BASIC COURT OF MITROVICA

P. No. 184/15

8 August 2016

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICA, in a Trial Panel composed of EULEX Judge Katrien Gabriël Witteman as Presiding Trial Judge and EULEX Judges Iva Niksic and René van Veen as Panel Members, with the participation of EULEX Legal Officer Chiara Tagliani as Recording Officer, in the criminal case against:

XH. K., , currently in detention on remand since 7 October 2015;

Accused through the Indictment of the Special Prosecution Office of the Republic of Kosovo dated 9 November 2015 with PPS number 08/09 of committing the criminal offences of:

"War Crime against the Civilian Population" under multiple counts, provided for and punished by Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Article 31 and 152 of the Criminal Code of the Republic of Kosovo (CCRK)[1], in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of the 1977 Additional Protocol II;

and

"Unauthorized Ownership, Control and Possession or Use of Weapons", provided for and punished by Article 374 Paragraph 1, in connection with Article 120, item 38 of the CCRK;

[1] Law No. 04/L-082

after having held the Main Trial hearings, all open to the public, on 18 March 2016, 11, 12, 13, 18, 19, 20 and 25 April 2016, 13, 23, 24, 25 and 30 May 2016, 7, 8, 12, 14 July 2016 and 2 and 4 August 2016 in the presence of the Special Prosecutor of the Republic of Kosovo Ms. Damare Theriot (on all aforementioned dates except 2 and 4 August 2016) and Mr. Charles Hardaway (on 2 and 4 August 2016 only), the accused XH.K. and his Defense Counsel Haxhi Millaku and Meriman Vehapi;

Having deliberated and voted pursuant to Article 357 of the CPC on 5 August 2016;

Pursuant to Article 362, 363, 364, 365, 366, 450, 451 and 453 of the CPC;

Renders the following:

JUDGMENT

I

CHARGE I

War Crime against the Civilian Population, provided for and punished by Article 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Article 31 and 152 of the CCRK, in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application, committed at Kosovo Liberation Army (KLA) centers located in K. and C. (Albania):

Under Count 1: Murder as War Crime against the Civilian Population

The Defendant **XH.K.** is found **NOT GUILTY**,

because it has **NOT** been proven that:

the Defendant in his capacity as a member of the KLA holding a high ranking position in the KLA Center in K. (Albania), in co-perpetration with other KLA members, murdered A.B. while he was illegally detained in K. Camp by beating and shooting him,

in K. (north of Albania) on June 4th or 5th, 1999.

Therefore, pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPC the accused XH.K. is acquitted of this Count.

Under Count 2: Illegal Detention as War Crime against the Civilian Population

The Defendant **XH.K.** is found **GUILTY**,

because it has been proven that

the Defendant in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, arrested and illegally detained Witnesses A, B, C, D, E, F, H, K A.B. and other unknown civilians in such center for a prolonged period of time,

in K. (north of Albania) during April, May and through mid-June of 1999.

By doing so, the Defendant XH.K. committed and is criminally liable for the criminal act of War Crime against the Civilian Population punished by Article 22 and 142 of the Criminal Code of the CCSFRY, currently criminalized under Article 31 and 152 of the CCRK, in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application.

Under Count 3: Inhumane Conditions as war crime against the civilian population

The Defendant **XH.K.** is found **GUILTY**,

because it has been proven that

the Defendant in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, kept Witnesses A, B, C, D, E, F, H, A.B. and other unknown civilians detained in such center under inhumane conditions (small cells, with lack of water, food, sanitation, air and access to medical treatment),

in K. (north of Albania) during April, May and through mid-June of 1999.

By doing so, the Defendant XH.K. committed and is criminally liable for the criminal act of War Crime against the Civilian Population punished by Article 22 and 142 of the Criminal Code of the CCSFRY, currently criminalized under Article 31 and 152 of the CCRK, in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application.

<u>Under Count 4</u>: Torture as War Crime against the Civilian Population

The Defendant **XH.K.** is found **GUILTY**,

because it has been proven that

the Defendant in his capacity as a member of the KLA in co-perpetration with S.G. and other KLA members,

- tortured Witnesses A, B, C, H and A.B. by beating them to the point of unconsciousness with batons, bats, and sticks,

in K. (north of Albania) on an unknown date in May 1999.

By doing so, the Defendant XH.K. committed and is criminally liable for the criminal act of War Crime against the Civilian Population punished by Article 22 and 142 of the Criminal Code of the CCSFRY, currently criminalized under Article 31 and 152 of the CCRK, in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional

Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application.

Under Count 5: Violation of Bodily Integrity or Health as War Crime against the Civilian Population

The Defendant **XH.K.** is found **GUILTY**,

because it has been proven that

> the Defendant in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, violated the bodily integrity and health of Witnesses A, B, C, D, E, F, H, and A.B. by repeatedly beating them or ordering others to do so,
>
> in K. (north of Albania) during April, May and through mid-June of 1999.

By doing so, the Defendant XH.K. committed and is criminally liable for the criminal act of War Crime against the Civilian Population punished by Article 22, 30 and 142 of the Criminal Code of the CCSFRY, currently criminalized under Article 8, 31 and 152 of the CCRK, in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application.

Under Count 6: Illegal Detention as War Crime against the Civilian Population

The Defendant **XH.K.** is found **GUILTY**,

because it has been proven that

> the Defendant in his capacity as a member of the KLA in co-perpetration with other KLA members

- illegally detained Witnesses K, L, M and N in the KLA camp in C. (north of Albania) during April, May and through mid-June of 1999, and

- illegally detained Witnesses L and N in a garage in Pr. on unknown days in June of 1999.

By doing so, the Defendant XH.K. committed and is criminally liable for the criminal act of War Crime against the Civilian Population punished by Article 22 and 142 of the Criminal Code of the CCSFRY, currently criminalized under Article 31 and 152 of the CCRK, in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application.

Count 7: Violation of Bodily Integrity or Health as War Crime against the Civilian Population punished by Article 22 and 142 of the CCSFRY, currently criminalized under Article 31, and 152 of the CCK in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of their Additional Protocol II of 1977 effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present application

because the Defendant in co-perpetration with other KLA members in his capacity as a member of the KLA violated the bodily integrity and health of an unknown individual from Pre.

in C. (north of Albania) on an unknown date in May or June, 1999

is rejected pursuant to Article 363 Paragraph 1 Subparagraph 1.1 of the CPC

because the SPRK Prosecutor during the Main Trial withdrew the count.

Under CRIMINAL CHARGE 2: Unauthorized Ownership, Control and Possession or Use of Weapons

The Defendant **XH.K.** is found **GUILTY**,

because it has been proven that

on the date of his arrest (06.10.2015) a 7.62 mm pistol M56 and three clasp knives were found in his vehicle,

in Pr. (Kosovo) on 06 October 2015

By doing so, XH.K. committed and is criminally liable for the criminal act of Unauthorized Ownership, Control and Possession or Use of Weapons in violation of Article 374 Paragraph 1 in connection with Article 120, item 38, of the CCRK.

II.

The Defendant XH.K. is SENTENCED

Under CRIMINAL CHARGE 1

For Count 2

to **5 (five) years** of imprisonment;

For Count 3

to **6 (six) years** of imprisonment;

For Count 4

to **7 (seven) years** of imprisonment;

For Count 5

to **6 (six) years** of imprisonment;

For Count 6

to **6 (six) years** of imprisonment;

For CRIMINAL CHARGE 2

to a fine of **€ 1.500 (one thousand five hundred euro's)**.

Pursuant to Article 80 of the CCRK

the Defendant XH.K. is SENTENCED

to an aggregate punishment of **8 (eight) years** of imprisonment and a fine of **€ 1.500 (one thousand five hundred euro's)**.

Pursuant to Article 83 Paragraph 1 of the CCRK

the time served in detention as well as any period of deprivation of liberty in relation to the criminal offences since 06 October 2015 until today are included in the imprisonment.

III.

Confiscated items

The following items, temporarily sequestrated by ruling of the Pre-Trial Judge dated 12 October 2015:

1. Pistol M57 7.62 Cal Ser No. 19Z45Z
2. 2 Magazine Full-Total 19 Bullets
3. 1 Pistol Holster
4. 1 Black Lock Blade Knife
5. 1 Green Lock Blade Knife
6. 1 Red Multi-Tool Knife

shall be destroyed pursuant to Article 115 Paragraph 5 of the CPC.

IV.

Injured parties

The Trial Panel takes note that the Injured Parties did not submit any claim for compensation during the Trial. They are instructed that they may pursue their property claim in civil litigation.

V.

Costs of proceedings

Pursuant to Article 453 Paragraph 1 of the CPC, the Defendant shall reimburse the costs of criminal proceedings, at the scheduled amount of € 2.000 (two thousand euro's).

REASONING

I PROCEDURAL BACKGROUND

1. On 13 July 2009, an investigation was initiated against S.G. for multiple counts of War Crime against the Civilian Population allegedly committed during the armed conflict in Kosovo. On 23 December 2009, the investigation was expanded to include the Defendant XH.K. for the same criminal offence. On 16 June 2010, the investigation was expanded to include R. A.. By ruling of the Pre-Trial Judge dated 28 June 2010, the investigation against the Defendant XH.K. was extended until 24 December 2010.

2. On 6 August 2010, the Prosecutor filed Indictment PPS 08/09 against S.G. and R. A.. The Defendant XH.K. was not included in the Indictment, since he was at large. The proceedings were joined to the proceedings against H. H., S.R. and S.H., who were being prosecuted for the same criminal offences. The case of S.R. was later severed due to his health condition.

3. On 8 October 2010, an arrest order was issued against the Defendant XH.K..

4. In a Judgment dated 29 July 2011 of the (then) District Court of Mitrovica, S.G., R.A., H.H. and S.H. were convicted and sentenced to 15, 12, 6 and 7 years of imprisonment respectively.[2] S.R. was convicted by judgment of the District Court of Mitrovica dated 13 October 2011 and sentenced to five years of imprisonment.[3] The judgments were partly modified and confirmed for the remainder by Judgment of the Court of Appeals dated 11 September 2013.[4] Requests for the protection of legality filed by S.R. and R.A. were rejected by the Supreme Court in its Judgment dated 7 May 2014, while in the same Judgment the request of S.G. was granted only with regard to points not relevant for the charge of war crime.[5]

[2] District Court of Mitrovica, *S.G. et alii* (P 45/2010), Judgment, 29 July 2011
[3] District Court of Mitrovica, *S.R.* (P 45/2010), Judgment, 13 October 2011
[4] Court of Appeals, *S.G. et alii* (PAKR 966/2012), Judgment, 11 September 2013
[5] Supreme Court, *S.G. et alii (*Pml.Kzz.1/2014), Judgment, 7 May 2014, p. 3 of 15

5. On 6 October 2015, the Defendant XH.K. was arrested in Pr.. On 7 October 2015, the Pre-Trial Judge ordered his detention on remand, which since has been extended to expire on the day this judgment becomes final.

6. On 9 November 2015, the Prosecutor filed the Indictment with number PPS 08/09 against the Defendant XH.K.. On 18 November 2015, an initial hearing was held pursuant to Article 245 of the Criminal Procedure Code of the Republic of Kosovo (CPC)[6]. During the hearing, the Defendant pleaded not guilty to the charge of war crime against the civilian population and guilty to the charge of unauthorized ownership, control and possession or use of weapons.

7. On 16 December 2015, the Defense Counsel Haxhi Millaku filed a written request for dismissal of the Indictment, to which the Prosecutor responded on 28 December 2015. In a Ruling dated 27 January 2016, the (then) Presiding Trial Judge rejected the request of the Defense counsel and declared all evidence proposed by the Prosecutor admissible.

II APPLICABLE LAW

8. Under Charge 1 of the Indictment, the Defendant is charged with seven counts of 'War Crime against the Civilian Population', provided for and punished by Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 152 of the CCRK, in violation of common article 3 to the Geneva Conventions 1949 and articles 4 and 5 of their Additional Protocol II 1977, committed at Kosovo Liberation Army (KLA) centers located in K. and C. (Albania) during April, May and June 1999.

II.1 Applicable substantial law

9. Pursuant to UNMIK Regulation 1999/24 Section 1, Paragraph 1.1 under (b), as amended by UNMIK Regulation 2000/59, the law which was in force in Kosovo on 22 March 1989, the CCSFRY, is the applicable substantive law in this case. This is confirmed by the

[6] Law No. 04/L-123

Supreme Court of Kosovo in the case Latif Gashi *et alii*.[7] According to Article 3 Paragraph 2 of the CCRK, 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.

On crimes committed in Albania

10. According to Article 106 of the CCSFRY, Yugoslav criminal law applies to a citizen of SFRJ (the Socialist Federal Republic of Yugoslavia) when he commits abroad a criminal act other than those referred to in Article 105 of this law, provided he is found on the territory of the SFRJ or has been extradited to the SFRJ.

11. Article 142 is not referred to in Article 105 of the CCSFRY, but the Defendant XH.K. was found in October 2015 on the territory of Kosovo, which at the time of the events was part of the SFRJ. Thus, pursuant to its Article 106, the CCSFRY applies to criminal offences under Article 142 committed by the Defendant outside Kosovo.

12. The current CCRK, in Article 115, provides for the application of Kosovo criminal laws to any person who commits criminal offenses outside the territory of the Republic of Kosovo as listed in the Article. Article 152 of the CCRK is one of the Articles listed in Article 115 Paragraph 1. Therefore, application of the relevant provisions of the CCRK would give the same result.

II.2 Applicable procedural law

13. Since the Indictment was filed after the entry into force of the CPC, pursuant to its Article 545 Paragraph 1, the procedural law applicable to the case is the CPC.

III JURISDICTION

III.1 Subject matter jurisdiction

14. Pursuant to Article 20 of the CPC, read together with Article 11 of the Law on Courts[8], the Basic Court is competent to adjudicate this case in the first instance.

[7] UNMIK Supreme Court, *Latif Gashi et alii* (AP-KZ 139/2004), Decision, 21 July 2005, p. 5

III.2 Territorial jurisdiction

15. According to Article 35 Paragraph 3 of the CPC, as a rule, co-defendants shall be subject to the jurisdiction of the court which has jurisdiction for one of them and at which an Indictment has first been filed.

16. In this case, the Indictment against the S.G. and others, who had been investigated for the same facts was filed with the (then) Mitrovica District Court on 6 August 2010. Therefore, the Mitrovica Basic Court is competent to hear the case against the Defendant XH.K..

Competence of EULEX Judges and Composition of the Panel

17. On 10 November 2015, following a request by the EULEX Judges Unit, and pursuant to Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo and based on the Agreement of 18 June 2014 between the Head of EULEX and the Kosovo Judicial Council (KJC) in the relevant aspects of cooperation of EULEX judges with judges working in local courts ('the Agreement'), the Acting President of the Mitrovica Basic Court assigned the case to a EULEX Judge as Presiding Trial Judge.

18. An exchange of letters on the extension of the EULEX mandate, which was bound to end on 15 June 2016, took place between the President of the Republic of Kosovo and the High Representative of the European Union on 9 and 15 June 2016. The Law on Ratification of this international agreement (Law No. 05-L-102) and the Law on amending and supplementing the Laws related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo were approved by the Assembly on 17 June 2016 and entered into force on 29 June 2016.

19. With regard to the composition of the Panel, Article 15, Paragraph 2 of the Law on Courts states that the case must be heard by a Panel of three professional judges.

20. It is a notorious fact that since March 2008 until the day the Judgment was rendered, due to the specific security requirements in the north of Mitrovica, there has been a firmly

[8] Law No. 03/L-199

established practice that criminal cases in the Basic Court of Mitrovica are tried by panels composed exclusively of EULEX Judges. Such practice was reaffirmed in the above-mentioned Agreement, where under section 5 (a), it states that "EULEX Judges will ensure that the Basic Court of Mitrovica remains operational, until the multiethnic court system in the North is implemented and operational."

21. The case was initially allocated to EULEX Judge Vidar Stensland as Presiding Trial Judge, who presided over the initial hearing phase. Due to internal reasons, by decision dated 17 February 2016 of the Office of the Presidency of EULEX Judges, the seat of Presiding Trial Judge was then allocated to EULEX Judge Katrien Gabriël Witteman. The Panel Members were EULEX Judges Iva Niksic and René van Veen. No objections were raised to the composition of the Panel.

IV MAIN TRIAL

22. The Main Trial sessions were held on 18 March 2016, 11, 12, 13, 18, 19, 20 and 25 April 2016, 13, 23, 24, 25 and 30 May 2016, 7, 8, 12, 14 July 2016 and 2 and 4 August 2016. They were all open to the public. The public was excluded only during the verification of the identity of the protected witnesses, in order to guarantee compliance with the Orders imposing protective measures on the Witnesses.

23. During the opening session of 18 March 2016, the Prosecutor withdrew the seventh Count of the charge of War Crimes against the Civilian Population, namely the count of Violation of Bodily Integrity or Health as War Crime in relation to an unknown individual from Pre., in C. (north of Albania) on an unknown date in May or June, 1999.

24. During the same session of 18 March 2016, the Accused pleaded not guilty to the Charge of War Crimes under all six remaining counts, whereas he confirmed his guilty plea for the charge of Unauthorized Ownership, Control, Possession or use of Weapon. The Trial Panel then took the decision to deal with the withdrawn count and the pleaded criminal offence of 'Unauthorized Ownership, Control, Possession or Use of Weapon' in the final Judgment.

V EVIDENCE AND LEGAL QUALIFICATION

V.1 Evidence presented during Main Trial

25. During the course of the Main Trial the following witnesses were heard.

Prosecution witnesses:

(1) Witness B on 11 April 2016
(2) Witness D on 13 April 2016
(3) Witness E on 13 April 2016
(4) Witness F on 18 April 2016
(5) Witness I.I. (former Witness L) on 20 April 2016
(6) Witness H on 25 April 2016
(7) Witness I on 13 May 2016
(8) Witness J on 23 May 2016
(9) Witness K on 24 May 2016
(10) Witness M on 25 May 2016
(11) Witness A.I. (former witness 1) on 30 May 2016
(12) Witness Ru.S. (former witness 2) on 7 July 2016
(13) Witness O.H. (former witness 3) on 7 July 2016

26. Witness G appeared at the session of 19 April 2016, but was not able to testify due to his health condition.

Defense witnesses:

(1) Witness A.P. on 8 July 2016
(2) Witness B.P. on 8 July 2016
(3) Witness N.B. on 12 July 2016
(4) Witness A.H. on 12 July 2016

27. On 14 July 2016, the Defendant was heard.

28. During the Main Trial, the following material evidence was read into the records.

(1) Prosecution Record of the Witness Hearing of Witness C dated 17 December 2009, admitted on 11 April 2016[9]
(2) EULEX Police WCIU Report on Interrogation Statement of Witness C dated 9 April 2009, admitted on 11 April 2016[10]

[9] Prosecution Binder C2, tab 2, p. 179-210

(3) Death certificate of Witness A, submitted by the Prosecutor and admitted on 23 May 2016[11]

(4) Record of the witness hearing of witness N on 10 and 16 March 2010, admitted on 24 May 2016[12]

(5) Record of the witness hearing in a preliminary investigation of witness N dated 2 December 2010, admitted on 24 May 2016[13]

(6) Minutes of the Main Trial in S.G. *et alii* dated 23 and 25 May 2011, containing witness testimony of witness N, admitted on 24 May 2016[14]

(7) Report of Physical Examination of Witness B, submitted by the Prosecutor and admitted on 12 July 2016[15]

(8) Death certificate of witness 5, admitted on 14 July 2016.[16]

29. During the Main Trial session of 2 August 2016, the list of material evidence submitted by the Prosecutor was admitted and administered.[17]

30. During the course of the Main Trial, the following pieces of evidence were exhibited by the Court.

(1) Exhibit 1, an enlargement done by the prosecutor of a picture taken from the case file, shown to witness I on 13 May 2016[18]

(2) Exhibit 2, a photograph found by the prosecutor by googling the name of the Defendant XH.K., shown to the witness Ru.S. on 7 July 2016 and to the witness B.P. on 8 July 2016.[19]

V.2 Admissibility of evidence

31. With the exception of the record of the witness interview of witness K dated 21 April 2010, which was excluded from the case file by the Trial Panel in its oral ruling dated 24 May 2016 as elaborated below in § 60, all evidence submitted by the Prosecutor is considered as admissible evidence.

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[10] Prosecution Binder C2, tab 2, p. 211-235
[11] Court Binder III, Tab 2
[12] Prosecution Binder D, tab 4, p. 356-494
[13] Prosecution Binder D, tab 4, p. 495-508
[14] Prosecution Binder I, tab 5-6, p. 343-509
[15] Court Binder IV, Tab 6
[16] Court Binder IV, Tab 5
[17] Court Binder IV, Tab 5
[18] Court Binder III, Tab 5
[19] Court Binder IV, Tab 8

V.3 Procedural and evidentiary orders and decisions

32. During the course of the Main Trial, the Court has taken the following procedural actions either *ex officio* or upon motions by the parties.

Court Order of 17 March 2016 for Measures to Protect Injured Parties and Certain Witnesses

33. On 17 March 2016, the Court issued an Order for Measures to Protect Injured Parties and Certain Witnesses, granting protective measures under Article 222 of the CPC to the Witnesses proposed by the Prosecution and mentioned in the Confidential Addendum attached to the Indictment.

34. In its order, the Court restated the protective measure of pseudonyms assigned to the Witnesses and their anonymity from the public, imposed in its order dated 31 August 2010 in the criminal case of *S.G. et al* P No. 45/10, including the subsequent obligation for the Defense Counsel not to disclose the identity or any data or information that could be used to identify the Witnesses.

Court Order of 24 March 2016 on the Prosecutor's Motion for additional Measures to protect Witnesses while giving evidence

35. During the opening session on 18 March 2016, the Prosecutor filed a Motion titled "Evidence to be given by all the Witnesses via Video-link in a Remote Location and Application of Voice Altering only for Witness C", pursuant to Article 222 Paragraph. 1, Subparagraph 1.3 of the CPC. The Prosecutor in her Motion referred to the pending obligation to guarantee compliance with the Court Order already granting protective measures to Witnesses B, C, D, E, F, G, H, I, J, K, L, M and N, and the necessity to hear them in a way that their identity not be revealed to the media and public present in the courtroom. The Prosecutor further requested that any form of audio or video recording be prohibited. With regard to Witness C, the Prosecutor requested the application of the additional measure of voice distortion.

36. The Defense opposed the motion, arguing that the Witnesses in question were never approached and there were never incidents of their identities being revealed to anyone. The

Defense Counsel then submitted that the Prosecutor's petition was in contradiction with the spirit of the European Convention on Human Rights (ECHR) and with Articles 7 and 9 of the CPC, since, by not allowing the Defense to challenge the Witnesses in open court and to analyze and assess directly the facial demeanor and the emotional reactions of the witnesses, the equality of arms would be undermined, affecting the impartiality of evidence and its evaluation. The Defense Counsel added that, since the right to a public trial would be affected anyway, the Prosecutor could have asked for the public to be excluded instead.

37. On 24 March 2016, the Court issued an Order granting the Prosecutor's motion. The Court assessed the need to strike a fair balance between the values protected by the right to a public trial, the right to defense and equality of arms on the one hand and the right of the witnesses to their personal safety on the other. The Court opined that such balance could indeed be reached by authorizing the witnesses to be heard in the modalities requested by the Prosecutor since, considering the sophisticated nature of the video-link equipment, the defense would be able to engage in any cross-examination using demonstrative evidence or presenting documents of use to the Witnesses, and their facial demeanor would be visible to the defense and to the Court at all times. Furthermore, the right to a public trial could be preserved by allowing media and public to remain in the courtroom during the testimonies, and to hear (but not see) the Witnesses.

Court Orders dated 12 and 13 April 2016 for Police Assistance in compelling Witness B to appear in Court

38. Witness B was summoned to appear in Court on 11 and 12 April 2016. The Witness appeared before the Court on 11 April 2016 and started giving his testimony via video-link from a remote location. As the Prosecutor had not finished the examination of the Witness at the end of the day, he was asked to return the day after, on 12 April 2016, to complete his testimony. However, on 12 April 2016 the Witness did not appear. On the same day, the Court issued an Order for Police Assistance in compelling the Witness to appear in Court, but to no avail. On 13 April 2016, the Court issued another compelling order, but again to no avail. The examination of the Witness could not be completed, and no cross-examination could take place.

Court's ruling of 14 April 2016 on the Prosecutor's Motion for lifting of protective measures

39. On 11 April 2016, the Prosecutor filed a Request to lift the protective measures imposed on Witness L and Witnesses 1, 2 and 3 by amending the Court Orders dated 17 and 24 March 2016, and allowing them to disclose their identity and to testify in open court. The Prosecutor asserted that these Witnesses had expressed their will to testify directly in open court with no further measures imposed to protect their identities.

40. During the Main Trial session of 13 April 2016, the Prosecutor orally supplemented the Request, demanding the same amendments for Witness B.

41. The Defense did neither support nor oppose the Request.

42. On 14 April 2016, the Court issued a ruling, granting the Prosecutor's request with regard to witnesses L, 1, 2 and 3, and rejecting it in connection to Witness B. The substantial differences at the basis of the Court's decision were elaborated as follows. Witnesses L, 1, 2 and 3 directly and clearly expressed their will to testify in open court. On the other hand, with regard to Witness B, the Court assessed that in the eventuality of the Witness's appearance before the Court, changing the *modus* in which his testimony had been taken until then, namely via video-link and with a pseudonym, might intrinsically impact on the equality of arms. Furthermore, the reasons for considering the sudden disappearance of the Witness, the Court could not exclude that the Witness could have indeed been under some form of pressure or threats and, therefore, the imposed measures were still necessary.

Court Order dated 21 April 2016 for Medical Assessment on Witness G

43. On 19 April 2016, Witness G appeared at the designed remote location to testify before the Court. However, before the commencement of his testimony, the health conditions of the witness deteriorated to a point that he had to leave the remote location. His testimony could therefore not be heard.

44. On 21 April 2016, the Court issued an Order for Medical Assessment, appointing a medical expert to carry out a personal examination of the Witness and to provide the Court

with an assessment as to whether the Witness could, both mentally and physically, attend a Court session and give testimony.

45. On 9 May 2016, the Court received the medical report. The expert established that the Witness suffered from the mental disorder of *Paranoid Schizophrenia*, that the disease had a chronic progress of permanent nature and with an intensity of psycho-symptomatology that varied from moderate to severe, and that lucid intervals were rather rare or entirely missing. The expert concluded that, due to the nature of the disorder, and particularly the Witness's current psychic and physical state, he could not take part in a court proceeding. The medical report was provided to the parties during the trial session of 13 May 2016.

Court's ruling dated 7 July 2016 on the Prosecutor's Notice of Corroboration for Witness A and the request to hear Witness G from his house or to have his statements considered as read

On Witness A:

46. During the first Main Trial session on 18 March 2016, the Prosecutor filed a Notice of Corroboration pursuant to Article 263 read together with Articles 219 Paragraph 6 and 243 Paragraph 2 of the CPC in relation to Witness A, arguing that on 15 February 2016 the Office of the Prosecution had been made aware that Witness A, whose statements must be considered relevant for the case, had passed away. The requested Notice of Corroboration would allow the Prosecutor to submit and rely on the statements previously given by the Witness. In particular, the Prosecutor requested the possibility to rely on the Witness' statements given to EULEX Police on 10 August 2009, 24 August 2009 and 15 December 2009, and on the Statement given by the Witness to the International Criminal Tribunal for the Former Yugoslavia (ICTY) on 17-18 and 19 January 2003.

47. During the Main Trial session on 12 April 2016, the Defense objected to the Motion, arguing that the statements could not be admitted and relied on, since the Defense had not had the chance to challenge the evidence given by Witness A at any stage of the proceedings, and a judgment should never be based on facts or evidence that could not be challenged by both parties.

48. The Court, in its oral ruling during the Main Trial session on 7 July 2016[20], assessed that the Prosecutor's notice was timely filed, and that the other requirements of Article 263 of the CPC were equally met. The notice was therefore accepted by the Court as timely and properly filed. However, the Court pointed out that Article 263 Paragraph 1 makes reference to Article 261, which refers back to Article 123 Paragraphs 2 and 3 of the CPC. The Court assessed that, since the Defense indeed did not have the chance to cross-examine the witness at any stage of the proceedings, the statements given by Witness A either to the EULEX authorities (Police and Prosecution) or to the ICTY must be considered as 'witness interviews', as meant in Article 131 of the CPC which, pursuant to Article 123 Paragraph 2 of the CPC, cannot be used as direct evidence during the Main Trial, including in the judgment.

On Witness G:

49. During the Main Trial session on 30 May 2016, after having received the report on the medical assessment of witness G, the Prosecutor motioned the Court to hear Witness G through the procedure outlined in Article 343 of the CPC, by permitting him to testify from his home in the presence of either the Presiding Trial Judge or a Judge of the Trial Panel. The Prosecutor argued that, according to the medical report, the Witness was diagnosed with paranoid schizophrenia on 8 January 2010, but that on 4 March 2010 he had given a statement in front of the Prosecutor which was coherent and clear, and where the Witness was able to answer all questions posed to him. This statement was later used by the Trial Panel in the Trial against *S.G. et alii* (hereinafter: 'the G. Trial'), although the witness did not testify before that Court. The Prosecutor, therefore, requested to apply Article 343 of the CPC. Subsidiarily, the Prosecutor demanded the Court to consider the witness' statements as read.

50. The Defense objected to the motion, arguing that the medical report was clear in the conclusion that the Witness could not take part in criminal proceedings. Any eventual testimony to be taken from the Witness would therefore *a priori* be incredible and unreliable.

[20] The Death certificate of Witness A was provided to the Court on 23 May 2016

51. The Court, in its oral ruling dated 7 July 2016, asserted that it could not deviate from the conclusion of the medical expertise ordered and carried out on Witness G, and which clearly mentioned the impossibility for the witness to take part in Court proceedings, thus including any testimony taken at his residence. The Court therefore rejected the Prosecutor's request.

52. In relation to the motion to have Witness G's statements read into the records, the Court observed how Article 338 Paragraph 1 Subparagraph 1.1 of the CPC allows records containing the testimony of Witnesses to be read *inter alia* if the person who has been examined becomes afflicted with mental disorder. However, once again a distinction must be made between witness interviews, as meant in Article 131, and witness testimonies, as meant in Article 132, and their subsequent different use as evidence according to Article 123 Paragraphs 2 and 3 of the CPC. Since the Defense in this case never had a chance to cross-examine witness G during the pre-trial stage, the examinations of the witness must be considered as 'interviews', and as such they do not fall under the definition of Article 338 Paragraph 1 Subparagraph 1.1 of the CPC, which clearly refers to 'testimony'.

Court's ruling dated 26 July 2016 on the Prosecutor's Application to have Witness A and Witness 5 Pre-Trial and Trial Statements read in Court

53. During the Main Trial session on 7 July 2016, the Prosecutor filed a Motion to have the Pre-Trial as well as the Trial Statements of Witness A and Witness 5 read into the records, pursuant to Article 338 of the CPC. The Prosecutor argued that both witnesses had died, entailing the applicability of Article 338 of the CPC and, thereby, the possibility to have their statements read into the records. The Prosecutor further argued that the word 'testimony' contained in Paragraph 1 of Article 338 has to be understood in its broadest sense, including all 'statements' given by a witness to the Prosecutor. It would be against the intent of the legislator to interpret the word 'testimony', in a strict way. Moreover, the heading of the Article itself refers to 'statements', not 'testimonies'.

54. The Defense Counsel in his oral response objected the Motion, arguing that at no stage of the proceedings the defense was given the opportunity to cross-examine these witnesses, and that reading their statements would therefore be unlawful. At the same time, the

Defense requested that all statements of both Witness A and Witness 5 in the G. Trial, be it interviews or testimonies, be declared inadmissible evidence.

55. In its Ruling dated 26 July 2016, the Court reiterated the intrinsic difference between witness interviews and witness testimonies according to Articles 131 and 132 of the CPC. The Court referred to its Ruling issued on 7 July 2016, where it clearly pointed out that all statements given by Witness A were to be considered as 'interviews' for the purpose of the CPC. Accordingly, the Court assessed that the statements given by Witness 5 had to be equally regarded as 'interviews', since the defense of XH.K. never had a chance to cross-examine him. Accordingly, the use of these interviews as direct evidence is barred by the rules set out in Article 123 Paragraph 2 of the CPC.

56. The Court then assessed whether the heading of Article 338 of the CPC would point at an interpretation of 'testimonies' as statements, including both testimonies and interviews, as sustained by the Prosecutor. The Court however rejected this interpretation in view of the fact that headings are not to be considered as an integral part of the Code itself, but just added to facilitate its use.

57. The Court rejected as ungrounded the Motion of the defense to declare the statements of Witness A and Witness 5 inadmissible, considering that the inadmissibility of statements under the CPC is exhaustively regulated by Article 128 and Article 249 Paragraph 1 of the CPC, and none of the circumstances listed in these provisions apply to the witnesses' statements.

Court's decision dated 24 May 2016 on the Defense Motion to declare inadmissible the unsigned statement of Witness K of 21 April 2010

58. During the Main Trial session on 24 May 2016, the Defense Counsel objected to the use during examination of the statement given by witness K on 21 April 2010, since neither the English nor the Albanian version bore any signature of the Witness[21]. The defense therefore requested the statement to be declared as inadmissible.

[21] Minutes of the Main Trial dated 24 May 2016, p. 19 of 41

59. The Prosecutor responded that the Motion was belated, since the Defense had had an opportunity to challenge the admissibility of any evidence at the initial hearing stage. All evidence was then declared admissible.

60. The Court did not find the Motion belated and concurred with the defense that, pursuant to Article 207 Paragraph 2 of the CPC, records of examinations must indeed be signed by the person who was examined. The importance of this provision is reaffirmed by the fact that Article 207 Paragraph 9 of the CPC clearly specifies that 'if the person (…) refuses to sign (…) this shall be noted in the record along with the reason for refusal'. Since neither versions of the witness' statement carry a signature, the Court considered that the statement dated 21 April 2010 does not meet the formal requirements of the CPC, and in view of the importance that a witness signs his statements as a proof that he agrees with its content, the Court declared it inadmissible evidence and excluded it from the case file.

V.4 Probative value of the evidence

Witnesses A, G and 5

61. In its different rulings during the course of the Main Trial, as mentioned above, the Trial Panel has pointed out that a clear distinction must be made between admissibility of evidence (Articles 249 and 259 of the CPC) and its use as direct evidence during the Main Trial, including the Judgment (Articles 261 and 262 of the CPC).

62. The conclusion was that, although Article 262 of the CPC appears to allow the use of evidence which could not be challenged by the defense as a basis for a conviction as long as it is not 'sole or decisive', Article 261, with its reference to Article 123 of the CPC, completely excludes its use, only allowing pre-trial testimonies (meaning witness examinations which the defense had the opportunity to challenge) as a basis of a conviction, albeit not the sole or decisive one.

63. For this reason, the Trial Panel has not allowed the statements of Witnesses A, G and 5 to be read pursuant to Article 338 Paragraph 1 Subparagraph 1.1 of the CPC, and it cannot use these statements as direct evidence in its judgment. This is not altered by the fact that, for witness A, a notice of corroboration was properly and timely filed by the Prosecutor and accepted by the Court.

Witness B

64. Witness B, for reasons unknown to the Court, disappeared before the Prosecutor finished the direct examination. Notwithstanding the efforts of both the Court and the Prosecution, the Witness did not reappear before the conclusion of the Main Trial, giving the Defense no chance to cross-examine him. For this reason, through analogous application of Article 123 Paragraph 2 of the CPC, the Court finds that the minutes of the Main Trial containing his (incomplete) direct examination cannot be used as direct evidence. Witness B's pre-trial statements, for the same reason, must share the same fate.

Witness C and Witness N

65. Pursuant to Article 338 Paragraph 1 Subparagraph 1.3 of the CPC, the direct examination of a witness may be replaced by reading the records of his previous examination if the parties agree.

66. One could argue that this Subparagraph cannot be read separately from Paragraph 1 of Article 338, which explicitly refers to '*testimony*'. This would imply that records of witness examinations could not be read, or considered as read, even if the parties agreed. However, it is the view of the Trial Panel that the Lawmaker's use of the word 'examination' in Subparagraph 1.3, instead of 'testimony' in Paragraph 1, favours an interpretation which is more in line with the spirit of the CPC, and wherein the agreement of the parties must be seen as a waiver of their right to question and cross-examine the witness. Following this more systematic than grammatical interpretation, the Trial Panel finds that the records of the examinations of witness C and witness N, which the parties have agreed to consider as read, can be used as direct evidence, and serve as a basis for a conviction, provided that it is not 'sole or decisive'.

V.5 Credibility of the witnesses

Protective measure and evidence heard through video link

67. As discussed above in § 37, the decision of the Trial Panel to impose protective measures under Article 222 of the CPC, including the decision to hear the Witnesses via video-link, was the result of a balancing of interests, where on the one hand the safety of the witnesses was taken into account by hiding their identity from the public and the press, and on the

other hand the inevitable infringement of the right of the parties was limited to a minimum by allowing them to both hear and see the witnesses, and to be present while their personal details were verified.

68. The Trial Panel finds no reason to assume, and in fact it was not argued by either of the parties, that the protective measures influenced in any way the credibility of the Witnesses' statements.

Meetings with the Prosecutor prior to the testimony in Court

69. Following the announcement of the current Judgment on 8 August 2016, in the brief account of the grounds given orally, the Trial Panel expressed its concerns about meetings that took place between the Prosecutor and the Witnesses prior to their testimonies in court.

70. As a rule, parties should abstain from actions by which - willingly or unwillingly - they could influence a witness' testimony. If a Prosecutor deems it necessary to prepare a witness for his examination in court, this should happen in a transparent way, so that it can be verified whether relevant information was transmitted to the witness. Any doubts in this regard, grounded or not, can easily be countered by keeping a record of the meetings and sharing it with both the court and the defense.

71. In this case however, although no such record was kept, the Court sees no indication that the Prosecutor's informal interviews with the witnesses had, to the detriment of the Defendant, any bearing on their testimonies.

General remarks regarding the credibility of the witnesses' testimonies before the Trial Panel

72. All Witnesses heard during the Main Trial had already been heard during the Pre-Trial stage by either the Police, including the EULEX War Crime Investigation Unit (WCIU), or the Prosecutor. In addition, most of them were previously heard during the G. Trial, where the Trial Panel concluded that their testimonies were – with a few exceptions – credible.[22] Their statements given during the G. Trial were generally consistent with those given at the pre-trial stage.

[22] District Court of Mitrovica, judgment, *S.G. et alii* (Case No. P 45/2010), 29 July 2011, Par, 50

73. During the current Trial, however, the Trial Panel noted that the same witnesses appeared to have mitigated their descriptions of the cruelties they had earlier stated they had undergone and/or the role the Defendant played therein. No satisfactory explanation was given of these divergences, nor has the Trial Panel found any concrete indication of pressure on the witnesses, either from the side of the Prosecution during their earlier statements or from the defense prior to or during the Main Trial.

74. It is a notorious fact that with time even the most painful memories, when not regularly refreshed, tend to fade. The Court, therefore, found the witnesses' testimonies, in general, credible where they confirmed their earlier given statements and less credible where now, seventeen years after the facts and more than five years after their last statements, they differed from them.

Credibility of Witness H and Witness I.I.

75. Both Witness H and Witness I.I. gave detailed testimonies in which they confirmed their earlier statements. Contradictions, if any, were minor. The Trial Panel will therefore mainly rely on these two testimonies, and find corroborating evidence in the testimonies of the other witnesses who were either heard during the Main Trial or whose earlier statements were considered as read with the agreement of the parties.

V.6 Analysis of evidence; established facts per count

<u>CHARGE I, War crime against the civilian population</u>

High Ranking Position of the Defendant

76. The Court, on the basis of the testimonies heard during the Main Trial, did not find proven that the Defendant was holding a high ranking position in the KLA Center in K. (Albania).

77. According to Witness A.I. , the Defendant XH.K. helped with logistics in the KLA Brigade 125.[23] Witness Ru.S. testified that the Defendant was a supplier of Brigade 125.[24] Although this does not exclude that the Defendant held, at the same time, a high ranking position in

[23] Minutes of the Main Trial dated 30 May 2016, p. 14 of 30
[24] Minutes of the Main Trial dated 7 July 2016, p. 17 of 43

the K. camp, and from the testimonies of Witness F and Witness K, as will be discussed below in §§ 147-150, it can indeed be deduced that the Defendant had a certain influence on the conditions in which the detainees were held, none of the Witnesses described the Defendant as the one, or among the ones, being in command of the K. facilities.

COUNT 1, murder

78. Several witnesses have given statements regarding the death of A.B.. However, the name of XH.K. as the possible perpetrator can be found exclusively in the minutes and records of the statements given by witness B prior to this Trial.

79. Confronted with these statements during his examination before this Court, Witness B denied ever having said that the Defendant XH.K. had been involved in the murder of A.B.. On the contrary, Witness B stated he had never seen the Defendant in the K. Camp[25].

80. The Prosecutor argued that Witness B's testimony during the Main Trial is in flagrant contradiction with his previous statements and, therefore, incredible.

81. The Trial Panel will not assess the issue of the credibility of the different statements given by Witness B, as it is bound by the fact that neither Witness B's previous statements nor his trial testimony, as elaborated above in § 64, can be used as direct evidence. Leaving aside the statements of Witness B, the Trial Panel found no evidence criminally linking the Defendant XH.K. to the murder of A.B..

Joint Criminal Enterprise (JCE)

[25] Minutes of the Main Trial dated 11 April 2016, p. 28 of 56

82. The Prosecutor, in the closing statement, proposed to hold the Defendant criminally liable for the murder of A.B. on the basis of the concept of Joint Criminal Enterprise (JCE), and more specifically the extended variant.

83. Whereas Article 22 of the CCSFRY defines co-perpetration as several persons jointly committing a criminal act 'by participating in the act of commission or in some other way', the ICTY in its jurisprudence adopted the theory of co-perpetration based on joint criminal enterprise[26].

84. The theory of co-perpetration based on JCE deemphasizes the importance of the accused's contribution to the common criminal plan and, instead, focuses on his intent as the definitional criterion for his responsibility as a co-perpetrator: i.e. if the accused shares the intent to commit the concerted crime, and thus identifies himself with the common criminal purpose, he is liable as a co-perpetrator in a JCE, even if his contribution was less than essential, though it has to be at least a significant contribution nonetheless.

85. The ICTY has identified three variants of JCE, called the 'basic', the 'systemic' and the 'extended' JCE categories, which have the same objective elements: (i) a plurality of individuals; (ii) a common plan aiming at or involving a crime and (iii) the accused's significant contribution to the said plan. The difference between the three categories of JCE lies in their subjective elements.

86. The 'basic' JCE type requires that the accused shares the common intent to commit the group crime. The 'systemic' category of JCE, which is applied in cases concerning systems of ill-treatment (e.g. concentration camps), requires that the accused has knowledge of the nature of this system and intends to further its criminal purpose. Finally, the 'extended' JCE form allows imputing responsibility for a crime that was committed outside the original ('basic'/'systemic' JCE) scope of the common plan if: '(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the

[26] ICTY Appeals Chamber, *Tadic* (IT-94-1), Judgment, 15 July 1999, Par. 185-229; ICTY Appeals Chamber, *Momcilo Krajisnik* (IT-00-39), Judgment, 17 March 1999, Par. 57-102

accused willingly took that risk'.[27] The presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required.[28]

87. There are arguments in favor of a direct application of the concept of JCE in all its variants in cases of war crimes committed during the Kosovo war. The Indictment in the current case, however, is primarily based on domestic law. And although the jurisprudence of the ICTY can be useful in the interpretation of co-perpetration under Article 22 of the CCSFRY, it cannot extend its application beyond the legal limits given by this Article, as this would be contrary to the principle of legality laid down in Article 33 of the Constitution of the Republic of Kosovo and Article 2 of the CCRK.

88. Including JCE in its extended variant in the interpretation of Article 22 of the CCSFRY, as proposed by the Prosecutor, would allow finding the Defendant's co-perpetration in a murder at which he was not present proven on the sole basis of his eventual intent (*dolus eventualis*). Such interpretation would, in the opinion of the Trial Panel, stretch the meaning of co-perpetration beyond the boundaries set by Article 22 of the CCSFRY, and violate the legality principle.

Conclusion

89. The Court therefore did not find proven that the Defendant, in his capacity as a member of the KLA, in co-perpetration with other KLA members, murdered A.B. while he was illegally detained in K. Camp by beating and shooting him.

COUNT 2, illegal detention

90. Witness C was not heard during the Main Trial, but with the agreement of both parties, her previous statements were considered as read.[29]

> Witness C recounted she was in the house of An. and witness B, C's boyfriend, when a car came with people who spoke Serbian. They took them to the Albanian border. When in K., a Jeep came with two KLA members in black uniform. They talked to An. and then they brought all of them to the KLA centre there, where they placed

[27] Lachezar Yanev, *'Co-Perpetration Responsibility in the Kosovo Specialist Chambers Staying on the Beaten Path?'*, Journal of International Criminal Justice 14 (2016), 107-108, with further references
[28] ICTY Trial Chamber, *Limaj et alii* (IT-03-66-T), Judgment, 30 November 2005, Par. 511
[29] Minutes of the Main Trial dated 11 April 2016, p. 55 of 56

them immediately in a store room.[30] During the first day, they locked them up in what looked like a warehouse, without giving any justification or reasons. There was a person guarding them.[31] Later, she was taken to a very small room, around 2x2 mtrs, close to the toilets.[32]

91. Both Witness D and Witness E, two Roma brothers, musicians from Pr., testified during the Main Trial that they had been arrested and brought to K., where they were kept.

Witness D testified that he went with his family, including Witness E, to K. during the war, after the NATO bombing. He was arrested in K. by two persons. They were with masks and KLA uniform. They took them to some kind of factory. The people there were wearing KLA uniforms. They told them that they were suspected of something. They then kept them there for work.[33] At a certain point they told them that they were free to go. So they left.[34]

Witness E testified that he travelled to Albania during the war with his family, including Witness D. In Albania, when they passed the border, KLA, wearing uniforms and with masks, suspected them and took them. They arrested him, together with Witness D, for allegedly being Serb police officers. They sent them to the KLA Headquarters (HQ), in military barracks, where they were kept for more than two weeks, or three weeks. It was a huge HQ.[35] There was a third Roma with them.[36]

92. Witness F, who was a forest ranger before the war, named the Defendant XH.K. in his testimony as the person directly involved in his arrest and illegal detention. Witness F knew the Defendant's name, since their villages were nearby and he, therefore, was acquainted with him. Furthermore, he recognized the Defendant during the Main Trial session of 18 April 2016, from photograph No. 47 (binder C2, page 376 (C441-16)).[37]

Witness F testified that he left Kosovo on 28 April 1999 and went with his family to K.. Two weeks after they arrived there, around the middle of May 1999, two persons came and invited him to follow them in order to give a statement. One of them was XH.K.. They were not wearing uniforms. Then they went by car to a camp, a kind of factory with some offices. In the meantime, he heard that this was the HQ of KLA. They took him to an office. Someone took his statement and then they sent him to a room. There were six to seven persons there, including Witnesses D and E, who were Roma musicians from Pr., and two catholic brothers (the Court understands: Witness B and A.B.), who were brought there ten days after his arrival. The room where they

[30] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C 291 (181)
[31] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C 292 (182)
[32] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C 294 (184)
[33] Minutes of the Main Trial dated 13 April 2016, p. 8-11 of 51
[34] Minutes of the Main Trial dated 13 April 2016, p. 28 of 51
[35] Minutes of the Main Trial dated 13 April 2016, p. 34-37 of 51
[36] Minutes of the Main Trial dated 13 April 2016, p. 39 of 51
[37] Minutes of the Main Trial dated 18 April 2016, p. 30 of 51

stayed was locked. They stayed there around a month.[38] On the last day, Witness F was interviewed by O. K. and then released.[39]

93. Witness H also mentioned the Defendant XH.K. as the person carrying out his arrest. He recognized the Defendant, because he had seen him previously.[40]

Witness H testified that he left Kosovo for Albania on 1 April 1999.[41] He settled in D.. His son, Witness I, was with him. Once there, at a certain moment, while he was alone with his son, XH.K. came together with another person, who was a military. They were in civilian clothing. XH. stood by the gate and had a revolver in the right pocket of his jacket. The other person entered the yard. They inquired about a certain family from J.. Then they both left.[42] On another occasion, when he was on the street, a vehicle without a number plate came. The driver, who was alone, asked about a certain family, and then asked him to get in the car, which Witness H refused. The driver said he was from KLA Police. He put a gun to the height of his shoulder and cocked it. He managed to take the gun from the man's hands and put him on the ground. When his family came out of the house, the man stood up and drove away.[43] On 18 May 1999, he was threatened again at gunpoint and taken away by four people. They brought him to 'R.', where they put him in a bunker. Then, on 21 May 1999 they took him and three other persons to K..[44] In K. they took them to an abandoned building. They then sent him to a room on the first floor. Under the staircase there was an improvised prison. When he entered, there was already another person: Witness A. On 22 May 1999, they brought into the room A.B. and Witness B. Also, there were three Roma, musicians from a village nearby Pr. (The Court understands: Witness D and E and a third Roma), and a forest ranger (the Court understands: Witness F). He also remembers a school administrator from I.. Two days later, he, together with Witnesses A, B and A.B. were moved to a room of the warehouse where spare parts of tractors had been kept. They found the Roma there, and the school director, and two or three days later they brought the forest ranger too. The room was locked from the outside, and two armed guards in KLA uniforms were standing at the door.[45] Witness H stayed in K. from 21 May until 1 June 1999, when he was released.

94. Witness I generally confirmed the testimony of witness H.

Witness I testified that on 1 April 1999, he left Kosovo for Albania with his entire family, including witness H, his father. They started from Pr. and went with the

[38] Minutes of the Main Trial dated 18 April 2016, p. 5-10 of 51
[39] Minutes of the Main Trial dated 18 April 2016, p. 28-29 of 51
[40] Minutes of the Main Trial dated 235 April 2016, p. 8 of 55
[41] Minutes of the Main Trial dated 25 April 2016, p. 6 of 55
[42] Minutes of the Main Trial dated 25 April 2016, p. 7-10 of 55
[43] Minutes of the Main Trial dated 25 April 2016, p. 11-12 of 55
[44] Minutes of the Main Trial dated 25 April 2016, p. 12-16 of 55
[45] Minutes of the Main Trial dated 25 April 2016, p. 30 of 55

whole convoy heading for D., where they stayed with his aunt. On three occasions people came to the apartment to look for his father. The first time a car showed up, the driver stopped the vehicle where his father was standing and spoke to him, asking about a certain family, as he was later told by his father. The driver then pulled out a gun and told his father to get inside. A struggle started. He walked out with his cousin, they stopped fighting, and the man drove away. The second time, He was at home with his father, in front of the house. The same man came along with XH.K.. Both were armed. They did not wear a uniform. They had their guns at their side. XH.K. waited at the gate, while the other person entered the yard. They then drove away. The third time, there were two police officers from Albania, and seven or eight other men, amongst whom XH.K.. XH.K. carried a gun. They wanted to come into the house and take Witness H. The landlord told the Albanian police officers to either produce a court order for the house search or to leave the premises, or he would go to the police station. Then they walked out, and the next day he and the family moved to another apartment. The day that Witness H was kidnapped was 17 or 18 May 1999. On that day he, his father and the landlord went for a stroll. At a certain point, a car stopped, and four people stepped out with pistols in their hands. They pointed their guns towards them. They struggled with them, but they overpowered them and forced Witness H into the car. They then left in an unknown direction.[46]

95. Witness K testified that he was arrested and later detained in K., mentioning the Defendant XH.K. as one of the men who arrested him and took him from the camp in C. to K.. Someone had told him that it was XH.K., whose name he knew from before.[47]

Witness K testified that on 28 March 1999, he left Kosovo for D.. After 10 or 12 days, he was arrested there. He went out from the workers camp where he stayed, and a car stopped. The two people in the car asked for his name. Then one of them stepped out and told him to go with them, because they had some questions for him. They showed him a letter telling him that they were from KLA. He got in the car with them. They took him to the KLA HQ in D., a hotel called D.. At the hotel, XH.K. went ahead inside. They then took him to a room in front of a person who told him he was a judge or prosecutor from Tirana, and asked him some basic questions. After a while, XH.K. said that there was no need to ask any further questions. After the questioning, they brought him to another room, where he stayed for two days and one night. He was then moved to another location near the seaside by two KLA members in uniform. Then someone intervened, and they took him back to Hotel D.. Shortly after, he was placed in a van with the soldiers, and they headed towards K..[48] After three days, someone came and took him to C., K.. XH.K. came two or three times to C., and the third time, he took him with him and sent him to K.. XH. came by car together with a friend, whom he believes was A. Ha.[49] In K., XH. took him to a room with a guard at the door. The door was not locked, but there were guards who

[46] Minutes of the Main Trial dated 13 May 2016, p. 6-12 of 21
[47] Minutes of the Main Trial dated 24 May 2016, p. 7-8 of 41
[48] Minutes of the Main Trial dated 24 May 2016, p. 5-12 of 41
[49] Minutes of the Main Trial dated 24 May 2016, p. 18-19 of 41

> had weapons. He saw Roma in K.. They were musicians from Pr.. On the day of his release, XH.K. came and told him that unless they would kill him (K.), he would release him. The same afternoon, he was released.[50]

96. In the testimonies cited above, A.B., Witnesses B, A, D and E are mentioned as co-detainees. Both Witnesses D and E called the facilities 'KLA HQ', while others described the facilities as including a warehouse and different rooms where detainees were kept.

97. On the basis of these testimonies, the Court established that the Defendant XH.K., in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, arrested and illegally detained Witnesses A, B, C, D, E, F, H, K, A.B. and other unknown civilians in a KLA center for a prolonged period of time in K. (north of Albania) during April, May and through mid-June of 1999. The proof for the role of S.G. as a co-perpetrator will be assessed below in §§ 121-125.

COUNT 3, inhumane conditions

98. Witness C, Witness E, Witness F and Witness H, in their statements described the conditions under which they were kept in the KLA center in K..

99. As mentioned above, Witness C was not heard during the Main Trial, but with the agreement of both parties, her previous statements were considered as read. Her statements contain the following.

> She was taken to a very small room, around 2x2 mtrs, close to the toilets. It was in the same yard, in a long building, and there the KLA members had the office where they were interrogating people. There was no furniture in her room, just mud and sand, and a very thin mattress.[51]

100. Witness E testified as follows.

> They slept on mattresses in the warehouse where the food was stored. The first two or three days they stayed in a small room of maybe 4x3 meters. There they were four or five: only the workers.[52]

101. Witness F described the room they were kept in as follows.

[50] Minutes of the Main Trial dated 24 May 2016, p. 22-30 of 41
[51] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C 294 (184)
[52] Minutes of the Main Trial dated 13 April 2016, p. 41 of 51

> It was a room of approximately 6x6 or 6x8 meters. For three or four days they slept on a concrete floor. After that, they were brought blankets and mattresses made out of sponge. The blankets were later taken away. One day XH.K. came to the door and had a conversation with him about the blankets, and some hours later somebody brought them back. XH.K. also inquired about his injuries. Every second day, a tank with fresh water would arrive. They were given food in cans, and also bread. Witness F recalled that he was allowed to bathe once.[53] One day, during the day, Witness F heard shots and later saw that the older catholic brother had a wound on the knee. Witness F saw the bandage, and there was blood. The younger brother had also a gunshot wound on his foot. In the morning, when they woke up, there was a doctor. After an hour, the older Catholic brother was taken out of the room in a blanket. Later he learned that he had died. [54]

102. Witness H gave a description of the improvised prison he was kept in upon his arrival in the K. camp.

> They sent him to a room on the first floor. Under the staircase there was an improvised prison, a very tiny room, the height and width of which were the same as the staircase. There was no furniture. When he entered there, there was already another person: Witness A. There was no light.[55] Two days later, they moved him, A, B and An. to a room of the warehouse where spare parts of tractors had been kept. They found the Roma there, and the school director, and two or three days later they brought the forest ranger too. The room was 3 x 4,5 mtrs. The floor was of concrete. Two or three of them had blankets and also mattresses, 1 cm thick.[56] They were more hungry than fed. He lost over 16 kilos in 10 days. There was no access to clean water and they drank water from a cistern. They were not able to bathe and smelled like animals. They would go to toilet with guards.[57]

103. On the basis of these statements, the Court established that the defendant, in his capacity as a member of the KLA in co-perpetration with S.G. and other KLA members, kept witnesses A, B, C, D, E, F, H, A.B. and other unknown civilians, detained in a KLA center under inhumane conditions (small cells, with lack of water, food, sanitation, air and access to medical treatment) in K. (north of Albania) during April, May and through mid-June of 1999. The proof for the role of S.G. as a co-perpetrator will be discussed below in §§ 121-125.

[53] Minutes of the Main Trial dated 18 April 2016, p. 8-9 of 51
[54] Minutes of the Main Trial dated 18 April 2016, p. 25-28 of 51
[55] Minutes of the Main Trial dated 25 April 2016, p. 17 of 55
[56] Minutes of the Main Trial dated 25 April 2016, p. 30 of 55
[57] Minutes of the Main Trial dated 25 April 2016, p. 31 of 55

104. The Trial Panel found established that there was lack of access to medical treatment based on the fact that, according to Witness F's testimony, only the morning after both catholic brothers suffered gun shots, a doctor was present, and that the older catholic brother (the Court understands: A.B.) died shortly after.

105. The Court will elaborate further below in §§ 138-150 why it qualified the involvement of the Defendant XH.K. as co-perpetration.

COUNT 4, torture

106. In the jurisprudence of the ICTY, torture is defined as the infliction of "severe physical or mental pain or suffering for purposes such as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind".[58]

107. In their statements Witness C and Witness H described how they had been maltreated in the K. camp.

108. Witness C described not only her own maltreatment, but also the maltreatment of Witness B and A.B..

> Witness C stated that after three days from her arrival in K., she heard a noise of beating. There were three persons who woke her up to look how An. was getting beaten up, with sticks and with a baton. They were asking him how he had come there, and when he answered the Serbs had sent him there, they were beating him up calling him a traitor. They also brought Witness B there to see what they were doing to An.. They beat Witness B, although they beat A.B. more than Witness B. They also beat her, slapping and kicking her, and asking why she was hanging around with them.[59] Two soldiers took her, while six or seven others were beating An.. The two soldiers slapped and kicked her. This lasted half an hour to an hour. Then they started beating her with hard plastic batons until she lost consciousness. They kept asking her if An. and Witness B were Serbian spies. When she woke up, they started beating her again.[60] That night they separated them and she never saw A.B. again.[61]

[58] See, among others, ICTY Judgment, *Anto Furundzija* (IT-95-17), Trial, 10 December 1998, Par. 159-160, with further references
[59] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C292-C293 (182-183)
[60] Report of interrogation statement dated 9 April 2009, Prosecution binder C2, p. C324 (214)
[61] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C292-C293 (183)

109. In his testimony, witness H, apart from his own torture, also mentioned the torture of Witness A, Witness B and An..

> Witness H testified that after the 22nd [of May 1999], they took him to an office with the word 'jurists' on the door. On the stairs down, the same persons who had brought him, started punching him. In this 'jurists' office, he saw XH.K. and a lot of other persons, amongst whom S.G., P. S., M. Z., XH. I. and A. C. This was the first time he saw XH.K. in K.. XH.K. was holding a rubber baton in his hand and told him that they had been waiting for him. XH.K. then started beating him with the rubber baton which he held in his right hand, while with his left hand he slapped him on the mouth. And he said: "You have killed 100 people and raped 50 women". XH.K. put out his cigarette on his chest and then hit him with a gun on his head, as a result of which he suffered injuries. XH. then broke his elbow with the rubber baton. As a result, he cannot straighten it anymore. XH.K. also put the baton in his mouth and broke the tooth bridge. XH.'s friends, S.G., P. S. and others who he could not see, because they were behind him, hit him as well that night. The beating went on for about 30 minutes. When XH.K. hit him with the butt of his revolver, he fainted and fell on the floor. Then XH.K. took a bucket of water and splashed it on him. He woke up, but then fainted again because he had sustained a severe blow, as a consequence of which he lost his vision. All of the prisoners were beaten that night, except for the forest man, who was not there at that time. They brought a female (the Court understands: witness C). They forced her to say that in the house of the two brothers (the Court understands: A.B. and witness B) only Serbs came. He saw Witness A being maltreated that night by S.G.. He saw witness A back later that night, and he was in an extraordinary bad condition. His legs and hands were swollen, he had bruises on his body which witness A showed all to him.[62] The same people who had beaten him (Witness H) started beating Witness B and A.B.. XH.K. was the most aggressive of them. When they came back in the room, they were in such a bad condition that they could neither stand up nor lay down. They were beaten very badly on their feet and their hands, and the brother who is still alive (the Court understands: Witness B) had a clavicle broken.[63]

110. Witness I confirmed the testimony of Witness H.

> Witness I testified that Witness H was gone for 13 days until he came back to the apartment in D. where they were staying. His condition was very catastrophic. He had cigarette burns, body injuries, and his forehead was injured, his teeth were broken and his health condition was very poor. Witness H told him that XH.K. and other persons whom K. knows, did all these inhumane tortures.[64]

111. From the statements of Witness C, it clearly appears that they were subjected to severe physical or mental pain for the purpose of obtaining information or a confession.

[62] Minutes of the Main Trial dated 25 April 2016, p. 18-28 of 55
[63] Minutes of the Main Trial dated 25 April 2016, p. 28-30 of 55
[64] Minutes of the Main Trial dated 13 May 2016, p. 12 to 21

Therefore, the maltreatments described by the witnesses, respond to the definition of torture mentioned above.

112. On the basis of the statements of witness C and witness H, the Court established that the Defendant XH.K., in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, tortured Witnesses A, B, C, H and A.B. by beating them to the point of unconsciousness with batons, bats, and sticks, in K. (north of Albania) on an unknown date in May 1999. The role of S.G. in the torture is explicitly mentioned by witness H.

113. The Court could not establish that the Defendant was present or otherwise involved in the second torture incident mentioned under this count, since, as discussed above under Count 1, the name of XH.K. in relation to this incident can be found exclusively in the minutes and records of the statements of Witness B given prior to this trial, and when confronted with these statements during his examination before this Court, Witness B denied ever having said that the Defendant XH.K. had been involved.

114. Therefore, the Court did not find proven that the Defendant in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, tortured Witness B and A.B. by ordering them to wear bulletproof vests and then shooting and ordering others to shoot them with automatic weapons, in K. (north of Albania) on an unknown date in June 1999.

COUNT 5, violation of bodily integrity or health

115. Witness C in her statement and Witness F in their testimonies have spoken about continuous or repeated beatings.

> Witness C stated that after the night of the beating, they put her in a room with dirt floor and a bed. She stayed there about a week. Twice they took her from this room to another room. In that room was A.B.. They would beat her and An.. Finally, one day they brought a doctor in to look at her. The doctor told them to stop beating her, because she was in a bad condition and she was going to die. After the doctor had seen her, they beat her less.[65]

[65] Report of interrogation statement dated 9 April 2009, Prosecution binder C2, p. C324 (214)

116. Witness F described the beatings as follows.

> While he stayed in K., he was hit once in the evening, when it was dark, and two or three people came in and beat them. They punched him in the eye, and the eye closed. His nose bled. The others in the room were beaten too. When they came in, they asked each of them what their names were and where they worked in the past, as they were put there as collaborators. He answered them that he was clean, but a person said he was a spy, a traitor. One of the prisoners was hit three or four times with a rubber baton. A few days later, he was hit with the rubber baton on his back. They were in the room, facing the wall. They were all beaten that day. It happened that people were taken from the room to be interrogated. Those who were taken out of the room to be interrogated, were beaten. It happened several times.[66]

117. Witness H described his own beatings, as well as the beatings of the Roma brothers (Witnesses D and E), and all the other people who were in the cell with him (A, B and An., the forest ranger (witness F) and the school director[67]). He also described how on the night of the torture, the Defendant XH.K. ordered A.B. to beat him.

> XH.K. gave the rubber baton to the brother who is now deceased (the Court understands: A.B.), and, looking at Witness H, told A.B. to give 50 hits on the hand of this 'Serbian'.[68] In the room where they slept, they were beaten up. This happened by people unknown to him, with a rubber baton. They would come in, telling them to stand up. They hit him 25 times on each hand. This happened twice, but then (the Court understands: the second time) another person came, while XH.K. and S. D. were interrogating him. The beatings on the hands happened to all the people who were in the cell with him. They interrogated and beat them during the night. He was interrogated once during the night and twice during the day by XH.K. and a so-called Prosecutor S. D..[69]

118. Moreover, the report of the Physical Examination of Witness H confirms the presence of old injuries on the body of the Witness, including scars on the forehead and chest, and a left elbow slightly deformed and which has difficulties in straightening.[70]

119. On the basis of this evidence, the Court established that the Defendant XH.K., in his capacity as a member of the KLA, in co-perpetration with S.G. and other KLA members, violated the bodily integrity and health of Witnesses A, B, C, D, E, F, H, and A.B. by repeatedly beating them or ordering others to do so, in K. (north of Albania) during April,

[66] Minutes of the Main Trial dated 18 April 2016, p. 16-22 of 51
[67] Minutes of the Main Trial dated 25 April 2016, p. 20-21 of 55
[68] Minutes of the Main Trial dated 25 April 2016, p. 27 of 55
[69] Minutes of the Main Trial dated 25 April 2016, p. 32-33 of 55
[70] Report of the Physical Examination of Witness H by EULEX Forensic Medical Doctor Marek Gasior, dated 10 November 2010, Prosecution Binder K, p. 162-184

May and through mid-June of 1999. The proof for the role of S.G. as a co-perpetrator will be discussed below in § 121-125.

120. The Court will elaborate below in §§ 138-150 why it qualified the involvement of the Defendant XH.K. as one of co-perpetration.

COUNT 2, 3, 4 AND 5

S.G. and other KLA-members

121. Counts 2, 3, 4 and 5 under Charge 1 mention that the Defendant XH.K. committed the acts in co-perpetration with 'S.G. and other KLA members'. The participation of other KLA members in the acts follows clearly from the facts established above, but in the current trial the name of S.G. was mentioned only by Witness H and Witness I.I.. Witness I.I. testified that he was arrested by S.G.[71], while Witness H described S.G. as a co-perpetrator in the torture committed in the KLA center in K..[72]

122. In the G. Trial, through the final judgment of the Court of Appeals, it has been established that S.G., together with other KLA members, holding a command position within the K. camp, committed some of the facts which have been found proven with regard to the Defendant XH.K., namely the inhuman treatment (Count 1 in the G. trial), torture (Count 2 in the G. trial) and violation of bodily integrity (Count 3 in the G. trial).[73]

123. Facts established in a final judgment can, as *res iudicata*, only serve as evidence in proceedings between the same parties. Therefore, the evidentiary value of the Court of Appeals judgment in the G. Trial, which was admitted as evidence in the current case[74], is limited to the fact that S.G. has been found guilty of and sentenced for the facts mentioned above. This fact however, is sufficient to establish the co-perpetration of S.G. in the acts found proven above under Count 3, 4 and 5.

124. Regarding Count 2, illegal detention, which was not included in S.G.'s Indictment, the evidence of the co-perpetration of S.G. follows from the fact that he was found guilty of

[71] Minutes of the Main Trial dated 20 April 2016, p. 7 of 27
[72] Minutes of the Main Trial dated 25 April 2016, p. 47 of 55
[73] Kosovo Court of Appeals, *S.G. et alii* (PAKR 966/2012), 11 September 2013, p. 3 of 27
[74] Minutes of the Main Trial dated 2 August 2016, p. 3 of 12

the fact 'having a command position' in the K. camp, corroborated by the testimony Witness H, who testified on the active role of S.G. in the KLA center in K..

125. Therefore, the Trial Panel established that the defendant XH.K. committed the acts under Count 2, 3, 4 and 5 in co-perpetration with S.G. and other KLA members.

COUNT 6, illegal detention

126. Witness K, Witness I.I. (former witness L), Witness M and Witness N testified about their illegal detention in the KLA camp in C. and in a garage near Pr.. They all, with the exception of witness N, mentioned XH.K. as one of the perpetrators.

> Witness K stated that after three days, someone came and took him to C., Kr. They went with a car. Witness M, who he saw for the first time, was also there. In C. it was a kind of military barracks, but they used to stay in a separate room. In the room they took them to, they found I.I.. The hands of all of them were tied, until they untied them. In the beginning it was him, Witness M, Witness I.I., Witness N and a person from Macedonia. The door of the room was locked from the outside.[75] XH.K. once came to the room all of them were in, and asked how Witness K was doing. He came two or three times.[76] Witness K stayed around two months in C..[77]

127. Witness I.I. recognized XH.K. in the court room.[78]

> Witness I.I. stated that he went to Albania on 12 April 1999 and got arrested by S.G.. He was then sent to C. in Kr., where there were army barracks of the time of Enver Hoxha. He was kept in C. from 12 April until 20 June. There were occasions when, in his room, up to 17 people were kept, including Witnesses M, N and K. The door of the room was locked from the outside. There was a guard at the door. I.I. saw XH.K. twice in C.. The first time he saw him, XH. was the driver of a car which took him, Witness M and Witness K down to Kr.. They were tied hand by hand. They were left in the vehicle for an hour, and then they brought them back to C.. The other time I.I. saw XH.K., was when they were bombed by the Serbs. On 20 or 21 June 1999, about 25 KLA soldiers took him and Witness N from C. to Pr.. The KLA soldiers were all in uniform and had automatic rifles. They brought the two Witnesses to the female dormitories of the technical school in Pr., where they locked them in the basement for two nights and two days. Then the German military entered, taking away the KLA soldiers' weapons and stripping off their uniforms. Someone came and told them that they were free, and that he would just bring their documents. Then they took them to a vehicle. XH.K. was driving. They brought them to the edge of the

[75] Minutes of the Main Trial dated 24 May 2016, p. 14-17 of 41
[76] Minutes of the Main Trial dated 24 May 2016, p. 18 of 41
[77] Minutes of the Main Trial dated 24 May 2016, p. 19 of 41
[78] Minutes of the Main Trial dated 20 April 2016, p. 11 of 27

forest, took them out of the car and pushed them forward. The KLA soldiers, including XH.K., were behind them and one of them had a gun. I.I. believed they would shoot them, as they were saying they would. Eventually they arrived at a garage, where they were locked up. They stayed there for three days, until two people came and told them they were free. "Go home, and if you tell anyone that you were in prison we will kill you", they said.[79]

128. Witness M described the location in C. as an old two-story building which had KLA soldiers in it. He found out later in C. about the name of XH.K. through Witness K and through his co-traveler A. Ha.[80]

Witness M testified that he heft Kosovo on 27 March 1999 to travel to Sh. near D. in Albania. He was arrested in D. on 16 April. He was at his nephew's, when a person came who identified himself as working for the security service in Albania. Outside were two of his friends waiting in a Jeep. They put him and his nephew in the Jeep and started driving. They drove to Hotel D.. One of them told him they were not from the Albanian security service, but from KLA. The three persons were XH.K., T. T. and B. Ll.. Later, they handcuffed him and put him in a Jeep. Then they travelled all night and in the morning they arrived in K.. They left him in the vehicle near the barracks. Then they brought another person: Witness K, who was also handcuffed and they took them to C., to an old two-story building which had KLA soldiers in it. They took Witness K and him to a small room. Witness I.I. was also there. They were handcuffed, in front, during the first night. Then they sent him, together with Witnesses K, to an office downstairs. After they had interrogated them, they sent them back to the room. The door was kept locked from the outside. They could not leave without the guard opening for them. On the fifth day, he saw XH.K.. On that day, A. H. came to the room. He took the three of them out of the room, sent them downstairs and put them in a Jeep. The three of them were tied together with their hands, one at his right hand and the other at his left. XH.K. was on the driver's seat. He drove the Jeep into an unknown direction. On the road they met another Jeep, a red one. The driver spoke to XH.K. and A. H., then turned his car and led the way until they arrived in Kr.. H. (D.) spoke to them, they took them from the vehicle, he uncuffed them and put them in the red vehicle, and they returned back to C.. They were put in the same room in C.. The next day H. D. came to the room with another person and sent him to Kr. After that, he was sent to K. to the Albanian security service, who kept him in an office for three days. Then he was released. Witness M stayed in C. for six days.[81]

129. Witness N was not heard during the Main Trial, but with the agreement of both parties, his previous statements were considered as read[82].

[79] Minutes of the Main Trial dated 20 April 2016, p. 6-19 of 27
[80] Minutes of the Main Trial dated 25 May 2016, p. 5
[81] Minutes of the Main Trial dated 25 May 2016, p. 4-14
[82] Minutes of the Main Trial dated 24 May 2016, p. 2 of 41

Witness N stated that during the war, around March 1999, he left the area of I. to go first to R. in Montenegro. There he stayed around 10 to 15 days. After that, he went to Sh., where he stayed in the refugee camp. On 1 May 1999, he was apprehended. They brought him to the Albanian police station, where he was detained 24 hours before he was released. That same night, 12 people came and apprehended him. Three of them were KLA. One of them had a weapon. The others were Albanian police. The police brought him to a container and from there, at 7:00 AM, they handed him over to KLA, who transferred him to K. in a taxi Mercedes. He was handcuffed.[83] Some hours later, two of the KLA took him from K. to Kr..[84] He stayed there around 2 or 3 hours. Then, they took him by a military police car to C..[85] They brought him up to the second floor, where Witness K, Witness I.I. and a person from M. were detained. A police officer was standing outside the door. After three days, S.G. arrived on two crutches. He said to them: "You will rot in prison". Witness N was in prison for one month and a half, including Pr.. In C., he stayed nearly a month in the room on the second floor. The door was kept locked, with an army guard at the door.[86] There were more prisoners. Two or three police officers were also arrested and held at a room below. In the room he stayed in, sometimes soldiers who were under disciplinary measures were brought in for a night or two. Witness M had left the day before his arrival. In fact, he heard that Witness M had been there, but he never saw him.[87] Approximately between 20 and 22 May 1999, they took him from C. to K., together with I.I. and the person from M., to be put on trial. They were handcuffed. They accused him of possession of weapons, and of accepting the Serbian regime. They never gave him the verdict. After the trial, they took him and I.I. back to C., while the person from M. stayed there. They were handcuffed together. When they arrived, Witness K was very happy to see them, because he had heard they had been killed.[88] They stayed ten more days in C., without being beaten. From C., they brought them to a student dormitory in Pr.. They were handcuffed on and off. The following day they brought them to a garage, where they were locked up for three days. There were himself, I.I., three Serbs and two Roma. After three days, they were released by men dressed in black uniforms and they were told not to tell anybody that they had ever been taken prisoner, as they would be killed and their family taken hostages. He was released together with I.I..[89]

130. Based on the above, the Trial Panel found proven that the Defendant in his capacity as a member of the KLA in co-perpetration with other KLA members, illegally detained Witnesses K, L, M and N in the KLA camp in C. (north of Albania) during April, May and through mid-June of 1999, and illegally detained Witnesses L and N in a garage in Pr. on unknown days in June of 1999.

[83] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D333-D342 (357-366)
[84] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D345 (369)
[85] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D348 (372)
[86] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D351-354 (375-378)
[87] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D355-356 (379-380)
[88] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D365-356 (389-380)
[89] Record of the witness hearing dated 10/16 March 2010, Prosecution binder D, p. D365-371 (389-395)

COUNT 7, illegal detention

131. This Count was rejected pursuant to Article 363 Paragraph 1 Subparagraph 1.1 of the CPC because the SPRK Prosecutor during the Main Trial withdrew the count.

CHARGE II, Unauthorized Ownership, Control and Possession or Use of Weapons

132. The relevant details with regard to this charge are la laid down in the report on the arrest of the Defendant, dated 07 October 2015.[90]

133. The Defendant pleaded guilty to this charge. Therefore, no further evidence was administered.

V.7 Legal qualification of the facts

CHARGE 1

134. The Trial Panel has assessed whether the facts found proven amount to "War crimes against the civilian population" committed in co-perpetration provided for and punished by Article 142 read together with Article 22 of the CCSFRY.

135. Article 142 of the CCSFRY reads as follows.

> 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; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

[90] Prosecution Binder K, p. 225-239

136. Article 22 of the CCSFRY reads as follows:

> If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.

137. In order to qualify the acts found proven above under 'established facts' as war crime in co-perpetration under Article 142 read together with Article 22 of the CCSFRY, it has to be established that the Defendant XH.K. (a) jointly (b) committed one or more of the acts set forth by Article 142 and (c) by doing so violated one or more rules of international law (d) effective at the time of war, armed conflict or occupation. These respective elements will be assessed below.

(a) jointly

138. As was discussed above in § 87, the Trial Panel found that the jurisprudence of the ICTY can be useful in the interpretation of co-perpetration under Article 22 of the CCSFRY, but it cannot extend its application beyond the legal limits given by this Article, as this would be contrary to the principle of legality laid down in Article 33 of the Constitution of the Republic of Kosovo and Article 2 of the CCRK. The third type of JCE, the extended variant, exceeds the boundaries set by Article 22 of the CCSFRY. The same, however, does not apply for the second type of JCE, which – contrary to the third variant - requires a *dolus directus* of the participants in the common purpose[91], and can and will therefore serve as a guideline in the Trial Panel's interpretation of 'in some other way' mentioned in this Article.

139. According to the ICTY in its Limaj judgment, all three types of joint criminal enterprise require, as to the *actus reus*, a plurality of persons, the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime, and participation of the accused in the common design. As for the *mens rea*, in the second ('systemic') variant, embracing the so-called 'concentration camp' cases, the accused has knowledge of the nature of a system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the detainees in the camp. In such cases

[91] Lachezar Yanev, *Theories of Co-Perpetration in International Criminal Law*, 2016, p. 188

the requisite intent may also be inferred from proved knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp, as well as from the position of authority held by an accused in the camp.[92]

Actus reus

140. Above under 'established facts', the Court has established that there were camps in K. and C. where prisoners were kept. The prisoners were beaten on a regular basis by a number of KLA members, and interrogated on their alleged collaboration with the Serbs. On one occasion, they were tortured. The Court has further established that the Defendant XH.K. was involved in their transport to and from the camps and that he took part in their torture. Furthermore, there is evidence that he interrogated some of the prisoners.

141. The *actus reus* follows from the fact that the KLA in their camps in K. and C. held prisoners with the common criminal purpose of, by ill-treating them, obtaining information on their alleged collaboration with Serbs, in which purpose the Defendant participated.

Mens rea

Knowledge of the crimes being perpetrated in the camp

Counts 2, 4 and 6

142. As seen above, it has been legally established that the Defendant XH.K. had not only knowledge of, but also directly participated in acts of commission of illegal detention in the camps of K. and C. as well as in the garage in the outskirts of Pr. (Counts 2 and 6), and that he directly participated in acts of commission of torture (Count 4).

Count 3, inhumane conditions

143. On the basis of the testimony of Witnesses F, it can be established that the Defendant XH.K. had knowledge of the inhumane conditions in which the detainees were kept. Witness F testified that they had blankets which were taken away, and later XH.K. came to the door, they had a conversation about the blankets, and then blankets and mattresses were brought back again.

[92] ICTY Trial Chamber, *Limaj et alii* (IT-03-66-T), Judgment, 30 November 2005, Par. 511, with further references

Count 5, violation of bodily integrity or health

144. That the Defendant was aware of the beatings appears not only from his participation at the torture as found proven under Count 4, but also from the testimony of Witness F who confirmed his earlier statement that XH.K. came to the door of the room they were kept in in K., looked at him and said: "who hit you " (…).[93] In addition, Witness H testified that on the night of the torture the Defendant ordered one of the witnesses to beat him (witness H).

Continued participation in the functioning of the camp

145. Witness F recounted the several beatings perpetrated against him and the other roommates by the hands of several KLA soldiers, after which they asked each of them what their names were and where they worked in the past, as they were put there as collaborators. Also Witness H testified that in the room where he slept with the other roommates, they were beaten up by unknown people before, during and/or after the interrogations took place, and that he was interrogated three times by XH.K., together with S. D.. Witness C described the torture, and how they were being asked questions while maltreated.

146. According to these testimonies, during their stay in the K. KLA center, the detainees were alternatively beaten and interrogated. In the view of the Trial Panel, the beatings cannot be separated from the context in which they took place. The beatings clearly contributed to the interrogations and *vice versa*, in that both were aimed at getting a statement or confession out of the detainees. Especially Witness H pointed at the defendant XH.K. as carrying out the interrogations. Thus, the Defendant continued his participation in the functioning of the camp.

Position of authority held by the defendant

147. Above in §§ 76-77, the Court did not find proven that the Defendant was holding a high ranking position in the KLA Center in K. (Albania). From the testimonies of Witness F and Witness K, however, it can be deduced that the Defendant had a certain influence within the camp.

[93] Minutes of the main trial dated 18 April 2016, p. 9 of 51

148. As seen above in § 101, Witness F testified that they had blankets which were taken away, and later XH.K. came to the door, they had a conversation about the blankets, and some hours later somebody brought them back. Witness K stated that once in the K. camp, when he told XH.K. that he was bored, a teacher was brought into his cell. He also received the visit of a doctor.[94] When a female prisoner was brought into the room, Witness K asked XH.K. to intervene and she was taken out.[95]

149. Furthermore, from the testimony of Witness K, it appears that the Defendant XH.K. was in a position to influence the decision on his release. In fact, Witness K testified that on the day of his release, XH.K. came and told him that unless they would kill him (K.), he would release him. After he had been brought in front of the judge, who told him he was completely innocent (…), the same afternoon, he was released.[96]

150. The foregoing is sufficient to conclude that the Defendant XH.K. held a position of authority in the K. Camp.

Interim conclusion

151. Following the criteria found in the ICTY Limaj case in its interpretation of co-perpetration under Article 22 of the CCSFRY, the Court established that the Defendant XH.K., apart from his direct and active participation in the illegal detention in the KLA centers in K. and C. and torture of some of the detainees in K., had knowledge of the inhumane conditions they were kept in and the violations of their bodily integrity or health being committed in the K. camp, and continued to participate in the functioning of the camp, while holding a position of authority in it. The criteria of the *actus reus* equally being met, the Court established that Defendant committed the acts found proven under Count 2 to Count 6 'jointly', by participating directly in the act of commission or in some other way, within the meaning of Article 22 of the CCSFRY.

[94] Minutes of the Main Trial dated 24 May 2016, p. 23 of 41
[95] Minutes of the Main Trial dated 24 May 2016, p. 25 of 41
[96] Minutes of the Main Trial dated 24 May 2016, p. 30 of 41

(b) one or more of the acts set forth by Article 142

152. The acts of torture (Count 4), inhumane conditions ('inhuman treatment' in Article 142) (Count 3), violation of bodily integrity or health (Count 5) and illegal arrests and detention (Count 2 and 6), are all explicitly set forth by Article 142. All these acts were directed against civilians, as will be seen below in § 155.

(c) violated one or more rules of international law

153. The Indictment refers to Article 3 Common to the Geneva Conventions 1949 (hereinafter: 'Article 3 Common') and Articles 4 and 5 of the Additional Protocol II (hereinafter: 'AP2').

154. In the acts described above, the Trial Panel found the following rules relevant:

- from Article 3 Common: (1) Persons taking no active part in the hostilities (…) shall in all circumstances be treated humanely (…);

- from Article 4 of AP2 (Fundamental guarantees): Par. 1. All persons who do not take a direct part (…) in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person (…). They shall in all circumstances be treated humanely (…);

- from Article 5 of AP2 (Persons whose liberty has been restricted): Par. 1. under (b): [persons deprived of their liberty related to the armed conflict] shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; and Par. 2. under (e): their physical or mental health and integrity shall not be endangered by any unjustified act or omission.

155. All witnesses were civilians, deprived of their liberty in relation to the armed conflict (AP2 Art. 5), and there is no indication of any of the witnesses or injured parties having taken a direct (AP2 Art. 4) or active part (Art. 3 Common) in the hostilities. On the contrary,

witness C stated that she worked for witness B in a coffee bar[97]; witness D testified that he was not a member of KLA, nor any other force[98]; witness E testified that he was a musician and a simple worker[99]; Witness F testified that he was a forest guard before the war[100]; witness H testified that he was a police officer until two years before the war, he was dismissed from the service by the Serbian forces.[101]; Witness K testified he was a teacher until 1985. and after that, he was a clerk in the regional office, and also that from May until August 1998, he was the commander of the civil protection force in his village, B. and as such he was engaged in the evacuation of civil population on 7 July 1998, when they had an attack of Serbian forces; witness M testified that he worked as an inspector of state security before the war and was kicked out of work in 1990 and that he did not have a job after that[102]; and Witness N stated that he was an active member of the socialist party of Serbia.[103]

156. The acts of illegal detention, inhumane conditions (or: inhuman treatment), torture and violation of bodily integrity or health all amount to inhuman treatment (Art. 3 Common and AP2 Art. 4) and a breach of the physical or mental health and integrity (AP2 Art. 5) of the detainees.

157. The Trial Panel thus found a violation of one or more rules of international law.

(d) effective at the time of war, armed conflict or occupation

158. The former Yugoslavia, including the (then) province of Kosovo-Metochia, became a high contracting party to the Geneva Conventions on 15 December 1950 and to the Additional Protocols on 28 December 1978.

159. Article 3 Common reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (…).

[97] Record of the witness hearing dated 17 December 2009, Prosecution binder C2, p. C290 (180)
[98] Minutes of the Main Trial dated 13 April 2016, p. 7 of 51
[99] Minutes of the Main Trial dated 13 April 2016, p. 34 of 51
[100] Minutes of the Main Trial dated 18 April 2016, p. 4 of 51
[101] Minutes of the Main Trial dated 25 April 2016, p. 6 of 55
[102] Minutes of the Main Trial dated 25 May 2016, p. 4
[103] Record of the witness hearing dated 10/16 March 2010, p. Prosecution binder D, p. D333 (357)

(…)

160. Article 1 of the Additional Protocol II 1977 (hereinafter: 'AP2') reads:

> Material field of application
>
> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> (…)

161. Article 3 Common applies to conflicts "not of an international character". As already assessed by the District Court of Mitrovica in the G. Trial[104], to meet the definition of a "non-international armed conflict", a minimum threshold needs to be met. Whereas Article 3 Common merely requires that the armed conflict not be of "an international character" and occur in "the territory of one of the High Contracting Parties" (both conditions being satisfied in the instant case), a higher threshold applies under AP2. AP2 only applies to conflicts between the armed forces of a High Contracting Party and "dissident armed forces or other organized armed groups which, under responsible command exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations."

162. It is not disputed that the KLA and the Serbian forces were engaged in such an armed conflict. According to the Indictment, the alleged crimes were committed in the period between April and June 1999. The existence of an armed conflict between the Serbian forces and the KLA in the relevant period was confirmed in the Supreme Court Decision of 21 July 2005 in Latif Gashi *et alii.*[105] This decision also found that the organizational structure of the KLA satisfied the above-mentioned requirements under AP2.[106]

[104] District Court of Mitrovica, *S.G. et alii* (P 45/2010), Judgment, 29 July 2011, Par. 25 ff
[105] UNMIK Supreme Court, *Latif Gashi et alii* (AP-KZ 139/2004), Decision, 21 July 2005, p. 9-11
[106] UNMIK Supreme Court, *Latif Gashi et alii* (AP-KZ 139/2004), Decision, 21 July 2005, p. 10

163. Thus the conditions of Common Article 3 and AP2 were met and those provisions were engaged in the non-international armed conflict between the forces of the Serbian Government and the KLA in Kosovo. But where a foreign State extends military support to an armed group acting against the government, the conflict will become international in character. In this case, the NATO bombing of Serbian military targets began on 24 March 1999.

164. The Trial Panel fully concurs with the District Court of Mitrovica in the G. Trial[107] that the status or applicability of Article 3 Common and AP2 did not change with the commencement of the NATO bombing. According to the Commentary of the International Committee of the Red Cross (ICRC) on Article 3 Common: "[t]he value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say".[108]

165. This must equally apply to the provisions of AP2, not only because AP2, according to its Article 1 Paragraph 1, "develops and supplements Article 3 Common (…) without modifying its existing conditions of application", but also because it cannot be accepted that the degree of protection provided to civilians under the Geneva Conventions and their additional Protocols during the conflict between KLA and the Serbian forces changed to their detriment as a result of the NATO bombing.

Territorial and temporal application

166. The District Court of Mitrovica in the G. Trial found that the fact that the alleged events occurred wholly within the territory of Albania, which did not take part in the armed conflict, does not impact upon the applicability of Article 3 Common and AP2, although

[107] District Court of Mitrovica, *S.G. et alii* (P 45/2010), Judgment, 29 July 2011, Par. 28.
[108] See also ICTY, Appeals Chamber, *Dusko Tadic* (IT-94-1), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Par. 109

they both mention 'an armed conflict occurring (or: 'taking place') in the territory of a high contracting state'.[109] This conclusion was confirmed in appeal.[110]

167. The Mitrovica District Court, in its judgment, applied the criteria set out in the Tadic[111] and Blaskic[112] cases, to find that the camps (or centers) in K. and C. were under the control of one of the parties to the conflict, namely the KLA, and are therefore to be considered as 'territory' within the meaning of Article 3 Common and AP2. It further found a clear *nexus* between the KLA, the alleged victims of the detentions and the armed conflict within Kosovo. Therefore, it concluded that the alleged crimes fall within the orbit of both Article 3 Common and AP2.[113] The Trial Panel fully concurs with these findings, which equally apply in the current case.

168. Under Count 6 is included the illegal detention of Witnesses L (I.I.) and N in a garage in Pr. on unknown days in June 1999. From the Witness testimonies, it appears that this detention took place some days after 20 or 21 June 1999.

169. The Court emphasizes that, according to the Tadic case, international humanitarian law applies from the initiation of (…) armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.[114] And although on 20 June 1999 the Serb withdrawal was complete and KFOR was well established in Kosovo[115], in the current case the date of 20 September 1999 must be considered, as no earlier than that day, an agreement to demilitarize the KLA and transform it into a Kosovo protection Corps was reached[116].

[109] District Court of Mitrovica, *S.G. et alii* (P 45/2010), Judgment, 29 July 2011, Par. 37-42
[110] Court of Appeals, *S.G. et alii* (PAKR 966/2012), judgment, 11 September 2013, Par. 64
[111] ICTY, Appeals Chamber, *Dusko Tadic* (IT-94-1), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Par. 67
[112] ICTY, Trial Chamber, *Blaskic* (IT-95-14), Judgment, 3 March 2000, Par. 69-72
[113] District Court of Mitrovica, *S.G. et alii* (P 45/2010), Judgment, 29 July 2011, Par. 46
[114] ICTY, Appeals Chamber, *Dusko Tadic* (IT-94-1), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Par. 70
[115] http://www.nato.int/kosovo/history.htm
[116] Heinke Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* Cambridge University Press, 2001, p. 532

170. It follows from the foregoing that Article 3 Common and Articles 4 and 5 of their AP2 were effective at the time of the armed conflict and at all times and places relevant to the present case.

Conclusion

171. The panel has established that the Defendant XH.K. jointly committed one or more of the acts set forth by Article 142, and by doing so violated one or more rules of international law effective at the time of war, armed conflict or occupation. His acts, as found proven under 'established facts', therefore qualify as war crimes punished by Article 142 read together with Article 22 of the CCSFRY.

CHARGE II

172. The defendant pleaded guilty to this charge. The findings of the WCIU are laid down in their report on the arrest of the Defendant, dated 7 October 2015, which incorporates the seizure of the objects in question[117]. The unlawful ownership, control and possession of the weapons qualify under Article 374 of the CCRK, but, contrary to what is mentioned in the enacting clause, the use of the weapons cannot be proven.

VI CALCULATION OF PUNISHMENT

CHARGE I

Lex mitior

173. Pursuant to Article 3 Paragraph 2 of the CCRK, 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.

174. Article 22 of the CCSFRY reads as follows:

[117] Prosecution Binder K, p. 225-239

> If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.

175. The provision is repeated within the current CCRK in Article 31, where it states that:

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

176. 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; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

177. The original Article 142 of the CCSFRY was changed by the amendments dated 16 July 1993, in that the death penalty foreseen by the article was replaced by ‘imprisonment of 20 years’.

178. The current CCRK in Article 152 states in its first Paragraph:

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

179. Whereas Article 41 of the CCSFRY provides ‘general principles in fixing punishment’, mentioning in particular the degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his

personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender, the CCRK in its Article 74 contains more detailed guidelines on mitigation and aggravation of punishments. The Lawmaker however added that the Judge is not limited by the circumstances listed in this Article.

180. Since both Article 152 Paragraph 1 read together with Article 31 of the CCRK and Article 142 read together with 22 of the CCSFRY foresee a minimum penalty of five years of imprisonment, and it cannot be established which Code is more favorable to the Defendant when it comes to aggravating and mitigating circumstances, the CCSFRY applies.

181. In fixing the punishment, the Court took into consideration all relevant circumstances of the case.

182. In particular, the Court considered as aggravating that the Defendant has not shown at any stage of the proceedings to feel responsible for the maltreatment of the prisoners in the camps of K. and C., nor did he show any sign of remorse. The facts, which clearly qualify as an excessive abuse of power, undoubtedly caused both physical and psychological damage to the victims.

183. As a mitigating circumstance, the Court took into account that the Defendant did show some humanity to the prisoners by giving them back their blankets. This was, however, far from enough to alleviate their sufferings. The foregoing moved the Court to impose the punishments as mentioned in the enacting clause. The aggregate punishment of eight years of imprisonment corresponds to the seriousness of the crimes in the context they were committed in.

CHARGE II

184. The fine imposed on the Defendant for the unauthorized ownership, control and possession of weapons is in line with the seriousness of the criminal offences on the one hand and the limited income of the Defendant, his assets and his personal obligations on the other.

VII COST OF PROCEEDINGS

185. The Defendant XH.K., instead of cooperating with justice and appearing as a Defendant in the Trial against S.G. and other co-perpetrators, chose to remain at large. The current Trial could have been avoided if the Defendant would have been available in 2011. Therefore, the Court holds the Defendant responsible for the costs related to the Trial to the scheduled amount mentioned in the enacting clause. The Court finds no reasons to entirely or partially relieve the Defendant from the duty to reimburse these costs, nor did the Court take into account that the Defendant was acquitted for charge I count 1, as these costs could not be determined separately from the total costs.

VIII CONFISCATED ITEMS

186. During the search and arrest of the Defendant XH.K., the WCIU officers found and seized, among other items, a pistol M57, 7.62 cal, Ser. No. 19Z45Z, two magazines full, total 19 bullets, a black lock blade knife, a green lock blade knife, a red multi-tool knife and a pistol holster.[118] These items were temporary confiscated in the decision of the Pre-Trial Judge dated 12 October 2015 and shall be destroyed pursuant to Article 115 Paragraph 5 of the CPC.

IX PROPERTY CLAIM

187. No property claim was filed within these proceedings. The injured parties are instructed that they may pursue their property claim in civil litigation.

[118] Arrest notification report, Prosecution binder K, p. 228

Presiding Trial Judge
Katrien Gabriël Witteman

Legal Remedy: Pursuant to Article 380 of the CPC, an appeal against this judgment may be filed within 15 days from the day the copy of the Judgment has been served. The appeal should be addressed to the Court of Appeals through the Basic Court of Mitrovica.