Court of Appeals

Case no 648/16

Date: 22 June 2017

Basic Court of Mitrovica: P. no. 122/2014

The Court of Appeals, in the Panel composed of EULEX Judge Anna Adamska-Gallant acting as Presiding Judge, EULEX Judge Dariusz Sielicki acting as reporting judge, and Kosovo Court of Appeals Judge Hava Haliti acting as a panel member, assisted by Bekim Ahmeti, EULEX legal advisor acting in the capacity of a recording clerk,

in the criminal case against the Accused:

Xh K, father's name R, mother's name and maiden name S B, born on … , in L Village, Municipality of P, in detention on remand since 6 October 2015;

charged with the Indictment of the Special Prosecution Office of the Republic of Kosovo dated 9 November 2015 PPS number 08/09 of:

Charge I

War Crimes 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 Article 31 and 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of Common Article 3 to the Geneva Conventions of 1949 and of Article 4 and 5 of the 1977 Additional Protocol II consisting of following criminal actions:

Count 1:

Murder as War Crime against the Civilian Population:

in particular, that the Accused in his capacity as a member of the KLA holding a high ranking position in the KLA Center in K (A), 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 (n of A) on June 4th or 5th, 1999;

Count 2:

Illegal Detention as War Crime against the Civilian Population:

in particular, that the Accused 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 (n of A) during April, May and through mid-June of 1999.

Count 3:

Inhumane Conditions as War Crime against the Civilian Population:

in particular, that the Accused 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 (n of A) during April, May and through mid-June of 1999;

Count 4:

Torture as War Crime against the Civilian Population:

in particular, that the Accused 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 (n of A) on an unknown date in May 1999;

Count 5:

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

in particular, 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 A) during April, May and through mid-June of 1999.

Count 6:

Illegal Detention as War Crime against the Civilian Population

in particular, 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 A) during April, May and through mid-June of 1999, and
- illegally detained Witnesses L and N in a garage in P on unknown days in June of 1999;

Count 7:

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

that the accused 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 P in C (north of A) on an unknown date in May or June, 1999; and:

Charge II

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, consisting of the following criminal action:

that on the date of his arrest (6 October 2015) a 7.62 mm pistol M56 and three clasp knives were found in his vehicle;

the Accused having been acquitted by the Judgment of the Basic Court of Mitrovica P. No. 184/15 dated 8 August 2016 (hereinafter: the impugned judgement) of Charge I count 1 of the Indictment, i.e. of Murder as War Crime against the Civilian Population; and

the Accused having been found guilty and sentenced by the same Judgment for the following offences described in the indictment:

- **Illegal Detention as War Crime** against the Civilian Population described and classified in Charge I Count 2, to 5 years of imprisonment;

- **Inhumane Conditions as War Crime** against the Civilian Population described and classified in Charge I Count 3, to 6 years of imprisonment;
- **Torture as War Crime against the Civilian Population** described and classified in Charge I Count 4 to 7 years of imprisonment;
- **Violation of Bodily Integrity or Health as War Crime against the Civilian Population** described and classified in Charge I Count 5, to 6 years of imprisonment;
- **Illegal Detention as War Crime against the Civilian Population** described and classified in Charge I Count 6, to 6 years of imprisonment;
- **Unauthorized Ownership, Control and Possession or Use of Weapons** described and classified in Charge II for to a fine of euro 1.500 (one thousand five hundred)

while the count described and classified in the Charge I Count 7 of the indictment was rejected pursuant to Article 363 Paragraph 1 Subparagraph 1.1 of the CPC because the Prosecutor withdrew it;

the Accused having been sentenced pursuant to Article 80 of the CCRK to an aggregate punishment of 8 (eight)years of imprisonment and a fine of euro 1.500 (one thousand five hundred) which comprised all previously indicated individual punishments;

while with the same Judgement the following objects were confiscated and ordered to be destroyed pursuant to Article 115 Paragraph 5 of the CPC: 1 pistol M57 7.62 Caliber with serial number 19Z45Z, magazine Full-Total with 19 bullets, the pistol holster, 1 black lock-blade knife, 1 green lock-blade knife, and 1 red multi-tool knife; and

pursuant to Article 83 Paragraph 1 of the CCRK the time served by Xh K in detention as well as any period of deprivation of liberty in relation to the criminal offences since 06 October 2015 until 8 August 2016 was credited for the punishment of imprisonment;

seized of the appeals filed by:

- defence counsel for Xh K H M on 9 November 2016;
- Special Prosecutor of the Republic of Kosovo (SPRK) on 07 November 2016;

having considered the motion of the Appellate State Prosecutor of Kosovo filed 27 December 2016 ;

having deliberated on 17 May and 22 June 2017, and voted on 22 June 2017,

renders the following:

JUDGMENT

I. Pursuant to Article 385 Paragraph 1 subpar. 1.4. of the Criminal Procedure Code (CPC)1 the Judgement of the Basic Court of Mitrovica in the case number P.No.184/15, dated 8 August 2016 (hereinafter: the impugned judgement) is hereby modified in the following parts:

1.1. in relation to Count 3 of Charge I (**Inhumane Conditions**) which is hereby re-qualified as outrages upon personal dignity, in particular cruel, humiliating and degrading treatment of the persons indicated in this count, and therefore it is classified as a war crime against individual persons under Article 31 and Article 152 Paragraph 1 and Paragraph 2 Subparagraphs 2.1 and 2.2 of the CCRK and in violation of Article 4 Paragraph 2 (a) of the Additional Protocol II (AP II) to the Geneva Conventions of 1949, and for this crime pursuant to Article 31 and Article 152 Paragraph 1 of the CCRK and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and Article 38 Paragraph 1 of the Criminal Code of the CCSFRY in its wording as entered into force on 1 July 1977 that was retained in force by Paragraph 1.1(b) of the UNMIK Regulation 1999/24 of 12 December 1999, he is hereby sentenced to 5 (five) years of imprisonment;

1.2. in relation to Count 4 of Charge I (**Torture**) which is hereby classified as violence to life and persons indicated in this count, and therefore it is qualified as a war crime against individual persons under Article 31 and Article 152 Paragraph 1 and Paragraph 2 Subparagraphs 2.1 of the CCRK, and in violation of Article 4 Paragraph 2 (a) of the AP II to the said Conventions, and for this crime pursuant to Article 31 and Article 152 Paragraph 1 of the CCRK and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and Article 38 Paragraph 1 of the CCSFRY in its wording as entered into force on 1 July 1977 that was retained in force by Paragraph 1.1(b) of the UNMIK Regulation 1999/24 of 12 December 1999, he is hereby sentenced to 6 (six) years of imprisonment;

1 1 Law No. 04/L-082

1.3. in relation to Count 5 of Charge I (**Violation of bodily integrity and health**)which is hereby re-qualified as outrages upon personal dignity, in particular cruel, humiliating and degrading treatment of the persons indicated in this count, and therefore it is classified as a war crime against individual persons under Article 31 and Article 152 Paragraph 1 and Paragraph 2 Subparagraphs 2.1 and 2.2 of the CCRK and in violation of Article 4 Paragraph 2 (a) of the Additional Protocol II (AP II) to the said Conventions, and for this crime pursuant to Article 31 and Article 152 Paragraph 1 of the CCRK and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and Article 38 Paragraph 1 of the CCSFRY in its wording as entered into force on 1 July 1977 that was retained in force by Paragraph 1.1(b) of the UNMIK Regulation 1999/24 of 12 December 1999, he is hereby sentenced to 6 (six) years of imprisonment;

1.4. in relation to Charge II (Illegal Possession of weapon) Xh K is hereby found guilty of the following criminal offence:

that on 6 October 2015 acting without a Firearm Carrying Permit required under Article 18 the Law No. 05/L -022 on Weapons he possessed the pistol M57 cal. 7.62 mm bearing the serial number 19Z45Z, and the magazine Full-Total with 19 bullets which constituted a weapon of category B1 as defined by the said Law and therefore he committed the offence of Unauthorised ownership, control or possession of weapons penalized under Article 374 Paragraph 1 of the CCRK and pursuant to Article 374 Paragraph 1 of the CCRK he is hereby sentenced to the fine in the amount of euro 1200 (one thousand two hundred);

1.5. pursuant to Article 374 Paragraph 3 of the CCRK the pistol M57 cal. 7.62 mm marked with the serial number 19Z45Z, and the magazine Full-Total with 19 bullets are hereby confiscated and pursuant to Article 115 Paragraph 5 of the CPC shall be destroyed;

1.6. pursuant to Article 115 Paragraph 1 of the CPCRK the following objects temporarily sequestrated by the ruling of the pre-trial judge dated 12 October

2015: 1 black lock-blade knife, 1 green lock-blade knife, 1 holster, and 1 red multitool knife shall be returned to Xh K;

1.7. the actions described in Charge I Counts 2 and 6 (**Illegal detention**)as having been committed by Xh K are hereby classified as Coercion defined in Article 46 Paragraph 1 of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK) of 28 June 19772, and pursuant to the Article 363 Paragraph 1.3 of the CPC these charges are hereby rejected due to the expiration of the period of statutory limitation defined in Article 95 Paragraph 1 subparagraph 6 of the CCSFRY;

1.8. the aggregate punishment imposed against Xh K is modified, and pursuant to Article 48 Paragraph 1 subparagraphs 3 and 6 of the CCSFRY he is hereby sentenced to an aggregate punishment of 7 (seven) years of imprisonment and euro 1200 (one thousand two hundred);

1.9. pursuant to Article 50 Paragraphs 1 and 3 of the CCSFRY the time served by Xh K in detention, i.e. since 06 October 2015 until 22 June 2017 is included in the aggregate punishment of imprisonment;

1.10. pursuant to Article 453 Paragraph 1 and Article 456 Paragraph 1 of the CPCRK(new) , the Defendant shall reimburse the costs of criminal proceedings, at the scheduled amount of Euro 2.200 (two thousand two hundred);

II. In the remaining part, i.e. with relation to the Charge I Count 1 of the indictment, the impugned judgement is hereby affirmed.

[2] PS No. 011-25/77

Reasoning

I. Procedural background

1. On 8 August 2016 the Basic Court of Mitrovica rendered the judgement in the criminal case P. No. 184/15 against Xh K. The particulars of that judgment are presented above in the enacting clause of the present judgment.

2. The Prosecution and the Defence Counsel filed appeals against the first instance judgment. Both appeals were filed within the prescribed period of time.

3. The SPRK appeal:

   3.1 The SPRK challenged the impugned judgement on the following grounds:

   a) violation of the criminal law with relation to the murder of A B. The Prosecutor argued that the facts established by the first instance court indicate that the accused participated in the Joint Criminal Enterprise (JCE) and that he contributed to the killing of A B by acting with eventual intent, i.e. that he could easily predict the consequences of the actions of the other participants of the JCE that led to the death of the victim;
   b) improper determination of criminal sanctions for the particular crimes attributed to the accused since the punishment was grossly disproportionate to the gravity of the crimes. The Prosecutor pointed out that the Basic Court failed to analyse the mitigating and aggravating factors for the determination of punishment. The Prosecutor argued that the Court violated the principle of applicability of the most favourable law by mixing provisions originating from various pieces of legislation, namely by applying the Criminal Code of the Socialist Republic of Yugoslavia simultaneously with Article 80 of the Criminal Code of Kosovo.

   3.2 The Prosecutor requested that the punishment against the defendant be increased.

4. The Defence Counsel's appeal

   4.1 The Defense argued that evidence was collected in serious violation of the procedural rules. According to him these violations contributed to incomplete and erroneous determinations of facts. In particular the Counsel referred to:

   a) Unlawful identification of the accused

The defence pointed out that the manner in which the identification of the accused was performed violated the relevant procedural provision not only in the investigation phase but also during the court hearings.

b) Coaching of witnesses.

The counsel argued that the Prosecutor resorted to proofing or coaching witnesses by meeting with them before they testified in the trial without notification of the Court. Those actions violated the principle of equality of arms as they might have influenced witness' testimonies.

c) Disregarding of evidence in favour of the accused.

The Defense Counsel argued that no proper consideration was given to the testimonies of witnesses A P, B P, A H, N B.

d) Disregarding of evidence against the credibility of Witness G.

The court ignored the proof that the witness was diagnosed with a mental disease.

e) Violation of the rules applicable to the Notice of Corroboration in relation to the testimony of witness O K)

f) The use of inadmissible evidence of Witness K.

g) The use of evidence collected in the trial against S G.

4.2 The defence argued that the above violations of the procedural rules resulted in the following errors related to the facts established by the basic court:

a) The Erroneous finding that the accused had a high position in the KLA although this was denied by witnesses N B, R S, and A I.

b) The erroneous finding that the premises in K were in fact a KLA detention center.

4.3 Furthermore, the Defense Counsel pointed out that concrete and individual actions of the accused were not established so he cannot be held responsible for the actions of the others.

4.4 Moreover, the defence counsel challenged the decision on sanctions. According to him, the Court did not take into consideration the mitigating circumstances in favour of the Defendant - that his parents are ill and over 80, living in difficult economic and hard social conditions.

II. Findings of the Court of Appeals

1. In relation to the accuracy of factual determination

1.1 The Court of Appeals fully concurs with the first instance court's findings on the circumstances of the death of A B. The evidence presented at the trial did not indicate any relevant circumstances other than those established and presented by the trial panel. The Court of Appeals notes *ex officio* that S G was finally acquitted of the murder of A B. The Court of Appeals agrees with the analysis presented in the impugned judgment with regard to the Prosecutor's hypothesis of the murder being an outcome of a Joint Criminal Enterprise with the participation of Xh K acting with eventual intent (*dolus eventualis*). The detailed and extensive argumentation on this matter presented by the first instance court is for the Court of Appeals fully convincing.

1.2 After a detailed analysis of all challenges against the accuracy of the factual determination which were raised by the defence counsel, the Court of Appeals concludes that the findings of the first instance court fully correspond with the evidence administered during the main trial.

1.3 The assessment of each piece of evidence presented by the first instance court in the reasoning of the impugned judgement is in full conformity with the scope of discretion which the trial panel is entitled to. There are no elements that would contradict elementary logic or common sense experience. The reasoning contains a detailed explanation on the probative value attributed to the pieces of evidence that were used as the grounds for the factual determination.

1.4 The trial panel meticulously scrutinized all information stemming from the evidence. Therefore, the assumption presented by the defence counsel that some testimonies contradicted the factual finding does not allow for considering these findings as erroneous. In particular, the defence counsel pointed out that no proper consideration was given to the testimonies of witness A. P, B P, A H, N B. The Court of Appeals concludes that the assessment of the probative value of these testimonies falls within the scope of judicial discretion which is a prerogative of the trial panel. The defence counsel's referral to the findings related to the position held by the accused in the KLA do not correspond with the content of the reasoning of the judgement as the trial panel indicated that it was not proven that his position was a senior one.

1.5 In relation to irregularities in the identification of the Accused that the defence counsel pointed to, the Court Of Appeals is of the opinion that the identification of the Accused at the trial raises no doubts as to its credibility. Therefore, those irregularities had not resulted in an erroneous establishment of facts.

1.5.1 The witnesses who recognized the Accused had a long lasting opportunity to observe him at the critical time and their testimonies as to the recognition of the culprit corroborate each other.

1.6 With regard to the allegations concerning the Prosecutor's meetings with witnesses after the indictment was filed, the Court of Appeals notes that it has been widely discussed in the jurisprudence of international courts whether such a practice might have a prejudicial effect on the probative value of witness testimony.

1.6.1 Such a practice is often referred to as "witness proofing" or "witness familiarisation". Another term which appears in the jurisprudence is "witness coaching" and it denotes unethical leading of the witness.

1.6.2 Although the practice of witness proofing appears to be accepted by international tribunals it seems to be an established practice that the prosecution notifies the other parties and the court about the intent to do so. Moreover, the scope of preparing the witness for the testimony is defined in the way that risk of prejudice is limited[3]. The Prosecutor in the case obviously failed to observe the practice. However, the defence was aware of the proofing and had an opportunity to challenge the witnesses' credibility during the cross-examination.

1.6.3 The practice of meeting with a witness after the indictment is filed and before he appears in the court is not regulated by Kosovo law. Therefore, it cannot be considered as explicitly prohibited. It is an opinion of the Court of Appeals that there were no grounds presented for the assumption that the proofing of witnesses in this case actually resulted in prejudice.

1.7 The Court of Appeals disagrees with the defence counsel's argument that individual and specific actions of the Accused were not established. Although the first instance court

[3] See e.g Prosecutor v. L et al., Decision on Defence Motion on Prosecution Practice of 'Proofing'Witnesses, 10 December 2004 ICTY.

did not elaborate in its reasoning on the nature of co-perpetration in relation to criminal acts that XH.K was convicted of, the facts established by this court support the conclusion that XH.K. was fully aware of the actions of the other persons who were actually torturing the victims and keeping them in inhuman conditions. Each individual action taken by individual persons including the Accused was done in the presence of other perpetrators. Each perpetrator took advantage of the actions performed by the others as they deprived the victim of the will to resist. Each individual action taken by an individual culprit coaxed the others to do the same. Therefore the actions performed by the Accused at the crime scene constituted a significant support for the others and must be considered as a substantial contribution to the commission of the crimes at hand. It meets the definition of co-perpetration given in both pieces of legislation that the Court of Appeals considered while determining the legal classification of the crimes that were attributed to the Accused, namely Article 23 of PCCK and Article 31 of the CCRK:

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

2. In relation to violation of the criminal law, the Court of Appeals addressed *ex officio* the following matters:

2.1 Classification of the crimes attributed to the Accused as war crimes against individual civilians.

2.1.1 The first instance court erroneously classified the crimes attributed to the accused that were presented in Charge I as war crimes against a civilian population and not as war crimes against individual civilians.

2.1.2 The court did not explain why the group consisting of few victims is to be considered as "civilian population" and not as "individual civilians" only.

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

2.1.4 The recital of acts to be prohibited was complemented by Article 4 Paragraph 2 of the Additional Protocol II.

2.1.5 The Federal People's Republic of Yugoslavia ratified the Geneva Convention of August 1949, that introduced common Article 3, on 15 September 1950.4 The Additional Protocol II to the four Geneva conventions was ratified on 28 December 1978 by the state under its new name, i.e. as the Socialist Federal Republic of Yugoslavia.[5]

2.1.6 The protection of individual civilians during the internal armed conflict in the domestic law that was in force in Yugoslavia at the time of the war in Kosovo, and subsequently in Kosovo until the time of sentencing in this case, underwent a significant evolution.

2.1.7 Initially, Article 142 of the CCSFRY, in its wording as introduced on 1 July 1977, criminalized as war crimes only those acts that were directed against a civilian population. Other criminal acts that were directed against individual civilians were penalized as ordinary crimes.

2.1.8 The amendment of Article 142 of the CCSFRY that entered into force on 30 August 1990 widened the scope of criminalization of acts against civilians. Besides numerous crimes against a civilian population it also criminalized as a war crime an attack against individual civilians or persons unable to fight. However only attacks that resulted in the death, grave bodily injuries or serious damaging of people's health were defined as war crimes.[6]

2.1.9 As a general rule introduced by the Regulation of 12 December 1999,[7] issued by the United Nations Interim Administration Mission, that had retroactive effect from 10 June 1999, the law that entered into force in Kosovo after 22 March 1989 and before 10 June 1999 was not applicable. However, the war crimes against individual persons were not subject matter of any former provisions. Therefore, according to Paragraph 1.2 of the Regulation, the court could exceptionally apply relevant provisions that were introduced after 22 March 1989 as long as they were not discriminatory for Kosovo.

2.1.10 Nevertheless, even the amended Article 142 of the CCSFRY in its wording introduced on 30 August 1990 did not criminalize the acts which did not cause grave bodily injuries or

[4] Službeni vjesnik Predizijuma Narodne skupštine FNRJ broj 6/1950. od 15. rujna 1950.

5 Službeni list SFRJ - Međunarodni ugovori 16/1978. od 18. prosinca 1978.

6 13 Sluzbeni List SFRJ 38/90.

7 14UNMIK/REG/1999/24 of of 12 December 1999.

serious damage to the victims' health. It must be stressed that no findings were made by the first instance court with regard to such results of the actions of XH.K.

2.1.11 Moreover, because of the principle of subjective identity of the judgement in relation to the indictment the crimes that were attributed to the accused in the judgement could not consist of material elements that were not present in the description of counts given in the indictment. For these reasons the Court of Appeals could not attribute any concrete bodily injures to the acts the accused was convicted of.

2.1.12 Criminalization of war crimes against individuals was introduced into Kosovo's domestic legal order only after the war in Kosovo was over.

2.1.13 The Constitution of the Republic of Kosovo that entered into force on 15 June 2008 recognizes a substantial exception to the principle of legality which stipulates that no one should be punished for any act or omission which did not constitute a criminal offence under the law in force at the time when it was committed.

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

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

2.1.15 This exception to the principle of legality stays in conformity with Article 7 Paragraphs 1 and 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:[8]

> *"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or*

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

international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

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

2.1.16 As a consequence of the exception to the principle of non-retroactivity of substantive criminal law not only the CCSFRY that was in force at the time of the commission but also subsequent pieces of legislation, i.e. both the Provisional Criminal Code of Kosovo (PCCK)9 and the CCRK, should be analyzed for the legal classification of the relevant crimes.

2.1.17 Article 120 of the Provisional Criminal Code of Kosovo (PCCK) and of the CCK provided that:

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

2.1.18. It is of essential importance for the case at hand that Article 120 Paragraph 2 of the Code defined only some of the acts indicated in Article 3 of the Geneva Conventions of 1949 as constituting a war crime against individual civilians:

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

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1. [9] Provisional Criminal Code of Kosovo (PCCK) adopted by UNMIK. The code entered into force on 6 April 2004. According to the Law No. 03/L-002 on supplementation and amendment of the Provisional Criminal Code of Kosovo adopted by the Assembly of the Republic of Kosovo on 6 November 2008, the code was renamed as Criminal Code of Kosovo (CCK) without any changes to the wording of Article 120. Protected persons were defined not only as civilians but as persons not taking parts in hostilities.

down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

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

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

3) Taking of hostages;"

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

According to Article 152 of the CKRK:

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

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

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

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

2.3. taking of hostages;

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

2.1.20. The Court of Appeals assessed that the actions described in Charge I count 3- detaining the victims in inhuman conditions, and in Charge I count 4 –torturing the victims, correspond with the characteristics of war crimes against individuals defined in Article 120 Paragraph 2 Subparagraphs 1 and 2 of the PCCK, and at the same time in Article 152 Paragraph 2 Subparagraph 2.2 of the CCRK.

2.1.21. In order to asses properly the criminal content and gravity of the actions attributed to the accused the Court of Appeals concluded that:

- detaining the victims in inhuman conditions reached the scale of outrages upon their personal dignity and constituted humiliating and degrading treatment (Count 3 of Charge I);
- torturing the victims constituted violence to life and persons (Count 4 of Charge I);
- violation of bodily integrity and health amounted to outrages upon personal dignity, in particular cruel, humiliating and degrading treatment (Count 5 of Charge I)

2.1.22. For this reason the Court of Appeals corrected the description of the crimes attributed to the Accused in order to indicate adequately all elements of these crimes.

2.1.23. In relation to inhuman treatment of the victims, the Court of Appeals rejected the argumentation that all refugees from Kosovo suffered from primitive living conditions. Restrictions on access to drinking water and sanitation that the detainees were exposed to cannot be justified by the overall situation in K. Those restrictions could obviously be avoided and for this reason they must be perceived as repressions.

2.1.24. Under both of the codes at hand (CCK and CCRK) the actions committed by XH. K. were to be classified as separate crimes in real concurrence as his actions comprised various *modus operandi*.

2.1.25. While classifying the crimes at hand as war crimes the Court of Appeals took into consideration the *nexus* between the armed conflict in Kosovo and the situation in places of detention in K.

2.1.25.1. The existence of the armed conflict in Kosovo at the critical time is a notorious fact. K is located in the territory of A that was not a war theatre at that time.

2.1.25.2. The Court of Appeals concluded that the actions that took place in K, were explicitly linked to the armed conflict going on in Kosovo. All the perpetrators were members of an armed group that was well structured and which effectively controlled the place where the persons displaced from Kosovo stayed or were detained. There was no control by any governmental agencies or state-run law enforcement. Therefore, civilians were deprived of any form of legal protection against arbitrary and offensive acts committed by KLA soldiers. The culprits including Xh.K. enjoyed temporary impunity;

2.1.25.3. The Court of Appeals followed the concept presented by the ICTY in the Delalic case that a war crime can be perpetrated even if "substantial clashes were not occurring in the region at the time and place" where the crimes were allegedly committed.[i]

2.2. Classification of the actions described in counts 2 and 6 of Charge I of the indictment (unlawful detention) as a crime of coercion under Article 46 Paragraph 1 of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK) of 28 June 1977

2.2.1 Unlawful detention of individual civilians is not penalized as a War crime against individual persons under any of the applicable statutes. Therefore, it was necessary to analyse the possibility of the classification of the facts that constituted the counts as any other offence.

2.2.2 The CCSFRY did not define any crime that would consist of unlawful detention of a person. Such a criminal act was penalized by criminal codes of the republics or autonomous provinces.

2.2.3 In relation to the crimes committed outside the territory of Yugoslavia, Article 112 of CCSFRY provided as follows:

> *Criminal code of the republic or autonomous province in which an offender is being tried applies to criminal acts defined in the code of the republic or autonomous province in cases when the acts have been committed outside the territory of the SFRY […]*

2.2.4 Unlawful detention of a person meets the characteristics of the offence of Coercion defined in Article 46 Paragraph 1 of the Criminal Law of the Socialist Autonomous Province of Kosovo of 28 June 1977 (CLSAPK):10

> *Whoever, by means of force or a serious threat, makes another person do or not do something or makes him suffer shall be fined or punished with up to one year of imprisonment.*

2.2.5 Pursuant to Article 95 Paragraph 1 subparagraph 6 of the CCSFRY, criminal prosecution of coercion is barred after the lapse of two years from its commission.

3. **Erroneous description of the crime of unlawful possession of weapons**

3.1 The first instance court found the Accused guilty of Unauthorized Ownership, Control and Possession or Use of Weapons. The specific crime attributed to the accused was described in the following way:

> *[…]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 P (Kosovo) on 06 October 2015.*

3.1.1 This action was classified by the first instance court as 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.

3.1.2 In the reasoning of the judgement the first instance court admitted that actually the use of weapons could not be proven.

3.1.3 The Court of Appeals found the description of the crime related to the possession of weapons that was attributed to the Accused as erroneous for the following reasons:

- the 3 clasp knives cannot be an object of the crime of Unauthorized Ownership, Control and Possession or Use of Weapons in violation of Article 374 Paragraph 1 of the CCRK;
- the description does not consist of a quotation of the applicable law that was violated by the Accused;

[10] PS No. 011-25/77

- the description does not reflect the intent essential for the guilt.

3.2 Classification of the possession of objects other than firearms as a crime of unlawful possession of weapon

3.2.1 According to Article 374 Paragraph 1 the act of ownership, control or possession of weapons may constitute a crime only if it is performed in violation of the applicable law.

3.2.2 The first instance court considered 3 clasp knives that were seized from the Accused's vehicle on the day of his arrest as weapons falling into the scope of definition of Article 374 Paragraph 1 CCRK.

3.2.3 The general definition of a weapon that is given in Article 120 Paragraph 38 of the CCRK allows to consider a knife as a cold weapon under the condition that its "main purpose is carrying out a physical attack towards physical integrity of people or property." It is obvious that not all knives fit this definition. The first instance court did not examine the features of the said knives.

3.2.4 Even without further examination of the features of the knives at hand, their possession in the place other than sports facilities and areas does not constitute a violation of the law applicable in Kosovo.

3.2.5 In the Kosovo law there are strict regulations related to firearms. At the same time there are no restrictions on possession of knives other that those stemming from Article 71 of the Law on sports[11] which prohibits holding and using of any weapon in sports facilities and areas. This prohibition is not relevant to the circumstances in this case.

3.2.6 For this reason the Court of Appeals corrected the description of crime of unauthorised possession of weapons attributed to the Accused by eliminating the items which cannot be an object of this crime.

3.3 Quotation of the applicable law that was violated by the Accused.

3.3.1 Since the description of the crime that the culprit is convicted for must consist of all statutory elements of crime given in its definition it was necessary to quote the provisions that are applicable to possession of weapons and that were actually violated.

[11] Law on sport 2003/24

3.3.2 For this reason the Court of Appeals indicated in the enacting clause that the pistol M57 cal. 7.62 mm bearing the serial number 19Z45Z, and the magazine Full-Total with 19 bullets constituted a weapon of category B1 as defined by the Law No. 05/L -022 on Weapons and that the Accused was in possession of this weapon without a Firearm Carrying Permit required under Article 18.

3.4 The indication of *actus reus* of possession of weapon in the enacting clause

3.4.1 As a general rule the description of the crime attributed to the culprit in the judgement of conviction must reflect the action or conduct which is a constituent element of a crime (*actus reus*).

3.4.2 The indication that weapons were found in the vehicle belonging to the Accused presented in the wording used by the first instance court leaves space for doubts as to the culprit's awareness of the fact that weapons were present in the car. This indication consisted of no *actus reus.*

3.4.3 Since the Accused pleaded guilty to the crime of Unauthorised ownership, possession or control or weapons, the description of the crime was amended

III. Sentencing by the Court of Appeals

1. As a consequence of the correction of the legal classification of crimes attributed to the Accused the Court of Appeals rendered the following sentence:

1.1. **Sentencing for War crimes by the Court of Appeals**

1.1.1. It was a duty of the Court of Appeals to impose the punishment in conformity with the amended classification of crimes given above.

1.1.2. Determination of law applicable for sentencing (*lex mitior*)

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

1.1.2.2. According to Article 4 of the CCSFRY:

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

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

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

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

1.1.2.5. Under both codes that provided for penalization of war crimes against individual civilians the only type of punishment is imprisonment.

1.1.2.6. In particular, the sanction prescribed by Article 120 Paragraph 1 of the PCCK was imprisonment of at least five to twenty years or long time imprisonment. According to Article 37 Paragraphs 1 and 2 of the PCCK the punishment of long-term imprisonment could be imposed for the most serious criminal offences committed intentionally either under particularly aggravating circumstances or causing especially grave consequences. This punishment could last for a term of twenty-one to forty years.

1.1.2.7. The sanction provided by Article 152 Paragraph1 is imprisonment of not less than five (5) years or life-long imprisonment. Pursuant to Article 45 Paragraph 1 imprisonment can last up to 25 years. According to Article 44 Paragraph 1 the punishment of life-long imprisonment could be imposed for the most serious criminal offenses committed under especially aggravating circumstances or criminal offenses that have caused severe consequences.

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

1.1.2.9. Following the rule of Article 33 Paragraph 1 of the Constitution of Kosovo the war crimes attributed to Xh. K. should be punished although they were not criminalized by the domestic law at the time of commission and there was no penalty prescribed for them at that time. Pursuant to the Article 33 Paragraph 2 of the Constitution:

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

1.1.2.10. The Court of Appeals is of the opinion that the phrase "the penalty provided by law" refers to the type of punishment and not to the penalty prescribed by law at the time of commission.

1.1.2.11. Following the general rule introduced by the UNMIK Regulation of 12 December 1999 (*op.cit*).[12] issued by the United Nations Interim Administration Mission, the law that is to be applied in relation to criminal sanctions for the crimes at hand is the law that was in force in Kosovo before 22 March 1989. According to Paragraph 1.2 of the Regulation, the court could exceptionally apply relevant provisions that were introduced after 22 March 1989 if they were not discriminatory for Kosovo and only if the matter was not covered by the law that was in force before that date. However, the matter of the minimum or maximum length of imprisonment was already regulated in Article 38 Paragraph 1 of the CCSFRY in its wording as adopted on 1 July 1977. The initial wording of this provision stipulated that the punishment of imprisonment may not be shorter than 15 days nor longer than 15 years. It must be noted that the same law provided for death penalty which was abolished by Paragraph 1.5 of the said UNMIK Regulation.

1.1.2.12. While determining the punishments for the War crimes the Court of Appeals kept in mind the goals listed in Article 33 of the CCSFRY. The priority was given to the need to increase morality and strengthen the obligation to respect the law. The Court was also governed by the principle of general prevention having in mind that the judgment should discourage other people from committing criminal offenses. The Court followed its obligation to evaluate all mitigating and aggravating factors, as required by Article 41 of the CCSFRY.

12 14UNMIK/REG/1999/24 of of 12 December 1999.

1.1.2.13. As aggravating factors in relation to the War crimes at hand the Court of Appeals considered the fact that the Accused has not shown any sign of remorse for the maltreatment of the prisoners. At the same time the Court kept in mind the significant level of suffering that the victims were exposed to.

1.1.2.14. As a mitigating circumstance, the Court took into account that the Accused showed some humanity to the prisoners by giving them back their blankets.

1.2. **Rejection of the count of unlawful detention**

1.2.1. Due to the classification of counts 2 and 6 of Charge I as coercion under Article 46 Paragraph 1 of the CLSAPK, and pursuant to the Article 363 Paragraph 1.3 of the CPC, these counts were rejected because of the expiration of the period of statutory limitation defined in Article 95 Paragraph 1 subparagraph 6 of the CCSFRY.

1.3. **Sentencing for Unauthorized possession of a weapon**

1.3.1. The Court of Appeals determined the punishment for the unauthorized ownership, control and possession of weapons with consideration given to the general rules for calculation of punishment given in the Article 73 of the CCRK (new code) seriousness of the criminal offences on the one hand, and the limited income of the Accused, and the fact that he is not to be considered as an affluent person on the other.

1.4. **Calculation of the aggregate punishment**

1.4.1. The law does not explicitly regulate the situation when the individual punishments for crimes classified in various pieces of legislation comprising the general rules for calculation of punishment that were in force at different time. Therefore, the general rule of applicability of *lex mitior* is to be followed.

1.4.2. Both the CCSFRY and CCRK consist of provisions on aggregated punishment for crimes that were committed in real concurrence. It appears that the provisions of CCSFRY are more lenient for the Accused:

1.4.2.1. according to Article 48 Paragraph 3 CCSFRY the aggregated punishment may not be as high as the total of all individual punishments, and may not exceed a period of 15 years' imprisonment;

1.4.2.2. according to Article 80 Paragraph 2 sub paragraph 2.2. CCRK the aggregate punishment must be higher than each individual punishment but it may not exceed a period of twenty five (25) years;

1.4.3. When imposing the aggregate sentence as prescribed in Article 48 Paragraph 2 subparagraph 2.3 of the CCSFRY the Court took into consideration that the particular war crimes were strictly linked to each other in the sense of time and place which justified a partial absorption of individual sentences rather than their accumulation.

1.5. **Decision on confiscation**

1.5.1. Pursuant to Article 374 Paragraph 3 of the CCRK it was the duty of the Court of Appeals to confiscate the pistol M57 cal. 7.62 mm marked with the serial number 19Z45Z, and the magazine Full-Total with 19 bullets.\

1.6. **Decision on return of items that were not confiscated**

1.7. Pursuant to Article 115 Paragraph 1 of the CPCRK it was mandatory to return to the accused the objects that were seized from him and temporarily sequestrated but were not confiscated by the judgement of the Court of Appeals. These were black lock-blade knife, green lock-blade knife, holster, and red multitool knife.

1.8. **The Costs**

1.8.1. The Court of Appeals based its decision related to the costs of criminal proceedings on legal provisions quoted in the enacting clause. The total cost of the proceedings has been determined with consideration given to the gravity of the crimes attributed to the accused and the number of investigatory and evidentiary actions that were taken in order to prove these charges

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Anna Adamska-Gallant EULEX Judge

Panel Members

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Dariusz Sielicki, EULEX Judge

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Hava Haliti , Kosovo CoA Judge

Recording Officer

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Bekim Ahmeti EULEX Legal Advisor

KOSOVO COURT OF APPEALS

[i] ICTY: Delalic´ et al., IT-96-21- T, Judgement, Trial Chamber, 16 Nov 2008