugned judgment. Beating of Witness B together with Witness A was proven by the statement of Witness A, who described beating of both victims in the same place and time. The appellate objection concerning the lack of the civil claim of witnesses A and B with regard to damages suffered from the beating is irrelevant, as the civil claim is the right of the injured party without any impact on the merits of the criminal case.

## 12. Applicable Substantial Law

The Trial Panel paid a broad attention to this issue. Its findings are elaborated in points 204 – 242 of the impugned judgment. The conclusions however are not clear, as in the enacting clause the criminal code in force from 1 January 2013 is used along with the Criminal Code of SFRY. The Panel thus assessed the applicable substantial law itself.

Article 3 of the CCRK, the code in force in time of the procedure, stipulates:

1. *The law in effect at the time a criminal offense was committed shall be applied to the perpetrator*
2. *In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.*

In 1998 when the acts the defendants are charged with were committed, the Criminal Code of the SFRY of 1977 (CCSFRY) was in force, amended by the Constitution of the FRY of 1992, which abolished the use of the death penalty.

In the meantime the Provisional Criminal Code of Kosovo (PCCK) of 2004 was in force, effective from 6 April 2004.

The recent Criminal Code of Kosovo (CCRK) came into force on 1 January 2013.

The assessment of the most favorable law cannot be based on a mere comparison of the range of applicable punishments. The evaluation of the whole impact of the application of particular code must be considered. Moreover the assessment cannot regard barely theoretical possibilities given by the law, but the concrete situation of the defendant must be taken into account.

Pursuant to the Indictment the defendants are charged with the criminal offence of War crime against the civilian population committed in complicity (in co-perpetration) pursuant to Articles 22 and 142 of the CCSFRY (currently criminalized under articles 31 and 152 of the CCRK).

Article 142 of the CCSFRY reads:

*Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health […] or who commits one of foregoing acts shall be punished by imprisonment for not less than five years or by the death penalty.*

Article 38 of the CCSFRY reads:

1. *The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years*
2. *The court may impose a punishment of imprisonment of 20 years for criminal act eligible for the death penalty.*

The CCSFRY does not give any definition of *civilian population.* The Panel contests the Trial Panel's conclusion presented in points 216 – 219, that individual civilians were not covered by protection of Article 142 of the CCSFRY.

The commentaries to the Article 142 of the CCSFRY read as follows:

*The civilian population is the victim of the criminal act. The criminal legal protection includes all the civilians in the occupied territory[…].*[7]

The panel concludes the formulation *"all the civilians"* must be understood as "each of the civilians".

The Code moreover refers to the *rules of international law effective at the time of war*. This formulation permits legal recognition of any development in international law without necessity of a change in domestic legislation. Common Article 3 of the Geneva Conventions covers individual civilians and those who are hors de combat. Therefore the Panel opines the perpetrators of the acts described by Witness A are criminally liable pursuant to Article 142 of the CCSFRY.

As mentioned above, the Constitution of 1992 abolished the use of the death penalty in Yugoslavia. This fact is to be considered when assessing the most favorable law. The abolition

[7] See at Ljubisa Lazarevic; Commentary of the Criminal Code of the FRY; 1995; 5th Edition; Savremena Administracija, Belgrade; Article 142; item 3

of the death penalty however does not affect Article 38 as cited above, as in its provisions *"eligibility to the death penalty"* only represents gravity of the criminal act.

The PCCK in Article 120 paragraph 1 reads:

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

Article 37 paragraph 2 of the PCCK reads:

*The punishment of long-term imprisonment is imprisonment for a term of twenty-one to forty years.*

The CCRK in Article 152 paragraph 1 reads:

*Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five years or by life-long imprisonment.*

Article 44 of the CCRK reads:

*The law may provide for the punishment of life long imprisonment for the most serious criminal offences committed under especially aggravating circumstances or criminal offences that have caused severe consequences.*

Comparing the mere range of the punishments applicable, the most lenient punishments, most favorable for the defendants, are stipulated by the CCSFRY. As mentioned above, the assessment of the most favorable law must consider all legal consequences arising from its application.

The CCRK, unlike the other two codes, provides for in its Article 81 the concept of criminal offence in continuation. By definition there is a criminal offence in continuation when at least two of following conditions exist:

1. *The same victim of the criminal offence*
2. *The same object of the offence*
3. *The taking advantage of the same situation or the same relationship*
4. *The same place or space of commission of the criminal offence*
5. *The same intent of the perpetrator.*

The exception is defined in paragraph 2, reading:

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

The Panel is of the opinion that in the case at hand in relation to defendants S.S., J.D., Z.D. and I.T. this concept is applicable with regards to beating of Witness A. The multiple beating acts were committed by the same perpetrators, against the same victim (Witness A), taking advantage of the same situation (the captivity of the victim), at the same place (KLA facility in Likoc)[8], led by the same intent of the perpetrators (to punish an alleged collaborator). Concerning these four defendants the recent CCRK is the most favorable law, since none of the previous codes encompasses such a concept and its application is more favorable for the defendants if compared with the use of the aggregate punishments.

Regarding the other defendants, the Panel notes they were imposed punishments mitigated below the minimal limit provided for by law. The comparison between the provisions enshrining mitigated punishments is thus necessary.

The **CCSFRY** in Article 43 allows the reduction of the punishment below the limit for punishments only when the lowest limit is not higher than three years. In the case at hand the reduction of the punishment below the limit is not possible, whereas in the **PCCK** in Article 67 paragraph 1 subparagraph 1 reads *If long-term imprisonment provided as the punishment for a criminal offence, the punishment can be mitigated to imprisonment of ten years* and the **CCRK** in Article 76 paragraph 1 subparagraph 1.2 reads *If a period of at least five years is provided as the minimum term of imprisonment for a criminal offence, the punishment can be mitigated to imprisonment of up to three years.*

Comparing the above cited norms, the conclusion on the most favorable provisions is that it is the recent CCRK.

### 13. Identification of the perpetrators

The Defense has challenged the enacting clause of the first instance judgment due to the fact the acts committed were described only in a general way, without distinction of a particular act by particular defendants.

From the nature of the acts committed by the perpetrators it is obvious the specific behavior of particular defendants is difficult to detach. However, it was proved all the defendants have participated in the violence described in the enacting clause so the criminal act was committed jointly by all of them. Their participation thus fulfills the conditions of co-perpetration pursuant to Article 31 of the CCRK, defined as follows:

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

[8] The panel is of the opinion that the KLA facility in Likoc must be considered one *place* pursuant to Art. 81, para 1, subpara 1.4, of the CCRK. The particular room of the building is not a different place in context of the continuous detention of Witness A in the whole facility.

Although it is undisputable that criminal responsibility is always personal or individualised, in the case at hand it was proven all the defendants were present when the offence was committed and all of them took an active part in its perpetration. The individual identification of the defendants was based on the personal knowledge of Witness A, who with no doubt knew all D. and D. brothers for being his neighbors. In the case of S.S. he knew him because of personal contact during his captivity in Likoc. In the case of I.T. he knew this person as a relative of D. family and witnessed his visits to D. house before the war.

The latter circumstances are important in the context of the appellate objection concerning the identification of I.T. in front of the court. The defense refers to Article 120 of the CPC. The first instance court gave its response in point 49 of its judgment. The Panel in general concurs with the first instance panel explication, that the identification of the defendant in front of the court was not regulated by the provisions set in Article 120. The Panel concurs it was in fact not an identification, leading to the recognition of a person, but rather the confirmation of a person described in the statements of the witness. The defendant as an individual who was involved in acts narrated in Witness A's statements was identified in the pre-trial stage and there were no doubts of his identity in the trial stage.[9]

Based on this the Panel is convinced as both, the description of the act and identification of the perpetrators are as precise as possible and give a legal ground to the conviction of all defendants.

In relation to the legal qualification, the Panel – referring to its conclusions as elaborated above – has clarified the applicable law. It is to be mentioned that the first instance court has applied the correct provisions of the CCRK. The first instance court, however, erred using the CCSFRY alongside, what made the enacting clause unclear. The Panel has eliminated this ambiguity.

**14. <u>Criminal Offense in continuation</u>**

The definition of a criminal offence in continuation as set in Article 81 of the CCRK has been given above. The application of this concept is relevant in the case of defendants S.S., J.D., Z.D. and I.T.. The Panel fully concurs with its application for the acts of count II of the impugned judgment. However, the Panel is of the opinion the first instance Trial Panel erred when not applying it also for count I.

The act of Count I was committed against witnesses A and B. Regarding Witness A there was no factual difference coming from the presence of another victim at the scene. As far as he was concerned, it was another event of beating in a long chain of such events during his detention. His beating, from the point of view of the perpetrators, does not differ as well. He was the same victim as in any previous beatings, his health and human dignity were the same object of the offense, the perpetrators have taken advantage of the same situation – keeping witness A in the

[9] The Main Trial Record 17 November 2014 page 30, also about identification of I.T. the main trial record of 15 September 2014 page 21-23

detention, the place of the criminal offence was the same – the Likoc facility, and the intent of the perpetrators was also the same – to "punish" the alleged "collaborator with Serbs". The exception from continuation as defined in paragraph 2 of Article 81 does not apply, as regarding Witness A the offence was committed against the same person.

The Panel thus concludes the offences committed by the four defendants mentioned in both counts are to be qualified as criminal offence in continuation.

## 15. Determination of the punishments

The first instance court described his assessment of punishments rather briefly in points 251 – 262 of the impugned judgment.

The Panel points out that when the court applies the concept of criminal offence in continuation there is no need to aggregate punishments – as when imposed separately for each count as in sheer concurrency of criminal offences.

Although determination of the punishments must be strictly individualized, the Panel concurs with the first instance court on the existence of mitigating and aggravating circumstances that can be granted to all or several defendants along.

As mitigating factor the honest life after the war can be granted to all the defendants. The Panel cannot recognize the fight against the regime ruling Yugoslavia in the time of the offence as mitigating factor, as this fact had no mitigating effect on the crime committed. On the contrary, the armed conflict was in the case at hand misused as the scene for the violence committed against people not related to the direct combat. The performance of the perpetrators as members of a party in the conflict is an element of the definition of war crime, so it cannot be considered to be a mitigating factor. The Panel also contests the important political positions or prestigious work as mitigating in this case. These positions did in no way affect the gravity of their criminal behaviour during the wartime.

With regards to aggravating circumstances the Panel concurs with point 253 of the impugned judgment, granting the extended time of the cruel treatment of Witness A in count II. The outrageous violation of the human dignity performed by commanding witnesses A and B to beat each other was not individualised to any of defendants. On the basis of factual findings this circumstance is to be considered as aggravating to defendant I.T., who by the statement of Witness A personally commanded both witnesses to beat each other. Another aggravating factor connected to I.T. is the manner of beating the victims. Witness A depicted, it was I.T., who used the wooden club and performed the beating in the most cruel way[10].

[10] The Main Trial Record of 12 August 2014 page 12,
The Main Trial Record of 17 November 2014 page 13, page 19

A specific aggravating factor was observed in relation to defendant S.S.. As proved by the evidence[11] he was a commander of KLA operation zone Drenica. From among all the perpetrators he held the highest rank. Apart from his formal power and responsibility, he bore a significant soft power as a model of conduct for other KLA members. Acting as a perpetrator of violence performed against detainees he enabled the decision of others to follow him in this behavior. Despite there is no proof he explicitly ordered others to beat the detainees in the case at hand and his commander's responsibility is behind the scope of the counts pertaining this case, his role as undisputed authority directly participating in the perpetration of the offence is to be considered as aggravating.

With regard the above mentioned assessment of individual behavior of defendants S.S., I.T., J.D. and Z.D. the court determined the punishments as stated in the enacting clause.

No specific aggravating circumstances were taken into consideration as far as the other six defendants are concerned; all of them took part in a single beating event. Despite the fact more than one victim was maltreated during that night, and the violence and cruelty were considerable, the Panel is of the opinion that in the range of the punishments applicable for the war crimes the punishments mitigated below the limits provided by law will be sufficient to achieve their purpose. The punishment of three years of imprisonment is the very minimum pursuant to Article 76 paragraph 1 subparagraph 1.2 of the CPC. The Panel did not recognise any individual circumstances which should result in determining a more severe punishment for any of the defendants.

All the periods of detention served by any of the defendants have been credited for in their punishments.

### 16. The costs of the proceedings

In case of the costs of the criminal proceedings the first instance court ordered the defendants to reimburse in amounts proportionate to the gravity of their offences. The trial panel did not give any reasons why J.D. was ordered to reimburse an amount broadly extending the logic of the decision. The Panel corrected the mentioned unbalance.

## D. Closing Remarks

With regards to the impugned judgment of the Basic Court, the Court of Appeals for reasons the elaborated above:

Rejects all the appeals on behalf of the defendants and the Prosecution. The verdict of guilt in counts I and II of the impugned judgment is affirmed;

[11] The Main Trial record of 12 August 2014 page 9

the Panel applied the legal concept of criminal offence in continuation in count I and II in concern with defendants S.S., I.T., Z.D. and J.D.;

consequently the Panel modified the punishments;

the Panel precisely credited the detention periods to the punishments;

and partially recalculated the costs of the criminal proceedings.

*Done in English, an authorised language. Reasoned Judgment completed on 7 October 2016.*

Presiding Judge

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Roman Raab
EULEX Judge

Panel member

_____

Jorge Martins Ribeiro
EULEX Judge

Panel member

_____

Hava Haliti
Kosovo Court of Appeals Judge

Recording Officer

_____

Adam Viplak
EULEX Legal Officer

**COURT OF APPEALS OF KOSOVO**
**PAKR 456/15**
**14.09.2016**