SUPREME COURT OF KOSOVO

Case number:	**PML.KZZ no. 322/2016** Court of Appeals case no. PAKR 456/15 Basic Court of Mitrovica case no. P 58/14
Date:	**19 July 2017**

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Elka Filcheva-Ermenkova (presiding and reporting), EULEX Judge Arnout Louter and Supreme Court Judge Nesrin Lushta, assisted by EULEX Legal Officer Timo Torkko as the recording officer, in the criminal case against the defendants:

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

charged under Indictment PPS 88/11 dated 8 November 2013 (hereinafter "Indictment") with two counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY No. 44 of 8 October 1976) (hereinafter "CCSFRY") (currently criminalized under Articles 31 and 152 of the Criminal Code of Kosovo (hereinafter "CCK") and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment;

acting upon the requests for protection of legality filed on:

- 3 November 2016 by defence counsel A.Q. on behalf of I.T.,
- 16 November 2016 by defence counsel R.M. on behalf of S.D.,
- 17 November 2016 by defence counsel B.M. on behalf of N.D.,
- 22 November 2016 by defence counsel K.O. on behalf of D.D.,
- 30 November 2016 by defence counsel V.B. on behalf of F.D.,
- 12 December 2016 by defence counsel S.I. on behalf of B.D.,
- 12 December 2016 by defence counsel B.T. on behalf of Z.D.,
- 12 December 2016 by defence counsel I.A. on behalf of A.D.,
- 23 December 2016 jointly by F.D. and N.D.,
- 28 December 2016 by defence counsel M.S. on behalf of J.D., and
- 23 January 2017 by defence counsel G.D.G.-S. on behalf of S.S.,

all filed against the judgment of the Basic Court of Mitrovica dated 27 May 2015 in case no. P 58/14 and the judgment of the Court of Appeals dated 14 September 2016 in case no. PAKR 456/15;

having considered the responses filed by the Chief State Prosecutor;

having considered the additional requests made by defence counsel G.D.G.-S. on behalf of S.S.;

having deliberated and voted on 19 July 2017;

pursuant to Articles 418 and 432—441 of the Criminal Procedure Code (hereafter: the CPC);

renders the following:

JUDGMENT

The requests for protection of legality filed by:

- **defence counsel A.Q. on behalf of defendant I.T.,**
- **defence counsel R.M. on behalf of defendant S.D.,**
- **defence counsel B.M. on behalf of defendant N.D.,**
- **defence counsel K.O. on behalf of defendant D.D.,**
- **defence counsel V.B. on behalf of defendant F.D.,**
- **defence counsel S.I. on behalf of defendant B.D.,**
- **defence counsel B.T. on behalf of defendant Z.D.,**
- **defence counsel I.A. on behalf of defendant A.D.,**
- **F.D. and N.D. jointly,**
- **defence counsel M.S. on behalf of defendant J.D. and**
- **defence counsel G.D.G.-S. on behalf of defendant S.S.,**

all against the judgment of the Basic Court of Mitrovica dated 27 May 2015 in case no. P 58/14 and the judgment of the Court of Appeals dated 14 September 2016 in case no. PAKR 456/15, are hereby rejected as ungrounded.

PROCEDURAL BACKGROUND

1. On 8 November 2013, Indictment no. PPS 88/11 was filed against the abovementioned defendants and other individuals at the Basic Court of Mitrovica. The charges against the other individuals were severed with a ruling of the presiding judge dated 14 April 2014.

2. The main trial commenced on 27 June 2014 and was concluded on 25 May 2015. It was held before a panel composed of EULEX Judge D.S. as the presiding judge, EULEX Judge V.S. and EULEX Judge A.A.-G..

3. On 27 May 2015, the Basic Court announced (briefly put) the following enacting clause of its judgment:

- Count 1: A.D., B.D., D.D., S.D., F.D., J.D., N.D., Z.D., S.S. and I.T. were found guilty of *war crime* classified pursuant to article 33 (1) of the Constitution of the Republic of Kosovo (hereafter: the Constitution) under articles 31 and 152 (1), (2.1) and (2.2) of the Criminal Code of the Republic of Kosovo (hereafter: CCK) and in violation of article 4, paragraph 2 (a) of the additional protocol II to the four Geneva Conventions of 12 August 1949.
- Count 2: J.D., Z.D., S.S. and I.T. were found guilty of *war crime in continuation* classified pursuant to article 33 (1) of the Constitution under articles 81 (1), 31, 152 (1), (2.1) and (2.2) CCK and in violation of article 4, paragraph 2 (a) of the additional protocol II to the four Geneva Conventions of 12 August 1949.
- The following terms of imprisonment were imposed on the defendants: A.D. – three (3) years; B.D. – three (3) years; D.D. – three (3) years; S.D. – three (3) years; F.D. – three (3) years; J.D. – seven (7) years; N.D. – three (3) years; Z.D. – seven (7) years; S.S. – eight (8) years; and I.T. – seven (7) years.

4. The judgment of the Basic Court dated 27 May 2015 was appealed by all of the defendants through their defence counsels and by the SPRK Prosecutor.

5. On 14 September 2016, the Court of Appeals rendered its judgment. The appeals filed by the SPRK Prosecutor and by the defence counsels were rejected as unfounded. Pursuant to article 394(1.4) CPC, the judgment of the Basic Court was *ex officio* modified in its enacting clause as follows (briefly put): The verdicts of guilt were affirmed. With regards to S.S., I.T., Z.D. and J.D., the criminal offences in counts 1 and 2 were considered parts of a criminal offence in continuation. The imposed terms of imprisonment against them were consequently modified as follows: S.S. – seven (7) years; I.T. – six (6) years and six (6) months; Z.D. – six (6) years; and J.D. – six (6) years.

6. Requests for protection of legality were filed in this case as described in the introductory part of this judgment. These requests have been served to the Office of the Chief State Prosecutor, who has thereafter filed responses to these requests on 27 December 2016, 5 January 2017, 20 January 2017 and on 17 March 2017.

7. By decision dated 27 April 2017, Kosovo Judicial Council (hereafter: the KJC) decided that the case before the Supreme Court shall be adjudicated in a panel composed of a majority of EULEX judges and presided by a EULEX judge.

8. On 15 May 2017 defence counsel G.D.G.-S. on behalf of defendant S.S. filed a request for evidence to be received from EULEX staff member. The request has been served to the Office of the Chief State Prosecutor, who filed a response on 31 May 2017.

9. On 19 July 2017 defence counsel G.D.G.-S. filed on behalf of defendant S.S. with the Supreme Court another request for evidence to be received from the EULEX staff member.

10. On 19 July 2017, the Supreme Court deliberated on the requests.

SUBMISSIONS OF PARTIES

Defence Counsel G.D.G.-S. on behalf of S.S.

11. Proposal: On behalf of S.S., defence counsel G.D.G.-S. moves the Supreme Court to acquit S.S. of the charges, to dismiss the charges or to annul the judgments and return the case to the Basic Court for re-trial. He requests the Supreme Court to hold a hearing in order to investigate the allegations related to the assignment of EULEX Judge A.A.-G. to the Basic Court Panel and to provide him with a copy of a report allegedly filed by the President of EULEX Judges. In a separate request addressed to the Supreme Court and EULEX, the defence counsel proposes that a EULEX staff member shall be heard as a witness during the abovementioned hearing. A letter from a EULEX staff member dated 4 August 2015, as well as several emails from anonymous EULEX employees in October and November 2016 are attached to the requests. The alleged violations are summarized in the following sections, as follows:

The assignment of EULEX Judge A.A.-G. to the Basic Court Panel:

12. On 24 June 2015, after the judgment of the Basic Court was announced, the television broadcaster Koha Vision reported the following in relation to the composition of the Basic Court Panel: On 29 May 2014, the Presiding Judge D.S. made a phone call to the then Acting President of EULEX Judges G.S.. After this phone call, he sent a request via

email through which he requested a judge from the EULEX Mobile Team to be assigned to the case. Thereafter, an order to assign EULEX Judge A.A-G. to the case was drafted. She was at the time working for the EULEX Mobile Team. According to the applicable roster, she was not the next EULEX judge in line to be assigned to a case [redacted]

13. The assignment of A.A.-G. to the panel of this case was made in violation of the procedures, policies and rules for the selection of judicial panels. [redacted] s. The parties were however never informed of the abovementioned procedural irregularities and therefore raised no objections on this matter when asked at the outset of the main trial. The composition of the Basic Court Panel was in substantial violation of the provisions of criminal procedure pursuant to article 384 (1.1) and (1.2) CPC read in conjunction with article 39 (1.5) and (3) CPC. Pursuant to article 384 (2.2) CPC, this violated the rights of the defence and influenced or might have influenced the rendering of a lawful and fair judgment.

14. After being informed about the reported irregularities mentioned above, the defence initially addressed the EULEX authorities to investigate the matter but was later informed by a EULEX staff member that the request should be addressed to the Court of Appeals. Accordingly, the defence raised the matter in the appeal against the judgment of the Basic Court and attached the letter of EULEX staff member thereto. However, the Court of Appeals did not investigate these allegations but instead erroneously found that there was no roster for assignment of EULEX judges in 2013 and that there were no grounds to conclude that the panel assignment violated the rules. These conclusions are incorrect and not supported by any evidence.

15. After the judgment of the Court of Appeals was rendered on 14 September 2016, the defence received a number of emails from anonymous EULEX employees in October and November 2016. These emails contain the following information: During the appellate procedure, the Presiding EULEX Judge of the Court of Appeals Panel mentioned a

conversation he had had with a EULEX staff member [redacted] The President was unhappy about the situation and had filed a report with EULEX in which he raised his concerns regarding to the impartiality of the panel. The Presiding Judge of the Court of Appeals Panel said he hoped the defence would not request the EULEX staff member to make a statement before the cou[redacted] The Presiding Judge of the Court of Appeals did not reveal any of this information to the parties of the proceedings.

16. Attached to the abovementioned emails were copies of the emails sent to and from the EULEX staff member on 29 May 2014. From these emails it is evident that the email through which assignment of a judge from the Mobile Team was requested was sent only five minutes before the Acting President of EULEX Judges requested another employee to draft a decision assigning EULEX Judge A.A.-G. to this case. This was not enough time to check the roster for the judges, especially considering that the Mobile Unit had a different roster for which a different judge was responsible. According to the anonymous EULEX employee, the Presiding Judge of the Court of Appeals Panel had spoken with the judge who was responsible for this roster. This judge had not received any information with regards to the assignment of EULEX Judge A.A.-G. to the case.

17. The defence repeats its request that the Supreme Court will hold a hearing in order to investigate whether the Basic Court Panel was improperly constituted as reported in the public press. The EULEX staff member should be heard as a witness during this hearing. Although there was an offer for the defence to meet the EULEX staff member, that meeting was never arranged. The defence has in addition not been provided with a copy of the report allegedly filed by the EULEX staff member. This report, if it exists, is critical for the defendant's rights.

Verbatim Record:

18. Prior to the start of the main trial at the Basic Court, the defence counsel filed a written motion through which he requested that a verbatim record of the proceedings should be kept. This request was denied on the first day of the main trial. The Presiding Judge ruled that he would rely on the typists taking minutes of the trial and that he would personally

monitor the words on his computer screen in real time to make sure the record was accurate. At the same time he ordered that audio or video recording of the testimonies of the protected witnesses would not be permitted as someone might recognize their voices. On numerous occasions during the main trial, objections were made to differences between what was said by the witness in Albanian and what was translated into English. There is no information as to how the presiding judge checked the accuracy of the record and it is not possible to check the accuracy of the kept record. The Basic Court Judgment states that the record of the proceedings was verbatim.

19. Article 315 CPC requires that the entire course of the main trial shall be either audio- or video-recorded or recorded stenographically unless there are reasonable grounds for not so doing. It also requires that the record of the main trial shall include a transcript of the audio recording of the main trial. No verbatim record was however kept in this case and there were no reasonable grounds to reject the request for it. The courtroom was regularly attended by members of the media and the public. Large portions of the trial were recorded by the media. Anyone out of that group could hear the video link testimonies from protected witnesses. The reasoning to refuse the request of the defence therefore lacked legal and logical basis.

20. A verbatim record of the entirety of the proceedings was the only way to ensure that the proceedings were accurately recorded for the future. As a result of the lack of a proper record, there is no verbatim record available for the courts of the higher instances. The lack of a complete and accurate record also negatively affected the judges' ability to fully and objectively determine the credibility, reliability and the probative value of the testimonies. A verbatim record of the entirety of the proceedings was essential to a fair and proper review of the evidence. In addition, the Presiding Judge violated his ethical duties as a judge by personally monitoring and correcting the record as he thereby crossed the line between his role as a neutral fact-finder into someone who is actively participating in the creation of the record itself. He thereby engaged in a conduct which undermines faith in the integrity of the judiciary. It is not possible for a judge to fulfil his/her duties as a judge if he/she also is required to monitor the accuracy of the record.

21. In the second instance, the Court of Appeals erroneously found that the Basic Court had valid reasons to refuse to provide an audio, video or stenographic verbatim record of the

trial because of the need for protection of the witnesses. Further, the Court of Appeals erroneously found that the Presiding Judge was able to guarantee that the statements were recorded correctly. The Presiding Judge does not speak fluent Albanian and consequently could not guarantee that the statements from the witnesses were accurately translated or recorded.

22. The failure to maintain a verbatim record of the proceedings denied the defendant a fair trial. Consequently, the convictions must be reversed and, under the legal principle of *Ne Bis In Idem*, all charges dismissed. At minimum, the defendant is entitled a new trial in which a proper verbatim record is maintained.

Hostile Witnesses and the use of pre-trial statements:

23. During the main trial, a number of witnesses stated that the pre-trial statements were not accurate. Those witnesses included Witness A, Witness K, Witness B and Dr. B.G.. The alleged deficiencies included being asked to sign statements which had not been translated and which had not been read back to the witnesses in their own language, statements including information the witness never provided to the prosecution or incorrect information, as well as statements that had been changed afterwards. The Basic Court failed to investigate these alleged deficiencies during the main trial. Moreover, the discrepancies between what the witnesses stated during the main trial and what they allegedly had stated in the pre-trial statements were used as a basis to declare some of the witnesses as "hostile witness", a concept which dramatically changed the procedure for questioning these witnesses. The Basic Court's failure to investigate the accuracy of the pre-trial statements negatively affected the defendants' right to a fair trial.

24. The abovementioned issues were raised in the appeal to the Court of Appeals. After the appeal was filed, one of the EULEX Prosecutors who had prepared the written pre-trial statements in this case testified in the criminal case against the defendants M.Z. and R.R. This testimony was submitted as newly discovered evidence to the Court of Appeals as it described the manner in which witness statements were summarized by the two EULEX Prosecutors who prepared a number of pre-trial statements in this case. In short, the EULEX Prosecutor testified that the written pre-trial statements were not verbatim records of what was said during the pre-trial interviews but to the contrary were summaries of those parts that the prosecution deemed to be relevant. The testimony of the

EULEX Prosecutor constitutes circumstantial evidence in this case as it confirms the witnesses' explanations that the written record of their pre-trial interviews was not complete or an accurate summary of what was said.

25. The Court of Appeals did not properly address the abovementioned issues in its judgment. The Court of Appeals Judgment erroneously states that the defence contests the general admissibility of the pre-trial statements. This is not correct as this legal concern does not relate to admissibility of the statements. The legal concern raised in the appeal was that some of the pre-trial witness statements are so skewed, so heavily edited and so poorly summarized that they could not be used for any purpose at trial. The deficiencies required – at minimum – some questioning from the trial panel given that several witnesses testified that their pre-trial statements were dramatically inaccurate. Given that these statements were used by the courts to such an extent, the charges should be dismissed. At least, the defendant is entitled to a new trial.

Deficiencies of the review of the Court of Appeals:

26. The outcome of the Basic Court Judgment was the result of the panel's failure to apply correct legal standards for evaluation of evidence or burden of proof. The legal requirement of proof beyond a reasonable doubt was not applied in this case. The Basic Court failed to consider the evidence as a whole and instead relied only on certain pieces of evidence. At times, the burden of proof was illegally shifted onto the accused. The defendant was not presumed to be innocent in accordance with the legal principle of *In Dubio Pro Reo*. All of these arguments were raised in the appeal but were not properly addressed in the second instance. The Court of Appeals thereby failed to apply the proper standard of its review on the allegations raised in the appeal.

27. The conviction of the defendant rested solely on the testimony of Witness A, whose testimony was not only contradicted by virtually all other independent witnesses who testified on related matters, but was also in itself contradictory, inconsistent and false. The Court of Appeals failed to properly address and evaluate the following pieces of evidence that contradicted, undermined, refuted and seriously questioned the credibility and reliability of the testimony of Witness A:

- *Dr. C.B.*: The Court of Appeals failed to properly address and evaluate the testimony of Dr. C.B. when it erroneously found that Witness A´s statement was corroborated by this statement. This testimony in fact raised serious doubt with regards to the credibility and reliability of Witness A as it contradicted his statement regarding to the alleged physical injuries caused by the alleged mistreatment. The Court of Appeals was under the legal principle of *In Dubio Pro Reo* legally bound to consider this and acquit the defendant.

- *Dr. G.H.*: The Court of Appeals failed to properly address and evaluate the testimony of Dr. G.H. regarding to Witness A´s mental condition. Instead of relying on this testimony, the Basic Court based its assessment of the credibility and reliability of Witness A on its own psychological assessment of his testimony and stated that the testimony of Dr. G.H. was not conclusive as it "did not prove" that Witness A´s competence to give credible testimony was impaired. This finding does not answer if Witness A lacked in credibility or reliability about past events and in addition illegally places the burden of proof on the defendant. These questions were raised in the appeal but were not properly addressed by the Court of Appeals. Instead, the Court of Appeals erroneously found that the only medical proof of a disease was dated 2003, that the diagnosis was of acute nature and that Witness A did not display any symptoms of mental disorder during his testimony.

28. The Court of Appeals failed to properly address and evaluate the lack of evidence to support the identification of S.S. as one of the perpetrators. The Court of Appeals repeated the Basic Court´s incorrect factual determination when concluding that it was proved that the defendant was one of the perpetrators even if there was no evidence to support such conclusion. The Court of Appeals should at least have challenged Witness A´s identification with some kind of test of his reliability and the accuracy of his statement. The failure to do so constitutes a violation of law that was not properly addressed by the Court of Appeals.

29. The Court of Appeals failed to evaluate and consider the evidence as a whole. The applicable legal standards for evaluation of evidence were not addressed or considered. In violation of the legal principle of *In Dubio Pro Reo*, the Court of Appeals failed to consider and properly address those pieces of evidence that contradicted Witness A, such

as the testimonies of Witness B, Dr. F.B., Dr. B.G. and R.S., as well as the application for veteran status submitted by Witness A. The testimony of Witness B contradicted the statement of Witness A on crucial material facts. The Court of Appeals incorrectly adopted the Basic Court's observation that Witness B was "visibly afraid to tell the truth". Due to the fact that there was no video or audio recording of that testimony, the Court of Appeals had no basis to reach this conclusion.

30. The Court of Appeals did not properly assess and address the credibility and reliability of Witness A or Witness K. These testimonies were in themselves inconsistent and internally contradictory on many points. On several important issues, the statement of Witness A was directly contradicted by other pieces of evidence, was not supported by any other piece of evidence or was in itself illogical or completely delusional. All of the parts of the statement of Witness A which strongly indicated that he is not credible and reliable were however not even mentioned in the challenged judgments. The Court of Appeals was obliged to address these parts with the conclusion that the testimony of Witness A was, to say the least, unreliable and that it clearly did not meet the standard of proof beyond a reasonable doubt.

31. The abovementioned deficiencies constitute a violation of articles 7 (1) and 370 (7) CPC. This denied the defendant a fair trial. His convictions should therefore be reversed and dismissed. At least he is entitled to a new trial.

Requests to obtain new evidence:

32. According to the separate request dated 10 May 2017 by the defence counsel of S.S., the EULEX staff member should be heard as a witness during the investigative hearing. The evidence of EULEX staff member is directly relevant to the alleged judicial irregularities in the selection and composition of the trial panel. The EULEX staff member has information and he can give direct evidence on the matter, especially about the protocol and the process used for the composition of trial panels. Therefore his potential testimony is highly relevant and essential to the fair resolution of the proceedings as well as to the integrity of the judicial system in Kosovo.

33. According to the request filed with the Supreme Court 19 July 2017 by the defence counsel of S.S., the defence renews its prior request for the Supreme Court to allow new evidence.

F.D. and N.D.

34. Proposal: In a joint request, F.D. and N.D. move the Supreme Court to acquit them of the charges or to annul the challenged judgments and return the case to the Basic Court for re-trial. They request the Supreme Court to order that the enforcement of the judgments be postponed until their request has been finally adjudicated. They state:

35. In violation of article 5 CPC, their right to a fair and impartial trial conducted within a reasonable time was infringed. The Basic Court Judgment was not rendered within the prescribed time limit. In violation of article 314 CPC, it took more than one year and five months, from the announcement of the Basic Court Judgment, until the Court of Appeals rendered its judgment. The delay was solely caused by the prosecution and the courts. Furthermore, none of the courts gave any explanation for the delay.

36. In violation of articles 2 and 3 CPC, the courts were prejudiced in this case and did not presume the defendants to be innocent at the outset or throughout the main trial. The factual determination was based on a one-sided and biased evaluation of the evidence. Only evidence that supported the charge was considered reliable and credible. Witness A was erroneously considered to be reliable and credible even though it was evident that he gave a false statement on several important issues. Furthermore, it was erroneously concluded that his testimony was supported by statements of other witnesses. By declaring some of these witnesses as hostile, only selected parts of their testimonies were considered. The parts of their statements that were speaking in favour of the defendants were consistently declared as unreliable. Both courts thereby erroneously determined the factual situation to the detriment of the defendants. In relation to the factual determination, the reasoning of the Basic Court Judgment is unclear and contradictory. The enacting clause of the Court of Appeals Judgment is contradictory to its reasoning.

37. Throughout the proceedings, the examination of witnesses was conducted in violation of the law. During the investigation, witnesses were examined many times until they were influenced to provide certain statements by means of threats or promises. During the main

trial, some of the witnesses were declared as "hostile witnesses" in violation of the applicable provisions of criminal procedure. The prosecutor was thereby continuously allowed to pose leading questions to the witnesses in violation of the law. At times, these questions were even formulated with the assistance of the presiding judge. This violated the legal principle of Equality of arms as it continuously favoured the prosecution.

38. The Basic Court Panel was composed in violation of the law as it consisted only of EULEX judges. This allegation is supported by the fact that the Court of Appeals Panel was composed of two EULEX judges and one local judge. In addition, one of the panel members was illegally appointed to the case pursuant to the information that became known to the public after the conclusion of the main trial. The illegal appointment of one of the panel members shows that the Basic Court was prejudiced to the case.

39. In violation of criminal law, the courts found the defendants guilty of criminal offences under a law that was not in force at the time of the alleged criminal actions and is not in favour of the defendant. With regards to the applicable criminal material law, the challenged judgments are incomprehensible and contradictory.

Defence Counsel V.B. on behalf of F.D.

40. Proposal: On behalf of F.D., defence counsel V.B. moves the Supreme Court to annul the challenged judgments and return the case to the Basic Court for re-trial. He states:

41. In substantial violation of the provisions of criminal procedure, the courts did not fully adjudicate the substance of the charges. The challenged judgments are incomprehensible and contradictory. The reasoning does not address decisive evidence and is contradictory to the case file. The Basic Court Judgment includes several contradictions, as follows:
    - In paragraph 80, the Basic Court refers to "all of the accused" but fails to specify which of the defendants beat Witness A and B. In addition, Witness B never mentioned that he was beaten by F.D..
    - In paragraph 86, the Basic Court concludes that F.D. suffered an *injury* on his arm, caused by a hand grenade, and that he was recommended not to use his *wounded* arm for three months. The terms injury and wounded are completely different. Furthermore, it is not stated which evidence the Basic Court relied on

when concluding that the injury was caused by a hand grenade. In this regard, the Basic Court exceeded the statements given during main trial.

- In paragraph 122, the Basic Court states that the arm injury did not prevent F.D. from beating Witness A and also that Witness A did not give any details regarding the act committed by F.D.. This statement is contradictory to the reasoning in paragraph 80 as Witness B is not mentioned and as it clearly states that Witness A did not give any description of an act committed by F.D..

42. In violation of article 262 CPC, the conviction of F.D. is based solely or to a decisive extent on the testimony of Witness A. The courts violated the legal principle of *In Dubio Pro Reo* under article 7 CPC when assessing this statement. Since the defendant did not commit the alleged criminal offences he is convicted of, no punishment should have been imposed.

43. In violation of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, the Basic Court Panel consisted only of EULEX judges. According to this law, the panel should have been composed of two EULEX judges and one local judge. In addition, one of the panel members was appointed in violation of the internal rules of EULEX. According to these internal rules, EULEX judges serving in the Basic Court in Pristina could only be appointed as substitute judges in cases before the Basic Court of Mitrovica.

Defence Counsel B.M. on behalf of N.D.

44. Proposal: On behalf of N.D., defence counsel B.M. moves the Supreme Court to acquit the defendant of the charges and to order that the enforcement of the judgments be postponed. He states:

45. In violation of criminal law, the courts found the defendants guilty of the criminal offence committed in co-perpetration without providing any arguments or evidence to support the elements prescribed in article 31 CCK. In relation to N.D., these criminal elements are clearly not met due to the fact that Witness A did not state that N.D. committed any unlawful actions against him.

46. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.1) and (1.2) CPC, the Basic Court Panel was not composed in accordance with the Law on Jurisdiction as it was composed of only EULEX judges. According to the Law on Jurisdiction, the panel should have been composed of two EULEX judges and one local judge.

47. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.12) CPC, the judgments are not drawn up in accordance with article 370 CPC. The conviction is solely based on the testimony of Witness A. This constitutes a violation of articles 262 and 361 CPC as the defendant cannot be found guilty based only on the testimony of one witness.

48. Pursuant to article 384 (2) CPC, the prosecution and the courts violated the law on numerous occasions according to the defence counsel. These violations have been specified in the final statements given before the first and the second instance courts and will not be repeated. When deciding on this request, the Supreme Court should analyse and carefully evaluate the content of all case files.

Defence Counsel M.S. on behalf of J.D.

49. Proposal: The defence counsel of J.D. moves the Supreme Court to acquit the defendant of the charges or to annul the challenged judgments and return the case to the Basic Court for re-trial. In addition, he requests the Supreme Court to terminate the detention on remand against the defendant. He states:

Composition of the Basic Court Panel:

50. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.1) CPC, the Basic Court Panel was composed only of EULEX judges. The panel was thereby composed in violation of the Law on Jurisdiction, according to which the panel can never be composed of only EULEX judges. It is irrelevant to this question what was agreed between the heads of EULEX and Kosovo Judicial Council as an agreement is not legally binding. From the reasoning of the Basic Court Judgment in paragraphs 12—14 it is clear that the Basic Court was aware of this violation as it refers to a "firmly established practice", not law. Further, the reasoning is incomprehensible as the Basic Court did not explain why the participation of one local judge would disable the right to

court, especially considering that all defendants and all defence counsels except one are of Albanian nationality.

51. The Court of Appeals failed to properly address the issues related to the composition of the Basic Court Panel. Instead, the Court of Appeals created further confusion by on the one hand concurring with the Basic Court with regards to its composition and on the other hand stating that the Court of Appeals Panel pursuant to the Law on Jurisdiction should be composed of two EULEX judges and one local judge. Further, the Court of Appeals failed to thoroughly assess and address the concerns raised in the appeals concerning the assignment of one of the panel members to the Basic Court Panel. The Court of Appeals should have presented a more detailed reasoning in relation to why this panel member was assigned to the case.

Deficiencies of the Challenged Judgments:

52. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.12) CPC, the challenged judgments do not meet the requirements set out in article 370 CPC. The enacting clause of the Basic Court Judgment is incomprehensible and lacks a clear factual description of the criminal actions of which each of the defendants is found guilty, a timeline regarding these actions and the consequences they lead to, as well as a clear reference to the applicable legal provisions. With regards to the legal provisions, the enacting clause is contradictory to the reasoning as the later refers to the Criminal Code of 2004 whereas the enacting clause refers to the Criminal Code of 2012.

53. The enacting clause of the Court of Appeals Judgment is incomprehensible as the appeals were rejected but the impugned judgment modified. It is also contradictory to the reasoning on page 34 of the Court of Appeals Judgment. From this part of the reasoning, it is clear that the Court of Appeals did not confirm that J.D. ordered Witness A and Witness B to beat each other or that he beat Witness A with a wooden bat. In the enacting clause however, these actions are considered as offences that constitute an inhuman and degrading treatment of Witness A and Witness B. Further, the Court of Appeals Judgment does not address the allegations raised in the appeal.

Scope of the Charge:

54. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.10) CPC, the enacting clause of the challenged judgments exceeds the scope of the charge. A comparison of the description of the offences as described in the indictment and the description provided in the enacting clause of the challenged judgments shows that the courts substantially changed the identity of the indictment.

Hostile Witnesses:

55. Witness statements were taken in violation of the law throughout the proceedings. During the investigation, Witness A and Witness B were heard many times and these statements were never presented to the defence. During the main trial, some of the witnesses were illegally declared as "hostile witnesses" in violation of the CPC. As a consequence of these illegal declarations, the prosecutor was allowed to pose leading questions to the witnesses in violation of the law. On several occasions, the presiding judge helped the prosecutor to formulate these questions. The presiding judge thereby acted completely different than what is incorrectly stated in paragraph 35 of the Basic Court Judgment. This behaviour violated the equality between the parties in the proceedings as it was only to the benefit of the prosecutor. Further, it contributed to an inaccurate factual determination as the witnesses were put under pressure.

Presumption of Innocence and the Factual Determination:

56. The challenged judgments are contradictory as they on the one hand state that the testimonies of Witness A and Witness K include deficiencies, such as a lack of structure and gaps, whereas on the other hand the court based the factual determination on these testimonies. Both courts erroneously concluded that Witness A is a reliable and credible witness despite his statement and the other evidence clearly proved the opposite. The courts did not provide sufficient reasons as to why the statements of other witnesses were not considered. The courts violated article 7 CPC when they did not examine and consider the evidence that proved that Witness A is not reliable, such as the statement of Dr. C.B. with regards to his injuries, the statement of Dr. G.H. concerning his mental health and his application for KLA veteran status. In violation of the legal principle of presumption of innocence set out in article 3 CPC, the factual determination was thereby conducted in a one-sided and partial way.

Principle of Legality:

57. The Basic Court violated the principle of legality when it based the conviction on a law that was not in force when the alleged criminal offence occurred. These concerns were raised in the appeal but were not correctly addressed by the Court of Appeals. Instead, the Court of Appeals incorrectly concluded that article 152 CCK is applicable as the most favourable law and provided incomprehensible reasoning for this conclusion. The application of legal provision that was not in force at the time of the alleged criminal offences violated the principle of legality, criminal law and the established court practice in Kosovo.

Imposition of Punishment:

58. The courts did not provide sufficient reasoning in relation to the imposed punishment. The factual description of the criminal actions can never be considered as an aggravating circumstance. As a mitigating factor, the Court of Appeals only considered the sincere behaviour of the defendants but failed to consider other applicable mitigating factors, such as the fact that the defendant does not have a criminal record, his family situation and his behaviour during the main trial.

Defence Counsel I.A. on behalf of A.D.

59. Proposal: The defence counsel of A.D. moves the Supreme Court to annul the challenged judgments and return the case to the Basic Court for re-trial. He states:

60. In violation of criminal law, A.D. was found guilty of the charge even if the criminal elements were not proved or established. The courts did not consider that the defendant did not intend to commit any crimes against his own population. As thoroughly elaborated in the appeal of the Basic Court Judgment, there was no evidence that proved any acts of the defendant.

61. In violation of criminal procedure, the courts incorrectly undertook the role of an expert when concluding that the statement of Witness A is reliable despite the statement of the expert Dr. G.H. which proved the opposite. Despite this statement both courts found that Witness A is reliable. It was however not under the authority of the court to decide on this issue.

Defence Counsel S.I. on behalf of B.D.

62. Proposal: The defence counsel of B.D. moves the Supreme Court to annul the challenged judgments and return the case to the Basic Court for re-trial. He states:

63. In violation of criminal law, B.D. was found guilty of the charge even if the criminal elements were not proved or established. The courts did not consider that the defendant did not intend to commit any crimes against his own population. As thoroughly elaborated in the appeal of the Basic Court Judgment, there was no evidence that proved any acts of the defendant.

64. In violation of criminal procedure, the courts incorrectly undertook the role of an expert when concluding that the statement of Witness A is reliable despite the statement of the expert Dr. G.H. which proved the opposite. Despite this statement both courts found that Witness A is reliable. It was however not under the authority of the court to decide on this issue.

Defence Counsel B.T. on behalf of Z.D.

65. Proposal: The defence counsel of Z.D. moves the Supreme Court to annul the challenged judgments and return the case to the Basic Court for re-trial. He requests the Supreme Court to, *mutatis mutandis* pursuant to article 389 (5) CPC, terminate the measure of detention on remand against the defendant and immediately release him. Further, he requests the Supreme Court to summon the EULEX staff member to testify about the composition of the Basic Court Panel. The allegations put forward in the request are summarized as follows:

66. The enacting clause of the Basic Court Judgment is incomprehensible in relation to the applicable legal provisions and the decision on punishment. The application of different legal provisions at the same time is not in accordance with law. The enacting clause does not specify when the alleged criminal offences were committed, or the concrete actions which were committed by each of the defendants. The enacting clause states that the defendants intentionally committed violence, cruel treatment, torture and humiliating and degrading treatment against Witness A and Witness B but these actions are not mentioned in any of the legal provisions that were applied. Furthermore, the Basic Court Judgment contains a large amount of superfluous information.

67. The Court of Appeals failed to thoroughly and separately address all of the allegations raised in the appeals. The Court of Appeals Judgment does not thoroughly address the following issues: (1) the deficiencies of the Basic Court Judgment mentioned above, (2) why the proceedings were severed into two separate cases, (3) the allegations related to the assignment of EULEX judge A.A.-G. to the case, (4) the allegations related to the concept of hostile witnesses, and (5) the allegations related to the basis of guilt pursuant to article 262 CPC. The findings of the Court of Appeals with regards to these issues are contradictory to the facts of the case, not supported by any fact/evidence, or totally incomprehensible.

68. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.10) CPC, the enacting clause of the Basic Court Judgment exceeded the scope of the charge pursuant to article 360 CPC. This violation should have been examined ex officio by the Court of Appeals.

69. The Basic Court Panel was composed in violation of the internal rules on assignment of EULEX judges to cases. This was indicated by anonymous emails addressed to a majority of the defence counsels. The unlawful composition of the Basic Court Panel directly influenced the outcome of this case.

70. The Basic Court was pursuant to article 361 CPC bound to base its judgment solely on the facts and evidence considered at the main trial. In violation of this provision, the Basic Court declared Witness B as a hostile witness and consequently treated his testimony given before the court as unreliable. Instead, the Basic Court based its verdict solely on the testimonies of Witness A and Witness K. Witness K was considered as circumstantial evidence by the Basic Court and the parties. This violated the case law of Kosovo and the ICTY according to which a judgment can only be based on direct (and not on circumstantial) evidence.

71. Witness A was the only witness that incriminated Z.D.. His testimony was not sufficient to establish guilt. He was questioned on several occasions between 2008 and 2011, when these documents were transferred to the SPRK Prosecutor. The defence requested the Basic Court to order these documents to be handed over to the defence but this was never done. It can therefore not be excluded that Witness A was instructed and rehearsed before

giving his statement before the SPRK Prosecutor. In addition, the testimony of Witness A is in itself contradictory and inconsistent on several points and in particular with regards to the role and actions of Z.D..[1] In parts, his testimony is highly unrealistic, for example with regards to the use of baseball batons since it is highly unlikely that these would not leave serious marks on his body. His testimony was also contradictory to the testimonies of other witnesses, such as the testimonies of Witness B, Witness K, Dr. C.B., Dr. G.H. and R.S.. These testimonies raised doubts about the credibility and reliability of the testimony of Witness A. The many contradictions and discrepancies in the statements of Witness A cannot be explained by the passage of time but should be treated as indicators of him fabricating his testimony. Because of these circumstances, the Supreme Court should conclude that the courts of the first and second instance found the defendant guilty even if there was not sufficient evidence to prove his guilt.

72. According to case law of the International Criminal Tribunal for former Yugoslavia, one of the elements of torture within the context of a war crime is that the perpetrator intends to inflict pain or suffering. This element was never proved or established in this case. The criminal elements of war crime also include a requirement that the actions are committed against the civilian population whereas this case concerns only two isolated cases. Further, in violation of the legal principles of presumption of innocence and individual culpability the defendant was sentenced even if it was not proved that he was aware of the facts that constitute the criminal offence. At least it was necessary to prove that the defendant was aware of the facts which constitute a criminal offence committed by him.

Defence Counsel A.Q. on behalf of I.T.

73. Proposal: The defence counsel of I.T. moves the Supreme Court to acquit the defendant of the charges. He states:

74. The Concept of Hostile Witnesses: The concept of hostile witnesses is not foreseen by the CPC. The reasoning of the Court of Appeals on page 21 of its judgment does not stand. The criminal procedure in Kosovo is not purely adversarial as it also contains inquisitorial elements, such as the court's possibility to collect evidence. Further, a "legal gap" should not be interpreted to the detriment of the defendant which was done in this case. There is

[1] In this regard, reference is made to the minutes from the main trial sessions held on 12 April 2014, 15 September 2014 and 16 September 2014.

no equality between the parties if the court is allowed to invent "procedural institutes" in violation of law. In violation of article 6 ECHR and article 2 CPC, the declarations of hostile witnesses violated the principle of "legal certainty" and the rights of the defence as protected by the Constitution.

75. Evaluation of the Medical Specialist Dr. M.G.: The report of the forensic expert Dr. M.G. was read during the main trial. Dr. M.G. should have been summoned and heard at the main trial in order to give the defence the opportunity to challenge his professional and scientific credibility. The requirements for reading of pre-trial statements set out in article 338 (1) CPC were not met. Further, in violation of article 341 (3) CPC, the parties did not get the opportunity to cross-examine the expert witness about his report. These arguments were raised in the appeal but were not addressed by the Court of Appeals.

76. Identification of the Defendant: In violation of article 6 ECHR, article 120 CPC and jurisprudence of international tribunals, the Basic Court considered Witness A´s identification of I.T. in the courtroom as corroborating evidence. The statement of Witness A was the only piece of evidence that could prove that I.T. was one of the perpetrators. His identification of I.T. is not reliable, considering that he initially identified another person during the investigation and considering his statement that he saw I.T. after the war from a distance of about 100 meters. Furthermore, he only saw the perpetrators, who he described had their faces painted, during night in candle-light. By recognizing the identification of the defendant in the courtroom as corroborating evidence, the defendant´s right to a fair trial pursuant to article 6 ECHR was violated. Further, this violated article 120 CPC which prescribes that identification through photographs may only be conducted during the investigation stage. By failing to consider these aspects, the courts did not provide legal grounds for the establishment of the subjective identity of I.T.. The statement in the Court of Appeals Judgment that Witness A had known all the perpetrators personally and therefore was able to identify them is incorrect, considering that Witness A stated that he had not known I.T. before he was detained and that he only recognized him afterwards.

77. Witness A´s Psychiatric Diagnosis: In violation of the law, the courts undertook the role of a psychiatric expert when assessing how Witness A´s psychiatric diagnosis affected his ability to provide a correct statement. According to article 7 CPC, the court has a duty to

establish facts in a complete and accurate manner. The courts are not psychiatric experts. The courts should therefore have relied on an expert when assessing to what extent the diagnosis of Witness A affected his ability to understand or recall facts.

78. The Connection between Witness B and the Conflict: In order to establish the criminal offence of war crime, a connection between the criminal offence and the armed conflict must be established. In relation to Witness A, it is stated in the judgment that the abuse he was subjected to was motivated by his alleged collaboration with the Serbian regime. In violation of the criminal material law, a connection between the alleged detention of Witness B and the armed conflict was not proved or established by the courts. There is no piece of evidence that links Witness B and his alleged detention with the conflict.

79. Imposition of Punishment: The imposed punishment shall be fair and proportionate to the criminal offence for which the defendant is convicted. The imposition of imprisonment is the most severe punishment provided for by the CPC. The courts violated the criminal law to the detriment of the defendant by failing to consider the passage of time between the alleged criminal offences and the criminal procedure which covers a period of more than fifteen (15) years.

Defence Counsel R.M. on behalf of S.D.

80. Proposal: The defence counsel of S.D. moves the Supreme Court to dismiss the indictment due to the lack of evidence, or alternatively to annul the challenged judgments and return the case to the Basic Court for re-trial. He states:

81. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.8) CPC, the conviction is based on inadmissible evidence, namely the testimony of Witness A. Witness A was anonymous and contradicting himself as well as other pieces of evidence.

82. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.12) CPC, the judgments are not drawn up in accordance with article 370 CPC. The enacting clause of the judgment of the Basic Court is contradictory to itself. The reasoning is insufficient and lacks grounds for decisive facts. None of the judgments address the allegations or the evidence presented by the defence.

83. The Court of Appeals Judgment incorrectly states that the defence counsel *alleged* that the defendant was not a KLA member, whereas this in fact was *proved* by evidence presented by the defence, namely the certificate no. 1/377 and the copy of a list of the brigade, as these documents prove that S.D. was never a KLA member. S.D. furthermore confirmed before the court that he has never used the pension of a war veteran and has never been awarded with a certificate for being a member of the KLA. These circumstances preclude criminal liability and the failure to consider the mentioned evidence violated criminal law pursuant to article 385 (1.2) CPC.

Defence Counsel K.O. on behalf of D.D.

84. The defence counsel of D.D. moves the Supreme Court to annul the challenged judgments and return the case to the Basic Court for re-trial, or to acquit the defendant from the charges. He states:

85. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.12) CPC, the challenged judgments are not drafted in accordance with article 370 CPC. In both judgments, the enacting clause is contradictory to the reasoning. The reasoning lacks of grounds on decisive facts and the conclusions are based only on certain parts of the evidence.

86. In substantial violation of the provisions of criminal procedure pursuant to article 384 (1.8), the judgments are based on inadmissible evidence, namely the testimonies of Witness A and Witness K. These testimonies are intrinsically unreliable pursuant to the definition set out in article 19 (1.29) CPC and are therefore inadmissible according to article 259 (2) CPC. The testimonies are intrinsically unreliable because the courts did not take into consideration that these testimonies are contradictory within themselves, to one another and to other pieces of evidence, as described in the following paragraphs.

87. The testimony of Witness A is not credible or reliable. Firstly, this conclusion is supported by the language, facial expressions and general behaviour of Witness A during the main trial. The allegations of Witness A contain many contradictions, inconsistencies and false information and are not supported by other pieces of evidence. On the contrary, other pieces of evidence and circumstances raised serious doubts in relation to the

credibility and reliability of Witness A. The following pieces of evidence/circumstances show that Witness A's statements with regards to the defendant are not credible and reliable: the testimonies of Witness B and of other witnesses; Witness A's application for veteran status; the expert report of Dr. G.H.; the register of KLA members; the certificate of war veteran organisations; the list of war veterans of Brigade 121 and the certificate dated 4 March 2015; the fact that the headquarters of KLA were not fixed in one location but located in improvised facilities; the fact that D.D. was part of another brigade and that the D. brothers were placed at different brigades; the fact that there was no detention centre at the headquarters of the KLA; the fact that Witness A before the war had a conflict related to property and legal matters with the extended family of D.D..

88. The testimony of Witness A is also not credible because parts of it are illogical. This applies to the statement of Witness A that he did not seek any medical assistance as a result of the alleged criminal offences committed against him. In this regard, his explanation that he omitted to seek medical assistance because the voluntary organisations such as the Red Cross and Mother Teresa Doctors were connected to the KLA soldiers is not credible. A more likely explanation is that Witness A does not possess medical documents because he was not injured or mistreated. Another example is the statement that Witness A had "worked with" EULEX from 2008 and that there had been recordings throughout these proceedings, whereas the prosecutor and the court denied the existence of any records of investigative actions taken before the criminal proceedings were officially initiated. If this statement of Witness A is not true, it clearly shows that he is not credible or reliable. If it is true, the investigation was conducted in serious violations of criminal procedure by undertaking investigative actions before the proceedings were officially initiated, by not respecting the time limits for the conclusion of the investigation and by depriving the defence the right of access to all evidence.

89. The indictment and the conviction of the defendant are based on the testimony of Witness A. This testimony is not sufficient to meet the high standard of proof beyond a reasonable doubt. The testimony of Witness A was not corroborated by any direct or circumstantial evidence. As described in paragraph 75 above, it was on the contrary refuted by other witnesses and documents. By failing to consider the evidence and circumstances that spoke to the benefit of the defendant the courts violated the presumption of innocence set out in article 3 CPC. The courts thereby also violated article 7 CPC as the evidence and

facts were not properly assessed and analysed in the challenged judgments and because the conviction is based on an erroneous factual determination.

90. In violation of criminal material law, the defendant was convicted for the criminal offence committed in co-perpetration even though the applicable objective and subjective criminal elements were not proved or established in relation to the defendant.

Responses of the Chief State Prosecutor

91. The Chief State Prosecutor argues that the requests should all be rejected as unfounded. As a general remark, he stresses that a majority of the allegations should be rejected as unfounded because they concern the courts' factual determination, in particular the arguments related to the credibility of Witness A, which is not allowed as a ground for requests of protection of legality as it is set in the CPC. In relation to each of the allegations, he states:

92. Several requests challenge the content of the enacting clause without substantiating any error. The enacting clause is fully in tune with the remainder of the judgment and contains all the elements as required by law. Moreover, it is noted that the fact that some of the details of the crimes could not be established, for example the exact date when it was committed, does not detract from the fact that all necessary elements of a criminal offence were convincingly proven. An enacting clause should always be read together with the remainder of the judgment.

93. The allegations that the courts violated article 262 CPC when assessing the testimony of Witness A are unfounded. None of the restrictions set out in article 262 CPC are applicable as the defence had the possibility to cross-examine Witness A and vigorously did so, the identity of Witness A was known to the defence and Witness A was not declared as a cooperative witness.

94. The allegations that the courts violated the CPC when allowing the concept of hostile witnesses are unfounded. The possibility of confronting a witness with his/her previous statements in case of detected departure from these statements is necessary for the conduct of a fair proceeding. The institution of hostile witnesses is not expressly foreseen in the CPC. The lack of a possibility to challenge the credibility of a witness must be

considered as a legislative error in the CPC. The lack of such possibility creates a danger to the integrity of proceedings, creates a loophole promoting intimidation of witnesses and stands in contrast with the general principles governing the criminal proceeding under the CPC, such as those prescribed in articles 7, 299 (3) and 329 (1) and (4) CPC. Moreover, article 257 (2) CPC prescribes that evidence should be declared as inadmissible when the code or other legal provisions expressly so prescribe. In relation to questioning or examination of a witness, the restrictions are set out in article 257 (4) CPC. None of those circumstances exist in the present case. Thus, in case of hostility, evidence obtained through the cross-examination of a witness by the party who called that witness falls under the general discretionary power of each court to admit and assess. The implementation of the concept of hostile witnesses did not violate the principle of equality of arms as the rules were set the same for both parties in the proceedings. Further, it did not violate the principle of *In Dubio Pro Reo* set out in article 3 CPC. In this regard, it is noted that this principle only applies to material criminal law and not to provisions of the criminal procedure.

95. The allegations related to the composition of the panel of the Basic Court are unfounded. The panel of the Basic Court was composed of three EULEX judges in accordance with a practice that has been used in many cases tried by the Basic Court of Mitrovica. This practice is the only way to ensure that the offences committed within the jurisdiction of this court are adjudicated. The defence counsel did not object to the composition of the panel at the beginning of the main trial. The defence counsel didn't raise any objections during the main trial against the appointment of EULEX Judge A.A.-G. in the panel, meaning that none of the defendants had any reason to doubt her impartiality. Even if there were some minor infringements within the EULEX internal regulations concerning assignment of judges in criminal cases, no real prejudice existed. The defendants were entitled to a fair trial by impartial judges.

96. Contrary to what the defence counsel of A.D. and B.D. claim, the criminal offence of war crime can be committed against one's own population. The question who can be a victim of a war crime is strictly connected to the notion of a nexus between the offence and an armed conflict. In this case, there is no doubt that the offences committed against Witness A – who was suspected of collaboration with the Serbian regime – were

sufficiently connected to the armed conflict present at the time in Kosovo. The same applies for Witness B, who was targeted for similar reasons.

97. The allegations raised by the defence counsel of D.D. with regards to the courts' analysis of the evidence are unfounded. The Basic Court thoroughly explained its assessment of the evidence. It presented in detail why it chose to rely on the testimony of Witness A despite certain shortcomings on his behalf and explained why it found some evidence that contradicted his account as not credible. The factual determinations presented in the judgment of the Basic Court leave no room for doubts.

98. The allegation raised by the defence counsel of S.D. in relation to the lack of reasoning about the certificate allegedly showing that he was not a KLA member is unfounded. The arguments are closely connected to the area of establishing the factual situation and as such should not be allowed in a request for protection of legality. The mere fact that such a discussion is not included in the judgments does not mean that this piece of evidence was disregarded.

99. The allegation raised by the defence counsel of F.D. in regard to the contradiction in the Basic Court Judgement concerning the role of F.D. in the beating of witness A is not only unfounded but should be rejected at this stage of the proceedings.

100. The allegation raised by the defence counsel of N.D. that both the Basic Court and the Court of Appeals failed to argument with what evidence the elements of co-perpetration was foreseen is unfounded. On the contrary, the trial panel convincingly explained why it found that the charged crime was committed in co-perpetration.

101. The allegation by the defence counsel of Z.D. that it is not clear which code has been applied in the determination of the criminal liability, is unfounded as the challenged judgement explains in detail which law was applicable and why. The allegations that the Trial Panel failed to establish the elements of existence of the criminal offence, a fixed date when the criminating actions were committed and the concrete actions of each of the defendants are all devoid of any merit. Prosecution does not concur with the allegation of the defence counsel that the Basic Court would have exceeded the indictment with regard to its objective identity. Moreover the prosecution does not agree with the defence counsel that final judgements of national courts or ICTY regarding criminal offences of

war crimes may be based solely on direct evidence and not on circumstantial evidence. There is no such rule in the CPC and the international jurisprudence of the international tribunals underlines that a trial chamber may rely on either direct or circumstantial evidence to underpin its findings. The argumentation of the defence that the acts alleged in the indictment were isolated incidents and not directed against the civilian population is unfounded.

102. The allegation raised by the defence counsel of I.T. that the defence was not given an opportunity to cross-examine M.G. is unfounded. According to the record of the main trial on 13 January 2015 the defence counsel for I.T. was present at the session and he did not state any objections considering the report as read. Concerning the identification of I.T, prosecution asserts that the credibility of witness A cannot be contested anymore at this stage of the proceedings. Contrary to what the defence counsel of I.T. claims, the mistreatment of witness B took place due to his alleged opposition to the KLA. The Court did not violate the criminal law even though the passage of time from the potential commission of the offence until the imposition of the sentence was not considered as a mitigating circumstance. Within the limits of article 74 of the CCRK, the Trial Panel has the discretion to determine which mitigating circumstances are applicable. The passage of time is not a mitigating circumstance according to aforesaid article and therefore no law was violated.

103. The courts already dealt with the arguments raised by the defence counsel of J.D. in previous applications. Moreover, the allegation related to the Trial Panel's assessment of evidence, particularly the credibility of Witness A, is not to be addressed again by the Supreme Court in a case of protection of legality.

104. Regarding the joint request of F.D. and N.D., prosecution asserts that Article 432 of the CPC is clear about the permissible grounds for filing a request for protection of legality. As the factual situation has already been determined by the Basic Court and the Court of Appeals, the request should be rejected concerning the allegations related to erroneous or incomplete determination of the factual situation.

105. The allegations raised by the defence counsel of S.S. with regards to the composition of the trial court panel are unfounded. Firstly, the allegation that the presiding Judge would

have handpicked Judge A.A.-G. to the panel in violation of the procedures, policies and rules concerning the selection of panels is unfounded. Moreover the defence is unable to clarify which provisions and legal framework were breached in the process. Secondly the allegations that, according to a judges list, two potential judges were bypassed in order for the presiding judge to obtain the appointment of Judge A.A.-G. are unfounded. The Court of Appeals already clarified in its judgement that there was no roster for assignment of EULEX judges in 2013. Thirdly, there are no elements to challenge the impartiality of the trial panel and therefore the defendants were entitled to a fair trial.

106. The request of the defence to hold a hearing investigating whether the trial panel was improperly constituted is to be rejected as CPC does not foresee the establishment of a hearing for those purposes within the procedure of a request for protection of legality.

107. With regards to the unsolicited emails that the defence has received during October and November 2016, the senders are not or have not been staff of EULEX. In addition, there is no evidence that the emails are authentic, accurate and reliable. The emails dated October and November 2016 relate to hearsay or alleged conversations between supposed EULEX staff members and EULEX judiciary. Even the email accounts do not belong to EULEX.

108. The emails defence has attached to its request copy some email exchange allegedly occurred among the Presiding Judge of the Drenica II case, the Focal Point of the EULEX Judges in the Basic Court of Mitrovica and acting President of the EULEX Judges, but the email exchange shows concerns related merely to the possibility for a number of judges to sit in the Trial Panel due to disqualification, shortness of the contracts and length of experience. The Presiding Judge has made no suggestion as to the name of the candidate for panel member.

109. Pursuant to articles 432-441 of the CPC, new evidence is not to be presented in case for protection of legality and therefore the defence evidence, presented as exhibit B, cannot be admissible.

110. The prosecution asserts that the lack of a verbatim record does not constitute grounds for filing a request for protection of legality pursuant to Articles 432 (1.2) and 384 (1) of the CPC. Moreover the defence would have to demonstrate the alleged violation that affected

the lawfulness of the judicial decision in order to have grounds to file a request for protection of legality pursuant to article 432 (1.3) of the CPC. The defence does not describe any specific witness statement that could include exculpatory evidence and therefore could affect the lawfulness of the judicial decision.

111. Concerning the alleged inaccuracy of the pre-trial statements the prosecution notes that article 131 (4) of the CPC allows the possibility to summarize the pre-trial interview. In addition, the value of the pre-trial interview is delimited pursuant to article 123 of the CPC. The alleged inaccuracy of the pre-trial statements is unfounded.

112. The argumentation in the request for protection of legality (paras 113-284) concerns the standard of proof and the assessment of evidence conducted by the trial panel and the Court of Appeals. The article 432 of the CPC sets the permissible grounds for filing a request for protection of legality. As the factual situation has already been determined by the Trial Panel of the Basic Court and the Trial Panel of the Court of Appeals, the request should be rejected concerning the allegations related to erroneous or incomplete determination of the factual situation.

113. The request of the defence to obtain new evidence, dated 10 May 2017 is without merits. The CPC does not foresee for the Supreme Court to convene evidentiary hearings or to take investigative actions in a case of protection of legality. Article 407 (2) of the CPC, which refers to articles 389 and 406 of the CPC to be applied mutatis mutandis, only refers to the case of an appeal to the Supreme Court. The reference does not apply for the protection of legality. There is no provision under articles 432-441 of the CPC which rule the procedure in case of protection of legality.

FINDINGS – PROCEDURAL QUESTIONS

Composition of the Panel

114. The Panel establishes that this case is defined as "ongoing" in accordance with the definition set out in article 1 A of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo no. 03/L-053, as amended by

laws no. 04/L-273 and 05/L-103 (hereafter: the Law on Jurisdiction). By decision dated 27 April 2017, the KJC has decided that the Panel shall be composed of two EULEX judges and one local judge and that a EULEX judge will be the presiding judge. The Panel is therefore correctly composed.

Applicable Laws

115. The Panel establishes that the course of proceedings in this case is governed by the CPC as the requests for protection of legality were filed after the CPC entered into force (Article 539 of the CPC). As correctly established and reasoned by the Basic Court and the Court of Appeals, the CPC was also the applicable procedural law in the challenged criminal proceedings and the PCCK is the applicable substantive law in relation to the charges.

Admissibility

116. The Panel finds that the requests for protection of legality filed in this case are admissible as they are filed by authorized persons, against final judgments and within the prescribed time limits (Article 433 of the CPC).

Procedural Requests

117. In this section, the Panel will address the proposals to hold a hearing in order to investigate if the Basic Court Panel was improperly constituted, to summon the EULEX staff member to be heard as a witness during the said hearing, the admissibility of the documents attached to the request of S.S. and his request to be provided with a copy of a report allegedly filed by the EULEX staff member. For the reasons set out in the following paragraphs, the Panel finds that none of these proposals can be granted and that there is no need for further proceedings.

118. The Panel initially observes that the course of proceedings in a case concerning requests for protection of legality is governed by articles 418 and 432 - 441 CPC. As to the course of proceedings, article 435 (1) and (2) CPC prescribes that a request for protection of legality, if it is not dismissed as belated or prohibited, shall be sent to the opposing party, who may file a reply thereto, and that it shall be considered in a session of the panel. Article 418 (4) CPC, which is applicable to all of the extraordinary legal remedies provided for by the CPC, refers to a number or articles that shall also apply to requests on

protection of legality. These provisions include the general principle of fairness, provisions regulating the form of requests and replies, as well as general provisions on time limits.

119. The Panel notes that none of the abovementioned provisions, or the articles they refer to, include a procedural possibility for the Supreme Court to hold an open session with the parties present or to conduct a hearing in order to take new evidence. In this regard, it must be pointed out that the *extraordinary* procedures are significantly different from the *ordinary* appellate procedures of the second and third instances, namely cases where the Court of Appeals or the Supreme Court adjudicates the ordinary legal remedy of an appeal against judgments. The appellate procedure before the Court of Appeals is regulated by articles 380—407, whereas articles 389—407 are applicable *mutatis mutandis* in the appellate procedure before the Supreme Court in the specific situations where article 374 (2) CPC allows such an appeal. Articles 383 (2) and (3) CPC define under what circumstances the appellant can present new evidence, facts or grounds in the appeal. Article 391 CPC prescribes that the decision of the Court of Appeals or the Supreme Court in these cases shall be taken in a session of the panel or in a hearing. Pursuant to article 392 CPC, a hearing shall be conducted only when it is necessary to take new evidence or to repeat evidence already taken due to an erroneous or incomplete determination of the factual situation. Articles 390 and 393 further describe which persons shall be notified or summoned to a session or a hearing of the Court of Appeals or Supreme Court, as well as other related provisions. None of the provisions referred to applies in the procedure applicable in cases of request for protection of legality, including the possibility for evidentiary hearings. The latter systematically stems from the prohibition a request for protection of legality to be filed on ground of erroneous or incomplete determination of factual situation (art. 432(2) CPC). The lawmaker logically decided that no evidentiary hearings should be permitted when the request itself may not be grounded on claims for factual inaccuracies.

120. Based on the above the Supreme Court can find no ground either to hold a hearing or to take new evidence in the form of the attached documents. In passing (as an *obiter dictum*) the Panel notes that the attached documents should be considered as intrinsically unreliable pursuant to the definition set out in article 19 (1.29) CPC. The latter describes evidence or information as intrinsically unreliable if the origin of the evidence is

unknown, based upon a rumour, or on its face is impossible or inconceivable. The emails attached to the requests of S.S. are all intrinsically unreliable as there is no information about their origin.

121. With regards to the request to provide the defence counsel of S.S. with a report allegedly filed by the EULEX staff member, the Panel initially notes that the Supreme Court – to which this request is addressed – does not have access to such a report and the defence counsel himself admits that the report allegedly was filed with the EULEX authorities, not the Supreme Court. The Panel further notes that it is not the task of the court to collect and/or provide the parties with documents that were not filed in the present case. In addition, as already explained above, new evidence is not collected in the procedure for Protection of Legality (see above paragraph 119). In passing the Panel notes that in case the report referred to contains allegations for misapplication of an internal EULEX regulation and if it was handed over to EULEX authorities, the latter have the discretion to open an internal investigation into the alleged violations of internal EULEX operation procedures.

122. Finally, the Panel notes that the requests for protection of legality pursuant to article 435 (2) CPC have been sent to the Chief State Prosecutor, who as the opposing party has filed responses with regards to the requests.

123. No further proceedings are necessary.

FINDINGS – MERITS OF THE REQUESTS

General Remarks on the Scope of the Panel's Adjudication

124. In this section, the Panel will make some general remarks about the specific restrictions applicable to the scope of the Panel's assessments of the merits of a request for protection of legality as it is set in the CPC. The Panel will thereafter list the allegations that the Panel will assess and address.

125. The scope of the Panel's adjudication of a request for protection of legality is firstly restricted by article 436(1) and (2) CPC. According to these provisions, the Panel shall as a main rule confine itself to address those violations of law which the requesting party has put forward in his/her request, and only if the Panel finds that reasons for deciding in favour of one of the defendants also exist in respect of another co-accused shall it act *ex officio* as if such request has also been filed by that co-accused. Consequently, and on the contrary to what the defence counsel of N.D. claims, the parties cannot in general terms request the Supreme Court to thoroughly assess "all the case files" and *ex officio* examine whether or not procedural or criminal material violations exist or do not exist. On the contrary, the CPC clearly prescribes that the Panel is obliged to only assess the specific allegations raised by the parties.

126. The scope of the adjudication of the merits of a request for protection of legality is further limited by the restriction set out in article 432 (2) CPC, according to which it may not be filed on the ground of an erroneous or incomplete determination of the factual situation. This restriction prohibits the parties to – *directly or indirectly* – challenge the courts' factual determination. The Panel notes that this restriction includes all questions related to the assessment of evidence, including the credibility of certain witnesses and the probative value of their testimonies.[2] If a party irrespective of this prohibition challenges the factual determination made by the courts, the Supreme Court is pursuant to article 437 CPC obliged to reject these arguments as unfounded and not to assess them further.

127. The Panel notes that the requests filed in this case include a large number of arguments that are directly or closely linked to the evaluation of evidence by the first and second instance courts. This applies in particular to the arguments related to the assessment of the credibility and probative value of the testimony of Witness A and the arguments related to the courts' evaluation of other witnesses' testimonies, including expert witnesses, or documentary evidence. In this regard, this Panel wishes to stress that the party cannot challenge the courts' factual determination by alleging that the court violated legal standards of assessment of evidence.

[2] *See* for example paragraph 3.2 of the Supreme Court Judgment dated 13 October 2015 in case no. Pml.Kzz 72/2015 and paragraph 42 of the Supreme Court Judgment dated 13 May 2016 in case no. Pml. Kzz 18/2016.

128. Also, the allegations that there was no evidence to prove a specific criminal element, such as those applicable for co-perpetration are in fact challenging the factual evaluation already conducted by the Basic Court and the Court of Appeals and therefore not allowed at this stage of the proceedings. In passing the Supreme Court only notes that the Trial Panel explained why it found that the crime charged was committed in co-perpetration.

129. The question of identification raised in the request of I.T. also falls under the category of factual evaluation and is therefore not allowed pursuant to 432(2) CPC. For the purpose of clarifying this issue, the Panel notes in short that in the minutes from the session held on 17 November 2014, page 12 the trial panel has explained thoroughly why the identification that took place that day would not have any prejudicial effect to the detriment of this particular defendant.

130. Pursuant to article 432 (1) CPC, a request for protection of legality can be filed on the grounds of violations of criminal material law, substantial violations of the provisions of criminal procedure and other violations of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision. The Panel has thoroughly read the requests filed in this case and defined the following allegations that will be addressed one by one throughout the following sections:

- *The exclusive participation of EULEX judges in the Basic Court Panel*
- *The assignment of EULEX Judge A.A.-G. to the Basic Court Panel*
- *The lack of a verbatim recording of the proceedings*
- *The hostile witnesses concept*
- *The usage of Pre-Trial statements*
- *The right to a fair trial*
- *The content of the written judgments*
- *The principle of Legality*
- *The scope of the charge*
- *Witness A as a basis of guilt (articles 262 and 361 CPC)*

The exclusive participation of EULEX judges in the Basic Court Panel

131. In this section, the Panel will address the allegation related to the exclusive participation of EULEX judges in the Basic Court Panel. In short, the defence argues that the Basic Court Panel was composed in violation of the Law on Jurisdiction as this law prescribes

that one local judge should have been sitting in the panel. The Panel rejects these allegations as unfounded.

132. According to Article 41 (2) CPC, a request for disqualification may be filed no later than before the conclusion of the main trial and a request for disqualification on the grounds set in Article 39(3) CPC may be filed before the commencement of the main trial. Firstly, the Panel notes that none of the parties raised any objections to the composition of the panel at the outset of the main trial, even though at that time it was clear that the panel was composed of three EULEX judges. This Panel is of the opinion that it would create a possibility to misuse the right to challenge the panel's composition if this issue could be raised in the second and third instance even if the party had no objections to it on the main trial. Another interpretation would lead to the conclusion that the question posed at the outset of the main trial with regards to the composition of the panel has no legal significance.

133. Secondly, the Panel agrees with the first and second instance courts that the Basic Court Panel was composed correctly. As thoroughly elaborated by the Basic Court (paragraphs 12-14), it has been a firmly established practice that criminal cases in the Basic Court of Mitrovica are adjudicated by panels composed exclusively by EULEX judges and this was further affirmed in the mentioned agreement between the Head of EULEX and the KJC.

134. Thirdly, at the case at hand the doctrine of necessity, as recognised by the Bangalore Principles of Judicial Conduct, dated September 2007, is applicable[3]. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may lead to injustice. This may arise where there is no other judge reasonably available, who is not similarly disqualified, or if an adjournment or mistrial will cause extremely severe hardship, or if a court cannot be constituted to hear and determine the matter in issue if the judge in question does not sit. Taking in consideration the circumstances at the Basic Court of Mitrovica, where local Judges (either from Albanian, or Serbian ethnicity) were not and still (at the moment of the preparation of this text) are not able to sit in cases, having a panel of exclusively EULEX judges was and

[3] See paragraph 100 of the Commentary on the Bangalore Principles of Judicial Conduct, issued by the UNODC, available on https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

still is the only way a court to be constituted. Therefore, the fact that the trial panel at the Basic Court was consisted only of EULEX Judges does not amount to any violation of criminal procedure. On the contrary, in the context of the particular situation of the Basic Court in Mitrovica, composing a panel of EULEX judges was the only possibility to ensure the right of the defendants in any given criminal case (not only the one at hand) of access to justice as part of the right to due legal process.[4]

135. For these reasons, the allegations related to the exclusive participation of EULEX judges in the Basic Court Panel are unfounded.

The assignment of EULEX Judge A.A.-G. to the Basic Court Panel

136. In this section, the Panel will address the allegations related to the assignment of EULEX Judge A.A.-G. to the Basic Court Panel and how these allegations were addressed by the Court of Appeals. In short, the defence claims that the assignment of EULEX Judge A.A.-G. to the Basic Court Panel violated internal rules on assignment of EULEX judges to criminal cases [redacted] Defence also argues that EULEX judges serving in Pristina could only sit as substitute judges in Mitrovica.

137. At the outset, the Panel notes that the objections in relation to the appointment of EULEX Judge A.A.-G. to the Basic Court panel are all made after the main trial. According to the time limits set in the article 41(2) CPC the allegations are thus belated.

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[4] The Universal Declaration of Human Rights (1949) Article 10: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*, International Covenant on Civil and Political Rights (1976) Article 14(1): *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children"*, The European Convention on Human Rights (1950) Article 6(1): *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"*.

138. Additionally, these allegations are based on a television report of Koha Vision and anonymous emails, allegedly sent from EULEX employees. As elaborated above under the heading "Procedural requests", the Panel has decided that new evidence cannot be accepted in the third instance procedure. As an *obiter dictum,* the Panel notes that this new evidence would be intrinsically unreliable (emails originating from an unknown author). As a result of these findings only, the Panel cannot accept the allegations on what preceded the assignment of EULEX Judge A.A.-G. to the case or the content of the discussions before the Court of Appeals. Only for this reason, the allegations are unfounded.

139. For the purpose of clarifying some of the legal issues raised in the requests, the Panel will however proceed and make some general remarks concerning the appointment of EULEX Judge A.A.-G. to the Basic Court panel. The main argument raised by the defence is that the internal roster of EULEX was thereby not followed and that the Basic Court Panel for this reason was not composed according to law pursuant to article 384 (1.1) CPC. The defence also claims that the relationship between two of the judges in the panel was of a kind that could have led to disqualification pursuant to article 384 (1.2) CPC.

140. The Panel agrees with the Court of Appeals Judgement that there has not been a roster for assignment of EULEX judges to the cases at the relevant time. According to the "Guidelines for case allocation for EULEX judges in criminal cases in district courts" applicable at the time of the appointment of Judge A.A.-G., no specific roster was upheld. The Guidelines merely clarify the structure of EULEX Judges in district courts and prescribe the general principles that are applicable regarding case allocation. Moreover, Judge A.A.-G. was assigned to the case pursuant to the decision dated on 29 May 2014 by the acting president of EULEX judges, who at that time was authorised to take this decision. In addition, EULEX Judge A.A.-G. was a legitimately appointed EULEX judge at the level of the first instance at the time.

141 [redacted] the Supreme Court has no reason to believe that

the impartiality of either of these judges was in any way affected when deciding the case. The Panel concludes that no basis for disqualification was present.

142. Therefore, the Panel is of the opinion that Judge A.A.-G's appointment could not be qualified either as a violation of article 384(1.1) or article 384(1.2) CPC. In passing, the Panel notes that even if there were violations of internal EULEX regulations, if at all (as much as the alleged breaches do not amount to a violation of a law relevant to the case – as is the claim at hand that the CPC was breached), it would be an issue within the discretion of the relevant EULEX administrative/disciplinary authorities, as already mentioned above paragraph 121.

143. Finally, concerning the defence's claim that EULEX judges serving in Pristina could only sit as substitute judges in Mitrovica, the Panel notes that even the local legal system recognises the possibility of internal reassignment of judges to different departments. Reference is made to Article 12 of the Law on Courts (No. 03/L-199) which governs the internal organization of the Basic Courts. Pursuant to Article 12 (4), the President of the Basic Court shall assign judges to departments to ensure the efficient adjudication of cases, and may temporarily reassign judges among branches and departments as needed to address conflicts, resolve backlogs, or ensure the timely disposition of cases. Similarly, according the article 20(3.1) of the said law, the President of the Court of Appeals shall assign judges to departments to ensure the efficient adjudication of cases, and may temporarily reassign judges among departments as needed to resolve backlogs or ensure the timely disposition of cases. In the case of EULEX judges this kind of reassignment is done by the acting president of EULEX Judges and on the Basic Court level between the two existing units, the so called Mobile Unit and the Unit in Basic Court in Mitrovica. The latter contradicts neither the local Law on Courts, nor the "Guidelines for case allocation for EULEX judges in criminal cases in district courts", mentioned earlier in paragraph 140.

144. Therefore the Panel concludes that there are no grounds for the requests for protection of legality as per article 432 of the CPC.

The lack of a verbatim record of the proceedings

145. The defence counsel of S.S. claims that the lack of a verbatim record of the main trial (in the form of either audio or video recording) constitutes a violation of article 315 CPC.

146. This Panel is of the opinion that there was no violation of Article 315 CPC. Article 316 CPC provides the possibility for the trial to be recorded only in writing as it was recorded by the Basic Court. Further, the parties are always entitled to check the written record and to request corrections pursuant to Article 316(2) CPC. Therefore this Panel has no reason to accept that the lack of audio/video recording at the case at hand violated in any way the defendant's right to a fair trial.

Hostile Witnesses concept

147. In this section the Panel will address the allegations related to the concept of hostile witnesses during the main trial. In short, the defence states that the concept of the hostile witness is not regulated in the CPC and that application of the concept is in violation of the CPC and also in violation of the principle of equality of arms.

148. The Panel agrees with the reasoning provided in the judgement of the Court of Appeals Judgement (point 5). It is undisputable that the CPC does not recognise the concept of the hostile witness as such. Moreover, there are no applicable provisions in the CPC for situations in which a complete turnover occurs in the statements of the witness under paragraphs 332-335 CPC governing witness examination. However, the Panel notes that according to Article 123(2) CPC: "...Evidence obtained during the pre-trial interview may be used during cross-examination to impeach witnesses if the witness has testified materially differently from the evidence given by the witness during pre-trial interview."

149. Taking in consideration the aforesaid provision and the general duty of the court to truthfully and completely establish the facts which are important to rendering a lawful decision (Article 7 CPC) together with the duty of the Presiding Judge to ensure that the case is thoroughly and fairly examined in accordance with the rules of evidence as provided for by the present code (Article 299(3) CPC), the Panel agrees that even if the CPC does not explicitly recognise the hostile witness concept, it does recognise its approach which is codified in the applicable procedural law (Article 123(2) CPC).

150. Therefore, this Panel is of the opinion that the Trial Panel at the Basic Court was following its duty to truthfully and completely establish the facts which were of essential importance in rendering a lawful decision. According to the Panel, the Presiding Judge - when posing questions to witnesses at the main trial - did not exceed duties set to him by law when applying the hostile witness concept. Moreover, the questioning allowed at the main trial - when applying the hostile witness concept - was not in violation with the prohibitions set in Article 257(4) CPC. Therefore, the allegations on this part are ungrounded.

Usage of Pre-Trial statements

151. The defence claims, in short, that the pre-trial statements of witnesses A, B, K and Dr. B.G. were skewed, heavily edited and poorly summarized and therefore could not be used for any purpose at a trial without violating defendant's right to a fair trial. According to allegations made by the defence, due to the fact that lower courts used these witness statements given in pre-trial interviews that were described inaccurate by witnesses themselves, all charges should be dismissed.

152. The Panel notes that Article 123(2) does not allow the trial panel to use the evidence obtained during the pre-trial interview as direct evidence in the main trial. The Panel is of the opinion that neither the Judgement of the Basic Court nor the Judgement of the Court of Appeals were based on the pre-trial statements in violation of the aforementioned article. Moreover, the Panel also agrees with the reasoning provided in the judgements of the lower courts what comes to the summarized records of pre-trial interview. Article 131(4) CPC allows the summarization of the pre-trial interviews.

153. As a conclusion the Panel is of the opinion that the applicable procedural legislation allows taking pre-trial interviews and summarization of these interviews. In addition, alleged inaccuracies in the pre-trial interviews concerning statements of witnesses A, B, K and Dr. B.G. have not affected the outcome of the lower courts as these allegedly inaccurate statements were not used as a basis for the judgement. As a consequence usage of the pre-trial statements did not lead to any violation of the right to a fair trial.

The right to a fair trial and alleged violation of the Constitution

154. In this section the Panel will address allegations related to the right of a fair trial as protected by the Constitution and the European Convention on Human Rights. As these allegations related to the right to a fair trial have been partially addressed before in this judgment, the Panel focuses its attention to the allegation that the main trial was not concluded within a reasonable time pursuant to Article 5(1) CPC.

155. Pursuant to article 6(1) of the European Convention on Human Rights (ECHR) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law. According to the Guide on Article 6 of the European Court of Human Rights[5], the reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment. Article 6 requires judicial proceedings to be expeditious, but it also lays down the more general principle of the proper administration of justice. A fair balance has to be struck between the various aspects of this fundamental requirement (*Boddaert v. Belgium*, § 39).

156. According to article 369 (1) CPC, a judgment shall be drawn up in writing within 15 days of its announcement if the accused is in detention on remand or if detention on remand has been imposed on him/her while in all other cases it is drawn within 30 days of its announcement. When a case is complex, the single trial judge or presiding trial judge may ask the president of the court to extend the deadline by up to 60 more days for the judgment to be written. According to article 405 (2) CPC, if the accused is in detention on remand, the Court of Appeals shall send its decision and the files to the Basic Court not later than three months from the day it has received the files from the court below.

157. However, taking into consideration the complexity of the case at hand, the seriousness of the charges and the number of defendants in the case, it is clear that the finalization of the text of judgement required significant time.

[5] The European Court of Human Rights, the Guide on Article 6 of the European Court of Human Rights (2013), page 33

158. Finally, the Panel notes that the delay itself does not violate Article in 384(1) CPC. Moreover, it is not mentioned in the requests for protection of legality how this delay would have affected the lawfulness of the judicial decision. Therefore the Panel finds that the requests for protection of legality are unfounded in this regard.

The content of the written judgments (Article 370 CPC)

159. Defence allegations related to the content of the written judgments stipulate that enacting clauses of lower courts did not meet the requirements set in Articles 370(3), 370(4) and 365 CPC. In the requests for protection of legality filed on behalf of F.D, N.D. and J.D. it is especially argued that these defects in the judgements consist of the following factors: no specific date of the alleged criminal offences is mentioned in the enacting clause, no concrete description on each of the defendants' criminal actions or consequences of their alleged actions is made and the legal provisions by which these criminal actions are sanctioned are not clearly mentioned.

160. The Panel is of the opinion that the enacting clauses of the lower courts identify the defendants and the criminal actions they were found guilty of. The date of count I is defined by stating that it took place on an undetermined date in September 1998 and in count II by stating that it took place on several undetermined dates in August and in September 1998. The Panel is of the opinion that the timing is established with reasonable accuracy.

161. The Panel notes also that the defendants were found guilty of crimes they committed in co-perpetration. Therefore the defendants are hold liable and punished as prescribed for the criminal offense itself. As a conclusion, the participation of the defendants to the crimes has been described accurately in the Basic Court and Court of Appeals judgments and there is no need to further specify which physical action (for example in the form of a kick in the back, a blow on the head, a slap on the face, etc.) was executed by which of the defendants.

162. Finally, the Panel notes that Court of Appeals judgment explicitly states what material criminal law was applied and provides a thorough reasoning in addition. The Panel is of

the opinion that there is no room for error or interpretation in relation to Basic Court or the Court of Appeals judgements.

163. As a conclusion, the panel states that the lower court judgements met the prerequisites set in Articles 370(3), 370(4) and 365 CPC and that the allegations are therefore unfounded.

The Principle of Legality

164. In some of the requests for protection of legality it is stipulated that the principle of legality was violated by lower courts.

165. According to the definition of the said principle set in the article 11 of the Universal Declaration of Human Rights (1948) *"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or 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 penal offence was committed"*. The principle of legality is also codified in the Provisional Criminal Code of Kosovo (PCCK) and in the Criminal Code of Kosovo (CCK).

166. Concerning the question of the applicable law, this Panel concurs fully with the conclusion and reasoning stated in the judgment of the Court of Appeals (pages 28 – 31). Not only the range of the punishments applicable by different laws but also other elements affecting (for example co-perpetration, continuation) the evaluation of the most favourable law need to be taken into consideration when deciding on the most favourable law.

167. As this Panel finds that the Court of Appeals in its judgement correctly rectified the Basic Court Judgment, the requests for protection of legality are unfounded on this part.

The Scope of the Charge

168. The defence counsel of J.D. argues that the conviction exceeded the scope of the charge. Defence counsel makes a referral to the Court of Appeals judgment (page 34., in English version page 33) concerning the determination of punishments and states that J.D. was not found guilty of ordering witnesses A and B to beat each other and that J.D. was not

guilty of beating them with a wooden bat. The Court of Appeals judgment does not specify which offences were committed by the defendant, and what are the consequences of these unlawful actions and by which legal provisions the defendant was held responsible for these acts.

169. The Panel refers to the points above addressing the limitations set by article 432(2) CPC regarding factual evaluation. The Panel also refers to what has been stated prior in this judgment concerning the criminal liability of a co-perpetrator.

170. The Panel notes that article 360(1) CPC states that the judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial. Article 360(2) CPC however states that the court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act.

171. As the defendants were convicted of acts subject to the charge contained in the indictment, the Panel is of the opinion that the scope of the charge was not exceeded. The mere fact that the judgment of the Court of Appeals - in a chapter "Determination of punishments" - lists the factors affecting the determination of punishments with respect to each of the defendants does not exceed the scope of charge.

Witness A as a basis of guilt (articles 262 and 361 CPC)

172. The defence claims, in short, that witness A's testimony was contradictory and intrinsically unreliable. Pursuant to defence claims, witness A's testimony was contradictory and not supported by other evidence and therefore it should have been deemed inadmissible as such. In addition, the evidence as a basis of guilt was based solely on witness A's testimony and therefore in violation of article 262 CPC.

173. The Panel refers to the reasoning in point 125 concerning the scope of adjudication of the Panel with regard to the claim concerning witness A's credibility in general. Concerning the claim that Witness A's testimony would have been intrinsically unreliable as defined in Article 19(1.1.29) CPC and inadmissible as such pursuant to Article 259(2) CPC, the Panel is of the opinion that this kind of assessment would in fact be nothing

more than a new evaluation of the factual situation concerning the credibility of Witness A. Due to the limitations set out in Article 432(2) CPC, the Panel does not asses these claims that challenge the factual evaluation done by the Basic Court and the Court of Appeals in a case concerning requests for protection of legality.

174. The Panel is of the opinion that the restrictions defined in article 262 CPC are not applicable in relation to Witness A. Witness A was neither anonymous to the defence, nor had the quality of a cooperative witness. The Panel also notes that the CPC does not restrict courts in to base their assessment of the facts only on one witness's testimony. Rather it is prescribed in article 361 (1) CPC that court shall base its judgment solely on the facts and evidence considered at the main trial. The testimony at hand was given at the main trial. Moreover, ICTY has held in its jurisprudence that a testimony of a single witness on a material fact does not as a matter of law require corroboration.[6] Therefore, and without entering into any factual evaluation, the Panel concludes by referring to the testimony of Witness A that neither the Basic Court, nor the Court of Appeals violated any of the provisions of Article 384(1) CPC.

175. Taking in consideration that this Panel does not evaluate the factual situation again and the reasoning provided above, the Panel finds allegations unfounded on this part.

CONCLUSIONS

Having considered the above, the Supreme Court decided as in the enacting clause of this judgment. With this outcome, the Panel found no reason to postpone or terminate the execution of the judgments.

THE SUPREME COURT OF KOSOVO
PRISTINA
PML.KZZ 322/2016, dated 19 July 2017

[6] ICTY no. IT-98-32-T on 29 November 2002 page 10 and ICTY no. IT-03-66-T on 30 November 2005 page 9.

Presiding and Reporting judge:

Elka Filcheva-Ermenkova
EULEX Judge

Recording officer:

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EULEX Legal Officer

Panel members:

Arnout Louter
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Nesrin Lushta
Supreme Court Judge