

Basic Court of Mitrovicë/Mitrovica

P 67/2017

In the name of the people

The Basic Court of Mitrovicë/Mitrovica in the trial panel composed of EULEX judges: Dariusz Sielicki as presiding judge, Radostin Petrov and Arnout Louter as panel members, assisted by EULEX Legal Officer Chiara Tagliani acting as recording clerk, in the criminal case No. P 67/2017 against:

Z.V., son of D. and P., born on ... in Mitrovicë/Mitrovica, residing in C. village, N. municipality, Montenegro, of Serbian nationality, citizen of the Republic of Serbia,

accused by the Special Prosecutor of The Republic of Kosovo with the Indictment PPS.no.90/2014, filed with the Court on 16 May 2017 and amended on 14 May 2018, of the charges described as follows:

- I. during the armed conflict in Kosovo, on 05 May 1999, between hour 11:30 -13:30 in Vushtri, street Emin Duraku, acting in co-perpetration with another identified person, in capacity of a Serbian police reservist, while both of them wore uniforms of the Serbian police and army and were armed with knives, pistols and automatic rifles; acting contrary to the norms of international law in force during the war, violating Article 3 (1a and c) common to Four Geneva Conventions of August 12, 1949, as well as violating additional protocol (protocol II) of

this convention of 1977, article 4, points 1 and 2a and 2e;

- a) he intentionally beat and then killed four Albanian civilians: E.R., H.F., A.F. and F.F., and he did it in the F. family house, after beating and pillaging various civilians of Albanian nationality;

- b) he intentionally violated the bodily integrity, health, physical or mental well-being of the following persons: S.F., F.S., V.X., Z.X., N.X., B.X., Ze.X., B.P., L.R., G.M., H.M., G.S., A.S., S.S., B.O., S.O., F.M., A.M., Al.M.by inflicting cruel and inhuman treatment and outrages on human dignity against them, beating them with fists, kicks and other strong objects in different parts of the body, inflicting in some cases marks or contusions on the body as well as heavy physical and mental pain upon them, whose consequences some of the victims suffer nowadays;

- c) he intentionally and violently pillaged money in various amounts, gold and other precious things from Albanian civilians, namely from: V.X., N.X., Z.X., B.O., S.O., B.M., U.M., F.M., prior to killing four Albanian civilians: E.R., A.F., H.F. and F.F.;

whereas those actions were classified in the Indictment as War Crimes against Civilian Population contrary to article 142 in connection with article 22 of the Criminal Code of the Socialist Federative Republic of Yugoslavia (CCSFRY), corresponding to Article 3 (1a and c) common to the four Geneva Conventions, currently criminalized under Article 152 (1) and (2.1) and Article 153 (1) and (2), in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo;

after the main trial held on the days 11 January 2018, 6, 7, 8,13,15,20,21 February 2018, 20,21,22,27,28,29 March 2018, and 14,15 May 2018 in the presence of the accused and his defence counsel M.D., and the representative of the injured parties Bu.Ma., having the injured parties: S.F., B.F., F.S., M.R., Aj.F.- Sht., A.S., L.R. (Ha.), V.X., N.X., Z.X., B.X., B.P., G.M., H.M., B.O., G.S., S.O., F.M., been duly informed about the dates and place of all trial sessions hearing,

whereas B.F., S.F., G.S., M.R., N.X., V.X., G.M., A.S. were present on the day 11 January 2018, and M.R., S.F., B.O., S.O. were present on the 14 May 2018, and B.O., M.R., S.O., S.F., B.F. and G.S. were present on 15 May 2018;

after the trial panel's deliberation and voting held on 16 May 2018 pursuant to the Article 359 Paragraph 1 of the Criminal Procedure Code of the Republic of Kosovo (CPCRK) in the presence of the accused, the defence counsel M.D., EULEX Prosecutor of the Special Prosecution Office of Kosovo Pa.F., the representative of the Injured Parties, pronounces in public the following:

V E R D I C T

- I.** Pursuant to Article 364, paragraph 1, item 1.3 of the CPCRK, the accused Z.V. is hereby acquitted of all the charges presented in the introductory part of this judgement because it has not been proven that the accused has committed the acts with which he has been charged;

- II.** Pursuant to Article 463, paragraph 3, of the CPCRK, the injured parties are hereby instructed that they may pursue the property claim in civil litigation;

- III.** Pursuant to Article 450 paragraph 2 Items 1-5 of the CPCRK, the cost of criminal proceedings and necessary expenses and the remuneration of the Defense Counsel for the defendants shall be paid from budgetary resources.

R E A S O N I N G

I. Procedural background

- 1. On 30 May 2014, the prosecutor issued a Ruling on Initiation of Investigation in the case PPS 90/14 against Z.V. for War crimes against the Civilian Population.

- 2. On 18 March 2016, the investigation was suspended to then be re-opened on 09 March 2017.

3. On 11 November 2016 the defendant was extradited to Kosovo by the Montenegrin authorities, following the Decision dated 18 July 2016 of the High Court of Podgorica, Montenegro, to grant the request for the extradition of Z.V. and the subsequent 'Decision on the Extradition of Defendant Z.V. to Kosovo' issued by the Ministry of Justice of the Republic of Montenegro on 7 November 2016.
4. On 16 May 2017, the prosecutor filed the indictment PPS 90/14 against the defendant for the counts that were presented under items I a, b and c of the introductory part of this judgement.
5. Pursuant to Article 245 of the CPCRK, an initial hearing was held on 04 August 2017. During the hearing, the defendant pleaded not guilty to all charges. Pursuant to Article 245 Paragraph 5 of the CPC the parties were invited to file written submissions in relation to the indictment.
6. On 04 September 2017 the defense counsel timely filed a Request for Dismissal of the Indictment.
7. On 14 September 2017 the prosecutor timely filed a Reply to the Requests to Dismiss the Indictment.
8. The defense counsel argued that:
 - a) it went against common sense and logic to assume that within three days of intense armed conflict and constant bombardment one person could have perpetrated all the alleged criminal actions;

b) the criminal liability of the accused was not clearly indicated in the Indictment since it is not specified 'who exactly was killed by the accused';

c) a well-grounded suspicion was absent since the prosecution's case relied solely on witnesses' statements and such statements contain contradictory elements that pose doubts as to the same witnesses' credibility. Furthermore, no other relevant material evidence has been put forward by the prosecutor;

9. On 14 September 2017 the Prosecutor timely filed a Reply to the Requests to Dismiss the Indictment.

10. By the ruling dated 30 September 2017 the presiding judge rejected the Request to Dismiss the Indictment submitted by the defense counsel as ungrounded and declared all evidence proposed by the prosecutor as admissible.

11. The Ruling was not subject of any appeal.

II. Competence of the court and panel composition

1. In accordance with Article 11 Paragraph 1 of the Law on Courts, Law No. 03/L-199, basic court has jurisdiction to adjudicate at first instance all criminal offences.

2. The crimes presented in the indictment were committed in Vushtrri which is located in the territory under the competence of the Basic Court of Mitrovicë/Mitrovica. Therefore, in accordance with Article 29 Paragraph 1 of the CPRK, this court has territorial jurisdiction to adjudicate the case.
3. According to Article 286 of the CPRK the main trial should be held at the place where the court has its seat, and in the courthouse.
4. On 23 June 2017, following a request filed by the EULEX competent authorities, in accordance with Article 3.5 and 3.6 of the "Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo" - Law no. 05/L-103 of 17 June 2016, the Kosovo Judicial Council (KJC) issued a decision thereby appointing an EULEX Judge as Presiding Trial Judge in the case.
5. On 08 September 2017, the KJC issued another decision whereby it stated that "the criminal case number P.nr.67/2017 (PPS 90/2014) shall be adjudicated by a trial panel composed of EULEX judges and presided by an EULEX judge".
6. No issue was raised by the parties regarding the composition of the trial panel. Therefore it is presumed that according to Article 382 Paragraph 4 of the CPRK they waived the right to challenge the composition.

III. Main trial

1. Duration of the main trial

- a) The main trial commenced on 11 January 2018 and was concluded on 16 May 2018. It covered 17 trial days.

- b) Due to the length of testimonies of witnesses for the prosecution, the duration of the main trial exceeded the period of 120 calendar days prescribed in Article 314 Paragraph 1.2 of the CPCRK. Each subsequent adjournment ordered by the trial panel did not exceed 30 days with the exception of the adjournment ordered on 29 March 2018 which lasted until 14 May 2018, and which was due to the involvement of the members of the trial panel in another criminal case against the accused. The adjournments were always reasoned by indication of procedural actions to be taken during the next court session.
- c) The parties have not raised objections to the duration of the breaks between court sessions, nor to the duration of the trial. Therefore, pursuant to Article 382 Paragraph 4 of the CPCRK it has been presumed that they waived the right to challenge this matter.

2. Presence of the parties

- a) The EULEX prosecutor of the Special Prosecution Office of Kosovo, the accused and his defense counsel were present on all trial days.

- b) The injured parties were duly informed about the trial and about their respective procedural rights, as well as that the main trial may be held in their absence, but they did not exercise their rights of a party during the trial. The

injured parties appeared in the courtroom on the following days:

- on 11 January 2018: B.F., S.F., G.S., M.R., N.X., V.X., G.M., A.S.;
- and on 14, 15, and 16 May 2018: M.R., B.F., S.F., B.O., S.O..

3. Language of the proceedings, interpretation and court recording

a) Based on Article 16 of the Law on Jurisdiction and Competencies of EULEX Judges and Prosecutors in Kosovo, the language used in the court proceedings was English.

b) In accordance with Article 1 Paragraph 2 of the CPCRK, interpreters translated the court proceedings and all court documents relevant to the trial from English into Albanian and Serbian and vice-versa. During the first two days of the trial translation into Serbian language was provided to the members of the public. On other days the Serbian translation was not requested by the public. The Serbian interpreter was placed next to the accused and defense counsel on all trial days in order to provide them with interpretation. Most of the interpretation was performed in a consecutive manner. The speakers were asked by the presiding judge to make intervals in their utterance, usually every 1 to 3 minutes and as a principle at the end of a complete thought, and then the interpreter rendered what was said into the target language. This method allowed the parties to control the accuracy of interpretation of all evidence taken in the courtroom.

- c) On some occasions the parties raised objections to the quality of translation. All the objections were immediately given consideration by the trial panel and the clarification was put in the record.

- d) Closing arguments of the parties and the announcement of the enacting clause of the judgment were translated simultaneously into English, Albanian, and Serbian.

- e) According to the decision of the presiding judge taken pursuant to Article 315 Paragraph 2 and 5 of the CPCRK on 11 January 2018, the record of the proceedings was made verbatim in writing and without audio, video or stenographic recording because the time used for translation allowed the court recorder to accurately capture and write down all words spoken in the courtroom.

- f) Accuracy of the written record was controlled by the presiding judge in real time. The computer screen displaying the record was placed in front of him. This manner of recording made use of other recording methods redundant as it appeared unlikely to achieve any better accuracy of the semantic content of the record. There were no objections to the accuracy of the minutes.

4. Principles applied for questioning witnesses

- a) As a principle, leading questions on direct examination were not allowed by the presiding judge. The only exceptions were permitted when recollection of facts by a witness was obviously exhausted, when there was a need to focus a witness's attention on a particular matter, or when the question touched upon a matter being undoubtedly

of common knowledge. Provocative, suggestive, and repetitive questions were also not allowed at this stage.

b) Badgering or insulting a witness, as well as misquotation of previous statements, was not permitted during all examination.

c) The panel actively participated in the questioning of witnesses at various stages of examination. However, the parties were always given an opportunity to challenge the answers given by the witness in response to a judge's question. The panel based its examination of witnesses on the conclusion that Article 7 Paragraph 1 of the CPCRK obliges judges to seek an objective truth. Therefore, a meticulous clarification of all factual matters that appear to the judges to be unclear was necessary. Since Article 299 Paragraph 1 of the CPCRK entitles the judges to pose questions to any witness but it does not indicate any particular stage of examination the panel took the stance that the code does not impose any limitations in relation to the time of interrogation by judges.

5. Evidentiary motions of the parties

a) All evidentiary motions of the prosecutor, namely the 'Motion for Judicial Notice of Adjudicated Facts' and the 'Motion for New evidence to be admitted during the Main Trial', were granted and the proposed pieces of evidence were declared as admissible and were duly examined during the main trial.

b) The motion dated 28 August 2017 filed by the defense counsel to examine witnesses: V.M.V., Z.J., T.T., Sr.T., V.J., Lj.S., D.P., and Du.J. was granted. However, the proposed evidence turned out to be unobtainable as the exact location of each of the witnesses remained unknown to the trial panel despite efforts taken in order to obtain it through the assistance of the competent Serbian authorities as the witnesses presumably resided in Serbia. Therefore, pursuant to article 258 paragraph 3, on 14 May 2019 the trial panel declared the said evidence as excluded from the body of evidence because it was not possible to examine it in court.

6. Evidence examined by the trial panel

a) The following witnesses proposed by the prosecutor were heard by the trial panel:

- B.F. on 6 February 2018;
- G.M. on 7 February 2018;
- H.M. on 7 February 2018;
- Aj.F. Sht. on 8 February 2018;
- B.O. on 13 February 2018;
- and S.O. on 13 February 2018;
- F.M. on 15 February 2018; ,
- G.S. on 20 February 2018;
- M.R. on 20 February 2018;
- A.S. on 21 February 2018;
- S.F. on 21 February 2018;
- F.S. on 20 March 2018; ,
- V.X. on 21 March 2018;
- N.X. on 21 March 2018;
- Z.X. on 22 March 2018;
- B.X. on 22 March 2018;
- B.P. on 27 March 2018;
- L.Ha. on 27 March 2018;
- F.I. on 28 March 2018;
- S.K. on 29 March 2018;

b) On 06 March 2018, the Prosecutor withdrew the witness I.J..

c) Upon consent of the parties during the session of 22 March 2018, the testimony of the witness Tu. R. was considered as read.

d) Upon the motion of the prosecutor the following pieces of evidence were presented to the trial panel and adduced into evidence:

a. photographs:

- aerial photo of the scene (ref: 1999-00285) of 21 January 2004
- five photographs of the crime scene evidenced under no. BI 2017-18-99, dated 26 October 1999
- seven photographs of the grave site of A.F., F.F., H.F. and E.R.

b. autopsy reports:

- of the body of F.F. (S.), dated 22 August 2000, no. HR 36/001B;
- of the body of A.F.(S.), date 22 August 2000, no. HR 37/001B;
- of the body of E.R., date 21 August 2000, no. HR 10/001B;
- of the body of H.F.(S.), date 21 August 2000, no. HR 11/001B;
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c. other documents:

- proof of chain of custody under file number 04-227, date 13.01.2004;
- Ballistics expertise report, date 07 February 2004, under file no. 2004 - 04 - 227 and Ballistics reference no.: B040077.
- Photo album dated 16 January 2004, file MHQF# 04-227 (34 photographs)

- Criminalistics Technical Report file no. # 04-227- including 2 scene sketches dated 11February 2004,
- Cards for ID data - background on above mentioned victims: H.F. with no. 13505, F.F. with no. 73022, A.F. 78575 and E.R. with no. 91162.
- Certificate from the Directorate for Administration and Personnel dated 13.04.2012 for for H.F..
- Report of the crime scene dated 13 April 2017, attached photo album with 17 photographs.

d. death certificates:

- E.R.- no. V 00122836, dated 12 April 2012,
- F.F.- no. V 00124003, dated 29 March 2012,
- A.F. - no.10109013 dated 20 March 2017,
- H.F.- no. V 00122878 dated 28 March 2012,

e. records of identification of a person in photo album:

- by S.F., dated 08 February 2016
- by B.F., date 08 February 2016
- by N.X., date 10 February 2016
- by S.K., date 08 February 2016
- by B.X., date 27 March 2017

f. The map of the Duraku street in Vushtrri with markings made by witness B.F. during his interrogation on February 2018, together with the corresponding A4 map, was marked as Exhibit 1 and was examined by the trial panel.

g. A piece of paper with on it the signature of witness G.M. was adduced as Exhibit 2 on 07 February 2018.

d).The accused decided to take the stand and his statement was heard in court on 15 May 2018.

IV. Determination of the factual situation

1. The facts relevant to the counts that the accused was tried for in this case were established by the trial panel as a result of the analysis and assessment of all pieces of evidence examined in the courtroom. The trial panel established that:
 - a. On 5 May 1999 between 11.30 a.m. and 2.30 pm, Go.P. and another unidentified person of Roma nationality appeared in the neighborhood of Emin Duraku Street in Vushtrri which was inhabited by the Albanian population. They were both wearing military style clothes. Go.P. addressed the other man as "Sa.". "Sa." was taller than Go.P. and looked chubby. They were armed with automatic rifles, handguns and knives.
 - b. The two men entered the house that belonged to the M. family and demanded money from G.M. and H.M. who were present there. G.M. and H.M. refused to give them anything because they had no money and the two men beat them and kicked them all over their body for about 20-25 minutes and subsequently they walked to the yard of F.Sa.'s house. After that Go.P. and "Sa." walked to I.M.'s house.
 - c. In that yard Go.P. and the other man met two young women. One of the women was holding a child on her hands. Go.P. grabbed the child and tried to pull it away from the woman but she resisted. After that the two men walked away in the direction of the house belonging to A.S..
 - d. They approached the house and tried to enter through the main door but it was locked. They met Q.S. on the street and took him to the back entrance of the house

and forced him to break down the door there. Go.P. and Q.S. went inside the house. 'Sa." stayed outside but after a short time he joined Go.P.. They stayed some time in the house threatening A.S. with killing him. "Sa." scratched A.S.'s neck with a knife.

- e. There was a group of refugees who had stayed in I.M.'s house for some days. They left their native village because of military operations of the Serbian forces going on there. Go.P. and "Sa." looted a golden necklace and other pieces of golden jewelry in the value of 4500 DM (Deutsche Mark) from Aj.F.- Sht., 1000 DM from B.M., and 700 DM from U.M.. They did it by threatening those persons with the use of deadly force, and in this way they forced them to surrender the money and valuables. At the same time they violated the bodily integrity of F.M. by hitting him with an automatic rifle in his back and Al.M. by grabbing him by his nose and slapping his face. They also threatened A.M. who was 7 years old with decapitation by putting a knife on his throat.
- f. They then moved to Sy.Ca.'s house. They met F.F. there and took him with them to B.O.'s house.
- g. There were S.O., B.O., G.S. and other adults and children there. Go.P. and "Sa." demanded money from them. "Sa." drew a cross on the forehead of S.O. and when she wiped it off he slapped her several times. Then he made G.S. undress by putting a knife on his throat and a handgun in his mouth. When he found no money he beat G.S.. After that Sh.S. gave him 300 DM. Then "Sa." and Go.P. left ordering the occupants of the house to lie on the floor and to keep their hands behind the head. They took F.F. with them and went to H.F.'s house.

h. In H.F.'s house "Sa." and Go.P. demanded money from the persons that were present there threatening them with the use of weapons. They hit several times S.F. and F.S.. "Sa." struck F.S. with the stock of his rifle. The women were made to lick blood from the intruders' palms. One of the intruders threw A.F. on the floor. Shortly after that E.R. and H.F. came into the house. The intruders discussed aloud whom to kill first. Then Go.P. fired a shot into E.R.'s chest. Then "Sa." fired at A.F. hitting him in the chest, and Go.P. shot at H.F.'s head and at F.F.'s chest. E.R., H.F. and F.F. died immediately while A.F. passed away around one hour later.

i. The intruders left H.F.'s house. They met L.R. and another women outside and compelled them to enter with them V.X.'s house. "Sa." took from V.X. his ID card, tore it and made V.X. chew it. Then he grabbed a boy named E. and threatened to injure him with a knife if he was not paid money. Z.X. gave "Sa." 2000 DM. Subsequently the intruders violated the bodily integrity of several persons: Z.X. by punching her with a fist on her head, N.X. by hitting him with the cheek of a knife, B.X., by punching him several times in the face, Ze.X., by slapping her with an open palm in an undetermined part of the body and B.P., by kicking him in the face and hitting him in the head with the knife's handle. They terrorized the victims with the threat of using the weapon and they looted 1200 DM from them and finally they left.

Z.V. did not participate in any of the criminal actions that were the subject of the proceedings. This finding was based on the following line of reasoning: witness B.F. observed perpetrators moving from one location to another. It excluded the possibility that there was any other person that accompanied Go.P. in A.S.'s house and was a co-perpetrator of other criminal acts.

2. Since Z.V.'s participation in the criminal acts at hand was not established, the trial panel found it redundant to elaborate on the details of the particular actions performed by the perpetrators in each of the particular locations. Any such details could not contribute to the identification of Z.V. as a perpetrator because his presence at the crime scenes was not established.

V. Assessment of evidence

1. The trial panel found as generally credible all the testimonies given in court by the witnesses for the prosecution. Generally speaking, their versions of the events were logical, coherent, and corroborated each other. This assessment is related to the accounts of events presented by the witnesses but not to their recognition of Z.V. as one of the perpetrators.
 - a. There were noticeable divergences and disparities in relation to several minor details. They mostly concerned the description of the clothing of the intruders and sometimes the sequence of their actions. It is the opinion of the trial panel that these divergences and disparities resulted from the time lapse and natural imperfection of human perception and memory. In fact, they assured the trial panel that the testimonies given in front of the panel were fully spontaneous and had not been concocted beforehand by the witnesses.

- b. In relation to all the witnesses, their reactions when confronted with the disparities seemed spontaneous and natural. Their explanations with regard to details asked during the examination in the main trial were assessed by the panel as sincere and convincing. It must be stressed that the interrogations during the investigation carried out by the ICTY were not very specific. The record shows that no questions for clarification were asked at that time. Therefore, the discrepancies did not impeach the credibility of the witnesses.
2. There were no doubts as to the trustworthiness of S.K.'s statement. However, his testimony was useful only for the assessment of the credibility of eyewitnesses as it referred to the statements given to him by other persons. In particular, his testimony could not be used for the identification of Z.V. as a perpetrator because it was based on unverifiable hearsay.
 3. The testimony given by Tu. R. was fully reliable as the accused did not contest it.
 4. All documents presented by the prosecutor were assessed as authentic and reliable as to their content as they were not contested by the defense and there were no reason to disregard them.
 5. The trial panel found the testimony of A.S. to be fully trustworthy not only with regard to the course of the actions that took place in his house but also in relation to the identification of the culprits. The testimony of A.S. served as a basis of the trial panel's finding that

Z.V. was not a perpetrator of the actions that were the subject of the proceedings.

a) There were no elements that would dictate criticism of A.S.'s veracity. The witness presented very good observation and reporting skills that are typical for his training and occupation as a police officer.

b) His account of the events outside the house, especially the location of the intruders and the way in which they entered his dwelling is in conformity with the details described by B.F.. A.S. decisively denied that Z.V. was present in his house, and therefore that he was one of the perpetrators. He recognized and identified both of them. He decisively stated that one of the intruders was Go.P.. This recognition is in conformity with the statement of B.F.. At the same time A.S. recognized and identified the other perpetrator as a man of Roma nationality who was addressed by Go.P. at the critical time as "Sa.". According to the witness he had seen "Sa." on numerous occasions before the event that took place in his house.

c) A.S.'s credibility was verified through meticulous and detailed cross-examination performed not only by the prosecutor but also by the panel members. All of his answers were logical, and coherent. The witness showed no propensity to deliberately evade any details. He was actually fully responsive.

d) A.S. was confronted with his statement given on 9 February 2016 with regard to the description of "Sa.'s" appearance when he said that "Sa. wore a sock on his face and head." This appeared to the trial panel as a

significant contradiction in relation to his statement given in court where the witness reported that "Sa." had his face uncovered. A.S.'s reaction to this contradiction was authoritative and seemed to be sincere and convincing. He appeared to not be confused at all and he firmly insisted that "Sa." had his face unmasked.

- e) It must be stressed that during the first interrogation conducted by an ICTY investigator that took place on 28 October 2004 the witness clearly stated that out of the two perpetrators only Go.P. wore a mask, which is consistent with his testimony in court. On 9 February 2016 the witness described that "Sa." had short black hair which is apparently incongruent with the statement that "Sa." kept a sock on his head and face as his hair could not be seen. The trial panel noted that the interrogation lasted from 10.40 to 13.30 and was conducted in Albanian, without allowing time for translation. Its record was taken by the interrogating officer and it consists only of less than three pages of a computer-typed text. It is presumed that the minutes of the interrogation are in fact only a summary of the witness's statement and not a verbatim record. Although this is a normal and fully acceptable way of taking the minutes during an investigation, it is very likely that unintentional distortion of the record can happen. Reading and signing the minutes by the interrogated witness does not eliminate the risk of mangling. Therefore, the said discrepancy did not result in the denial of A.S.'s credibility.

- f) A.S. knew Z.V. before the war. He used to meet him in the court where Z.V. worked. A.S. used to go there in the course of his duties as police officer to deliver mail to the court. He said he met Z.V. a "hundred times". The perpetrators spent a certain period of time in his house. This gave him an opportunity to observe both of them directly and from a very close distance. His recognition

of the perpetrators was based on strong grounds and for this reason was considered by the trial panel as reliable and conclusive.

6. The recognition and identification of Z.V. as a perpetrator by all other witnesses in the case has been assessed by the trial panel as doubtful, unconvincing and therefore unreliable. Therefore, the relevant statements of the witnesses who claimed to recognize Z.V. already at the critical time or later, i.e. during a photo lineup, could not eliminate the doubts as to Z.V.'s participation in the perpetration of the crime, doubts that stemmed from A.S.'s statement. Pursuant to Article 3 paragraph 2 of the CPCRK the doubts had to be interpreted in favor of the accused.

7. In the light of A.S.'s statement, the trial panel concluded that the recognition of Z.V. by other persons who claimed to have known him before the war was erroneous. However, the contradiction between them and A.S. as to the recognition was not the sole and exclusive factor that contributed to this conclusion. In particular:

a) B.F. claimed to have known Z.V. since the time when they both attended the same elementary school. When asked by the prosecutor when he saw Z.V. for the last time before 5 May 1999 the witness spontaneously answered: "I did not see Z.V. until the day that these murders took place, but I have seen Go.P. two days before, I saw him at my uncle's house." Only after the question was repeated to him did the witness say that he saw Z.V. when he went to the court to pay a fine and it was on the day when massacres in Qirez and Likoshan occurred. Although the witness claimed that they occurred in 1999 it is a notorious fact that the massacres took place in March 1998. The trial panel noted that because of the 4-year age difference between B.F. and Z.V. the witness was not

more than 11 years old when the accused left the school. It is a notorious fact that schooling at the level of elementary school in Yugoslavia started at the age of 7 and lasted 8 years. Therefore, B.F.'s recollection of the accused as his schoolmate appeared to be very distant in time and the recognition of the accused made in 1998 and then on the critical day could be based only on very vague resemblance as it actually referred to the person that the witness met as a schoolmate around 12 years earlier, when the accused was around 15 years old. Moreover, B.F. kept observing the perpetrators and at the same time he kept running away from them and hiding from them. His opportunity to see them and to recognize them was not as direct as the possibility that A.S. had.

- b) The recognition of Z.V. presented by Aj.F.Sht. turned out to be manifestly unreliable. The witness stated that she met Z.V. while he worked as a court clerk in 1984 or 1985 and he looked as a grown up man. Z.V. was born in 1970 so he could not have started working in the court at that time.

- c) The panel came to the conclusion that the recognition of Z.V. as a culprit from the photo lineup by persons who did not know him before the critical day and never met him after cannot be considered as reliable evidence. Only S.F. was presented with a photo album relatively shortly after the critical time. Her statement on the identification of the accused was assessed by the trial panel as not conclusive because of the doubts stemming from the following grounds:
 - a. The image used for the photo array showed only the face of the suspect looking straight forward without showing his profile. It did not convey any information on the body structure, height. It did not allow for

perception of such characteristics as the length of the nose or prognathism. The resolution and clearness of the image was poor as it was a photocopy of the original picture. It did not allow one to see the height of the cheekbones. It did not depict any unique facial features or distinguishing marks. It originated from Z.V.'s identity card and was taken several years before the critical time. The image allowed one to perceive merely a resemblance of the depicted person to his actual appearance and it did not show features that could exclude erroneous identification. It created the risk of positive identification of the accused only because of his general resemblance to the actual perpetrator.

- b. The method used for the presentation of the photo album is called simultaneous lineup. The photos were shown to each witness in a group. It is obvious that the witnesses engaged in comparison of the images and therefore in relative judgment. It obviously created the danger that they picked the one who most closely resembled the culprit relative to others, relying on results of the comparison and not only on their memory.

- d) N.X. claimed to have had a nodding acquaintance of Z.V. before the war. He recognized Z.V. from the picture only on 10 February 2016. He was presented with the same photo album including a picture of the accused on 12 December 2004 and he was not able to recognize the accused. Moreover, that time he stated that the intruder who came to his house with Go.P. was known as "Dragan". Because of these contradictions and divergences his statement concerning the recognition of the accused was considered as not trustworthy.

- e) B.X. recognized Z.V. as a culprit from the picture only on 4 April 2017. At the same time he did not identify Go.P. although A.S. on 28 October 2004, N.X. on 12 December 2004, V.X. on 3 February 2016, and H.M. on 4 April 2017 claimed that they recognized Go.P. but not the other culprit. Because of this selective recognition, the time lapse, and the fact that B.X. saw the culprits for a relatively short time, his statement on the recognition of Z.V. was considered as unconvincing.
- f) No other witnesses recognized Z.V. from the photo lineup in the course of investigations.
- g) Several witnesses claimed to have recognized Z.V. in the courtroom. The trial panel concluded that the so-called in dock recognition had no evidentiary value. Presenting a person as the accused in the court carries the risk of having an obviously prejudicial effect on a witness as the accused is the only person to be identified. On the other hand, negative in-dock identification could be used as exculpatory evidence. Therefore all witness statements that consisted of recognition of Z.V. as a perpetrator were for the trial panel manifestly unconvincing.
- h) The trial panel could not rely on the recognition of the accused by a declarant who was not available to testify at trial. According to the statement of S.O., A.S. told her that he recognized Z.V. at the critical time. His utterance constituted unverifiable hearsay and for this reason it had no probative value.

VI. The judgement

1. Description of the charges

- a) The trial panel concluded that the description of the charges presented in the indictment conveys sufficient and in fact precise information on the scope of the accusation, i.e. on the actions of the accused, their place and time, and the victims who were harmed by them. However, the description was given in a summary and narrative way and consisted of elements that did not belong to the characteristics of the crimes that the accused was charged with. For the purpose of clarity and precision, the crimes that Z.V. was accused of were presented in the introductory part of the judgement in a structured way and with the omission of elements unnecessary for the legal classification.

- b) It was the duty of the trial panel to remove the name of the other perpetrator, namely Go.P., from the description of the charges against Z.V. in the introductory part of the enacting clause. Inclusion of the name of a person who did not participate in the trial in the enacting clause as a co-perpetrator would violate the principle of presumption of innocence and the right to a fair trial. The presumption not allow for the presentation in the indictment of the names of unindicted co-perpetrators in order to avoid unfair stigmatization of such persons. However, there is a practice established commonly in EU domestic courts that allows for the mention of a co-perpetrator's name in the reasoning of the judgement for the sake of clarity of the presentation of facts established during the main trial. Such a mention is not considered as prejudicial for any other criminal proceedings and it is much less likely to stigmatize the mentioned person than indication in the enacting clause would.

2. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK it was mandatory to acquit Z.V. because it was not proven that he committed the criminal acts that he was accused of.

3. The trial panel based its decision related to the costs of criminal proceedings on legal provisions quoted in the enacting clause.

Dariusz Sielicki
EULEX Presiding Judge

Chiara Tagliani
Recording Clerk

Authorized persons may file an appeal against this judgment to the Court of Appeal through the Basic Court of Mitrovicë/a within fifteen (15) days of the day the copy of the judgment has been served, pursuant to Article 380 Paragraph (1) of the CPC.