HLC Kosovo annual report 2019

WAR CRIMES TRIALS – STILL AT THE BEGINNIG

CONTENT

List of Acronyms:

CC SFRY – The Criminal Code of the Socialist Federative Republic of Yugoslavia which came into force in 1977, which was deemed applicable according to UNMIK regulation 1999/24 of December 12th, 1999. According to this regulation, "the law applicable in Kosovo shall be the law in force on Kosovo on March 22th, 1989" or laws in force before the amendments to the Yugoslav Constitution in 1989;
CCRP – Criminal Code of the Republic of Kosovo, which came into force on January 1st, 2013, as well as Criminal Code of the Republic of Kosovo, which came into force on April 14, 2019;
CPCRK – The Criminal Procedure Code of the Republic of Kosovo, which came into force on January 1st, 2013;
EULEX – The European Union Mission for the Rule of Law in Kosovo;
FDJ – Freedom, Democracy, Justice;
FRY – Fedaral Republic of Yugoslavia;
HLC Kosovo – Humanitarian Law Center Kosovo;
ICTY – International Criminal Court for the former Yugoslavia;
KFOR – Kosovo Force, the North Atlantic Treaty Organization, (NATO) peacekeeping force which has been in Kosovo since June 12th, 1999;
KLA – Kosovo Liberation Army;
KP – Kosovo Police;
LDK – Democratic League of Kosovo
MIA – Ministry of Internal Affairs;
NATO - North Atlantic Treaty Organization
PPS – Criminal complaint of the Special Prosecution (The acronym in English is identical to the one in Albanian. The international mission in Kosovo uses the Albanian acronym, because the case registry in Kosovo is done in Albanian);
SCID – Serious Crime Investigation Directorate;
SPRK – The Special Prosecution of the Republic of Kosovo;
UNMIK – United Nations Mision in Kosovo;
WCIU – War Crimes Investigation Unit

FOREWORD

Within the project *"Monitoring Conflict Related Crime Trails in Kosovo and the Inclusion of the Youth in the Justice Sector"*, the Humanitarian Law Center Kosovo (HLC Kosovo) continued to regularly monitor war crimes trials organised in Kosovo courts throughout 2019. During the reporting period, some trials that were related to the events that took place during the armed conflict in Kosovo were also monitored (*The Prosecutor v. Ivan Todosijević*) as well as those that were politically related (*The Prosecutor v. Nedeljko Spasojević*).

In addition to the regular monitoring of court proceedings, an analysis of the monitored trials and related court records was also carried out. It was possible to implement the whole project due to the access to court records as a result of a successful cooperation with the Kosovo Judicial Council. During the reporting period, the HLC Kosovo and the Kosovo Judicial Council extended their memorandum of cooperation for another two years. Access to court records allowed the HLC Kosovo to conduct a professional analysis of the criminal proceedings that took place during the reporting period.

Project activities

During the reporting period (January 1 - December 31, 2019), the HLC Kosovo monitors[1] were active in 40 court sessions in six (6) criminal cases on charges of *War Crimes against the Civilian Population*, as well as in one (1) case related to *war crimes* trials (some of the Defendants in a war crimes case were charged with the escape from the Prishtinë/Priština Clinical Centre where they were hospitalised while the criminal proceedings were ongoing). During the reporting period, the main trial in the case on charges of inciting national, racial or religious hatred, discord and intolerance was also monitored. This case was related to the events that occurred during the armed conflict. Moreover, some sessions held before Pre-Trial Judges on Prosecution's applications for detention on remand were monitored in relation to the suspects who were arrested because of a grounded suspicion that they had committed the criminal offence of *War Crimes against the Civilian Population*.

The report covers the analyses of the criminal proceedings conducted, during the reporting period, before the courts of first instance, mainly before the Special Department of the Basic Court of Prishtinë/Priština, as well as the analyses of the

[1] During the reporting period, the trials were monitored by HLC Kosovo monitors, as well as by a group of students from the Law Faculty of the Public University of Prishtinë/Priština and some private colleges with which the HLC Kosovo signed a cooperation agreement. A group of nine (9) students prepared a total of eighty-two (82) daily trial reports.

main trials that began in the previous years before the Serious Crimes Departments of the Basic Courts of Prizren and Pejë/Peć.

War Crimes Trials

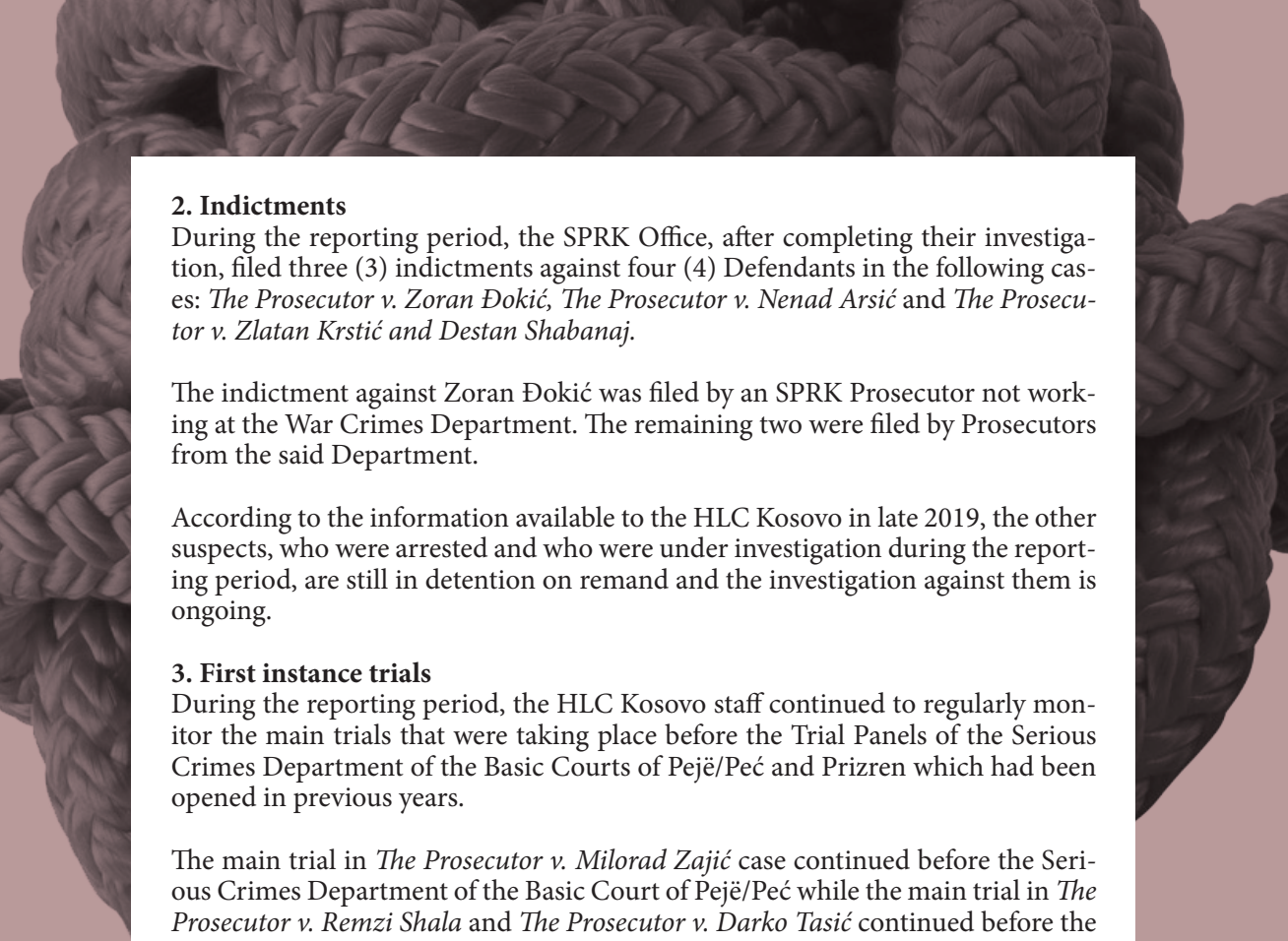
1. Preliminary procedure

During the reporting period, several sessions were monitored that were held in accordance with the SPRK's application for detention on remand against the persons arrested during the year mainly at the Kosovo border crossings with Serbia due to a grounded suspicion that during the armed conflict in Kosovo, 1998-1999, they had committed the criminal offence of *War Crimes against the Civilian Population*.

In 2019, at the request of the SPRK, six (6) persons were apprehended at the Jarinje and Brnjak border crossings, against whom the measure of detention on remand was ordered following the detention hearings held by the Special Department of the Basic Court of Prishtinë/Priština. The cases were as follows: *The Prosecutor v. Zoran Đokić, The Prosecutor v. Shemsi Garaj, The Prosecutor v. Zlatan Krstić, The Prosecutor v. Destan Shabanaj, The Prosecutor v. Goran Stanišić, The Prosecutor v. Ramiz Džogović, The Prosecutor v. Nenad Arsić* and *The Prosecutor v. Miloš Petković* who was extradited from Hungary in accordance with an international arrest warrant. In the rulings of the Pre-Trial Judges of the Special Department of the Basic Court of Prishtinë/Priština, detention on remand was ordered against the foregoing suspects, while in the rulings issues by SPRK Prosecutors, an official investigation was initiated against them due to a grounded suspicion that they had committed the criminal offence of *War Crimes against the Civilian Population* with the exception of the suspect Petković. The investigation against him was originally launched on May 31, 2012, then terminated as he was unavailable to the Kosovo judicial authorities, and then reopened after his extradition.

In some of the above listed cases, the investigation was suspended after certain investigative actions had been conducted and evidence obtained. In *The Prosecutor v. Miloš Petković* case, after certain investigative actions had been taken (hearing of individual witnesses and obtaining other evidence), the Prosecutor, due to the lack of evidence, withdrew from further prosecution of this suspect. Petković was released from detention on remand by a ruling of the Pre-Trial Judge immediately after the decision of the competent Prosecutor to withdraw from prosecution[2]. Also, the preliminary criminal investigation was suspended and a ruling on termination of investigation was rendered in *The Prosecutor v. Shemsi Garaj* case. Namely, during the preliminary criminal investigation, material evidence was obtained that confirmed that, at the time when the Prosecution claimed for the criminal offence to have happened for which there was a grounded suspicion that the suspect had participated in it, his whereabouts had been outside the territory of Kosovo.

[2] Details on the preliminary criminal investigation, the extradition of the suspect to the Kosovo prosecution authorities, the ordering of the detention measure and its termination are given in the part of the report related to the preliminary criminal investigation.



2. Indictments
During the reporting period, the SPRK Office, after completing their investigation, filed three (3) indictments against four (4) Defendants in the following cases: *The Prosecutor v. Zoran Đokić, The Prosecutor v. Nenad Arsić* and *The Prosecutor v. Zlatan Krstić and Destan Shabanaj.*

The indictment against Zoran Đokić was filed by an SPRK Prosecutor not working at the War Crimes Department. The remaining two were filed by Prosecutors from the said Department.

According to the information available to the HLC Kosovo in late 2019, the other suspects, who were arrested and who were under investigation during the reporting period, are still in detention on remand and the investigation against them is ongoing.

3. First instance trials
During the reporting period, the HLC Kosovo staff continued to regularly monitor the main trials that were taking place before the Trial Panels of the Serious Crimes Department of the Basic Courts of Pejë/Peć and Prizren which had been opened in previous years.

The main trial in *The Prosecutor v. Milorad Zajić* case continued before the Serious Crimes Department of the Basic Court of Pejë/Peć while the main trial in *The Prosecutor v. Remzi Shala* and *The Prosecutor v. Darko Tasić* continued before the Serious Crimes Department of the Basic Court of Prizren.

During the reporting year, and after the indictment assessment procedure, on November 18, 2019, the main trial in *The Prosecutor v. Zoran Đokić* case was opened before a Trial Panel of the Special Department of the Basic Court of Prishtinë/Priština. In *The Prosecutor v. Nenad Arsić* case, at the very end of the year (December 24, 2019), an initial hearing was held before the Presiding Trial Judge when the parties to the proceedings were given a binding instruction to submit to the Court any objections to the indictment and requests for its dismissal within 30 days.

War crimes indictments in three (3) cases were represented before the Court by two SPRK Prosecutors who are not Prosecutors at the SPRK's War Crimes Department. In the other two (2) war crimes cases, the indictments were represented by a Prosecutor of this Department.

An indictment against Zlatan Krstić and Destan Shabanaj was filed on December 30, 2019. It was announced in public on January 8, 2020. In this report, the HLC Kosovo conducted an analysis of two preliminary criminal investigations that took place separately in the reporting period in relation to the now Defendants.

4. Appellate proceedings
The present Annual Report contains the analyses of the appellate proceedings held before the Appellate Panels of the Court of Appeals in the following cases: *The Prosecutor v. Zoran Vukotić (Vukotić 1 and 2), The Prosecutor v. Milorad Zajić, The Prosecutor v. Skender Bislimi* and *The Prosecutor v. Remzi Shala*. In some of these cases, the analysis also covered first-instance proceedings initiated in previous years that continued during the reporting period.

In some of the above cases [*The Prosecutor v. Zoran Vukotić (Vukotić 1 and 2), The Prosecutor v. Milorad Zajić* and *The Prosecutor v. Skender Bislimi*], the Judges of the Serious Crimes Department were adjudicating, while in *The Prosecutor v. Remzi Shala* case, the parties' appeals were considered by the Judges of the Special Department of the Court of Appeals. Upon the appeals against the acquittals in two cases [*The Prosecutor v. Zoran Vukotić (Vukotić 2)* and *The Prosecutor v. Milorad Zajić*], the sessions of the Appellate Panels were held without the presence of the parties who had not been notified thereof, pursuant to Article 390, Paragraph 1 of the CPCRK which provides that the parties to the proceedings shall be notified of the session of the Appellate Panel when a sentence of imprisonment is imposed on the Defendant. None of the sessions of the Appellate Panel was attended by the Appellate Prosecutor, since the presence of the parties under Paragraph 4 of the said Article is not mandatory.

5. Extraordinary legal remedies
During the reporting period, the Supreme Court of Kosovo adjudicated in *The Prosecutor v. Skender Bilsimi* upon the request for protection of legality filed by the Defence Counsel for the convicted person.

Upon the motion of the SPRK Prosecutor, the State Prosecutor submitted to the Supreme Court of Kosovo a request for protection of legality in *The Prosecutor v. Milorad Zajić* case against the acquittals rendered by the Serious Crimes Department of the Basic Court of Pejë/Peć and the Serious Crimes Department of the Court of Appeals. During the reporting period, the Court did not adjudicate on this request. The request was filed with the Court on December 18, 2019.

6. Basic Court of Mitrovicë/Mitrovica
By the decisions of the higher instance courts (the Court of Appeals and the Supreme Court of Kosovo), certain cases [*The Prosecutor v. Sylejman Selimi et al., The Prosecutor v. Zoran Vukotić (Vukotić 1, 2)*] were remitted to the Basic Court of Mitrovicë/Mitrovica for reconsideration on certain charges. During the reporting year, no main trials were opened in these cases before this Court.

Moreover, the Basic Court of Mitrovicë/Mitrovica did not open the main trial in *The Prosecutor v. Zoran Vukotić (Vukotić 3)* on the indictment dated June 23, 2017. In this case, the Defendant is charged also with the commission of the criminal offence of *War Crimes against the Civilian Population*. According to the indictment,

an initial hearing was held in mid-December 2017 before an International Judge. On February 1, 2018, this Judge issued a ruling denying the Defence Counsel's motion to dismiss one count of the indictment. This ruling was upheld by the Court of Appeal on April 20, 2018. During the reporting year, the Presiding Trial Judge (a Judge of the Serious Crimes Department in charge of the case) issued a ruling on January 9, 2019 wherein it was declared that Court had no jurisdiction to adjudicate in this case, and the case files were remitted to the Special Department of the Basic court of Prishtinë/Priština as the court with subject matter jurisdiction. By the end of the reporting period, the HLC Kosovo did not manage to obtain the information which court would adjudicate in this case as per the indictment dated June 23, 2017 (more on the jurisdiction of the Special Department, see below).

The Basic Court of Mitrovicë/Mitrovica did not open the main trial in *The Prosecutor v. Sylejman Selimi et al.* (part of the *Drenica 1* case) which was, in accordance with the ruling of the Supreme Court of Kosovo dated June 11, 2018, remitted to this Court for retrial.

Cases pertaining to war crimes, ethnically and politically motivated crimes

1. First instance trials
During the reporting period, Trial Panels of the Serious Crimes Department and Special Departnemnt of the Basic Court of Prishtinë/Priština were adjudicating on the SPRK indictments in certain war crimes related cases:

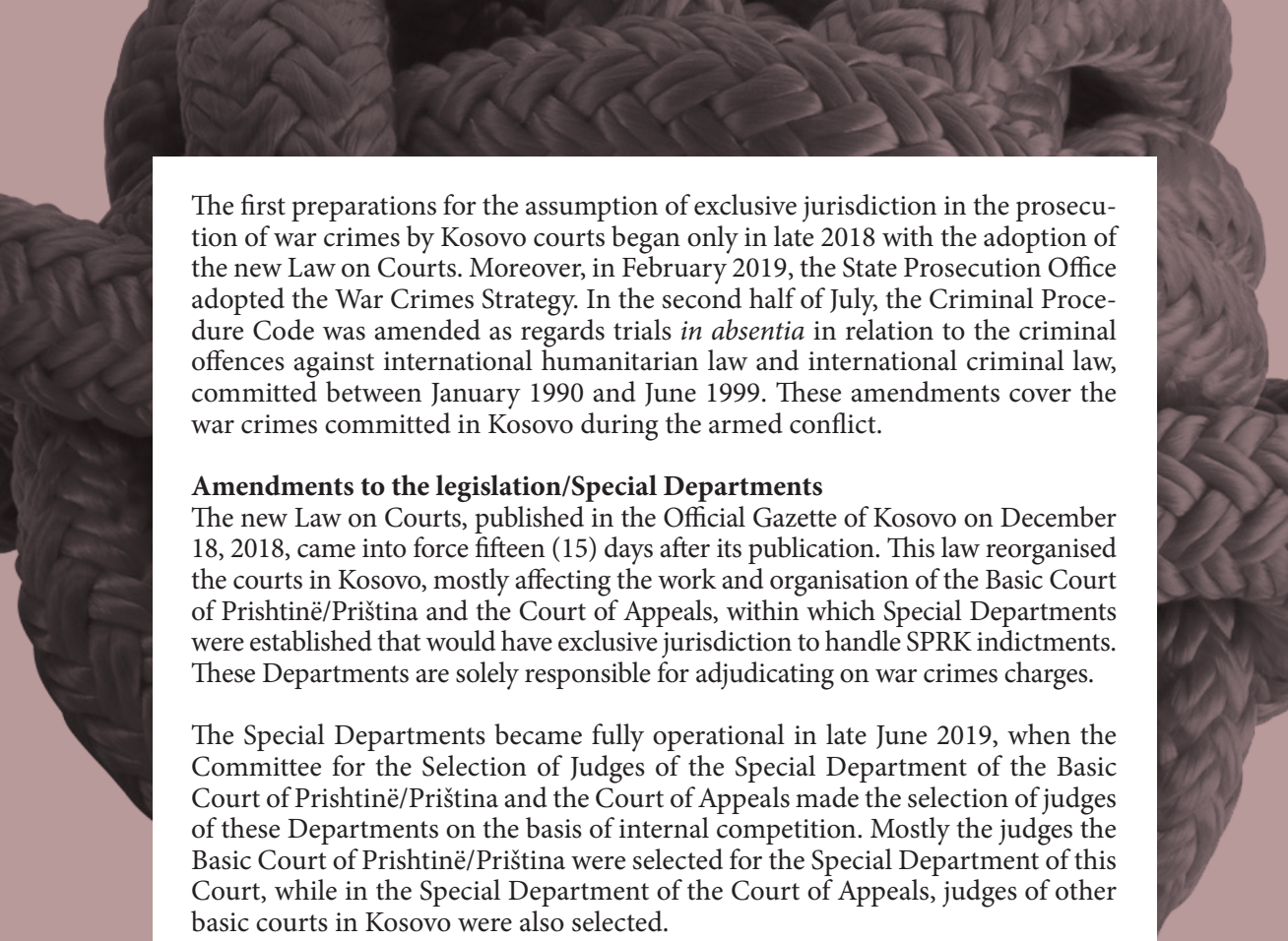
- In *The Prosecutor v. Emrush Thaqi et al.* case, on August 28, 2019, the main trial was opened before the Trial Panel of the Serious Crimes Department on the indictment dated November 17, 2016 in relation to the escape of some Defendants from the Clinical Centre of Kosovë/Kosovo in Prishtinë/Priština, aiding and abetting the escape and witness tampering. The case is linked to the *Drenica* case wherein the Defendants were charged with the criminal offence of *War Crimes against the Civilian Population*.

- In *The Prosecutor v. Ivan Todosijević* case, the main trial was held before the Special Department of the Basic Court of Prishtinë/Priština. Before the same Department, an initial hearing was held in *The Prosecutor v. Nedeljko Spasojević et al.* case (the murder of Oliver Ivanović).

All indictments were represented by SPRK Prosecutors.

Involvement of the domestic judiciary in prosecuting war crimes

The reporting year was in many ways specific in the prosecution of war crimes. The most important feature is that domestic prosecutors and judges were solely responsible for handling war crimes cases.



The first preparations for the assumption of exclusive jurisdiction in the prosecution of war crimes by Kosovo courts began only in late 2018 with the adoption of the new Law on Courts. Moreover, in February 2019, the State Prosecution Office adopted the War Crimes Strategy. In the second half of July, the Criminal Procedure Code was amended as regards trials *in absentia* in relation to the criminal offences against international humanitarian law and international criminal law, committed between January 1990 and June 1999. These amendments cover the war crimes committed in Kosovo during the armed conflict.

Amendments to the legislation/Special Departments
The new Law on Courts, published in the Official Gazette of Kosovo on December 18, 2018, came into force fifteen (15) days after its publication. This law reorganised the courts in Kosovo, mostly affecting the work and organisation of the Basic Court of Prishtinë/Priština and the Court of Appeals, within which Special Departments were established that would have exclusive jurisdiction to handle SPRK indictments. These Departments are solely responsible for adjudicating on war crimes charges.

The Special Departments became fully operational in late June 2019, when the Committee for the Selection of Judges of the Special Department of the Basic Court of Prishtinë/Priština and the Court of Appeals made the selection of judges of these Departments on the basis of internal competition. Mostly the judges the Basic Court of Prishtinë/Priština were selected for the Special Department of this Court, while in the Special Department of the Court of Appeals, judges of other basic courts in Kosovo were also selected.

Under the new Law on Courts, the Special Department of the Basic Court of Prishtinë/Priština shall be adjudicating in cases wherein the indictment assessment procedure has not been completed yet. The cases wherein the indictment assessment procedure have been completed will be continued and closed before other competent basic courts.

With the new Law on Courts, the Special Department of the Basic Court of Prishtinë/Priština will also have the jurisdiction in cases where the Court of Appeals, acting upon the appeals against the decisions of Pre-Trial Judges in the indictment assessment procedure (irrespective of which Department of the Basic Court has rendered a decision on the indictment assessment), has remitted the cases wherein substantial violations of criminal procedure have been found during the indictment assessment procedure.

A Special Panel of the Court of Appeals shall decide upon the appeals in the cases received by this Court after the entry into force of the new Law on Courts.

War Crimes Strategy
In February 2019, the Kosovo Prosecutorial Council and the State Prosecution Office adopted the War Crimes Strategy to facilitate a more professional pros-

ecution of approximately 900 war crimes cases handed over by EULEX in late December 2018, as well as the cases regarding missing persons.

Since June 14, 2018, the SPRK have become exclusively responsible for investigating and prosecuting war crimes and other violations of international humanitarian law.

The Strategy stated that the number of the Prosecution and Police staff, as well as the technical staff at the Prosecution Offices, does not closely match the number of newly received cases. The Strategy stipulates that the list of priorities should be compiled, and that one of the problems for the more efficient prosecution of war crimes is the unavailability of many perpetrators of war crimes to Kosovo authorities. They are mostly located in Serbia, with which Kosovo does not have legal cooperation. That is why one of the most important strategic goals is to establish legal cooperation with Serbia.

Trials in absentia

In early July 2019, the Law on Amendments to the Criminal Procedure Code of Kosovo (No. 06/L-091) was published in the Official Gazette of Kosovo, which entered into force on July 19, 2019. It provides for the trials *in absentia* in relation to the criminal offences against international humanitarian law and international criminal law, committed between January 1990 and June 1999.

Since the very moment when a public debate on trials *in absentia* was initiated, the HLC Kosovo has been against the introduction of this institute into the legal provisions. The draft of the new Criminal Procedure Code proposed the introduction of trials *in absentia* for other offences too. The HLC Kosovo continues to stand on the position that the trials *in absentia* violate the fundamental rights of the Defendants as guaranteed by the Constitution of Kosovo, as well as by many international regulations and conventions.

The HLC Kosovo welcomes the amendment of the Criminal Procedure Code regarding the length of the investigation period. The draft of the new Criminal Procedure Code provides for the possibility of extending the investigation period beyond two (2) years. A Pre-Trial judge may extend the investigation for additional six (6) months, maximum two (2) more years, when there is a Prosecutor's reasoned request due to the specific nature of the case, a high number of suspects and the need for international assistance.

WAR CRIMES AGAINST THE CIVILIAN POPULATION

1.1. Preliminary procedure

1.1.1. The Case: *The Prosecutor v. Miloš Petković*

Acting upon a motion of the Special Prosecutor's Office of the Republic of Kosovo (SPRK), dated July 8, 2019 (KTS/PPS No.149/2009) to abolish the security measure in *The Prosecutor v. Miloš Petković* case, a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Arben Hoti, issued a ruling on the same day and abolished the measure against the suspect Miloš Petković against whom pretrial proceedings were ongoing on grounded suspicion that, during the armed conflict in Kosovo, in complicity with other (known[3] and unknown) perpetrators, he had committed the criminal offence of *War Crimes against the Civilian Population*[4].

On the following day, on July 9, 2019, Judge Hoti decided to withdraw the national and international arrest warrants against the suspect, issued by the Basic Court of Prizren. The suspect Petković was arrested on an international arrest warrant in September 2018 in Hungary. After the extradition procedure had been completed, he was extradited to the competent Kosovo authorities.

The course of criminal proceedings
Due to a grounded suspicion that, during the armed conflict in Kosovo, the suspect Miloš Petković was one of the accomplices in the commission of a crime committed in the village of Krusha e Vogel/Mala Kruša on March 25 and 26, 1999, an international prosecutor[5] issued, on May 31, 2012, a ruling on initiation of investigation against him and fifty-four (54) other suspects.

On March 25 and 26, 1999, in the village of Krusha e Vogel/Mala Kruša, during the armed conflict in Kosovo, in violation of the norms of international law, by acting

[3] In connection with the crimes that occurred during the armed conflict in Kosovo on March, 25 and 26, 1999, in Krusha e vogël/Mala Kruša, the main trial on the same charges is ongoing before the Basic Court of Prizren in *The Prosecutor v. Darko Tasić* case.

[4] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY (in force by UNMIK Regulation 24/1999 of 12 December 1999), also punishable by Article 147, Paragraph 1 (1.1) and Paragraph 2 (2.5, 2.12) as read with Article 31 of the CCRC (which entered into force on April 14, 2019), due to violations of Article 33 of the Fourth Geneva Convention of 12 August 1949.

[5] The ruling was rendered by EULEX International Prosecutor Cezary Michalczuk.

as members of the reserve police forces of the Ministry of Internal Affairs (MUP) of the Federal Republic of Yugoslavia (FRY) or of Serbian paramilitary forces, in complicity with other MUP members whose identity has not been discovered, they took part in the seizure of property, looting, illegal destruction of houses, large-scale theft and other actions that could not be justified by military needs, which resulted in 137 houses set on fire, and cars, agricultural machinery and other valuables stolen – all owned by Albanian villagers – civilians. Thereby, they committed the criminal offence of *War Crimes against the Civilian Population,*[6] in complicity;

On March 26, 1999, in the village of Krusha e Vogel/Mala Kruša, during the armed conflict in Kosovo, in violation of international law, by acting as members of the reserve police forces of the Ministry of Internal Affairs (MIA) of the Federal Republic of Yugoslavia (FRY) or of Serbian paramilitary forces, in complicity with other MIA members whose identity has not been discovered, they separated the women and children from the men, and ordered the women to leave the village and walk with their children to Albania, completely displacing the women and children from the village. Thereby, they committed a *War Crime against the Civilian Population*[7].

During the investigative phase, it was determined that the suspects and accomplices were not available to the Kosovo prosecution authorities. In order to determine the whereabouts of the persons suspected of committing the above-described and other criminal offences during the critical period (late March 1999) in the villages of Krusha e Vogel/Mala Kruša, on July 18, 2015, the Basic Court of Prizren issued an arrest order against the suspects. On November 4, 2015, this Court also rendered an order to issue a national wanted notice against the suspects. As the suspects were still unavailable, in order to ensure their presence and the smooth conduct of the criminal proceedings, on October 21, 2016, the Basic Court of Prizren addressed the International Legal Cooperation Unit of the Department of Legal Affairs at the Ministry of Justice of Kosovo, requesting

[6] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, also punishable by Article 121, Paragraph 2 (5 and 12) in conjunction with Article 23 of the CCK (which entered into force in June 2004, which was in force at the time when the ruling on initiation of investigation was issued), in violation of Article 3 of the Fourth Geneva Convention of 12 August 1949 relative to the protection of civilian persons in time of war and of Article 17 of the Second Protocol Additional to the said Convention.

[7] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY (in force by UNMIK Regulation 24/1999 of 12 December 1999), also punishable by Article 121, Paragraph 2 (8) in conjunction with Article 23 of the CCK (which entered into force in June 2004, which was in force at the time when the ruling on initiation of investigation was issued), in violation of Article 33 of the Fourth Geneva Convention of 12 August 1949 relative to the protection of civilian persons in time of war and of Article 17 of the Second Protocol Additional to the said Convention.

that an international wanted notice be issued against the suspect and the persons suspected of committing the crimes that occurred in late March 1999[8].

For these reasons, the investigation was repeatedly suspended by the rulings of the competent authorities, reopened in order to carry out certain investigative activities, and then suspended again, in order not to exceed the deadlines provided for the investigation[9].

Acting upon the international wanted notice, the Hungarian authorities arrested the suspect Miloš Petković on September 26, 2018. Kosovo Police (KP) was informed of his arrest. The Ministry of Justice of Kosovo submitted to the Hungarian Ministry of Justice a request to extradite the suspect Miloš Petković to the Kosovo prosecution authorities. The extradition request was granted. Following the completion of formalities, the suspect was extradited to the competent Kosovo authorities on May 17, 2019.

Following his extradition, the suspect was ordered, on the same day, a forty-eight (48) hour apprehension measure, i.e. police detention. On May 17, 2019, the SPRK issued a ruling to re-open the investigation against the suspect on grounded suspicion that he had participated in the commission of the crimes that had taken place in Krusha e Vogel/Mala Kruša on March, 25 and 26, 1999.

The SPRK[10] filed with the Special Department of the Basic Court of Prishtinë/Priština an application for ordering a security measure, i.e. detention on remand, which would secure the presence of the suspect to judicial authorities, and thus, create conditions for a smooth completion of the investigation within legal deadlines; in particular, given the tight deadline to complete the investigation. During the course of the investigation, it was necessary to hear the suspect and the witnesses, and to obtain other evidence that would shed light on the circumstances under which the charged criminal offence had been committed. On the basis of the foregoing, it would be possible to decide whether to file an indictment or to terminate criminal proceedings against the suspect.

Following the Prosecution's application for detention on remand, a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Arben

[8] The HLC Kosovo has no information on the procedure and the date when the wanted notice was issued by the competent authorities.

[9] Article 159 of the CPCK provides that an investigation must be completed within two (2) years. This Article provides that a pre-trial judge, at the request of a competent prosecutor, in complex cases, may extend the investigation for another six (6) months.

[10] State Prosecutor Drita Hajdari.

Hoti, held a hearing on May 18, 2019 to consider the application for ordering a security measure. The session was held in the presence of the suspect Petković, an ex officio Defence Counsel, Attorney Ljubinko Todorović, and State Prosecutor Drita Hajdari. The suspect and his Defence Counsel were provided with official interpretation from Albanian into Serbian.

In the course of the session, the State Prosecutor stood entirely by the written official application for ordering a security measure against the suspect.

In his address to the Court, the suspect's Defence Counsel stated, inter alia, that, based on the information he had received as a Defence Counsel in the conversation with the suspect prior to the commencement of the court session, the suspect had not been at all in Kosovo during the critical period. According to him, Petković had left Kosovo in September 1998. After that, his first appearance in Kosovo was on May 17, 2019, when he had been arrested. The Defence Counsel pointed out that there were no elements for the criminal prosecution to continue in relation to the offences set out in the application.

In his statement to the Court, the suspect reiterated that he had not been in Kosovo since mid-September 1998 until May 17, 2019. The accusations he was charged with were unfounded, he had not been a participant in the events that had taken place in Kosovo on March 25 and 26, 1998, as it had not been possible to participate. The accusations made by the witnesses were unfounded. The suspect was of the opinion that, with regard to the events in Krusha e Vogël/Mala Kruša, Kosovo judiciary had accepted unfounded accusations of individual witnesses, who had been passing such information to each other. As a result, criminal proceedings had been initiated against him in 2015; hence, his arrest in 2018. In the course of 2017, he had crossed the Hungarian border several times and had had no problems. Upon entering this country in 2018, he had been arrested although he had not been to Kosovo since 1998, and had not participated in the events that had taken place in Krusha e Vogël/Mala Kruša. He added that the Court could reach whatever conclusions they wished.

After analysing the case file, the Pre-Trial Judge concluded that the SPRK's application was well founded. In the ruling dated May 18, 2019, the suspect was ordered detention on remand on grounded suspicion that on March 25 and 26, 1999, in the village of Krusha e Vogël/Mala Kruša, by acting as a member of the reserve police forces of the FRY or Serbian paramilitary forces, he had committed the criminal offence of *War Crime against the Civilian Population*. The Court also found that this was a serious criminal offence carrying a sentence of long-term imprisonment, that there was a risk of flight of the suspect who had not been living in Kosovo for a long period of time, that he had avoided responding to the prosecution authorities in order to avoid

criminal liability, and that, if released, he would be able to hinder the prosecution authorities in organizing criminal proceedings. The Court also stated in the ruling that the suspect had been arrested on an international warrant and that detention on remand was the only measure to ensure the smooth running of the proceedings.

In the ruling dated June 16, 2019, the detention measure against the suspect was extended by the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština for additional two (2) months, until August 17, 2019.

During the investigation phase against the suspect Miloš Petković, which took place in the summer of 2019, certain investigative actions were carried out. A number of witnesses were heard, who did not offer evidence of his possible involvement in the commission of the criminal offences he was charged with, i.e. of the possible actions that he had taken at the time when the crimes in Krusha e Vogël/Mala Kruša had taken place. Only one witness testified that on March 25, 1999, after leaving his home together with his family members, he had had to go back to take some food for his baby. According to him, he had then seen the suspect near his home with some other members of the suspect's family. According to this witness, they had been uniformed and armed, and after they had seen him, they had started shooting in the direction of the witness. He had run back and had joined his family. The witness could not confirm which member of the Petković family had shot at him on that day.

Other witnesses heard during the investigation did not offer evidence of any possible involvement of the suspect Petković in the criminal offences that had taken place in Krusha e Vogël/Mala Kruša on March 25 and 26, 1999. They stated that they had not seen the suspect those days. When the heard witnesses were confronted by the Prosecution with their previous testimonies given to EULEX investigators wherein the suspect Petković was included in the list of those who had taken part in the commission of the crimes in Krusha e Vogël/Mala Kruša, the witnesses clarified that they had mentioned the suspect as a resident of Krusha e Vogël/Mala Kruša. They could not specify in their testimony any illegal act of the suspect.

The Prosecution also conducted a check on the publicly available electronic database of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in order to clarify any possible involvement of the suspect in the crimes committed in Krusha e Vogël/Mala Kruša. According to the findings of the Prosecution, after the check was conducted, the name of the suspect Petković did not appear in any of the cases tried before the ICTY.

On July 8, 2019, after the completion of the above investigative actions, the analysis of case files and the existing evidence, SPRK State Prosecutor Drita Hajdari

filed with the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština a motion to terminate the detention measure against the suspect due to a lack of evidence.

Acting upon the motion of the Prosecution, the Pre-Trial Judge issued, on the same day, a ruling on termination of the detention measure imposed on the suspect Petković. The ruling entered into force on the same day and the suspect was released immediately after the ruling had been issued.

In the reasoning of the ruling, the Pre-Trial Judge stated, inter alia, that the Prosecution had submitted to the court a reasoned motion to terminate detention, and that, after the initial ruling on detention on remand had been rendered, the Prosecution was faced with a lack of evidence to confirm a well-founded suspicion of Petković's involvement in the crime that had taken place in late March 1999 in Krusha e Vogël/Mala Kruša.

On July 9, 2019, the Pre-trial Judge of the Special Department issued a ruling to annul the national wanted notice issued against Petković on November 4, 2015, as well as the international wanted notice issued on October 21, 2016. Both notices had been issued by the Basic Court of Prizren. The Court rendered this decision following the motion of the competent State Prosecutor to abolish the security measure against the suspect Petković, due to a lack of evidence to support the grounded suspicion that he had committed the criminal offence of War Crimes against the Civilian Population. According to the findings of the Court, there were no grounds for the said wanted notices to remain in force.

1.1.2. The Case: *The Prosecutor v. Shemsi Garaj*

On September 6, 2019, State Prosecutor Enver Krasniqi of the War Crimes Department of the SPRK issued a ruling on termination of investigation against the suspect Shemsi Garaj, against whom, at the request of this Prosecutor, an investigation had been launched on grounded suspicion that he had committed the criminal offence of *War Crimes against the Civilian Population*[11].

According to the ruling, the evidence obtained during the investigation did not confirm the grounded suspicion that the suspect had committed the criminal offence for which the investigation had been initiated.

[11] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, as read with Article 3 common to the Fourth Geneva Convention, also punishable by Article 152 in conjunction with Article 31 of the CCRK (entered into force on January 1, 2013).

The course of the preliminary criminal investigation

In early 2017, the SPRK authorised the Serious Crime Investigation Directorate (SCID) of the KP to work on obtaining information, verifying witness allegations and revealing the circumstances under which crimes against the civilian population had occurred in Klinë/Klina, Tikvesh/Tikveš settlement, on March 27, 1999, during the armed conflict in Kosovo.

After conducting preliminary investigative actions, obtaining information and hearing certain witnesses, on December 22, 2017, the SCID filed with the Prosecution Office a criminal report against M.M, S.M, G.V, N.V, R.G, H.G, G.G, Xh.G[12] and the suspect Shemsi Garaj.

Acting upon the criminal report, on April 12, 2019, State Prosecutor Enver Krasniqi of the War Crimes Department of the SPRK filed with the Serious Crime Department of the Basic Court of Prishtinë/Priština a ruling on initiation of investigation (PPS. No. 435/2009) against the suspects Shemsi Garaj, M.M, S.M, G.V, N.V, R.G, H.G, G.G and Xh.G on grounded suspicion that, during the armed conflict in Kosovo, being armed and clod in military and police uniforms, in mutual complicity, in Klinë/Klina, Tikvesh/Tikveš settlement, they had committed the criminal offence of *War Crimes against the Civilian Population*. In the ruling it was alleged that the suspects had participated in the killings, wounding, beating, mistreatment, arson, looting and expulsion of the Albanian civilian population from the settlement. The villagers had been ordered to leave their homes within five (5) minutes, and after the deadline had expired, the suspects had started beating, mistreating and injuring them by inflicting lacerations. Moreover, they had set fire to the houses of the Albanians they had expelled. They had also set fire to those houses where, at the time of the expulsion, there had still been people inside, who, due to health problems, had not been leave the houses. According to the information available to the Prosecution at the time the investigation was launched, a seventy-five-year-old (75) woman, S.T, was burned inside her home. It was also alleged that the injured party R.T had sustained injuries – lacerations, while M.T had been beaten.

Given that the police investigation had been ongoing against the suspect Shemsi Garaj, he was arrested by members of the KP - War Crimes Investigation Unit (WCIU) - on April 11, 2019, and was ordered a forty-eight hour (48) apprehension measure. Following the arrest of the suspect, on April 12, 2019, the State Prosecutor filed with the Serious Crime Department of the Basic Court of Prishtinë/Priština Basic an application for detention on remand against the suspect Shemsi Garaj.

[12] The suspects M.M, S.M, G.V, N.V, R.G, H.G, G.G and Xh.G are still unavailable to the Kosovo prosecution authorities. In order not to reveal the names of the persons under investigation, the report shall mention only their initials.

Acting upon the submissions of the State Prosecutor, the Pre-Trial Judge[13] held a hearing on April 12, 2019 to consider the State Prosecutor's application for detention on remand. The hearing was held in the presence of the parties to the proceedings, the State Prosecutor, the suspect and his Defence Counsel[14].

During the hearing, the Prosecutor stood by the written submissions and proposed that the suspect be ordered detention on remand in order to ensure his presence in court and the smooth running of criminal proceedings.

The Accused and his Defence disputed the Prosecution's allegations, stating that the suspect had not been at all in Kosovo on the critical date (for which the Prosecution claimed that there was a grounded suspicion that he had taken part in the commission of the offences). According to the Defence, one year prior to the critical event, he had left Kosovo, and had gone, through Albania and Montenegro, to Norway where he had stayed for twenty (20) years. The Defendant informed the Court that he could obtain written evidence of his stay in certain European countries during the critical period.

Following the hearing, the analysis of case files, the criminal report, the rulings to initiate an investigation, the testimony of injured parties, the photo documentation on the identification of suspects, the photo album made at the scene and other documentation, the Basic Court found that, on March 27, 1999, in complicity[15] with persons not available to the Kosovo prosecution authorities, the suspect had committed the criminal offence he was charged with in the ruling on initiation of investigation. The Court also found that, given the fact that the suspect had been living outside Kosovo for a long time, the smooth running of criminal proceedings could only be secured by ordering the detention measure. In a ruling dated April 12, 2019, the Court ordered one-month detention on remand that was to last until May 11, 2019.

On June 5, 2019, the State Prosecutor submitted to the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština an amended ruling on initiation of investigation against the suspect Garaj and other suspects whose initials have been listed above. The amended ruling clarified the personal data of individual suspects.

At the request of the competent prosecutor, the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Prishtinë duly extended the deten-

[13] Judge Arben Hoti of the Special Department of the Basic Court of Prishtinë/Priština.

[14] During the detention hearing, the suspect Garaj was represented by Attorney Teuta Qaushi from Prishtinë/Priština.

[15] The accomplices' initials were cited in the ruling on detention on remand.

tion measure against the suspect. Through his Defence, the suspect appealed the Pre-Trial Judge's decision on detention on remand. The Court of Appeals rejected the suspect's appeal as unfounded. As stated in the decisions of the competent authorities, detention on remand against the suspect was ordered to last until September 11, 2019.

On June 11, 2019, while the suspect was in detention on remand, his Defence Counsel submitted two official letters to the SPRK and the Court, a letter from the Italian authorities confirming that the suspect had entered the territory of Italy on March 24, 1999 and a letter from the competent authorities of the Netherlands confirming that, on March 24, 1999, he had submitted to the competent authorities of the Netherlands a request for a refugee status.

In order to confirm or deny the suspect's allegations that he had not been in Kosovo during the critical period, the Prosecutor sought, through the competent authorities, to verify the suspect's alibi allegations and the documentation he had provided to the Prosecution and the Court. Through international legal assistance, the competent authorities of the Netherlands confirmed in writing that the information in the attached documentation was true, i.e. that the person, for whom verification of the accuracy of data was sought, had entered the territory of the Netherlands on March 24, 1999 and had been deported on December 1, 1999.

On August 27, 2019, the competent State Prosecutor filed with the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština a reasoned motion to terminate detention on remand against the suspect Shemsi Garaj. On the basis of the documents issued by the competent authorities of the Netherlands, as well as other pieces of material evidence, the Judge found that the reasons for ordering detention on remand against the suspect ceased to exist.

Acting upon the request of the State Prosecutor's Office, on August 28, 2019, Pre-Trial Judge Albana Shabani Rama of the Special Department of the Basic Court of Prishtinë/Priština rendered a ruling on termination of detention on remand against the suspect Shemsi Garaj. Detention was terminated due to the circumstances precluding his criminal liability for the criminal offence suspected to have been committed in complicity.

On September 6, 2019, State Prosecutor Enver Krasniqi rendered a ruling on termination of investigation against the suspect Shemsi Garaj. In the ruling, the Prosecutor presented the actions he had taken during the course of the investigation against the suspect, as well as the reasons that had led to the termination of the investigation.

1.1.3. The Case: *The Prosecutor v. Zlatan Krstić*

Acting upon the SPRK's application, dated April 13, 2019 (KTS/PPS No. 17/2019) in *The Prosecutor v. Zlatan Krstić* case, a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Arben Hoti, rendered, on April 14, 2019, a ruling on thirty-day detention against the suspect Krstić (April 12 to May 12, 2019) on grounded suspicion that he had committed the following criminal offences: *War Crimes against the Civilian Population*[16], *War Crimes in serious violation of Article 3 common to the Geneva Conventions*[17], and the criminal offence of *Organizing a Group to Commit Genocide, Crimes against Humanity and War Crimes*[18].

The course of preliminary criminal investigation
In connection with the events that took place on March 26, 1999 in the village of Nerodime e Epërme/Gornje Nerodimlje, Municipality of Ferizaj/Uroševac, when members of one family were harassed and robbed and when some members of this family were killed, the SPRK authorised the KP Serious Crimes Directorate (SCD) to investigate into the circumstances under which these events had taken place.

After carrying out investigative actions and obtaining some evidence, on April 13, 2019, the foregoing authorities submitted to the SPRK a criminal report against Zlatan Krstić, M.Z, B.K, M[19],R.M and B.J[20].

The suspect Zlatan Krstić was arrested on April 12, 2019, according to the order issued by the SPRK Prosecutor on grounded suspicion that he had committed the criminal offence of *War Crimes against the Civilian Population*. He was ordered forty-eight hour police apprehension.

On April 13, 2019[21], the SPRK Office filed with the Special Department of the Basic Court of Prishtinë/Priština a ruling to open an investigation against the suspect Zlatan Krstić as well as against the suspects M.H, B.K, R.M, B.J , who are still unavailable to the Kosovo prosecution authorities.

[16] Provided for and punishable under Article142 in conjunction with Article 22 of the CC SFRY.

[17] Provided for and punishable under Article 152 Paragraphs 1 and 2 items 2.1, 2.2 and 2.3 of the CCRK (2013)

[18] Provided for and punishable under Article 160 as read with Article 31 of the CCRK (2013).

[19] Only the name of the suspect and his father's name have been stated in the criminal report.

[20] The report will not list the names of the suspects unavailable to the Kosovo prosecution authorities, but only their initials, so as not to interfere with the ongoing official investigation against these persons.

[21] State Prosecutor Valdet Gashi.

At the Prosecution's request, the investigation was launched on suspicion that, during the armed conflict in Kosovo, in complicity with other persons, at 20:00h, on March 26, 1999, being uniformed and armed, acting according to the plans and their superiors' orders, knowingly and intentionally, the suspects first harassed and then killed Osman, Brahim, Bajram and Agron Nuhaj. Thereafter, they had taken actions of inflicting injuries, destroying property, looting, applying an extreme physical and psychological mistreatment of civilians, and setting property on fire. In the end, they had expelled nineteen (19) members of the Nuhaj family from the village of Nerodime e Epërme/Gornje Nerodimlje, the Municipality of Ferizaj/Uroševac. In the Prosecutor's ruling, the suspects' actions were classified as *War Crimes against the Civilian Population*, *War Crimes in serious violation of Article 3 common to the Geneva Conventions*, and as the criminal offence of *Organizing a Group to Commit Genocide, Crimes against Humanity and War Crimes*.

The Prosecution opened the investigation against the suspect and other persons on the run on the basis of the evidence obtained during the hitherto investigation, i.e. the testimonies of the injured parties/witnesses who had described the critical event and had identified the suspects. The investigation was opened to verify the allegations and claims of the witnesses and to obtain new evidence to support witness allegations and the circumstances under which the events in the village of Nerodime e Epërme/Gornje Nerodimlje had taken place on the critical day, as well as to reveal the circumstances under which the members the Nuhaj family had died.

Following the submission of the ruling to initiate the investigation against the suspect and the persons mentioned in the ruling that were not available to the Kosovo authorities, on the same day, the State Prosecutor filed with the Special Department of the Basic Court of Prishtinë/Priština an application for detention on remand against the suspect Zlatan Krstić.

In their application, the Prosecution also stated the reasons for ordering detention on remand: the suspect had been unavailable for a long time to the prosecution authorities, he was a resident and a citizen of Serbia; and, if released pending trial, there was a high risk of flight that would result in avoiding criminal liability. During the police investigation, not all witnesses had been heard and not all necessary evidence had been obtained. The Prosecutor moved the Court to order the detention measure in order to ensure his presence in court, as well as a smooth running of criminal proceedings. In their application, the Prosecution made an analysis of the reasons why it had proposed the strictest measure of securing the presence of the suspect in court, noting that if other, more lenient measures were ordered, the investigation could not be successfully completed. According to the Prosecution, detention on remand was the most appropriate in this case.

Acting upon the SPRK's application, Pre-Trial Judge Arben Hoti of the Special Department of the Basic Court of Prishtinë/Priština held a detention hearing on April 14, 2019. The hearing was attended by State Prosecutor Valdet Gashi, the suspect Zlatan Krstić, who was brought to the Court from the Detention Centre in order to be heard, as well as his Defence Counsel, Attorney Dejan Vasić from Mitrovicë/Mitrovica.

During the hearing, the suspect and his Defence Counsel were provided with interpretation into their mother tongue.

During the session, the Prosecutor stood by everything in the written submission, i.e. the application on detention on remand that he proposed to be granted by the judge.

In response to the Prosecutor's application for detention on remand, the Defence Counsel for the Accused said that he could not state his position with regard to the grounded suspicion in his client's actions, or that he could present his stance on the persuasiveness of the evidence available to the Prosecution, because the Defence had had no access to the evidence, or witness statements, prior to the detention hearing.

The Defence Counsel also said that he had been informed in conversations with the suspect and his family members that the suspect had never worn a uniform and that he had not stayed in Kosovo during the armed conflict. Hence, he had been living outside Kosovo even before the armed conflict. Thereafter, he had been coming to Kosovo only to visit his family members. Every year, he had been coming to Kosovo and had been visiting relatives in the village of Livadh/Livađe, Lipjan/Lipljan Municipality, as well as the relatives in the village of Nerodime e Epërme/Gornje Nerodimlje, Ferizaj/Uroševac Municipality. He had never had a problem during his visits. According to the Defence, the suspect was not able to influence any witnesses, because the Prosecution itself did not know what other witnesses they will hear.

The suspect stood by his Defence Counsel's allegations in their entirety, and added that, out of the persons who had incriminated him, he knew only one, who was a friend of his, who had been maintaining his car and to whom he had sold his immovable property twenty-three (23) years ago. During the previous year (2018,) he had also completed the transfer of ownership of the real estate. Since 1999, he had come to Kosovo more than fifteen times. He had a Kosovo identity card, and he had never had a problem. From 1978 to 1992 he had lived in Kragujevac. Because of his family duties, he had returned to Kosovo, where he had lived for 4 to 5 years, i.e. until 1998, when he had moved again to Kragujevac. He was in possession of a military booklet from which it could be confirmed that he had never been part of the army or the police.

In the event the Court considered that a security measure was necessary, the suspect and his Defence moved the Court to order a more lenient measure for securing the presence of the suspect in court. They stressed that the Court should take into account the suspect's health isssues whereof he had medical records.

After analysing the case file, the attached evidence, the enclosed witness statements, including some of the witness statements given before the ICTY, as well as other enclosed evidence, given that the suspect was charged with a serious criminal offence carrying a sentence of long term imprisonment, the Court found that the Prosecution's application for detention on remand was founded. In the particular case, there was also a risk of flight, a risk of falsifying evidence, influencing witnesses and interfering with the evidentiary proceedings. In a ruling dated April 14, 2019, thirty-day detention on remand was ordered against the suspect that was to last until May 12, 2019.

The suspect and his Defence appealed against this Ruling of the Pre-Trial Jude of the Basic Court due to an erroneous and incomplete establishment of the factual situation, and moved the Court to remit the impugned ruling to the court of first instance court for reconsideration and re-adjudication. The appeal emphasised that the measure of house detention would secure the presence of the suspect in court, especially given the suspect's medical condition.

In their motion dated April 19, 2019, the Appellate Prosecution moved the court of second instance to reject the appeal filed by the Defence Counsel on behalf of the suspect as unfounded and to uphold the impugned ruling.

Acting upon the suspect's appeal, the Appellate Panel of the Court of Appeals, presided over by Judge Mejreme Memaj[22], held a session on April 23, 2019 and rendered a ruling wherein it rejected the appeal as unfounded and upheld the ruling of the Basic Court of Prishtinë/Priština dated April 14, 2019.

According to the findings of the Appellate Panel, the allegations from the appeal were unfounded. In his ruling on detention on remand, the Pre-Trial Judge had properly reasoned the grounded suspicion, having regard to the evidence enclosed to the case file which confirmed the grounded suspicion that the suspect had participated in the commission of the offence of which he was suspected. Based on the evidence presented, it had been proven that there were reasons to order the strictest measure for securing the suspect's presence in court and a smooth conduct of criminal proceedings. The offence the suspect was charged

[22] Members of the Appellate Panel: Judges Hava Haliti and Xhevdet Abazi.

with was a serious one carrying a severe punishment. There was also a risk of flight, should the suspect be released pending trial.

At the request of the State Prosecutor, the detention measure had been repeatedly extended by the end of the reporting period, the last time by a ruling dated November 11, 2019, for a period of two months, from November 12, 2019 to January 12, 2020.

Through his Defence Counsel, the suspect had regularly filed appeals against the rulings of the Pre-Trial Judge on security measures, which the Court of Appeals rejected after it had considered the State Prosecutor's request, the appeals filed, and the case file.

According to the information obtained while compiling the Annual Report, the indictment against the suspect Krstić was filed on December 30, 2019. Unofficially, the same indictment also charged the suspect Destan Shabanaj. Both suspects are charged in relation to the same event. As we have had no access to the indictment, it will not be presented in the 2019 report on the trials monitored.

1.1.4. The Case: *The Prosecutor v. Destan Shabanaj*

Acting upon the application for detention on remand in *The Prosecutor v. Destan Shabanaj* case, dated June 16, 2019 (KTS/PPS No. 17/2019), and filed by the SPRK State Prosecutor on November 11, 2019, a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Arben Hoti, rendered a ruling, without holding a session, whereby detention on remand was extended against the suspect Shabanaj for additional two (2) months, from November 14, 2019 to January 14, 2020.

The proceedings against the suspect were initiated on grounded suspicion that he had committed the following offences: *War Crimes against the Civilian Population*[23], *War Crimes in serious violation of the Geneva Conventions*[24], *War Crimes in serious violation of Article 3 common to the Geneva Conventions*[25] *and Organization of Groups to commit Genocide, Crimes against Humanity and War Crimes*[26].

[23] Provided for and punishable under Article 142 of the CCRK, in conjunction with Article 22 of the CC SFRY.

[24] Provided for and punishable under Article 144 of the CCRK.

[25] Provided for and punishable under Article 146, Paragraphs 1 and 2, items 2.1, 2.2 and 2.3 of the CCRK.

[26] Provided for and punishable under Article 154, as red with Article 31 of the CCRK (all articles

The course of hitherto criminal proceedings

Due to the grounded suspicion that: during the armed conflict in Kosovo, in the evening of March 26, 1999, in the village of Nerodime e Epërme/Gornje Nerodimlje, Ferizaj/Uroševac Municipality, acting as a member of the Serbian police, in complicity with other persons, uniformed, armed and carrying police equipment, in line with the previously prepared plan and his superiors' orders, the suspect Shabanaj participated in the physical and mental mistreatment and, later on, in the killing of four (4) civilians, members of the Nuhaj family (Osman, Brahim, Bajram and Agron), as well as in inflicting bodily injuries, destruction, looting, burning, arson and expulsion of nineteen (19) members of the Nuhaj family from the above mentioned village.

Moreover, several days later, on April 1, 1999, armed with an automatic rifle and with the intention of covering up the criminal offences committed against the civilian population, and of destroying the evidence, i.e. the remains of the Nuhaj family who had been killed on March 26, 1999 in the village of Nerodime e Epërme/Gornje Nerodimlje, and the corpse of Ismet Ramadani, the suspect Salihaj transported, in a truck, the remains to a nearby cemetery in Ferizaj/Uroševac, where he ordered the driver of an excavator to open a pit in order to bury the remains of those who had been killed. After opening the pit, he issued an order to several workers of the Public Waste Disposal Company "Komunalna zvezda" from Ferizaj/Uroševac to dump the corpses into a pit (mass grave), which was subsequently closed by the excavator. The suspect's actions are punishable by national laws, international conventions and additional protocols. Thus, the Prosecutor found that there was grounded suspicion that the suspect Shabanaj had committed the following criminal offences: *War Crimes against the Civilian Population*, *War Crimes in serious violation of the Geneva Conventions, War Crimes in serious violation of Article 3 common to the Geneva Conventions and Organization of Groups to commit Genocide, Crimes against Humanity and War Crimes.*

According to the information available to the HLC Kosovo at the time of compiling this report, an investigation into the aforementioned criminal offences was opened by a ruling dated April 13, 2019 against several perpetrators[27]. In the course of investigative activities, as a result of the obtained testimonies of individual witnesses, on June 13, 2019, the Kosovo Police (KP) - Directorate of War Crimes and Miss-

referred to above are from the 2019 CCRK).

[27] In connection with the crimes committed in the village of Nerodime e Epërme/Gornje Nerodimlje, Ferizaj/Uroševac Municipality, the SPRK launched an investigation against the suspect Zlatan Krstić and other persons unavailable to the Kosovo prosecuting authorities. Until the end of the reporting period, the criminal proceedings against Zlatan Krstić and Destan Shabanaj were conducted as separate criminal proceedings. *The Prosecutor v. Zlatan Krstić* case is covered by this report.

ing Persons - filed with the SPRK a criminal report against the suspect Shabanaj and D.S. (a Serb) who, according to the Civil Registration Agency, was a citizen of Kosovo, with permanent residence registered in Kosovo). On the basis of the allegations from the report and the evidence obtained regarding the crimes committed on March 26, 1999, the Special Prosecution Office issued a ruling, on June 15, 2019, extending the investigation to include these suspects too.

As the investigation into the aforementioned criminal offences was ongoing, on June 14, 2019, upon entering the territory of Kosovo, the suspect Shabanaj was arrested at the Bërnjak/Brnjak border crossing, Zubin Potok/Zubin Potok Municipality. On the same day, the KP imposed on him a forty-eight (48) hour detention measure. On the following day, June 15, 2019, the SPRK[28] filed with the Special Department of the Basic Court of Prishtinë/Priština an application for detention on remand against the suspect Shabanaj on grounded suspicion that he had committed the criminal offences as described above. Moreover, there was a risk that the suspect might flee as he had dual citizenship (a citizen of Kosovo and of Serbia), and was a holder of a Serbian passport that allowed him visa free travel to any country in the world. In addition to that, extradition of suspects between Kosovo and Serbia was not possible due to a lack of legal cooperation or mutual legal assistance. According to the Prosecution, in this case, a probability of influencing potential witnesses who had not yet been heard by the Prosecution and of destroying the evidence was not ruled out. In this specific case, this was a serious criminal offence that carried a sentence of long term imprisonment.

Acting upon the Prosecution's application for ordering a security measure, a Pre-Trial Judge of the Special Department, Arben Hoti, held a detention hearing on June 16, 2019. Following the hearing, on the same day, a ruling was issued wherein the suspect was ordered a one-month detention that was to last until July 15, 2019. As stated in the ruling, the session was attended by the parties to the proceedings. The State Prosecutor stood entirely by the written application for ordering a security measure.

The suspect's Defence Counsel, Attorney Shefqet Hasimi from Prishtinë/Priština, objected to the Prosecutor's application for detention on remand, and moved the Court to order a more lenient measure that would secure the presence of the suspect, i.e. house detention, which would be carried out in the suspect's apartment in Fushë Kosovë/Kosovo Polje. The Defence Counsel informed the Court that criminal proceedings had been conducted against his client by EULEX, and proposed that the Prosecution check whether he had been accused of the same charges.

[28] SPRK State Prosecutor Valdet Gashi.

The suspect supported the allegations of his Defence Counsel and added that he had not participated in the action taken by the police on the critical day when the civilians had been killed. He had almost never carried a weapon. He knew that the victims' corpses had been transported in a tractor. He recalled that the corpse of one victim had been found near a livestock market, and another corpse of a person killed by a firearm near the road in the village of Babush/Prelaz. He also remembered that the remains of 6-7 people had been buried at the municipal cemetery according to the standard procedure, and that there was a record thereof. The bodies had been identified through fingerprints. The funeral had also been attended by forensics officers from the Ferizaj/Uroševac police station (the ruling on the security measure contains the names of the forensics officers mentioned by the suspect in his statement to the Court). The suspect denied that he had taken part in the burial of the remains of the persons killed in the village of Nerodime e Epërme/Gornje Nerodimlje. The suspect did not dispute the fact that he had officially been given a firearm during the armed conflict, but he claimed that he had never used it, that he had not known how to use it, that he had not completed his military service, and that he had a written proof thereof. He had never worn a uniform, be it a military or a police one. The suspect also stated that he had been interrogated by an EULEX prosecutor, after which he had been told that he was free to go. After this hearing, he had been coming repeatedly to Kosovo without any problems.

He moved the Court to place him into house detention for health reasons. He stated he would respond to any court summons.

The Pre-Trial Judge stated in the reasoning of the ruling on detention on remand that, after analysing the case file, he found that the Prosecutor's request to order the most stringent measure for securing the presence of the suspect was founded.

According to the findings of the Court, the suspect, in concert with other persons, members of the Serbian military and police, during the armed conflict in Kosovo, had participated in the commission of the criminal offences described in more detail in the ruling on initiation of investigation, dated April, 13 2019. The grounded suspicion was supported by the ruling to expand the investigation, by the photo documentation presented by the witnesses, as well as by the testimony of individual witnesses who had clearly described the suspect's identity, and his actions during the events of which he was suspected. In his statement, he confirmed that, in 1999, he was a part of the Serbian military and police forces, that he had been in possession of a weapon, but he denied being involved in the commission of the charged criminal offences.

In the reasoning of the ruling on detention on remand, the Pre-Trial Judge found that, in this particular case, there was a real risk that the suspect might flee, as he was also a citizen of the Republic of Serbia and a holder of travel documents that allowed him to travel around the world, and that, on the other hand, there was no legal cooperation between Serbia and Kosovo. If released, there was a great danger of interfering with the conduct of criminal proceedings and of establishing the truth in the proceedings on charges of serious criminal offences which carried a sentence of long-term imprisonment.

Acting upon the request of the State Prosecutor, dated November 8, 2019, the Pre-Trial Judge extended in his ruling, dated November 11, 2019, detention on remand against the suspect, on the same grounds, for a period of two (2) months, until January 14, 2020.

The HLC Kosovo findings
By the end of the reporting year, the HLC Kosovo had no information, or access to court documentation, or to other procedural actions that were expected to be taken during the pre-trial proceedings against the suspect Shabanaj.

On the basis of monitoring certain sessions (when Prosecution's requests for extension of the measure of securing the presence of the suspect in court were discussed), and of partial access to the files of preliminary criminal investigation, it can be noted that the proceedings in *The Prosecutor v. Zlatan Krstić* case and in *The Prosecutor v. Destan Shabanaj* case, both dealing with the same event, have been initiated by the same prosecutor and have been taking place before the same pre-trial judge. The HLC Kosovo has also presented the two cases separately in the annual report due to a lack of information on whether the Prosecution has proposed a joinder of proceedings[29].

1.1.5. The Case: *The Prosecutor v. Goran Stanišić*

Acting upon the SPRK's application for detention on remand in *The Prosecutor v. Goran Stanišić* Case, dated July 20, 2019 (KTS No. 14/2018), a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Albina Shabani Rama, held a hearing on July 22, 2019 to consider the merits of the above mentioned application.

[29] According to information obtained through the media, on December 30, 2019, an SPRK Prosecutor filed an indictment against Zlatan Krstić and Destan Shabanaj. We did not have access to the indictment filed on that date.

According to the official press release of the Basic Court of Prishtinë/Priština, on July 22, 2019, the Special Department ordered the suspect Goran Stanišić one-month detention on remand (from July 20 to August 19, 2019) on grounded suspicion that he had committed the criminal offence of *War Crimes against the Civilian Population*[30]. According to the findings of the Court, the conditions laid down in the law for detention on remand had been met. The parties were instructed that they had the right to file an appeal with the Court of Appeals in Prishtinë/Priština.

As decided by the Pre-Trial Judge, the hearing was closed to the public; however it did not apply to members of the profession, i.e. to monitors of the OSCE, EULEX, HLC Kosovo, BIRN, KLI[31] and GLPS[32], who were warned about the duty to keep official secrets, i.e. they were banned to disclose any information from this court session.

The course of pre-trial proceedings

In connection with the events that took place in the village of Sllovi/Slovinje, Lipjan/Lipljan Municipality on April 15 and 16, 1999, when the villagers were subjected to intimidation, mistreatment, robbery, expulsion from their homes, and when forty-two (42) persons were killed and several others injured, the SPRK authorised the KP Serious Crimes Department (SCD) to investigate the circumstances under which these events had taken place.

Following certain investigative actions, on May 14, 2018, the Police filed a criminal report against the suspect Goran Stanišić, M.M, S.M, as well as other twenty-eight (28) suspects, on grounded suspicion that they had committed the criminal offences of *War Crimes against the Civilian Population* and other criminal offences covered by Chapter XV of the 2012 Criminal Code of Kosovo.

Due to a grounded suspicion that the suspect Goran Stanišić was one of the accomplices in applying violence against the civilians in mid-April 1999 in the village of Sllovi/Slovinje, Lipjan/Lipljan Municipality, he was arrested on July 20, 2019 at the Jarinje/Jarinje border crossing, Leposaviq/Leposavić Municipality, when he was placed into a forty-eight (48) hour apprehension.

Following the arrest of the suspect, on the same day, the SPRK filed with the Special Department of the Basic Court of Prishtinë/Priština an application for de-

[30] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY as read with Article 3 of the Geneva Conventions, also punishable by Article 145 (*War crimes in serious violation of the laws and customs of war applicable to non-international conflicts*), and Article 146 (War *crimes in serious violation of Article 3 common to the Geneva Conventions*).

[31] Kosovo Law Institute.

[32] Group for Legal and Political Studies.

tention on remand[33] on grounded suspicion that he had committed a *War Crime against the Civilian Population*, in complicity. As stated in the application, this measure would secure the presence of the suspect in court as well as a successful conduct of the investigation.

The Prosecution filed the application only with respect to the suspect Stanišić; the remaining suspects were not available to the Kosovo prosecution authorities.

In the request for a security measure, the SPRK alleged that the suspect Goran Stanišić, during the armed conflict in Kosovo, in collaboration with identified and unidentified members of the reserve military and police units, on April 15 and 16, 1999, during an offensive against the civilian population of the village of Sllovi/Slovinje and the surrounding area, Lipjan/Lipljan Municipality, by applying military force, violence, robbery and intimidation, he had first expelled the Albanian civilians from their homes and had subsequently separated and killed forty-two (42) persons. During these attacks, at least eleven (11) persons had sustained bodily harm. According to the Prosecution, more lenient measures could not ensure the successful conduct of the proceedings.

Acting upon the request of the Prosecution, on July 22, 2019, the Special Department of the Basic Court of Prishtinë/Priština held a hearing, and on the same day, issued a ruling ordering a thirty-day detention measure against the suspect on grounded suspicion that he had committed, in complicity, a *War Crime against the Civilian Population*, punishable under the Criminal Code of Kosovo, which entered into force in 2019.

According to the findings set forth in the ruling, there were circumstances which indicated a risk of flight which would result in avoiding criminal liability, if the suspect was released pending trial. In support of these circumstances was the fact that the suspect had not been living in Kosovo since the end of the armed conflict. Moreover, there was a possibility of influencing the witnesses who had not yet been heard in the investigation and whom the suspect knew because they were from his village. In support of the decision to order detention on remand was also the fact that this was a very serious criminal offence, as well as the manner in which it had been committed. Given the reasons above, the Court deemed the detention order as necessary to secure the presence of the suspect in court.

[33] The application was filed by SPRK Prosecutor Enver Krasniqi.

As stated in the ruling[34] of the Pre-Trial Judge dated July 22, 2019, the hearing was attended by the parties to the proceedings.

After presenting the Prosecution's application, SPRK Prosecutor Dritana Hajdari moved the Court to order the most stringent measure for securing the presence of the suspect in court, i.e. detention on remand. According to the Prosecution, the witnesses interviewed identified the suspect. They knew him well, because he was their neighbour. If released pending trial, the suspect might influence the heard witnesses to alter their testimonies or persuade those witnesses, who were yet to be heard, to give different statements, thereby hindering the further course of the criminal proceedings.

The suspect's Defence Counsel, Attorney Miro Delević from Mitrovicë/Mitrovica, challenged the Prosecution's application, arguing that it was unfounded. The charges for the crimes that had occurred during the armed conflict in Kosovo in the village of Sllovi/Slovinje had already been prosecuted and all the accused persons had been acquitted by a final judgment. The suspect had been a witness in these proceedings.

The Defence Counsel also said that the suspect had left Kosovo for economic reasons immediately after the armed conflict, but had been regularly coming Kosovo because of family duties. He proposed to the Court that, if found necessary, his client be ordered a more lenient measure for securing court attendance, as he would always respond to the court summonses.

The suspect Stanišić supported his Defence Counsel's allegations and added that if he had done anything illegal, he would have never come to Kosovo again. He regretted what had happened in the village of Sllovi/Slovinje.

During the reporting period, at the request of the Prosecution, detention on remain was repeatedly extended against the suspect Stanišić, as this was the case with a large number of victims and witnesses who could not have been heard in a month or in the following months.

The ruling ordering one-month detention against the suspect, rendered by the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, as well as the ruling extending the detention order, were appealed by the suspect and the Defence Counsel. The appeals were rejected as unfounded in the rulings rendered by the Appellate Panel of the Court of Appeals.

[34] As the hearing was closed to the public and as it was forbidden to disclose any information stemming from it, the course of proceedings was presented according to the ruling ordering the detention measure.

The investigation in *The Prosecutor v. Goran Stanišić* case had not been completed by the end of the reporting period.

1.1.6. The Case: *The Prosecutor v. Ramiz Džogović*

Acting/deciding upon the SPRK's application for detention on remand in *The Prosecutor v. Ramiz Džogović* case, dated October 4, 2019 (KTS No. 61/19) and received on the same day, a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Arben Hoti, held a hearing to consider the merits of the Prosecution's application. Following the hearing, the review, and the analysis of the application, the Judge rendered a ruling ordering one-month detention against the suspect Džogović that was to last from October 3, 2019, when he was arrested, until November 3, 2019.

The suspect was ordered the strictest measure of securing his presence in court on grounded suspicion that he had committed the following criminal offences: *War Crimes against the Civilian Population*[35], *War Crimes as a serious violation of the Geneva Conventions*[36], *War Crimes as a serious violation of Article 3 common to the Geneva Conventions*[37], *War Crimes as a serious violation of law and customs applicable to non-international armed conflicts*[38], as well as the criminal offence of *Unauthorized Ownership, Control or Possession of Weapons*[39].

The course of pre-trial proceedings
On October 4, 2019, the SPRK[40] submitted to the Special Department of the Basic Court of Prishtinë/Priština an application for detention on remand against the suspect Džogović on grounded suspicion that: in the early morning of August 29, 1998, in the village of Shushicë/Sušica, Istog/Istok municipality (around 6:00 a.m.), in complicity with unidentified persons, being uniformed and armed, he had participated in an attack by the Serbian police forces against the Salihaj family, when nine (9) members of the family and one of their grandchildren had been

[35] Provided for and punishable by Article 142 of the CC SFRY (in force by UNMIK Regulation 1999/24 of December 12, 1999).

[36] Also provided for and punishable by Article 144 of the CCRK (that entered into force on April 15, 2019).

[37] Also provided for and punishable by Article 146 of the CCRK (that entered into force on the aforementioned date).

[38] Also provided for and punishable by Article 147 as read with Article 31 of the CCRK (that entered into force on the aforementioned date).

[39] Provided for and punishable by Article 366, Paragraph 1 of the CCRK.

[40] State Prosecutor Enver Krasniqi.

killed. During the attack, the property of the Salihaj family had been set on fire and destroyed. Moreover, there was grounded suspicion that while the property of the Salihaj family had been burning during the day, a photo had been taken of the suspect together with an unidentified perpetrator next to a building of the Salihaj family that had been on fire.

The State Prosecutor also charged the suspect with the commission of the criminal offence of *Unauthorized Possession of Weapons*. During the search of the house belonging to the suspect Džogović, that was carried out by the Kosovo Police (KP) on October 3, 2019, around 14:20 hrs., in the village of Dobrushë/Dobruša, Istog/Istok municipality, one Kalashnikov automatic weapon was found - serial number 105529, produced by Yugoslav Zastava - as well as one magazine, twenty-eight (28) 7.62x39 mm caliber bullets and three (3) 9x19 mm caliber bullets, for which the suspect had not obtained a licence from the competent institutions. After the search, the aforementioned weapons were confiscated.

The search of the suspect's home was conducted on the order of the State Prosecutor, which followed the criminal report filed by the KP's War Crimes Investigation Unit (WCIU), dated October 2, 2019. In the criminal report, the suspect Džogović was charged with the commission of the aforementioned offences in complicity.

Acting upon the criminal report and the supporting evidence – witness testimonies and the evidence obtained through investigative activities conducted by the police, the State Prosecutor found that there was a grounded suspicion that the suspect had committed the above mentioned criminal offences. For these reasons, and in order to ensure the presence of the suspect in court during criminal proceedings and their successful conduct, he requested in his application that the suspect be ordered detention on remand. According to the Prosecution, if the suspect was released pending trial, there was a risk that he would flee, avoid criminal liability and avoid responding to summons by the Prosecution and the Court. The criminal offences he was suspected of having committed were serious, carrying a longer term of imprisonment. If not detained, it would be difficult to successfully resolve the circumstances under which the murder had been committed. According to the Prosecution, the only measure that could ensure smooth conduct of criminal proceedings was detention on remand.

Acting upon the Prosecution's application for ordering a security measure, the Special Department of the Basic Court of Prishtinë/Priština held a hearing on the same day that was attended by the parties to the proceedings, the Prosecutor, who had filed the application, and the suspect Džogović together with his Defence Counsel, Attorney Esat Muharremi from Pejë/Peć.

During the hearing, the State Prosecutor presented and reasoned the written application for ordering the most stringent measure. He also stood by the proposals specified in the application.

The suspect's Defence Counsel impugned the Prosecution's application which, in the opinion of the Defence, was based on circumstantial evidence that was not probative. The Defence Counsel also objected to the reasons the Prosecution referred to when proposing the strictest measure to ensure the presence of the suspect in court. According to the Defence, the Prosecution did not contend that there was a risk of flight in this specific case, twenty (20) years after the end of the armed conflict. The Prosecution did not state the reasons that would affect his decision to leave his place of residence if he had not done so in the meantime. The Prosecution did not explain other reasons for ordering the most stringent measure, i.e. that he would influence the witnesses, or obstruct criminal proceedings. He moved the Court to order a more lenient measure for securing his presence in court.

The suspect Džogović stood by his Defence Counsel's allegations and added that he had been able to move freely around the town (Istog/Istok) for the previous twenty years, that he had been going downtown on a regular basis, at least once or twice a week, that he had been meeting with lawyers, judges, municipal officials, that he had never had a problem, and that no one had ever pointed a finger at him. During the armed conflict, he had been helping the population of the surrounding villages by providing them food, and by welcoming them in his home. He acknowledged that a weapon had been found in his house during the search.

Having held the hearing and having analysed the enclosed case files, the Pre-Trial Judge rendered a ruling whereby a security measure was ordered against the suspect in relation to the aforementioned offences. After considering the merits of the Prosecutor's application for ordering the measure of securing the presence of the suspect in court, the Pre-Trial Judge analysed the supporting evidence, found that the Prosecutor's application was founded, and that the conditions for ordering the detention measure against the suspect were fulfilled. Based on the evidence provided by the Prosecution, it entailed that, in this particular case, there was a risk that the suspect might flee in order to avoid criminal liability. There was also a risk of failure to respond to the summonses of the Court, the probability of influencing the witnesses not heard by the Prosecutor, and the likelihood of forging or tampering with evidence. The Judge found that there was also a danger that the suspect might influence potential accomplices who had not yet been identified or not available to the Court. According to the findings of the Court, detention was the only measure to ensure the presence of the suspect in court.

The suspect and his Defence filed an appeal against the ruling on detention on remand, which, following the session, was rejected by the Court of Appeals as unfounded. The ruling on detention on remand rendered by the Pre-Trial Judge was upheld. According to the findings of the Appellate Panel of the court of second instance, the Pre-Trial Judge of the court of first instance properly considered and assessed the supporting evidence when deciding on ordering the security measure against the suspect.

On October 29, 2019, the SPRK filed with the Special Department of the Basic Court of Prishtinë/Priština a reasoned application for extension of detention on remand against the suspect.

Following the receipt of the Prosecution's application, consideration and analysis of the reasons for the extension of the security measure, the Pre-trial Judge analysed the case file, the application for extension of the security measure, the supporting evidence and the reasons why the extension had been proposed, and found that there were still circumstances due to which the security measure had been ordered, that there was a danger the suspect might flee in order to avoid criminal liability, and that, if released pending trial, he might influence the witnesses and accomplices. On October 31, 2019, without holding a session, the Court issued a ruling wherein it established that the detention measure was the only measure that could ensure the smooth conduct of criminal proceedings. The Court extended detention on remand against the suspect for additional two (2) months, from November 3, 2019 to January 3, 2020.

The HLC Kosovo findings

The State Prosecutor has instituted criminal proceedings against the suspect in relation to a number of criminal offences of *War Crimes*. What is striking is that the application for ordering a security measure, when it comes to such serious charges, did not contain any description or a list of specific actions that respectively relate to the four criminal offences.

Moreover, when classifying the criminal offences, the Prosecution listed legal headings of the criminal offences the suspect had been charged with, but did not specify the provisions that would more closely describe the illegal actions of the suspect. Namely, the legal provisions set out in the application for detention on remand against the suspect contain several items.

According to the current case law (national and international), it is indisputable that, when classifying a criminal offence, it is mandatory to state the legal heading of the offence under the criminal code in force at the time of the commission of

the criminal offence[41]. In case of amendments to the criminal code, if the new code also envisages the criminal offence as such, it is mandatory to state the legal heading of the criminal offence according to the criminal code currently in force. The criminal code in force at the time of the commission of the criminal offences, as well as the criminal code that was applied when initiating criminal proceedings against the suspect, provide that a more favorable law be applied against perpetrators. In this specific case, the classification of the criminal offences the suspect has been charged with has been carried out under the Criminal Code of Kosovo which entered into force in mid-April 2019, which is more stringent for the suspect in terms of the sentence.

The description of the criminal offence(s) the suspect has been charged with does not specify under what circumstances these offenses were committed, whether in peacetime or during an armed conflict. Only the date of the commission of the criminal offence has been stated, but not the character of the armed conflict (internal, international), although the Defendant's actions have been classified as *War Crimes*, which can only be committed during the war or an armed conflict.

The Pre-Trial Judge, too, used the same manner of classifying the criminal offences against the suspect.

The HLC Kosovo olso notes that a preliminary criminal investigation and criminal proceedings in cases where suspects are charged with war crimes have been much more expeditious after the Special Department of the Basic Court of Prishtinë/Priština was established. In most cases, at least during the preliminary criminal investigation, legal deadlines for taking procedural actions are respected, which is very important for the protection of human rights of suspects or accused persons.

[41] Article 2 item 2 of the CCRK (2019): 'No criminal sanction or measure of mandatory treatment may be imposed on a person for an act, if prior to the commission of the act, the law did not define the act as a criminal offence and did not provide a criminal sanction or measure of mandatory treatment for the act'.

1.2. The fisrt instace proceedings

1.2.1. The Case: *The Prosecutor v. Darko Tasić*

On September 13, 2018, following the assessment of the SPRK indictment dated April 26, 2018 (KTS/PPS. No. 149/09), the main trial in *The Prosecutor v. Darko Tasić* case was opened before a Trial Panel (presided over by Judge Artan Sejrani[42]) of the Serious Crimes Department of the Basic Court of Prizren against the Defendant Tasić for the commission of the criminal offence of *War Crimes against the Civilian Population* on two counts. The trial was also ongoing during the reporting period.

The course of criminal proceedings[43]
Criminal proceedings in relation to the events that took place during the armed conflict in Kosovo in the village of Krusha e Vogël/Mala Kruša, Prizren municipality, in the period from March 25 to 27, 1999, were initiated by a ruling of the SPRK International Prosecutor[44], dated May 31, 2012, on launching an investigation against fifty-five (55) suspects due to a grounded suspicion that they, in the capacity of members of Serbian paramilitary forces, in complicity with members of the regular police forces, had killed more than one hundred (100) men in the barn owned by Rasim Batusha and at several more locations in the village, and had tried to kill seven (7) more civilians. The defendants were also charged with seizing money, valuables and personal documentation from the villagers on that occasion.

The investigation was also initiated against another forty-eight (48) suspects[45] due to a grounded suspicion that, on March 25 and 26, 1999, as members of the reserve armed forces of the FRY MIA[46] or paramilitary forces, as well as in complicity with other unknown perpetrators, they had participated in the confiscation of property, looting, setting houses and cars on fire, and large scale de-

[42] Members of the Trial Panel: Judges Ajser Skenderi and Xheladin Osmani.

[43] This analysis will cover the part of the main trial that was taking place before the Trial Panel during the reporting period, with a brief overview of the part of the criminal proceedings that had taken place in previous years. This part of the main trial is presented in detail in the 2017 and 2018 Annual Reports which can be found on the HLC Kosovo official website: http://www.hlc-kosovo.org/

[44] SPRK International Prosecutor Cezary Michalczuk.

[45] Including the Defendant Tasić.

[46] Ministry of Internal Affairs of the Federal Republic of Yugoslavia

struction of property that was not justified by the military needs. On the same day, they had separated the women and children from the men, and had forced them to set off, on foot, to Albania.

In the aforementioned ruling, an investigation against the suspects was also initiated in relation to other criminal offences committed on the critical day in the village of Krusha e Vogël/Mala Kruša, that were classified as *War Crimes against the Civilian Population*.

The investigation was, in accordance with the foregoing ruling, repeatedly suspended and reopened in order to carry out certain investigative actions so that the deadline foreseen for conducting an investigation would not be exceeded.

The investigation into the crimes committed in March in the village of Krusha e Vogël/Mala Kruša, in accordance with the ruling issued in late May 2012, was, after obtaining evidence, suspended against individual suspects and launched against new persons.

In order to bring the suspects to justice, an international warrant was issued against twenty-seven (27) suspects in 2016. The Defendant Tasić was arrested at the Bërnjak/Brnjak border crossing, Zubin Potok municipality, on November 22, 2017, in accordance with this arrest warrant. On the same day, a ruling was issued to reopen the investigation, as well as a ruling on his police apprehension that was to last for forty-eight (48) hours. On the following day, a one-month detention measure was ordered against him in a ruling of the Pre-Trial Judge of the Basic Court of Prizren[47].

In the indictment dated April 26, 2018, the SPRK International Prosecutor[48] charged the Defendant Tasić with the commission of the criminal offence of *War Crimes against the Civilian Population*[49] on two counts:

- between March 25 and 26, 1999, in the village of Krusha e Vogël/Mala Kruša, the municipality of Prizren, in the area known as the "Hajdari mahala", acting as a

[47] According to the rulings of the Pre-Trial Judge or the Presiding Trial Judge, which were affirmed by the decisions of the Court of Appeals, the Defendant was in detention on remand during the criminal proceedings.

[48] The indictment was filed by International Prosecutor Paul Flynn. The represents the last indictment filed by an international prosecutor.

[49] Provided for and punishable under Article 142 as read with Article 22 of the CC SFRY, also punishable under Article 152, Paragraph 2.2 in conjunction with Article 31 of the CCRK, in violation of Article 3 (c) common to the Geneva Conventions of 12 August 1949, Article 4, Paragraph 2, items (e) and (g) and item 13 of Protocol II additional to the Geneva Conventions (8 June 1977).

member of the reserve police forces of the Federal Republic of Yugoslavia (MIA) or Serbian paramilitary forces, in complicity with other perpetrators, members of the aforementioned forces whose identity has not been identified, the Defendant was involved in the confiscation and plunder of property, illegal or arbitrary destruction of property (setting houses on fire) at large scale that was not justified by the military needs, which resulted in grave consequences for the villagers of Albanian nationality;

- in the same capacity, on March 26 and 27, 1999, in complicity with other members of the police forces, the Defendant participated in or was involved in the defamation of the bodies of an unknown number of unidentified persons in the area around the village of Krusha e Vogël/Mala Kruša by setting them on fire and/or trying to destroy them by throwing them into the river Drim near the village.

An initial hearing was held on May 14, 2018 before a judge of the Basic Court of Prizren, Artan Sejrani. The Defendant pleaded not guilty to the charges. The second hearing was held on June 14, 2018. In between these two hearings, the Defendant and his Defence Counsel filed a motion to reject the indictment. Due to the great volume of the case, they kept the right to comment on any new possible evidence and any witness proposal during the trial. The Prosecution, in their written response, moved the Court to reject as unfounded the motion to reject the indictment.

In the ruling dated June 14, 2018, the Presiding Trial Judge rejected as unfounded the motion to reject the indictment. This court ruling was impugned in the Defendant's appeal, which was also rejected as unfounded by the Court of Appeals' ruling dated July 7, 2018.

The main trial was opened on September 13, 2018 when the parties to the proceedings presented their opening statements. The trial continued with the administration of evidence. After the main trial had been opened, the Trial Panel was in session, including the initial and the second hearing, for eighteen (18) days [eight (8) days in 2018, ten (10) days in 2019]. During the trial (from the opening till the end of 2019), fifteen (15) prosecution witnesses were heard. Upon the motion of the Prosecution, statements from the earlier stages of criminal proceedings were read, given by three witnesses[50] who had had in the meantime passed away or were

[50] Pursuant to Article 338, Paragraph 1, item 1.1 of the CPCRK, statements from earlier stages of the proceedings shall be read at the main trial 'if the persons who have been examined have died, become afflicted with mental disorder or disability or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons'.

in poor health and were difficult to be heard before the Court. The Defence Counsel objected to the reading of the witnesses' statement from the earlier stages of criminal proceedings, and insisted on direct examination of individual prosecution witnesses (those still alive), arguing that the evidence from the earlier phases of the case was inadmissible and that it could not serve as a basis for a judgment.

Material evidence was presented too, including the evidence obtained from the International Criminal Tribunal for the former Yugoslavia (ICTY) through international legal cooperation, i.e. the evidence from the cases tried before this Tribunal (*The Prosecutor v. Milan Milutinović et al.*, *The Prosecutor v. Vlastimir Đorđević*). In the course of the trial, some technical errors in the official records were corrected too.

The main trial was open to the public from the very beginning. All sessions were audio- and video-recorded.

Drita Hajdari, an SPRK Prosecutor, represented the indictment during the trial.

The trial was announced to continue on January 15, 2020, when a prosecution witness - UK journalist John Sweeney - is to be heard. In order to secure the presence of this witness and his hearing before the Trial Panel, several scheduled court sessions were adjourned during the reporting period.

The HLC Kosovo observations:
As it was observed in previous years, the HLC Kosovo still has objections to the slow pace of the main trial in the criminal proceedings against the Defendant Darko Tasić. The Defendant was arrested on November 22, 2017 and has been in detention on remand for more than two years, with a real likelihood of being detained for the third year if the Court does not act more expeditiously in this case.

The Criminal Procedure Code (Article 314) foresees deadlines for the completion of the main trial. This Article foresees that if the main trial is before a single trial judge, the main trial shall be completed within ninety (90) days. If the main trial is before a trial panel, it shall be completed within one hundred and twenty (120) days, unless the trial panel issues a reasoned decision to extend the time for the main trial. The main trial may be extended for another thirty (30) days for each reasoned decision, by stating substantiated reasons for the extension of the main trial. In the second half of 2019, the main trial was postponed on several occasions due to the inability to hear a witness, UK journalist John Sweeney, whose hearing had to be organised through international legal assistance. The HLC Kosovo finds that the institutions through which international legal assistance is orga-

nized should act more expeditiously, especially in cases where the defendant is in detention, because in these situations, too, the presumption of innocence applies, irrespective of the gravity of the charged offence.

With regard to *The Prosecutor v. Darko Tasić* case, the HLC Kosovo considers it necessary to reiterate the recommendation stated in the 2018 Annual Report concerning the need for Kosovo courts, despite their excessive workload, to give priority to war crimes cases. As time goes by, facts and memories fade, witnesses die, evidence disappears, and it becomes increasingly difficult to gather evidence of the crimes committed during the armed conflict; hence, victims or their families have fewer possibilities to exercise their right to justice.

The main trial was taking place in Albanian, with interpretation into Serbian for the Defendant and his Defence Counsel (*chuchotage*). When the Defendant or his Defence Counsel were addressing the Court, consecutive interpretation from Albanian to Serbian was organised and vice versa. Interpretation before this Trial Panel was good during the trial, the official records were kept properly, and according to the information provided by the Defence Counsel, he was receiving timely translations of the official records, which was at an adequate or acceptable level. This is commendable, given numerous translation problems in other cases that have been observed by the HLC Kosovo while monitoring the most important trials.

1.2.2. The Case: *The Prosecutor v. Zoran Đokić*

The main trial in *The Prosecutor v. Zoran Đokić* case, initiated on the SPRK indictment dated May 31, 2019 (KTS. No. 23/2018), was opened on November 18, 2019 before a Trial Panel, presided over by Judge Arben Hoti[51], of the Special Department of the Basic Court of Prishtinë/Priština. In the indictment, the Defendant was charged with having committed, in complicity, the criminal offences of *War Crimes against the Civilian Population*[52], *War Crimes in serious violation of Article 3 common to the Geneva Conventions*[53], *War Crimes in serious violation of laws and customs applicable in non-international armed conflicts*[54].

[51] Members of the Trial Panel: Judges Albina Shabani Rama and Shadije Gërguri.

[52] Provided for and punishable under Article 142 of the CC SFRY in force by UNMIK Regulation 24/1999 of 12 December 1999.

[53] Provided for and punishable under Article152 Paragraph 1 of the CCRK (2012) - according to which the criminal offences the Defendant was charged with were classified in the indictment dated May 31, 2019.

[54] Provided for and punishable under Article153 Paragraph 1 items 2.1; 2.2; 2.5; 2.8; 2.13 and 2.15 and Article 3 of the CCRK (2012).

The course of criminal proceedings

Due to a grounded suspicion that, during March and May 1999, in the settlement *Kristal* in Pejë/Peć, several serious crimes were committed by a number of uniformed and armed persons (physical and psychological abuse, robbery of civilians who did not participate in the conflict, murder of thirty-three (33) civilians, expulsion of the population from their homes), the SPRK authorised the Kosovo Police Serious Crimes Department (KP SCD) to investigate into the circumstances under which the crimes had occurred and to identify possible perpetrators.

Following the investigative activities carried out by the said Police Department, the Prosecution Office received a criminal report on October 5, 2018. With regard to this report, on October 8, 2018, SPRK State Prosecutor Habibe Salihu filed with the Serious Crimes Department of the Basic Court of Pejë/Peć a ruling on initiation of investigation against the Defendant Zoran Đokić. By the aforementioned ruling, an investigation was also launched against the suspects R.B, V.I and S.S who have been unavailable to the Kosovo prosecution authorities.

The investigation was initiated on grounded suspicion that the suspects had taken part in or had assisted in the commission of the criminal offence by opening fire against civilians on March 26, 27, 28 and May 13, 17 and 28, 1999, in the *Kristal* settlement in Pejë/Peć, when 33 civilians had been killed. By doing so, the suspects had committed the criminal offences of *War Crimes in serious violation of the Geneva Convention*[55] (intentionally causing great suffering, serious bodily harm, rape and sexual harassment), *War Crimes in serious violation of Article 3 common to the Geneva Conventions*[56],*War Crimes in serious violation of laws and customs applicable in non-international armed conflicts*[57], *Organization of Groups to Commit Genocide, Crimes against Humanity and War Crimes*[58],*Responsibility of Commanders and other Leaders*[59], and *War Crimes against the Civilian Population*[60].

Following the decision to open an investigation against the suspects, the SPRK filed with the Serious Crimes Department of the Basic Court of Pejë/Peć a request to issue an arrest warrant against the suspects under investigation. The Court was requested to issue an arrest warrant after the regular summoning process of the suspects that was completed by sending summonses to the addresses the Prose-

[55] Provided for and punishable under Article150 Paragraph 2 items 2.1 and 2.3 of the CCRK.

[56] Provided for and punishable under Article152 Paragraph 2 items 2.1 and 2.3 of the CCRK.

[57] Provided for and punishable under Article153 of the CCRK.

[58] Provided for and punishable under Article 160 of the CCRK.

[59] Provided for and punishable under Article 161 of the CCRK.

[60] Provided for and punishable under Article 142 in conjunction with Article 22 of the CC SFRY.

cution had managed to obtain during that period. It was not possible to serve the summonses as the suspects had no longer lived at the addresses available to the Prosecution. On November 2, 2018, the Basic Court of Pejë/Peć, acting upon the Prosecution's request, issued an arrest warrant against the persons under investigation (by the ruling dated October 8, 2018). Pursuant to this order, the suspect Zoran Đokić was arrested on February 1, 2019 at 10:00 p.m. at the Jarinë/Jarinje border crossing, Leposaviq/Leposavić Municipality.

On February 2, 2019, Prosecutor Salihu issued a ruling on apprehension of the suspect Zoran Đokić, which started to run from the moment of his arrest. On the same day, she also filed with the Court an application for detention on remand in order to secure the presence of the suspect in court and to allow a smooth running of criminal proceedings in respect of the offences suspected to have been committed in 1999 by the suspect, in complicity with other persons unavailable to the Kosovo law enforcement agencies.

According to the Prosecution, the grounded suspicion that the suspect had committed the criminal offence he was charged with was supported by material evidence, inter alia, the statement of an eye-witness to the events with which the suspect was charged. The Prosecution moved the Court to order the strictest security measure on the grounds that more lenient measures could not secure the presence of the Defendant in court.

On February 2, 2019, the Pre-Trial Judge of the Serious Crimes Department of the Basic Court of Pejë/Peć held a detention hearing to consider the Prosecution's request for ordering a security measure.

During the hearing, the suspect and his Defence Counsel, Attorney Ljubomir Pantović from Mitrovicë/Mitrovica, challenged the merits of the Prosecution's application, arguing that it was based solely on the statement of one witness, and that the Prosecution had not identified the perpetrators who had acted on the critical day it the settlement *Kristal* in Pejë/Peć. According to the Defence, another person with the same name and surname, whose father's first name also began with the same letter as the suspect's father, used to live in the settlement where the suspect[61] had lived before and during the armed conflict in Kosovo. That other person had been a member of the Serbian MIA during the armed conflict in Kosovo and had participated in many police actions prior to the armed conflict. The Defence Counsel moved the Court to order a more lenient measure that would, according to the Defence, secure the presence of the suspect in court.

[61] At the time of compiling this report, the HLC Kosovo was not in possession of the information on what this exact settlement was.

Following the hearing, the Pre-Trial Judge rendered a ruling rejecting the request of the Defence. He granted the Prosecution's application for detention on remand against the suspect Zoran Đokić. The Court found, inter alia, that the suspect had been identified by the Prosecution as a participant in the commission of the offence he was charged with, and also, by witness testimonies and photo documentation available in the case file. The suspect did not live in Kosovo, and the charged criminal offences carried a sentence of long term imprisonment. Moreover, there was a risk of flight and a risk interfering with the successful conduct of criminal proceedings. Other more lenient measures in this case would not be adequate to secure the presence of the suspect in court.

The suspect was ordered (1) one – month detention on remand that was to last until March 2, 2019.

Through his Defence Counsel, Attorney Pantović, the suspect appealed the ruling on the security measure rendered by the Serious Crimes Department of the Basic Court of Pejë/Peć on grounds of substantial violations of criminal procedure and an erroneous and incomplete determination of the factual situation.

The Defence Counsel stated in the appeal that the court of first instance had taken grounded suspicion for ordering detention as a general reason and the risk of flight as a special reason. With regard to the grounded suspicion as a general reason, according to the allegations from the appeal, the Court had presented a completely vague argument. The legal classification of the offences the suspect was charged with was completely vague and incomprehensible. According to the appeal, a grounded suspicion must be based on clearly described evidence indicating that that the suspect had committed the charged criminal offence. The application for detention on remand and the ruling ordering this measure must explain in detail the existence of the grounded suspicion; there should be a high probability that the suspect had committed the charged criminal offence, which had not been contained in the application for detention on remand or in the ruling ordering such a measure.

According to the Defence, the legal classification of the criminal offences the suspect was charged with was unacceptable. The suspect was charged with the criminal offences provided for by the law that came into force on January 1, 2013, and not under the law in force at the time of the commission of these offences. Moreover, according to the Counsel, there were no grounds for ordering detention. He moved the Court of Appeals to grant the appeal, to modify the ruling of the Pre-Trial Judge, and to terminate detention on remand against the suspect because there was no grounded suspicion that he had committed the criminal

offence; or alternatively, to order house detention that would be carried out in his father's apartment in North Mitrovica.

The Appellate Panel of the Serious Crimes Department of the Court of Appeals, presided over by Judge Hava Haliti[62], in their ruling dated February 22, 2019, rejected the appeal of the suspect's Defence Counsel as unfounded and upheld the ruling on detention on remand rendered by the Basic Court of Pejë/Peć.

According to the findings of the court of second instance, the Department of Serious Crimes of the Basic Court of Pejë/Peć had properly explained in their impugned ruling the grounded suspicion that the suspect had committed the charged criminal offences. According to the findings of the Appellate Panel, the case files provided sufficient grounds for the suspicion that the suspect had aided or had opened fire at the Albanian civilian population on March 26, 27 and 28, as well as on May 13, 17 and 28,1999 in the settlement *Kristal* in Pejë/Peć when thirty-three (33) people had been killed. Whether the grounded suspicion would be proven was to be established at further stages of criminal proceedings. The court of first instance had properly assessed the reasons and grounds for ordering the detention measure.

During the reporting period, the detention measure had been duly extended against the suspect by the Pre-Trial Judge of the Basic Court of Pejë/Peć. After the new Law on Courts[63] entered into force at the beginning of the year, according to which the Special Department of the Basic Court of Prishtinë/Priština was established with the jurisdiction over the cases falling within the competences of the Special Prosecution Office of Kosovo, a Pre-Trial Judge of that Department[64] was adjudicating on the Prosecution's request for ordering security measures.

The indictment

On May 31, 2019, State Prosecutor Habibe Salihu filed with the Special Department of the Basic Court of Prishtinë/Priština an indictment against the Defendant Zoran Đokić for having committed the criminal offences of *War Crimes in serious violation of Article 3 common to the Geneva Conventions*, *War Crimes against the Civilian Population, War Crimes in serious violation of laws and customs applicable in non-international armed conflicts*, Article 153, Paragraph 2, items 2.1, 2.2, 2.5, 2.8, 2.13, and 2.15. and Article 3 of the CCK[65]

[62] Members of the Appellate Panel: Judges Xhevdet Abazi and Tonka Berishaj.

[63] https://md.rks-gov.net/desk/inc/media/F6BADB4F-6CD7-42F2-9E54-9D01B98A778E.pdf

[64] At the time of compiling this report, the HLC was not in possession of the date when the case file was handed over to the Special Department of this Court.

[65] Criminal Code of Kosovo (2012) which entered into force on January 1, 2013.

The Defendant committed these criminal offences as follows:
- during March and April 1999, in the settlement *Kristal* in Pejë/Peć, acting within the framework of an organized criminal group of Serbs, composed of uniformed and armed members of the army, police and paramilitary groups, who have been unavailable to the prosecuting authorities of Kosovo, by means of intimidation, robbery, murder, expulsion, violation of the bodily integrity or health of unprotected Albanian civilians who did not directly participate in the conflict, he entered the homes of Albanian civilians, forced them to leave their homes together with their family members, inflicted immense suffering on them, and applied physical and mental abuse against them. From the home of, nowadays, late Hilmia Zeqiri, he expelled his family and the families present inside his house (the family of his brother Skender and the family of Shaban Kaliqani, who had previously been forced to leave their home), and ordered them to hand over the money and valuables (family jewellery). Furthermore, in the courtyard of Zeqiri's house, he punched Shaban Kaliqani in the face and broke his teeth, then killed Hilmi Zeqiri, after which he beat Skender and confiscated DM 1,000 from him. After expelling the civilians from the house, some 70 metres from Zeqiri's courtyard, at the gate of Asllan Mula's yard, the Defendant separated Skender, Shaban and Bashkim Berisha from the convoy, then opened burst fire from his Kalashnikov in the direction of Skender's head and Bashkim's chest. He said to Shaban: 'What are you waiting for, run'. While running, Shaban met Riza Mamaj who had been shot in the chest and who, subsequently, succumbed to his injuries. Shaban continued to his father's house, wherefrom he left for Montenegro the following day.

The indictment assessment procedure
Acting on the indictment dated May 31, 2019, Judge Arben Hoti[66] of the Special Department of the Basic Court of Prishtinë/Priština held an initial hearing on July 11, 2019 when the indictment was read. The Defendant stated that he had understood the allegations stemming from it and pleaded not guilty to any of the charges.

Following the hearing held on July 11, 2019, the Defence for the Defendant submitted a written request to the Presiding Trial Judge on August 2, 2019 seeking that the indictment be rejected. According to the Defence's findings: the indictment was flawed, not based on a grounded suspicion that would confirm that the Defendant Zoran Đokić had committed the charged criminal offences, the time of the criminal offences was not stated accurately, and there was no evidence that any events had taken place in March or April in the aforementioned settlement in Pejë/Peć.

[66] Judge Hoti is the Presiding Trial Judge, who, during the indictment assessment procedure, acted as a Single Trial Judge.

Moreover, according to the Defence, the classification of the criminal offences was imprecise and unclear, it was carried out according to the law that was not in force at the time of the commission of the criminal offences the Defendant was charged with, and the applicable law was not more favorable to the Defendant. The Prosecution did not have sufficient evidence in the proceedings that the Defendant had committed the charged criminal offence. The evidence enclosed to the indictment was unreliable, its analysis had not been carried out, and the testimonies of witnesses had been just retold. Furthermore, it was proposed in the indictment that only the evidence supporting the indictment should be adduced at the main trial, although the Prosecution was required by the law to present the evidence in support of the allegations of the indictment but also the evidence in favour of the Defendant. The Defence, by objecting to the evidence, challenged, inter alia, the quality of the Prosecution's evidence, especially the enclosed photographs, stating that the photographs were blurred, not numbered, and that it was not possible to determine the origin of the photographs or the time when they had been taken.

The second hearing was held on August 14, 2019, within the forty (40) day legal deadline[67].

During this hearing, State Prosecutor Salihu informed the Court that she had duly received the views of the Defendant and his Defence regarding the indictment, i.e. the request to dismiss the indictment and the objections to the evidence attached thereto.

She stated that the Defence's written submissions were untenable. The indictment was compiled in accordance with the legal provisions and supported by sufficient evidence that had been obtained in the manner prescribed by the law, that is, the indictment was based on admissible evidence. For these reasons, she moved the Court to reject the motion of the Defence.

Throughout this hearing, the Defendant and his Defence stood entirely by the written request to reject the indictment and the objection to the supporting evidence. During the hearing, the Defence announced an alibi for the Defendant, i.e. they submitted to the Court the names of the witnesses they planned to summon in support of an alibi.

The Defence Counsel for the Defendant assessed the Prosecution's views as general and stood by everything stated in his written submissions, which was also supported by the Defendant.

[67] Pursuant to the Criminal Procedure Code, it is not mandatory to hold the second hearing. Article 254 of the CPCRK specifies the course of this hearing.

The hearing was public.

The Special Department's ruling on the Defence's motion and objections
On September 16, 2019, after the initial and the second hearing had been held, the Presiding Trial Judge rendered a ruling rejecting the Defendant's motion to reject the indictment and the objections to the proposed evidence.

According to the findings, the Court rendered this decision after a careful analysis of the allegations and claims of the parties to the proceedings, and found that the Defendant Zoran Đokić had committed the offences charged in the indictment. The Prosecution's evidence had been obtained in a manner prescribed by the law and it indicated that the aforementioned criminal offences had been committed by the Defendant.

In their appeal dated September 23, 2019, the Defendant and his Defence challenged the ruling of the Presiding Judge due to an erroneous determination of the factual situation. They argued that there was insufficient evidence to support the grounded suspicion that the Defendant had committed the criminal offence charged in the indictment. A grounded suspicion meant that there was admissible evidence[68]. The indictment contained a vague factual description that did not correspond to the evidence obtained at the investigative stage of the criminal proceedings. As stated in the appeal, the conditions for rejecting the indictment had been met.

Deciding on the Defendant's appeal, the Court of Appeals, in the ruling of the Appellate Panel[69] dated October 17, 2019 rejected the appeal as unfounded and upheld the ruling of the Special Department of the Basic Court of Prishtinë/Priština. According to the findings of the court of second instance, the allegations from the appeal were unfounded. According to the facts described in the indictment, there were sufficient reasons to believe that the Defendant had committed the charged criminal offences. The evidence in the file confirmed the grounded suspicion. It would be assessed during the main trial before the court of first instance.

Before the opening of the main trial, the Defence Counsel for the Defendant proposed new evidence to the court of first instance on November 15, 2019. The proposed evidence was related to the professional engagement of the Defendant Zoran Đokić by international organizations and institutions in Kosovo after the armed conflict, until 2014.

[68] As provided for by Article 19 Paragraph 1 item 1.12 of the CPCRK.

[69] The appeal was decided by the Appellate Panel of the Special Department of the Court of Appeals, presided over by Judge Kreshnik Radoniqi, and composed of Judges Gordana Vlašković and Ferit Osmani.

The main trial

Following the decisions of the competent courts that the main trial could be opened, the main trial before the Trial Panel of the Special Department of the Basic Court of Prishtinë/Priština was scheduled to start on November 18, 2019; however, it was postponed due to the absence of the Defence Counsel for the Defendant. The main trial was opened in the presence of the parties to the proceedings on December 4, 2019. Five (5) sessions have been held so far, the initial and the second hearing (held on July 11 and August 14, 2019), and the ones held on November 18, December 4 and December 19, 2019.

During the part that took place in the course of the reporting period, the indictment was read. The Defendant again stated that he had understood it, but he pleaded not guilty. Opening statements by the parties to the proceedings were also presented.

In her opening statement, the Prosecutor introduced the evidence she planned to administer during the main trial in support of the grounded suspicion. She listed the witnesses who would be heard during the main trial and briefly presented parts of their statements from earlier stages of criminal proceedings.

The Prosecutor's opening statement was supported by the injured parties present and their representative, Attorney Kujtim Kërveshi from Prishtinë/Priština, who stated in his address to the Court that: the witnesses proposed in the indictment had substantial evidence of the events that had taken part in late March 1999 in the settlement *Kristal*; there was evidence that, on the critical day, the Defendant had been a participant in the event and that, as a uniformed and armed person, he had used a weapon and had harassed, plundered, beaten and killed some people. The Defendant had taken part in these actions, and during the trial, the injured parties would present the evidence thereof. The representative proposed additional witnesses to be heard. He also stated that he would file a timely property claim on behalf of the injured parties.

In this part of the trial, the representative withdrew his proposal that some pieces of evidence, proposed by the Defence and prepared in Cyrillic, be translated into Albanian, given that the defence was based on an alibi, and that the Defendant might need this evidence at a later stage of the main trial.

With regard to his absence at the opening of the main trial, Attorney Pantović explained that he had not received summons for the opening of the main trial scheduled for November 18, 2019.

In his opening statement, he said that the Defence did not dispute that crimes had occurred in the settlement *Kristal* at the critical date, on March 29, 1999, but that he would prove that the Defendant had not taken part in the commission of those crimes. During the course of the trial, he would prove that the indictment was inadmissible and not based on convincing evidence, and that the Prosecution witnesses did not have direct knowledge of the crime. The Defence expected that the Trial Panel would, in the end, be satisfied that there was no evidence that would confirm the Defendant's guilt beyond any reasonable doubt.

The main trial continued with the hearing of witnesses proposed by the Prosecutor. By the end of the reporting year, three (3) witnesses had been heard and another witness had started to give testimony. The hearing of the Prosecution witness, whose testimony had not been completed, was announced for January 20, 2020, when the main trial was due to continue.

In the course of the hitherto main trial, the Trial Panel had so far not ruled on individual motions of the parties, which were mainly related to new evidence and hearing of new witnesses. The Panel announced to rule on these motions in the continuation of the main trial.

The part of the main trial, which was held in 2019, was open to the public. It was conducted in the Albanian language with consecutive interpretation into Serbian.

The HLC Kosovo observations:
Based on monitoring the criminal proceedings conducted in *The Prosecutor v. Zoran Đokić* case during the reporting period, as well as of the access to court records, the HLC Kosovo finds that, the main trial has, so far, been conducted in accordance with the law. The rights of the parties to the proceedings have been respected by the courts during the hitherto stages of proceedings.

Having analysed the stages of criminal proceedings (the pre-trial stage, the indictment assessment procedure and the main trial), the HLC Kosovo has found that the Prosecution's documentation is unclear and imprecise when it comes to the suspicion related to such a serious criminal offence. In the ruling on initiation of investigation, the Defendant has been suspected of committing multiple forms of the criminal offence of *War Crimes*, i.e. he has been charged with the commission of six (6) crimes, but without any description of his specific actions. The enacting clause of the ruling contains legal names of the offences, while, in the reasoning, a very brief description of the suspect's actions has been set out. Article 104,

Paragraph 1 of the CPCK[70] clearly states that a ruling to initiate an investigation should, inter alia, include: the name of the person against whom an investigation was initiated, the date and time of the commission of the offence suspected of having been committed, a description of the suspected criminal offence, the legal name of the criminal offence, the circumstances and facts warranting a grounded suspicion of the perpetrator of the criminal offence.

The enacting clause of the indictment is also quite incomprehensible and imprecise. In the indictment's enacting clause, the Defendant has been charged with the commission of several criminal offences, on multiple counts, without clearly specifying these actions. The indictment also does not specify under what conditions the offences were committed, in peacetime or in times of armed conflict or war. According to international regulations, *a war crime* can only be committed in times of war or armed conflict that is not of an international character, or during an occupation. Legal classification of the criminal offences has not been adequately carried out in the indictment, nor does the indictment state whether or not the offences the Defendant has been charged with were committed in complicity (the enacting clause of the indictment states that the Defendant acted in a group). The legal name of the criminal offence according to the law which was effective at the time of the commission of the charged offence has not been accurately stated.

The Indictment states that the applicable law is more favorable to the Defendant, although, according to the applicable law, the charged criminal offence carries an imprisonment of not less than five (5) years or a life-long imprisonment[71]. The Criminal Code of the SFRY, in force at the time of the commission of the offence by UNMIK Regulation 24/1999 of 12 December 1999[72], prescribes for the criminal offence of *War Crimes against the Civilian Population* an imprisonment of not less than five (5) years or a death penalty that was abolished by the aforementioned UNMIK Regulation. According to the Criminal Code of the SFRY, a death sentence might have been replaced by a sentence of imprisonment of twenty (20) years. Article 38 of the CC SFRY, Paragraph 1, foresees that an imprisonment may not be shorter than five (5) years, or longer than fifteen (15) years.

Legal classification in the indictment was carried out under the Criminal Code of Kosovo, in force from January 1, 2013 to mid-April 2019, although this Code is not more favourable to the perpetrator. Pursuant to the legal and constitutional provisions, it is mandatory to apply the law in effect at the time the charged

[70] https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861

[71] Article 153 of the CCRK: https://gzk.rks-gov.net/ActDetail.aspx?ActID=2834

[72] http://www.unmikonline.org/regulations/1999/re99_24.pdf

criminal offence was committed. In the event of a change in the law, the law most faIvorable to the perpetrator shall apply[73].

1.2.3. The Case: *The Prosecutor v. Nenad Arsić*

On December 24, 2019, a Trial Panel of the Special Department of the Basic Court of Prishtinë/Priština, presided over by Judge Albina Shabani Rama, held an initial hearing upon the SPRK's indictment, dated December 6, 2019 (KTS No 01/2016), filed against the Accused Nenad Arsić on grounded suspicion that he had violated the bodily integrity of some members of the Shala family from Prishtinë/Priština during the armed conflict in Kosovo, and that he had seized significant amounts of oil and money from the same family, thereby committing the criminal offence of *War Crimes against the Civilian Population*[74] on two counts.

The course of criminal proceedings
Acting upon the criminal report filed by the members of the Shala family from Prishtinë/Priština, who, on May 21, 1999, were harassed and robbed by members of the Serbian police forces, including a reserve police officer Nenad Arsić, the SPRK authorized the War Crimes Investigation Unit (WCIU) of the Kosovo Police to investigate into the allegations from the criminal report filed by the Shala family members. Following the investigation, the WCIU filed a criminal report on September 5, 2019, against the suspect Arsić on grounded suspicion that he had committed the criminal offence of *War Crimes*.

Acting upon the criminal report, with the intention to clarify the allegations stemming from it, on October 22, 2019, SPRK State Prosecutor Drita Hajdari filed with the Special Department of the Basic Court of Prishtinë/Priština a ruling on initiation of investigation against the suspect Nenad Arsić on grounded suspicion that: during the armed conflict in Kosovo, in *Emshir/Emšir* settlement in Priština, in the morning of May 21, 1999, in complicity with three unidentified members of the Serbian police, the suspect had entered the homes of the Shala brothers, Skender and Jakup, requesting that all other persons present leave the premises. When only the Shala brothers had remained in the house, the suspect had beaten them with hard objects, i.e. wooden sticks, inflicting serious bodily harm on them. Although their

[73] Article 3 of the CCRK (pursuant to the same Article of the 2012 and 2019 CCRK, it has been foreseen that the law more favourable to the perpetrator shall apply).

[74] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, also punishable as a War Crime in serious violation of the Geneva Conventions under Article 144, items 2.2 and 2.3, in conjunction with items 1 and 1.2, as read with Article 31 of the CCRK (2019).

health had been poor because of the ill-treatment they had been subjected to, they had been forced to drink alcoholic beverages and sing a Serbian song: "Who is saying, who is lying that Serbia is small". On that occasion, the suspect, in concert with other members of the police, had rummaged the houses of the Shala brothers, Jakup, Skender, Isak and Enver. On that occasion, they had found and taken DM 160,000 hidden in the yard of their father, Sherif Shala, as well as DM 80,000 hidden in a chicken coop located in the courtyard of the house of the injured party Isak Shala.

The Prosecutor classified the actions of the suspect as a *War Crime against the Civilian Population*[75], committed in complicity.
As the investigation had already been ongoing against the suspect, the KP members arrested him on October 22, 2019, in the afternoon, while crossing the Merdare border point. Following his arrest, he was ordered a forty-eight (48) hour detention measure.

Application for detention on remand
Following the arrest of the suspect, on the same day, i.e. on October 22, 2019, the competent Prosecutor filed with the Special Department of the Basic Court of Prishtinë/Priština an application for detention on remand, i.e. the strictest measure for securing the presence of the suspect in court.

The request specified the reasons for ordering the most stringent measure. The suspect knew the witnesses; if released pending trial, he could contact the witnesses and influence them to change their statements, which may hinder criminal proceedings. The suspect was charged with the commission of a serious criminal offence with grave consequences, carrying a sentence of long-term imprisonment. The suspect was also a citizen of the Republic of Serbia, with which Kosovo prosecution authorities had not established legal cooperation. More lenient measures provided for by the law could easily be violated, which would make it difficult to ensure his presence before the court.

The detention hearing
On October 23, 2019, a Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Valon Kurtaj, held a hearing in order to consider the Prosecutor's application for detention on remand against the suspect Nenad Arsić.

[75] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, also provided for as the criminal offence of *War Crimes* in violation of laws and customs applicable in international armed conflicts under Article 145, Paragraph 1, item 1.2, Paragraph 2, items 2.1, 2.8. 2.13, 2.21, as well as the criminal offence of *War Crimes* in serious violation of the Geneva Conventions, under Article 144, Paragraph 1, item 1.2, Paragraph 2, items 2.2, 2.3, 2.4 and 2.7, as read with Article 31 of the CCRK (2019).

The hearing was closed to the public. A representative of the EULEX Monitoring Unit and a HLC Kosovo Monitor were allowed to attend the hearing (the parties to the proceedings had no objection to the presence of the HLC Kosovo Monitor)[76].

The hearing was held in Albanian. The suspect and his Defence Counsel were provided with consecutive interpretation into Serbian.

Following the hearing, the Pre-Trial Judge rendered a ruling on the same day wherein he ordered a one (1) month security measure against the suspect, that was to last until November 22, 2019.

Ruling on ordering the security measure

In the ruling, the Court elaborated on the requests of the parties to the proceedings, State Prosecutor Drita Hajdari and the Defence Counsel for the suspect, Attorney Dobrica Lazić from Graçanicë/Gračanica.

As stated in the ruling, Prosecutor Hajdari elaborated before the Court the allegations from the written application for ordering a security measure. At the request of the Court, she elaborated them chronologically, presenting the history of the proceedings against the suspect, from the moment when initial information was obtained, the time when members of the injured family filed a criminal report to the stage of filing the application for ordering a security measure.

During the hearing, the suspect's Defence Counsel objected to the Prosecution's application for ordering the strictest measure for securing the presence of the suspect in court, in particular, to the circumstances that the suspect might be able to influence witnesses and their testimonies, as well as the injured parties. According to the Defence, prior to the hearing, his client had not been given access to the ruling on initiation of investigation and the Prosecution's application for detention on remand in his native language. It was also stated that the Defence Counsel still did not have access to the evidence available to the Prosecution, that he was not in the position to acquaint himself with its content, or to analyse it, and, that he could not state his opinion with regard to the evidence. During the session, the suspect and his Defence Counsel were informed, through an interpreter, of the content of the ruling on initiation of investigation and the application for detention on remand.

Having learnt the charges against the suspect, the Defence objected to the allegation that the suspect had participated in the commission of the charged criminal

[76] As the hearing was closed to the public, no details of the hearing will be presented in the text to follow.

offences against the Shala family, whose members he had met several times after the armed conflict. The Defence Counsel also stated that his client had never gone into hiding because he had had no reason to do so. Until 2011, he had lived in Qaglavicë/Čaglavica and had displayed normal behaviour. After he had returned to Kosovo, he was arrested. According to the Defence Counsel, twenty (20) years after the incident, it was difficult to prove the commission of the criminal offence the suspect had been charged with, irrespective of the fact that, in this particular case, the criminal offence in question was not time-barred.

The Defence Counsel also objected to the application for detention on remand, as there was no grounded suspicion that the suspect had committed the charged criminal offence. The suspect had not been accused or reported by anyone in the period of twenty (20) years. No one had ever pointed a finger at him. In the end, the Defence Counsel asked the Court that, if it was necessary to order a security measure to ensure his presence in court, the suspect be ordered a more lenient measure, i.e. the measure of house detention or the measure of reporting to the police station.

The suspect supported the allegations of his Defence Counsel.

After analysing the allegations of the parties and the supporting evidence, the Court found in their ruling that the Prosecution's s reasons specified in the application for detention on remand were founded, and that, in the specific case, the conditions for ordering the strictest measure for securing the presence of the suspect in court had been met.

According to the findings of the Court, there was a grounded suspicion that the suspect had committed the charged offence. If released pending trial, or if an alternative, more lenient measure be applied, his presence in court would not be secured, and criminal proceedings would not run smoothly since the investigation in the case was at an early stage. There was a real probability of avoiding criminal liability, influencing witnesses, destroying or tampering with evidence. These actions could not be prevented by more lenient security measures.

An appeal against the ruling on detention on remand

The ruling of the Special Department, dated 23, October 2019, was challenged by Attorney Lazić in a duly filed appeal on the grounds of violations of the provisions of criminal procedure. Challenging the Prosecution's application, the Defence argued that the Prosecutor had failed to prove that there was a grounded suspicion that the suspect had committed the criminal offence he had been charged with, more closely described in the ruling on initiation of investigation against the suspect.

In his appeal, the Defence Counsel stated, inter alia, that the suspect and his Defence Counsel, contrary to Article 161 of the CPCK, had not been given access to any of the evidence relied upon by the Prosecutor, even during the hearing, except for the fact that he had been in possession of the statements of witnesses who had testified that his client had taken part in the ill-treatment and robbery of the injured parties. The attorney moved the court of second instance to review the allegations from the appeal and the case files, to annul the ruling on detention on remand against the suspect and to release him pending trial.

Having considered the Defence Counsel's appeal, as well as the case file, the Appellate Prosecutor moved the Court of Appeals to reject as unfounded the appeal filed by the Defence counsel on behalf of the suspect and to uphold the ruling on the security measure rendered by the court of first instance.

The decision of the Court of Appeals

The Appellate Panel of the Special Department of the Court of Appeals, presided over by Judge Kreshnik Radonjiqi[77], held a session on October 30, 2019, in order to consider the appeal of the suspect's Defence Counsel, filed against the ruling of the Pre-Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, dated October, 23, 2019. On the same day, this Panel rendered a ruling rejecting the appeal as unfounded, and upholding the ruling of the court of first instance that was adjudicating on the security measures.

In their reasoning of the ruling rejecting the appeal, the Appellate Panel stated that it had rendered its decision after considering the appeals and the case file, finding that the allegations from the appeals were unfounded. According to the findings of the Appellate Panel, the Pre-Trial Judge had duly explained the grounded suspicion that the suspect had been involved in the commission of the suspected criminal offence. The evidence obtained at the present stage of the proceedings, as well as the statements of the witnesses, describe the involvement and the actions of the suspect on the critical day. Moreover, the Panel found that there were legal grounds for ordering detention, i.e. the circumstances that justified the fear that, if released, the suspect could go into hiding and become unavailable to the judicial authorities. The suspect's permanent residence was in Niš; therefore, in case he left Kosovo it would be impossible to secure his presence in court. If at liberty, he could influence witnesses to alter their testimony and testify in his favor. According to the findings of the Appellate Panel, more lenient measures would be insufficient to successfully conduct and complete the criminal proceedings.

[77] Members of the Special Department of the Court of Appeals: Judges Vaton Durguti and Burim Ademi.

The ruling of the Pre-Trial Judge, dated October 23, 2019, was appealed also by Attorney Dejan Vasić from Mitrovicë/Mitrovicë, citing an erroneous determination of the factual state in his appeal dated October 26, 2019. The Appellate Panel of the Court of Appeals, sitting in the same composition and presided over by Judge Vaton Derguti, rejected as unfounded this appeal in their ruling dated November 1, 2019.

Prior to the expiration of one-month detention, the Prosecution Office, in their reasoned motion dated November 15, 2019, requested an extension of detention for the Accused, as there were still reasons for the detention to continue. It was stated that, in addition to the reasons stated above, the Prosecution was planning to hear new witnesses in the investigation. In their response to the Prosecutor's request, the Defence to the suspect Arsić proposed a more lenient security measure. A Pre-trial Judge of the Special Department rendered, on November 19, 2019, a ruling on extension of detention until January 22, 2020.

The Accused and his Defence appealed this ruling of the Pre-Trial Judge too due to an erroneous and incomplete determination of the factual situation. In the ruling dated December 6, 2019, the Special Department of the Court of Appeals rejected this appeal as unfounded, and upheld the ruling on extension of detention rendered by the court of first instance, assessing it as lawful and well founded.

The indictment
Having completed the investigation, heard the injured parties and the witnesses, obtained material evidence, and conducted identification of the Accused through a witness, on December 6, 2019, the SPRK filed an indictment with the Special Department of the Basic Court of Prishtinë/Priština against Nenad Arsić.

The Accused was charged with the commission of the criminal offences of *War Crimes against the Civilian Population* on two counts:

- that, during the armed conflict in Kosovo, in Prishtinë/Priština, in *Emshir/Emšir* settlement, on May 21, 1999, at about 8:00, as a member of the reserve police force, in complicity with other unidentified police officers, having arrived in a police vehicle at the property of the Shala family, he had demanded from Skender and Jakup that all persons present in their homes at that moment (refugees from other conflict zones who had found temporary shelter with the Shala family) leave the premises. When only the Shala brothers had remained in the houses, the suspect, in order to violate the bodily integrity and physical and mental health of the injured parties, had been hitting Jakup and Skender Shala with hard objects (pieces of wood and wooden sticks) on various parts of the body, causing them great suf-

fering and grievous bodily harm. He had also been insulting and cursing them. Although the brothers had been in poor health because of the ill-treatment they had been subjected to, they had been forced to drink alcoholic beverages and sing a Serbian song: 'Who is saying, who is lying that Serbia is small'. Even nowadays, the Shala brothers still feel the effects of the ill-treatment. By doing so, the Accused had committed the criminal offence of *War Crimes against Civilian Population*[78], in complicity;

- that, on the same day, at the same place as stated above, in complicity with other hitherto unidentified members of the Serbian police forces, during this action against Albanian civilian population, he had knowingly participated in the mass destruction and misappropriation of property that could not be justified by military needs. While looking for money and valuables, he had participated in the search of the Shala family homes, by damaging furniture and other valuables, demolishing auxiliary facilities, and searching the farm of Jakup Shala, from which they seized barrels containing 3,200 liters of oil, DM 160,000 hidden in the yard of Sherif Shala, as well as DM 80,000 hidden in a chicken coop located in the courtyard of the home of the injured party Isak Shala. From the garages and yards of the Shala family they had seized the following vehicles on the critical day: a *Ranault Espase,* a motor cultivator and a tractor owned by Jakup Shala, a *Volkswagen Jetta* owned by Enver Shala, an *Opel Vectra* owned by Hakif Bajrami, a *Yugo Corral 55* owned by Vahid Halili and an *MB 100 Mercedes* owned by Skender Shala. The Prosecutor classified the suspect's actions as a *War Crime against the Civilian Population*[79], committed by the suspect in complicity with unknown persons.

The initial hearing

Acting upon the indictment dated December 6, 2019, the Presiding Trial Judge of the Special Department of the Basic Court of Prishtinë/Priština, Albina Shabani Rama, held an initial hearing on December 24, 2019. The hearing was attended by the parties to the proceedings, i.e. the competent State Prosecutor and the Accused together with his Defence Counsel, Attorney Dejan Vasić.

[78] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, also punishable as a *War Crime* in serious violation of the Geneva Conventions under Article 144, Paragraph 2, items 2.2, 2.3 in conjunction with Article 1.2, item 1a, as read with Article 31 of the CCRK (2019).

[79] Provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, also punishable as a *War Crime* in serious violation of the Geneva Conventions under Article 144, Paragraph 2, item 2.4, in conjunction with Paragraph 1, item 1.1, as read with Article 31 of the CCRK (2019).

The Defendant and his Defence Counsel were provided with consecutive interpretation from Albanian into Serbian and vice versa.

During the session, the indictment was read out, to which the Accused pleaded not guilty to any counts in the indictment. He stated that he had understood the indictment.

The Accused and his Defence Counsel were informed of the right to file with the court a motion to dismiss the indictment and the objection to the supporting evidence, as soon as possible, and no later than in 30 days. After obtaining the response of the competent prosecutor, the Court would decide upon the motion without holding a session.

The hearing was public. The media present (including the ones from Serbia) were allowed to record the session for 5 minutes, with a warning that the recordings should not clearly show not the face of the Accused. Interested journalists had not previously asked from the Court a permission to record. After recording for five minutes, the media present were allowed to follow the hearing.

The parties to the proceedings will be notified of the following session by a regular court summons.

The HLC Kosovo findings:
The part of the criminal proceedings in *The Prosecutor v. Nenad Arsić* case held in 2019 was expeditious. The prosecution and the courts adjudicating on the case respected the legal deadlines for taking procedural steps, from rendering the ruling to open an investigation to the filing of the indictment. The same is true of the statutory procedural actions of the Special Department of the Basic Court of Prishtinë/Priština and the Court of Appeals, such as the scheduling of the initial hearing by the Presiding Trial Judge, or the process of deciding upon appeals. The HLC Kosovo commends the fact that the Criminal Procedure Code, which foresees that urgent procedural steps be taken when the Accused is placed into detention, was respected.

As the only objection to the proceedings so far, the HLC Kosovo finds an announcement of the Presiding Trial Judge that the parties to the proceedings would be notified of the next court session by a regular summons. This constitutes a prejudice to the Court's decision on the Defendant's motion and his Defence to dismiss the indictment and the objection to the supporting evidence.

1.3. Apellate proceedings

1.3.1. The Case: *The Prosecutor v. Zoran Vukotić (Vukotić 1)*

On December 18, 2018, an Appellate Panel of the Serious Crimes Department of the Court of Appeals, presided over by Judge Fillim Skoro[80], held a session in the case of *The Prosecutor v. Zoran Vukotić (Vukotić 1)*. The criminal proceedings in this case were initiated on the SPRK indictment (PPS/KTS No. 60/2017) dated April 20, 2017. The Appellate Panel was adjudicating on the appeals filed by the parties to the proceedings against the judgment of the Basic Court of Mitrovicë/ Mitrovica dated May 25, 2018.

Following the session, on January 30, 2019, the Appellate Panel rendered a judgment wherein:

- the SPRK's appeal against the judgment dated May 25, 2018 was granted in relation to **Count 1** of the judgment, whereby the Defendant Vukotić was acquitted of the criminal offence of *War Crimes against the Civilian Population*. With regards to this count of the judgment, the case was remitted to the court of first instance for reconsideration and re-adjudication;

- the SPRK's appeal in relation to **Count 3** of the first-instance judgment of guilty was rejected as unfounded;

- the appeals filed by the Defendant Zoran Vukotić and his lawyer Nebojša Vlajić against **Count 3** of the first instance judgment were rejected, and

- **Count 3** of the first instance judgment, wherein the Defendant was found guilty and sentenced to six (6) years and six (6) months imprisonment was affirmed.

Let us remind ourselves, the Defendant Vukotić was acquitted in the first instance judgment, dated May 25, 2018, of the criminal offence of *War Crimes against the Civilian Population*[81] - **Count 1** of the indictment dated May 20, 2017 wherein

[80] Members of the Appellate Panel: Judge Tonka Berishaj (acting also as the Reporting Judge) and Judge Hava Haliti.

[81] Provided for and punishable under Article 142, in conjunction with Article 22 of the CC SFRY, also punishable under Articles 152 (Paragraphs 1 and 2.1) and 153 (Paragraph 1 as read with Paragraph 2) in conjunction with Article 31 of the CCRK, in violation of Article 3 (1a)

he was charged with the following: between May 2 and 3, 1999, as a reserve police officer of the Vushtrri/Vučitrn police station, he had participated in an attack on Albanian civilian population travelling in a convoy between the villages of Studime e Epërme/Gornje Studimlje and Studime e Poshtme/Donje Studimlje.

In this judgment, the Defendant Vukotić was found guilty of **Count 3** of the indictment dated May 20, 2017 which charged him with the following: acting with intent, in the same capacity and in complicity with other members of the Serbian forces, he had participated in applying an inhumane treatment and causing serious suffering to the Albanian civilians by beating them while they had been held in the Smrekovnicë/Smrkovnica prison. He was sentenced to six (6) years and six (6) months of imprisonment for this offence.

The course of criminal proceedings[82]
With regard to certain crimes which occurred during the armed conflict in Kosovo in the territory of Vushtrri/Vučitrn municipality from early May to early June 1999, an investigation was initiated by ICTY investigators immediately after the armed conflict.

On September 1, 2013, in a ruling issued by an SPRK international prosecutor, an investigation was initiated against the Defendant Vukotić as one of the suspects of the crimes that were subject of the indictment dated April 20, 2017. At the time the ruling to open the investigation was rendered, the Defendant was not available to the prosecution authorities; hence, an international arrest warrant was issued. He was arrested on March 10, 2016 in Montenegro in accordance with the foregoing warrant. He was extradited to the Kosovo competent authorities on November 10, 2016[83]. The following day, he was placed into one-month detention on remand[84] and the investigation into the Studime/Studimlje massacre continued. The investigation was expanded to include the harassment and inhumane treatment exercised by the Defendant against the detainees of the Smrekonicë/Smrekovnica prison. After numerous pieces of information had been obtained, the investigation was expanded to include illegal arrests and detentions at the Vushtrri/Vučitrn Agricultural Cooperative.

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common to the Geneva Conventions.

[82] As in other cases covered by this report, the phases of criminal proceedings that were held in 2017 and 2018 will be presented in brief, while the criminal proceedings that were held in 2019 will be presented in more detail.

[83] Following the procedure carried out upon the extradition request.

[84] During the course of the criminal proceedings in the present case, as well as in the cases in accordance with other indictments filed by the SPRK, the Defendant Vukotić was in detention on remand in accordance with the decisions of the Pre-Trial Judge, as well as the decisions of the Trial Panel or the Presiding Judge in this criminal case.

The indictment

On April 20, 2017, the SPRK filed an indictment against the Defendant Vukotić for the criminal offence of *War Crimes against the Civilian Population*[85] on several counts. He was charged with the following:

- during the armed conflict in Kosovo, as a reserve police officer of the Vushtrri/Vučitrn police station, acting alone or in complicity with other members of the Serbian forces, he had taken part in the attacks on the Albanian population who had been travelling in a convoy from the village of Studime e Epërme/Gornje Studimlje to Donje Studimlje/Studime e Poshtme by applying an inhumane treatment and by taking part in the killings of a number of the civilians travelling in the convoy. He was also charged with participation in the confiscation of property belonging to these civilians, as well as with the plunder of large amounts of money and valuables, that had not been justified by military needs;

- he had participated in the illegal detention of a large number of Albanian civilians in the premises of the Agricultural Cooperative building in Vushtri/Vučitrn;

- from May 2- 3 to early June 1999, in the capacity of prison guard, in complicity with others or directly, he had participated in the inhumane treatment, harassment, beating and violation of the bodily integrity and health of the detainees, Albanian civilians, in the Smrekonicë/Smrekovnica prison.

In the decision dated April 27, 2017 rendered by the Kosovo Judicial Council (KJC), the motion was granted that a trial panel composed of EULEX Judges adjudicate in the case initiated upon the indictment P/K no. 54/2017 (PPS/KTS No. 60/2012).

The indictment assessment procedure

An initial hearing before the Basic Court of Mitrovicë/Mitrovica was held on May 29, 2017[86]. With the consent of the parties, it was decided that the second hearing - prescribed for by the law but not mandatory - would not be held.

In their written motion, the Defendant and his Defence requested that **Count 2** of

[85] Provided for and punishable under Article 142, in conjunction with Article 22 of the CC SFRY, also punishable under Articles 153 and 152, as read with Article 31 of the Criminal Code of Kosovo, in violation of Article 3 common to the Geneva Conventions of 12 August 1949 and Articles 4 and 5 (1) of Protocol II additional to the Conventions of 8 June 1977, as well as under all international rules that were applicable during the armed conflict in Kosovo.

[86] International Judge Arnout Louter was in charge of the indictment assessment procedure in the capacity of Presiding Trial Judge, while members of the Panel were International Judges Dariusz Sielicki and Radostin Petrov.

the indictment be rejected, in respect of which, the SPRK, at the time of filing the indictment, had not had the consent of the competent Montenegrin authorities to prosecute this offence. In his response, the International Prosecutor did not object to the motion filed by the Defence. In a court ruling dated July 27, 2017, the Defence's motion was granted and the charge under **Count 2** was dismissed because of the circumstances that precluded prosecution under this count.

In a separate ruling dated July 27, 2017, the Defence's motion on a joinder of the three indictments against the Defendant Vukotić (April 20, 2017, May 16, 2017 and June 23, 2017) was rejected as inadmissible.

The main trial

The main trial on the remaining counts of the indictment dated April 20, 2017 was opened on September 26, 2017. The Defendant pleaded not guilty to the indictment and the parties presented their opening statements. In the course of the main trial, the Trial Panel was in session for twenty (25) days, taking into account the initial hearing. The main trial was public. Twenty-six (26) prosecution witnesses were heard, as well as three (3) witnesses proposed by the injured parties. The crime scene inspection was carried out at the locations where the Prosecution claimed the crimes had been committed. At the end of the trial, the Prosecution filed an amended indictment. Under **Count 1,** some persons were granted the status of victims; **Count 2** was withdrawn; **Count 3** was divided into 17 subcounts according to the injured parties. The witnesses proposed by the Defendant and his Counsel declined to testify before the Trial Panel for fear that they could be arrested and indicted. The material evidence proposed by the parties to the proceedings was adduced. Through their legal representative, the injured parties filed a property claim. The Defendant did not testify before the Trial Panel.

The first instance judgment

In a judgment announced on May 25, 2018, due to lack of evidence, the Defendant was acquitted on Count 1 of the indictment dated April 27, 2017 for the commission of the criminal offence of *War Crimes against the Civilian Population*.

In the judgment, the Court did not state their stand on **Count 2** of the indictment.

The Defendant was found guilty on **Count 3** of the indictment because, by the evidence adduced, it was proven beyond a reasonable doubt that he had committed a *War Crime against the Civilian Population*, for which he was sentenced to six (6) years and six (6) months imprisonment.

In the written judgment, the Court presented a detailed account of the course

of criminal proceedings, as well as the proven facts which guided the Court in rendering their decision. When sentencing, the Court found the CC SFRY to be the most favorable law, pursuant to which the criminal offence the Defendant was accused of carried a term of imprisonment of five (5) to fifteen (15) years, i.e. twenty (20) years as a substitute for the death sentence. The Court found that the sentence imposed was adequate to the gravity of the offence the Defendant was found guilty of, holding that the purpose of punishment would be achieved in relation to the Defendant as well as to other perpetrators.

The appellate proceedings[87]
The parties to the proceedings filed their appeals against the judgment dated May 25, 2018.

The Prosecution's appeal
In their appeal dated July 16, 2018, the SPRK challenged the first instance judgment in respect of both counts, i.e. the acquittal and the conviction.

The Prosecution challenged **Count 1** of the judgment dated May 25, 2018 due to substantial violations of the provisions of criminal procedure, violations of the criminal law, and an erroneous and incomplete determination of the factual situation, and moved the court of second instance to grant the appeal, to annul **Count 1** of the first instance judgment and to remit the case to the court of first instance for reconsideration and re-adjudication. In the part of the judgment wherein the Defendant was found guilty of **Count 3**, it was requested from the court to modify the judgment and to impose a more severe sentence on the Defendant. According to the Prosecution, the court of first instance had erroneously assessed the evidence, i.e. the statements of the eyewitnesses, who had testified during the main trial about the events that had taken place between May 2 and 3, 1999, while travelling in the convoy from the village of Studimë/Studimlje towards Vushtrri/Vučitrn. The prosecution witnesses had clearly described the critical event, had recognised the Defendant Vukotić and had provided a detailed description of what he had looked like in the critical night. These witnesses had also identified the Defendant in a photo line-up during the investigation. On the basis of their testimony, the facts of the case had been fully and thoroughly explained. In support of the allegations set forth in the appeal, the Prosecution quoted certain parts of these witnesses' statements.

[87] Although the session of the Appellate Panel was held in late 2018, this analysis will cover, in detail, this part of the criminal proceedings held in accordance with the indictment dated April 20, 2017. While drafting the report on the trials monitored during 2018, the HLC Kosovo did not have access to the documentation of the appellate proceedings.

The Prosecution was of the opinion that, due to the erroneous assessment of the evidence, as well as to the fact that some of the evidence had not been considered and taken into account by the Court, the first instance judgment had not been drafted in accordance with Article 370, Paragraph 7 of the CPCK.

According to the appeal, the court of first instance had violated the criminal law in favor of the Defendant because of the erroneous determination of the factual situation. The law had been applied which should not have been applied on the count of the indictment in respect of which the court had rendered an acquittal.

In their appeal, the Prosecution also challenged the convicting part of the judgment. According to the appeal, the sentence imposed was not adequate to the gravity of the criminal offence, or to the circumstances under which the crime had been committed, the time and context of the criminal offence, and the manner of the offence against innocent and unarmed civilians. The appeal stated that the court had not taken into account that some of the victims at the time of the offence had been minors and elderly persons, and that the criminal offences committed during the war or an armed conflict had a stronger impact on the community compared to the criminal offences committed in peacetime.

The Prosecution moved the Court of Appeals to grant the Prosecution's appeal, to partially annul the first-instance judgment in respect of the acquittal and to remit the case to the court of first instance court for reconsideration and re-adjudication, and, with regard to the convicting part of the judgment, to impose a more severe sentence on the Defendant.

The response to the Prosecution's appeal
The Defence Counsel (attorney Nebojša Vlajić) responded to all allegations referred to in the Prosecution's appeal dated July 16, 2018.

According to the Defence, the Prosecution had filed the appeal due to the erroneous determination of the factual situation, but had failed to offer anything new as evidence, other than to repeat the witness statements given during the investigation and at the main trial. In his response, the Defence Counsel also stated the contradictions in the testimony of the witnesses the Court referred to in acquitting the Defendant of the charges specified under **Count 1** of the indictment.

The Defence challenged the Prosecution's appeal in respect of the part related to the violations of the provisions of criminal procedure and the opinion that the judgment had not been drafted in accordance with Article 370, Paragraph 7 of the CPCRK. According to the Defence, the Prosecution's allegations were unsubstan-

tiated because the Court, when rendering the judgment of acquittal, had assessed each witness's testimony and the material evidence, both individually and in relation to other evidence and had subsequently provided a detailed explanation of why it had considered the evidence as credible or not credible.

Responding to the Prosecution's allegations in relation to the convicting part of the judgment, that is, the decision on the criminal sanction, the Defence stated in their response that the sentence was too severe and unfair. The Defendant had been a guard in the Smrekovicë/Smrekovnica prison, without any commanding role, and that he had not been in charge of detaining prisoners, or the conditions wherein the prisoners had been held.

In his response, the Defence moved the Court of Appeals to reject the Prosecution's appeal as unfounded, to grant the Defence Counsel's appeal as founded, and to acquit the Defendant or to impose a more lenient sentence.

The Defence Counsel's appeal

In his appeal dated July 13, 2018, the Defence Counsel to the Defendant Vukotić, attorney Nebojša Vlajić from Mitrovicë/Mitrovica, challenged the part of the first instance judgment wherein the Defendant Vukotić had been found guilty and sentenced to six (6) years and six (6) months of imprisonment (including the time spent in detention from the moment of his arrest in accordance with the international warrant) due to an erroneous and incomplete determination of the factual situation, as well as to the violation of the criminal law.

According to the appeal, the court of first instance had erroneously determined the factual situation and the relevant facts which had had to be proved. The erroneously determined facts had led the Court to an erroneous conclusion and classification of the Defendant's actions as grave violations of international law. These actions had manifested an utterly humiliating and degrading treatment the result of which was violation of the bodily integrity or health, and causing of immense suffering. According to the appeal, the foregoing did not exist in relation to the action that were the subject of the indictment and the judgment of guilty. The Court's conclusions were exaggerated, too severe and unfair to the Defendant. The erroneously determined factual situation had led to an erroneous application of the substantive law, the criminal law and the Geneva Conventions.

According to the appeal, the Defendant could have been held liable only for his actions. Provided that he had been present in the prison during the critical period, he had not had a supervisory role: he had not been the director of the prison, he had not been responsible for the conditions under which the prisoners held

been held, and he had not been responsible for organising food for the prisoners. Prison guards should only be responsible for direct actions.

According to the Defence Counsel, none of the prisoners had claimed to have sustained long-term injuries or serious consequences, to have had fractures or open wounds, nor had the Court had any evidence of such consequences. The injuries complained of by the witnesses during the proceedings had been less intense, mainly bruises, swellings and pain. Such actions should, in no case, have fallen within the description of war crimes. In the Smrekovnicë/Smrekovnica Prison, no one had been maimed, disabled, or sexually humiliated. When there was no torture, there was no inhumane treatment. There was no medical record of what the witnesses had claimed to have survived in their statements, that could have been used for an expertise to determine the degree of suffering to which the witnesses had been exposed.

According to the allegations set forth in the appeal, the sentence imposed on the Defendant under **Count 3** of the judgment was unfair, severe, disproportionate to the gravity of the charge and disproportionate to the Defendant's guilt. In support of his claims, the Defence Counsel presented the cases tried before the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague wherein the convicted persons had been given much more lenient punishments for much more serious crimes with grave consequences for their victims. He moved the Court of Appeals to grant the appeal as founded, to uphold the acquitting part of the judgment of the Basic Court of Mitrovicë/Mitrovica dated May 25, 2018, to modify its convicting part and to acquit the Defendant or substantially mitigate his sentence.

The Defendant Zoran Vukotić challenged the Basic Court's judgment dated May 25, 2018 due to an erroneous and incomplete determination of the factual situation, and moved the court of second instance to grant his appeal, to modify the first instance judgment, i.e. to impose a more lenient sentence or to remit the case to retrial. In his appeal, the Defendant particularly insisted on the discrepancies in the testimonies of certain witnesses, as well as on the fact that, during the critical period, he had not had any competence to make decisions to have any kind of influence.

In the submission dated October 11, 2018 (KTŽ/PPA No. 442/18), the Appellate Prosecutor moved the court of second instance to grant the Prosecution's appeal, to find the Defendant guilty in the acquitting part, and to impose a more severe sentence in the part of the judgment wherein the Defendant was found guilty. He also proposed that the appeals of the Defendant and his Defence Counsel be rejected as unfounded.

Adjudication on the appeals
The Appellate Panel of the Serious Crimes Department of the Court of Appeals, composed of Presiding Trial Judge Fillim Skoro and panel members Judge Tonka Berishaj (who also acted as the Reporting Judge) and Judge Hava Haliti, held a session on December 18, 2018 to consider the above mentioned allegations in the appeals.

The session was attended by the Defendant and his Defence Counsel, attorney Vlajić, and some of the injured parties. The session was held in the absence of the Appellate Prosecutor[88]. The Reporting Judge presented a very brief and cursory account of the hitherto proceedings, the indictment, the judgment, the appeals and the parties' responses. No official minutes were taken during the session.

During the hearing, and after presenting several clarifications, the Defence Counsel stood by the allegations set forth in the appeal, which was supported by the Defendant. The injured parties who were present supported the SPRK's appeal and filed their property claim.

The Judgment of the Court of Appeals
In the judgment, dated January 30, 2019, the Court of Appeals granted the SPRK's appeal in relation to **Count 1** (acquittal) and remitted the case to retrial on this count, and affirmed **Count 3** of the first instance judgment as well as the imposed sentence of six (6) years and six (6) months of imprisonment.

Having analysed the case and assessed the judgment upon the appeals filed, but also ex officio, the Court found that the parties' appeals against the convicting part of the judgment were unfounded.

What was first presented in the judgment was the analysis and the findings of the part of the judgment related to the conviction, that is, **Count 3**.

The Court stated ex officio that there had been no substantial violations of criminal procedure that would have caused an annulment of this part of the judgment.

The Court assessed the allegations in relation to the erroneous and incomplete determination of the factual situation to be unfounded. The court of first instance had based its decision, in this part, on the evidence presented during the main trial that had been assessed in accordance with the law. The facts had been established in a complete and detailed manner. The factual situation had also been

[88] Article 390 Paragraph 4 of the CPCK: "If parties who were duly notified of the session fail to appear, the panel shall nevertheless hold the session".

supported by the evidence established by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *The Prosecutor v. Milan Milutinović et al.* case, presented as evidence during the main trial.

The Court of Appeals presented a detailed account of the findings of the court of first instance with respect to **Count 3** of the judgment, having stated which prisoners had been beaten in a systematic manner; that their integrity and health had been violated by the Defendant's actions during their stay in the prison; and the fact that these circumstances had been supported by sound evidence. According to the findings of the Court, the identification of the Defendant as the perpetrator was established without any doubt. All witnesses from Vushtrri/Vučitrn identified the Defendant as an employee of the then Municipal Court of Vushtrri/Vučitrn. Other witnesses had learned the Defendant's name through witnesses from Vushtrri/Vučitrn. The Defendant caused mental distress, fear and terror to all the witnesses who had been victims of his actions. The witnesses who had testified before the Court were the Defendant's direct victims. The witnesses had supported each other in their testimonies, as the torture and beatings had been organised in such a manner that the prisoners had been forced to watch the beatings of other prisoners.

The Court found the Counsel's allegations with regard to this Count to be exaggerated. The Court of Appeals found the findings of the court of first instance on the witnesses' testimonies and the identification of the Defendant as founded, accurate and objective because they had been presented without any intention or motive to give false testimony.

The Court of Appeals assessed as unfounded the Defence's arguments that the Defendant had had no supervisory role in the Smrekovnicë/Smrekovnica prison, that he, as a prison guard, could not have influenced the conditions in which the prisoners had been detained. The Defendant's actions had had grave consequences for the victims, as established by the testimonies of the witnesses who had been beaten and harassed by the Defendant. The Court supported its stance by stating the findings of the ICTY judgments in individual cases, wherein it had been found that harassment and torture did not always have to involve bodily harm too.

The court of first instance had found that the Defendant had systematically and extremely harshly beaten the prisoners who had been forced to watch the torture and beatings of others. Some witnesses had testified that the Defendant had beaten them only once, that they had not been aware if and when they would be harassed and tortured, and that they had been forced to watch the torture and beatings of others. According to them, the Defendant had always played nationalistic songs while beating the prisoners.

The parties to the proceedings had diametrically opposed views regarding the decision on the punishment in relation to **Count 3**. The Court of Appeals rejected the Prosecution's appeal against the decision on the punishment under **Count 3** of the judgment. The Court found that the sentence imposed on the Defendant was adequate to the gravity of the criminal offence committed, taking into consideration the mitigating and aggravating circumstances. The conditions for rendering a more lenient or a more severe sentence had not been fulfilled. In his appeal, the Defendant had not proposed any reasons that would have had any impact on mitigating the sentence.

With regard to the allegations set forth in the SPRK's appeal on the acquittal of the first instance judgment dated May 25, 2018 (**Count 1**), the Court of Appeals found, ex officio, that the acquittal had contained substantial violations of criminal procedure.

The first instance judgment had not provided an adequate reasoning regarding the decisive facts. The justifications given had also been vague and unacceptable, i.e. contradictory to the relevant facts, and the evidence contained in the case files, particularly the witnesses' statements given to the police and the prosecution during the investigation, as well as during the main trial. The inconsistencies in the testimonies would inevitably result in the case being annulled and remitted to re-adjudication. The Trial Panel had based its acquittal mainly on the testimony of the Defendant, as well as on the testimony of certain witnesses given at the main trial, when they had mitigated their testimony in relation to their earlier statements.

According to the Court of Appeals, the witnesses' testimonies raised serious doubts about the identification of the Defendant as the perpetrator. When rendering the judgment of acquittal, the court of first instance had not taken into account its finding that, as time had passed by, the witnesses had been giving more mitigating statements, and that their memories had begun to fade over time.

With regard to the allegations that the factual situation had been erroneously and incompletely determined, the Court of Appeals found that the incomplete and erroneous determination of the factual situation was closely related to the erroneous application of the criminal law, resulting in a violation of the law.

During the retrial, the court of first instance is to eliminate the aforementioned substantial violations of criminal procedure, and the mistakes in the determination and proper assessment of the facts and in the application of the law. During the retrial, the allegations related to the factual situation and the application of

the criminal law, set out in the Prosecution's appeal, should also be taken into account. All the proposed evidence should, once again, be administered and conscientiously assessed, both individually and in mutual interrelation, particularly the witnesses' testimonies from all the stages of criminal proceedings. On the basis of such an assessment of the evidence, a fair and lawful judgment should be rendered.

The HLC Kosovo findings:
The retrial in *The Prosecutor v. Zoran Vukotić (Vukotić 1*) case was not scheduled until the end of the reporting period, for which there cannot be any justification. The HLC Kosovo considers this to be unacceptable and a violation of generally accepted standards, especially when it happens in a situation where the Defendant is serving a sentence on one of the counts in the indictment which is indisputable and which has been affirmed by the court of second instance. The start of the retrial before the Basic Court of Mitrovicë/Mitrovica has been postponed without any justification, even though, according to the official information obtained from the court, this case has been assigned to judges and a Trial Panel has been formed to adjudicate in the retrial of the case.

The unjustified postponement of the trial constitutes a serious violation of the Defendant's rights, a violation of international provisions, in particular, of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, pursuant to which every defendant has the right to have the criminal proceedings completed within a reasonable time.

In this case too, the HLC Kosovo has observed a poor use of official languages which has an impact on a fair trial. The judgment of the Court of Appeals, rendered in late January 2019, addressed the appeals of the parties to the proceedings quite professionally, and presented the findings and reasoning of the decision. However, this decision of the Court of Appeals, too, could not have been spared of one of the most current technical problems that is a feature of the Kosovo judiciary, and that is pertinent to interpretation during court proceedings as well as to translation of court decisions. The judgment dated January 30, 2019, too, contains errors in the Serbian translation. In the same text, there is an occasional absence of legal terminology. Although technical, given that this issue violates fundamental human rights to the use of the mother tongue and the equality of arms, if continues, it can grow into a substantial one.

1.3.2. The Case: *The Prosecutor v. Zoran Vukotić (Vukotić 2)*

Acting upon an SPRK[89] appeal filed against the Judgment of the Basic Court of Mitrovicë/Mitrovica dated May 16, 2018 in *The Prosecutor v. Zoran Vukotić* case (Vukotić 2 - indictment dated May 16, 2017), an Appellate Panel of the Serious Crimes Department of the Court of Appeals, presided over by Judge Fillim Skoro[90], held a session on January 9, 2019 without the presence of the parties to the proceedings[91], wherein it granted the Prosecution's appeal, annulled the judgment of the Basic Court ex officio and remitted the case to the court of first instance for re-adjudication.

The course of criminal proceedings[92]
Initial investigative steps into the brutal murders, beatings, plundering, harassment and inhumane treatment of the civilian population, motivated by national hatred, and allegedly committed in May 1999 in the territory of the town of Vushtrri/Vučitrn, were initiated immediately after the end of the armed conflict in 1999 against the Defendant Vukotić and other persons who are still not available to the Kosovo prosecution authorities.

Based on the evidence obtained in relation to the aforementioned events, an international arrest warrant was issued against the suspects due to a grounded suspicion that they had committed the criminal offence of *War Crimes against the Civilian Population*. The official investigation was opened by a ruling dated May 30, 2014. Due to the unavailability of the suspects, it was repeatedly suspended and re-opened.

The suspects included Zoran Vukotić. He was arrested on March 10, 2016 in Montenegro, in accordance with the international arrest warrant. He was extradited to Kosovo on November 11, 2016. Following the conclusion of the investigation, a mixed team of SPRK Prosecutors[93] filed an indictment against him on May 16, 2017.

[89] While compiling the present report, the HLC Kosovo did not have access to a copy of the appeal filed by the SPRK Office. The Prosecution's allegations, which will be cited in the report, were taken from the judgment of the Court of Appeals dated January 9, 2019.

[90] Members of the Appellate Panel: Judges Xhevdet Abazi and Abdullah Ahmeti.

[91] The Appellate Panel held its session by applying Article 390, Paragraph 1 of the CPCK, without the presence of the parties to the proceedings. The law foresees that, in the case wherein the accused was sentenced to imprisonment, the notification of the Appellate Panel's session shall be served on the State Prosecutor, the accused and his Defence Counsel.

[92] The proceedings against the convicted Zoran Vukotić were also presented in the 2017 and 2018 Annual Reports that can be found on the official HLC Kosovo's webpage: http://www.hlc-kosovo.org/category/publications/

[93] SPRK State Prosecutor Elez Blakaj, in cooperation with International Prosecutor Charles Har-

The indictment:
In the indictment, the Defendant Vukotić was charged with the following: during the armed conflict in Kosovo, on May 5, 1999, during the period from 11:00 to 13:30 in Vushtrri/Vučitrn, in Emin Duraku Street (nowadays Haxhi Zeka Street), acting in complicity with a known co-perpetrator who is still not available to the prosecution authorities, in the capacity of Serbian reserve police officer, uniformed and armed with a knife, a pistol and an automatic rifle, in violation of international norms that were in force at that time [Article 3 (1a) common to all four Geneva Conventions of 12 August 1949, and Article 4, paragraphs 1 and 2 of the Second Additional Protocol of 1977], he committed the criminal offence of *War Crimes against the Civilian Population*[94]:

- by the use of firearms, he killed four Albanian civilians: Enver Rrustolli, Hamdi, Abdullah and Fahredin Fazliu;

- he harassed and violated the bodily integrity and physical and mental health of the following civilians: Sanije Fazliu, Fikriya Shaqiri, Vehbi Xhema, Zejnepe Xhema, Nexmi Xhema, Besarte Xhema, Zelihe Xhema, Behare Plana, Lulje Rashica, Ghani Maxherri, Halima Maxheri, Gazmend Shabani, Ahmet Sahiti, Skender Shabani, Bejtë Osmani, Shukri Osmani and Faik Musa.

- he seized considerable amounts of money and other valuables from Vehbi, Nexhmi and Zejnepe Xhema, Bejta and Shukri Osmani, Beqir, Ukshin and Faik Musa.

The indictment assessment procedure
The indictment dated May 16, 2017 was assessed before the Basic Court of Mitrovicë/Mitrovica at the initial hearing held on August 4, 2017[95]. The Defendant pleaded not guilty to all the charges. His Defence Counsel duly filed a motion to reject the indictment, as well as a motion to hear an alibi witnesses during the main trial. In response, the Prosecution challenged the Defence's motion.

In a ruling dated September 30, 2017, the Basic Court rejected as unfounded the Defence's motion to reject the indictment. No appeal was filed against this ruling.

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daway. In the course of the trial, the indictment was represented by International Prosecutor Paul Flynn.

[94] Provided for and punishable under Article 142 in conjunction with Article 22 of the CC SFRY as read with Article 3 common to the Geneva Conventions, also provided for under Article 152, Paragraph 1, item 2.1 and Article 152 as read with Article 31 of the CCRK.

[95] The hearing was conducted by International Judge Dariusz Sielicki who presided over the Trial Panel composed following the filing of the indictment dated May 16, 2017.

In the decisions of the Kosovo Judicial Council (KJC) dated June 23 and September 8, 2017, a Trial Panel composed of EULEX judges was assigned to adjudicate on the indictments against the Defendant Zoran Vukotić.

The main trial

Following the indictment dated May 16, 2017, the main trial in *The Prosecutor v. Zoran Vukotić (Vukotić 2)* case was opened on January 11, 2018. During the session, the indictment was read, the Defendant pleaded not guilty and the parties to the proceedings presented their opening statements.

The main trial was open to the public, it was conducted in English with consecutive interpretation into Albanian while the Defendant and his Defence Counsel were provided with interpretation into the Serbian language. The official record was kept verbatim in the English language. There were no conditions for audio recording of the main trial. During the trial, nineteen (19) witnesses proposed by the Prosecution were heard. The Defence proposed that certain witnesses who were living outside of Kosovo be heard. The Court failed to organise their hearing during the trial or to determine their current place of residence. However, as proposed by the Defence, one prosecution witness was heard. The Prosecution withdrew from examining this witness, and therefore, the Court examined him ex officio. Material evidence was administered. The Defendant stated his case before the Trial Panel. The parties to the proceedings presented their closing arguments, while the injured parties filed a property claim.

In the judgment announced on May 16, 2018, the International Trial Panel, presided over by Judge Dariusz Sielicki[96], acquitted the Defendant Zoran Vukotić of all charges of *War Crimes against the Civilian Population*[97]. According to the judgment, the evidence adduced during the trial did not prove that, on May 5, 1999 in Vushtrri/Vučitrn, the Defendant Zoran Vukotić, acting in complicity with a known co-perpetrator[98], in the capacity of Serbian reserve police officer, had committed the charged criminal offence.

The appellate proceedings

The SPRK duly filed an appeal against the judgment of acquittal of the Basic Court of Mitrovicë/Mitrovica dated May 16, 2018 due to substantial violations of crim-

[96] Members of the Trial Panel: International Judges Arnout Louter and Radostin Petrov.

[97] In violation of Article 3 (1a and c) common to the Geneva Conventions of 12 August 1949, as well as Article 4 items 1, 2a and 2e of Protocol II additional to the Conventions of 1977, also provided for and punishable under Article 142 as read with Article 22 of the CC SFRY and Articles 152, Paragraphs 1 and 2.1, and 153, Paragraph 1, as read with Paragraph 2, in conjunction with Article 31 of the CCRK.

[98] Unavailable to the Kosovo prosecution authorities. The investigation against him has been suspended.

inal procedure, violations of the criminal law and an erroneous determination of the factual situation, proposing that the first instance judgment be annulled and the case remitted to the court of first instance for a retrial.

The Prosecution stated in their appeal, inter alia, that in rendering the first instance judgment, there had been substantial violations of the provisions of criminal procedure, i.e. that the judgment had not been drafted in accordance with Article 370 of the CPCRK. The reasoning of the judgment of acquittal was unclear, incomprehensible and contradictory to the enacting clause and the relevant facts. The judgment was not based on the evidence administered during the main trial. In rendering the judgment, the Court had not adequately assessed the testimony of witnesses and the evidence presented during the main trial, as well as the testimony of witnesses from earlier stages of criminal proceedings. The Court had not assessed each witness statement and each piece of evidence individually. The court had not given credence to the persons who had been eyewitnesses to the criminal event (although the Court deemed these testimonies to be sincere), from whose testimony it was clear that the Defendant Zoran Vukotić had been at the scene on the relevant day, with another person, now, on the run. The Court based the decision on the testimony of a witness who had not been present at the scene at the critical moment. According to the allegations set forth in the appeal, the Court had not taken into account the identification of the Defendant carried out by the witness, nor had it stated the reasons why this evidence had been rejected.

According to the Prosecution, the written judgment had not been drafted in accordance with the legal deadlines prescribed under the CPCRK and the Trial Panel had been composed contrary to the provisions of criminal procedure and to the jurisdiction of EULEX at the time of the main trial.

Attorney Miro Delević from Mitrovicë/Mitrovica, as the Defence Counsel for the Defendant Zoran Vukotić, filed a response to the SPRK's appeal, proposing that the appeal be rejected as unfounded and the first instance judgment of acquittal be affirmed.

In his submission dated October 11, 2018 (KTŽ/PPA No. 445/18), the Appellate Prosecutor proposed to the Court of Appeals to grant the SPRK's appeal against the first instance judgment and remit the case to the first instance court to a retrial and re-adjudication.

Acting upon the Prosecution's appeal and the response of the Defendant's Counsel, the Appellate Panel of the Serious Crimes Department of the Court of Appeals held a session on January 9, 2019. Pursuant to Article 390, Paragraph 1 of

the CPCRK[99], the Court did not send notification of the session to the parties to the proceedings.

Having considered the allegations from the Prosecutor's appeal, the Court of Appeals found that the appeal was well founded; yet, the Court annulled the judgment ex officio.

According to the findings of the Court of Appeals, the Prosecution's allegations of violations of the provisions of criminal procedure were well founded, the impugned judgment was unsubstantiated, the factual situation had not been properly and completely determined, and the decisive facts were, to a sufficient degree, in contradiction with the evidence in the case files and the Court's findings. The court of first instance had not assessed each witness statement individually and in their interrelation, but had noted that it was not possible to establish the identity of the defendant from the witnesses' statements in the case file.

According to the findings of the court of second instance, the Basic Court had used the statement of one witness as the basis for the judgment of acquittal, without stating the specific reasons why the Court had not accepted the statements of the prosecution witnesses, including eye-witnesses, as well as the testimonies of these witnesses from the earlier stages of proceedings, when they had had a more recent memory in relation to the war, to the specific event, as well as to the identification of the defendant.

According to the findings of the Court of Appeals, there had been substantial violations of criminal procedure in rendering the first instance judgment. Not even the factual situation had been determined in a proper and lawful manner. There were contradictions between the relevant facts, especially regarding the allegations in the reasoning and the documentation from the case file.

The Appellate Panel supported the Prosecution's allegations that the first instance judgment had been rendered after the legal deadline for drafting a written judgment[100] by the Trial Panel which had not been composed as prescribed by the law. According to the court of second instance, the court of first instance had taken, as

[99] Article 390, Paragraph 1 of the CPCRK: When an imprisonment sentence was imposed on the accused, the notification of the session of the appellate panel shall be sent to the state prosecutor, to injured party, and to the accused and his/her defence counsel.

[100] The Court of Appeals' decision did not state any specific circumstances regarding this allegation. Article 369, Paragraph 1 of the CPCRK provides for a period of fifteen days (15) for drafting a written judgment when a defendant is in detention on remand. The said Article provides for a possibility of extending the period of drafting the judgment up to sixty (60) days in complex cases.

the main basis for the acquittal, the Defendant's statement as well as the statement of the witness given during the main trial, but without stating why it had not taken into account the witnesses' statements given to the police or to the prosecutor when the witnesses' memory of the critical event was fresher and closer to the event. Moreover, the court of first instance had supported the acquittal by the testimony of the witness who had not been present at the crime scene on the critical day, but had been in the neighborhood. This witness had claimed that, on the critical day (before arriving at the crime scene where the victims had been killed, harassed and robbed), his home, in the above mentioned neighbourhood, had been visited not by the Defendant but by another person. The Court had given faith to this witness, and not to the persons who had eye-witnessed the critical event.

According to the findings of the Court of Appeals, the judgment had been rendered in gross violation of criminal procedure and on the basis of an erroneous and incomplete determination of the factual situation. The judgment was annulled in order for the aforementioned violations to be remedied in a retrial, and in order for a proper decision to be rendered in a lawful manner.

In the reasoning of the ruling, the court of second instance merely stated that the Defence Counsel for the Defendant Vukotić had filed a response to the Prosecutor's appeal, but did not present a single piece in relation to the reasons stated in the response.

The HLC Kosovo findings
The ruling dated January 9, 2019, wherein the case was remitted for retrial, was rendered by the Court of Appeals ex officio.

The HLC Kosovo is of the opinion that the ruling, wherein the case was remitted to a retrial, contains mistakes, in particular, regarding the translation of the court ruling. The translation of the ruling does not match the original document.

According to the ruling of the Court of Appeals, the first instance judgment had also been impugned because of the fact that the court of first instance, when rendering their decision, had not used the testimony of the witnesses given in the investigation. This allegation of the Prosecution was affirmed by the Appellate Panel. The Criminal Procedure Code is clear in its provisions under what conditions the statements from the earlier stages of proceedings may be used.

The HLC Kosovo deems the allegations set forth in the appeal, and accepted by the Court of Appeals, to be unfounded in relation to the substantial violations of criminal procedure concerning the composition of the Trial Panel. The Trial Panel was com-

posed in accordance with the decisions of the Kosovo Judicial Council dated June 23 and September 8, 2017[101], wherein EULEX Judges were assigned to adjudicate on the indictments filed by the SPRK. At the opening of the main trial, the parties to the proceedings had no objections to the composition of the Trial Panel. The Agreement on Cooperation between the Kosovo Judicial Council and EULEX Judges, signed on June 18, 2014, stipulates, inter alia, that the President of the Basic Court of Mitrovicë/Mitrovica may, in urgent cases and for security reasons, assign EULEX Judges to act in such a case. The agreement also foresees that, in cases wherein the defendants or victims are members of the minority communities, the KJC may rule, upon a reasoned request from EULEX authorised persons, that EULEX Judges act in pre-trial proceedings and that the Trial Panel be composed exclusively of EULEX Judges.

According to the ruling of the Court of Appeals, the case, initiated on the indictment dated May 16, 2017, was remitted to the court of first instance for reconsideration and re-adjudication. During the retrial, the Serious Crimes Department of the Basic Court of Mitrovicë/Mitrovica shall be adjudicating.

According to the official information provided to the HLC Kosovo by the Basic Court of Mitrovicë/Mitrovica in late November 2019, the case had been assigned to the judges of this court, but the main trial in the case had not yet been scheduled.

The Kosovo Law on Courts, which came into force in early 2019, has established a Special Department at the Basic Court of Prishtinë/Priština that is competent to adjudicate on SPRK indictments. This Department will not be adjudicating in this case. According to the instruction of the Supreme Court of Kosovo dated September 25, 2019, the cases, remitted to a retrial by the decision of the Court of Appeals due to substantial violations of the provisions of criminal procedure, wherein such violations did not occur during the initial trial, shall be adjudicated by the Special Department of the Basic Court before which the first instance proceedings took place.

1.3.3. The Case: *The Prosecutor v. Milorad Zajić*

Acting upon the SPRK's appeal dated April 30, 2019 (KTS/PPS No. 756/2014) in *The Prosecutor v. Milorad Zajić* case, filed against the judgment of the Serious Crimes Department of the Basic Court of Pejë/Peć dated March 8, 2019, and following a session held on October 1, 2019, an Appellate Panel of the Serious Crimes Department

[101] According to Article 7, Paragraph 1, item 1.1 of the Law on the Kosovo Judicial Council: The Council decides on the organisation, management, administration and supervision of courts under the law: https://gzk.rks-gov.net/ActDetail.aspx?ActID=18335

of the Court of Appeals, presided over by Judge Abdullah Ahmeti[102], rendered a judgment wherein the Prosecution's appeal was rejected as unfounded.

In the decision of the Court of Appeals, the judgment of the Basic Court Pejë/Peć wherein the Defendant Milorad Zajić was acquitted of committing the criminal offence of *Organisation of Groups to commit Genocide, Crimes against Humanity and War Crimes*[103] was affirmed.

The session of the Appellate Panel was held in accordance with Article 390 of the CPCRK[104], without the presence of the parties to the proceedings.

The course of criminal proceedings

Due to a grounded suspicion that, during the armed conflict in Kosovo, in the summer of 1998, as a member of the Serbian armed forces, the Defendant Milorad Zajić participated in the attacks on the civilian population of the village of Dushë/Duš, Klinë/Klina municipality, when several houses were set on fire in which several civilians were killed, who, for various reasons had not been able to leave their homes, while, on the same occasion, some villagers sustained bodily harm.

The first suspicions that one of the participants of the aforementioned events was Milorad Zajić were delivered to the competent institutions during 2006, i.e. to the then District Prosecution Office in Pejë/Peć. All this happened around the time when the Defendant Zajić went back to live in Klinë/Klina as a returnee.

In 2008, the matter was transferred to the jurisdiction of the SPRK. In relation to the aforementioned suspicions, the majority of witnesses – injured parties were heard during 2008 by UNMIK police. The official investigation into the case was initiated by an international prosecutor's ruling dated May 30, 2014. The case files were transferred to the jurisdiction of local prosecutors[105] shortly after the investigation had been initiated. In the summer of 2015, more precisely, on August 6, 2015, the competent prosecutor authorised the Kosovo Police (War Crimes Investigation Unit - WCIU) to investigate the allegations and circumstances under which the events in the summer of 1998 had taken place. WCIU investigators heard the witnesses one

[102] Members of the Appellate Panel: Judges Hava Haliti and Xhevdet Abazi.

[103] Provided for and punishable under Article 160 of the CCRK.

[104] This Article of the Criminal Procedure Code of Kosovo specifies the circumstances under which a session of the Appellate Panel may be organised, the presence of the parties to the proceedings, the consFequences of failure to attend, and when the session may be held without the presence of the parties to the proceedings. According to this Article, it is mandatory to notify the parties to the proceedings in cases where a sentence of imprisonment has been imposed on the defendant.

[105] After June 15, 2014, when the mandate of EULEX was narrowed down.

more time, and, on April 1, 2016, submitted to the Prosecution a report stating that the Defendant Milorad Zajić had been involved and active during the armed conflict, that he had been uniformed and armed, and that he had put his family house at the disposal of the Serbian armed forces. However, none of the injured persons had seen him performing any specific actions, or that he had played a leading role in these events. The investigation was suspended on April 22, 2016 against the then suspect, in order to avoid exceeding the legal deadline for conducting the investigation.

The investigation was reopened on March 19, 2018. The suspect Zajić was arrested on the same day in the premises of the Klinë/Klina police station while he was reporting a theft in his home during his absence. The measure of house detention was ordered against him due to his poor health and advanced age.

The indictment

Following the investigation, the SPRK (Prosecutor Habibe Salihu) filed an indictment against Milorad Zajić on July 25, 2018, charging him with the commission of the criminal offence of *War Crimes against the Civilian Population*[106]. According to the indictment, during the armed conflict in Kosovo, between June and July 1998, in the village of Dushë/Duš, the municipality of Klinë/Klina, in complicity with unknown perpetrators – Serbian villagers, he had actively participated in the offensive of the police, the army and paramilitary units against the Albanian civilian village population; he had put his family house at the disposal of the armed Serbian forces by placing sacks filled with sand on the roof and the terrace; and had used his vehicle, a yellow *Zastava 101*, to transport firearms of different caliber to his house. The indictment also charged him with the following: on June 19, 1998, in the evening, he had fired his automatic weapon at the houses of the Albanian villagers, in an effort to force them to leave the village. He had also participated in the attack on July 28, 1998, when a few houses in the village had completely burnt and when Zada, Osman and disabled Haradin Marmullaku had died. They had stayed in their homes because of their inability to leave them, mainly for health reasons. Ismet and Bashkim Marmullaku and the wife and daughter of Xhemë Marmullaku had been killed on that day, while Enver and Ramiz Marmullaku had sustained bodily harm in the last attack.

The indictment assessment procedure

The Serious Crimes Department of the Basic Court of Pejë/Peć (a Trial Panel presided over by Judge Kreshnik Radoniqi) held an initial hearing wherein the Defendant pleaded not guilty to the charges and filed an objection to the evidence and a motion to reject the indictment. The Prosecutor disputed this by respond-

[106] Provided for and punishable under Article 142 in conjunction with Article 31 of the CC SFRY in violation of Article 3 common to the Geneva Conventions of August 8, 1949. The criminal offence the Defendant has been charged with is also punishable under Article 152 of the CCRK.

ing to the Defendant's motion and the objection to the supporting evidence, and moved the Court to reject it as unfounded.

In his ruling dated October 2, 2018, Judge Radoniqi rejected as unfounded the Defendant's objection to the evidence and the motion to reject the indictment. The Defendant appealed against the ruling of the Basic Court. On November 8, 2008, the Serious Crimes Department of the Court of Appeals issued a ruling rejecting the Defence Counsel's appeal as unfounded.

The main trial

Following the indictment assessment procedure, the main trial was opened on December 27, 2018. During the trial, the Defendant pleaded not guilty to the charges. The parties to the proceedings presented their opening statements. The main trial continued with the presentation of evidence and the examination of witnesses. The Trial Panel was in session for ten (10) days in the course of the main trial (including the initial hearing). During the trial, eleven (11) Prosecution witnesses were heard, material evidence was adduced, the Defendant testified before the Panel and the parties to the proceedings presented their closing statements.

In her closing statement, Prosecutor Salihu stated that after analysing the circumstances under which the village of Dushë/Duš had been set in fire, the Trial Panel should take into account that this was the event that had taken place twenty (20) years ago that it was no wonder that some witnesses, while testifying in court, had made certain inconsistencies, that they had forgotten some important circumstances, and that they had focused on certain not so important circumstances. In her opinion, the administered evidence had proven that the village had been attacked during June and July 1998, that the houses belonging to the injured parties had been set on fire, that Zade, Osman and Haredin Marmullaku, who had not been able to leave their homes together with other villagers, had been burnt alive during the attack, that the wife and daughter of Enver Marmullaku had been killed, and that Enver and Ramiz Marmullaku had been wounded. In view of the above circumstances, after the war it had been difficult even to consider to collect the evidence from the witnesses and the injured parties. But it had not been difficult for the witnesses to identify the Defendant Milorad Zajić, to provide his description and to state where he had been living. The witnesses had confirmed that he had been seen in the village before the attack on the civilian population, that he had been armed and uniformed, and that he had been driving a yellow *Zastava 101*. He, like many others, had sent his family members away from the village, and his home had housed members of the Serbian armed forces who had stayed in it for the duration of the attack. It was also determined that his house had been secured, reinforced with sand bags and prepared for the attacks. The

Defendant had stayed at his home for the duration of the attack. The witnesses had also testified that shots had been fired from his house into the direction of Albanian houses in the village.

In her closing statement, the Prosecutor elaborated on the testimonies of the witnesses who had been heard during the main trial. On the basis of the evidence presented at the main trial, as well as the evidence obtained from the earlier stages of criminal proceedings, the Prosecutor specified the enacting clause of the indictment and re-classified the charged criminal offences. According to the Prosecutor's findings, the Defendant's actions contained the elements of the criminal offence of *Organisation of Groups to commit Genocide, Crimes against Humanity and War Crimes*[107]. She moved the Court to find the Defendant liable for the commission of this criminal offence, to find the Defendant guilty and to punish him according to the law.

In his closing statement, the Defence Counsel, attorney Dejan Vasić, stated, inter alia, that the accusations of the inhabitants of the village of Dushë/Duš that his client had been one of the participants in the attack on the village started to appear in 2006 when he had returned to live in Klinë/Klina.

Based on the evidence administered during the main trial and the witnesses' testimonies, it can be concluded that none of the witnesses had directly seen the Defendant doing anything wrong. They couldn't have done that because he had done no harm to anyone. The witnesses had incriminated the Defendant based on rumors. It was indisputable that the Defendant's house in the village was located on an uphill slope, that at the time of the armed conflict he had owned a striking yellow *Zastava 101*, that during the armed conflict the armed forces had been staying in his house for a while, and that, in the summer of 1998, the last time he had been in the village had been on June 19, 1998, when he had left his vehicle in the village because he had had no fuel. The next time he had come to the village had been in the second half of August 1998. Then he had learned that the armed forces had been staying inside his house. His neighbours had told him about what had happened in the village in the meantime. When he had returned he had found that his vehicle had been burnt. Finally, the Defence Counsel moved the Court to render a judgment of acquittal.

The Defendant stood by his Defence Counsel's closing statement, and emphasised that he was not guilty to the charges in the indictment. The testimonies against him were fabricated and tendentious. On June 19, 1998, no one had been killed in the village because there had been no shooting. He was sorry for the deaths of

[107] Provided for and punishable under Article 160, Paragraph 2 as read with Paragraph 1 of the CCRK.

the victims. He had nothing to do with the murders committed in the village. He was ready to look every Albanian in the eyes, because his conscience was clear.

During the trial, the official record was kept verbatim in the Albanian language. The court sessions were interpreted consecutively when the Defendant or his Defence Counsel were addressing the court, and in other circumstances, the proceedings were interpreted into Serbian only for the Defendant and his Defence Counsel (*chuchotage*).

The first instance judgment

Following the main trial, on March 8, 2019, the Trial Panel rendered a judgment wherein the Defendant Zajić was acquitted of the criminal offence of O*rganisation of Groups to Commit Genocide, Crimes against Humanity and War Crimes*. The injured parties were instructed that they may pursue their property claims in civil litigation.

According to the findings set forth in the judgment, the Trial Panel found, on the basis of the pieces of evidence presented and their assessment, both individually and in mutual interrelation, that it was not proven that the Defendant Zajić had committed the criminal offence he had been charged with in the indictment. The case was based on the testimony of witnesses, there was little material evidence to prove the Defendant's involvement in the commission of the charged criminal offence. The Court could not give credence to the testimony of the witnesses because of great inconsistencies in their testimonies given during the main trial, as well as in their statements from different stages of criminal proceedings.

The Court thoroughly analysed, in their judgment, the testimony of each witness heard during the main trial, as well as the testimonies from the earlier stages of proceedings. The Court presented the discrepancies in the testimonies and gave an assessment of each individual testimony, as well as the reasons why the Court did not find the testimonies convincing.

The Court also analysed the material evidence adduced during the trial. On the basis of the photographs that had been presented as evidence, the Court could not identify the Defendant as a member of the group. The Defendant was not present in the submitted photographs. The attached evidence established that, during the month of June (1999), the Defendant had been an employee of the Jugobanka branch in Klinë/Klina, which the parties did not find disputable. The Court also presented as evidence an UNMIK Investigator's report dated July 16, 2008, which was compiled after a witness had been heard, which implied that, according to the witnesses heard, it could not be confirmed that the suspect had committed the charged acts.

The Court also presented as evidence a police report dated January 23, 2019 with a detailed description of the crime scene that was subject of the indictment, that is, the location of the witnesses' houses - the injured parties' and the Defendant's house - as well as the location of a mushroom factory. Following the report, and with the consent of the parties, the Panel decided not to carry out a site visit.

The Court assessed the Defendant's testimony, as well as the ones given by all the witnesses, on the basis of which it was stated that the villagers had been exposed to serious wartime events during the summer of 1998, that their houses had been set on fire, that three persons had gone missing, that two members of one family had been killed and that some of the villagers had been injured. The Court also noted that the witnesses had changed their statements regarding the Defendant. During their testimony, they had offered their opinion or assumptions regarding the participation of the Defendant in the attacks in the village, from which it could not be determined beyond a reasonable doubt that the Defendant had participated in the commission of the criminal offences.

The Court found that an offensive had been carried out in the village of Dushë/Duš from June 20 until July 28-29, 1998, but there was no evidence that the Defendant had been present in the village and that he had taken any action in that offensive. The Court also had no evidence that the Defendant or his family members had willingly made their home available to the Serbian armed forces during the offensive. The crimes had taken place after the Albanian population had left their homes and the village. According to the witnesses, the three persons had gone missing in late July. The Court did not establish by the evidence presented that the Defendant had been uniformed and armed during the armed conflict. Even if that had been determined, it did not constitute a criminal offence. The Court also assessed the case presented by the Defendant, but as there was no evidence to support his guilt, his case was not elaborated on in the judgment.

On the basis of the evidence administered during the trial, the Court did not find that the Defendant's actions contained the elements of the criminal offence he had been charged with in the amended indictment. The evidence presented did not confirm that the Defendant had participated in the criminal group or that he had had the role of organiser, leader or the person giving orders.

The appellate proceedings

On April 30, 2019, the SPRK impugned the judgment of the Serious Crimes Department of the Basic Court of Pejë/Peć on the grounds of substantial violations of criminal procedure, an erroneous and incomplete determination of the factual situation and violations of the criminal law, and moved the Court of Appeals to

annul the first instance judgment, on the basis of the evidence in the case files, and to find the Defendant guilty or to remit the case to the court of first instance for reconsideration and re-adjudication.

According to the Prosecution, the first instance judgment contained substantial violations of criminal procedure. The enacting clause of the judgment was vague, contradictory to itself, and to the reasoning of the judgment. The judgment was not based on the facts and the evidence presented at the main trial. The court of first instance had not assessed each piece of evidence individually in order to reach clear and specific conclusions on the basis of such an assessment. The judgment did not state what evidence had been admitted. The evidence had been insufficiently and unconvincingly reasoned.

The Prosecution stressed in the appeal that the court of first instance had failed to properly assess the evidence, which had led to an acquittal. Although there had been sufficient evidence in support the Defendant's guilt, the Court had acquitted him. According to the Prosecutor, when assessing the evidence, the court of first instance should have taken into account the fact that the witnesses in this case had had to testify about something that had happened twenty years ago. Substantial violations of criminal procedure and the erroneous determination of the factual situation had led to an erroneous application of the criminal law, i.e. to the Defendant's acquittal.

On May 13, 2019, the Defendant and his Defence Counsel (attorney Dejan Vasić from Mitrovicë/Mitrovica) filed a response to the Prosecutor's appeal. They opined that, the court of first instance, in rendering its decision, fulfilled all the conditions regarding the reasoning of the judgment as provided for in Article 370, Paragraph 7 of the CPCRK.

According to the Defence's allegations, in the first instance verdict the Trial Panel had carefully, thoroughly, clearly and unequivocally described the discrepancies in the testimonies of each individual witness. The Court had properly assessed all the evidence presented before the court and had rendered a proper decision to acquit the Defendant. The reasoning of the judgment contained detailed explanations of essential elements of the criminal offence. The substantive legal provisions had been properly and accurately applied. The Court of Appeals was moved to reject the SPRK's appeal as unfounded and to affirm the first instance judgment.

In a motion dated April 30, 2019, the Appellate Prosecutor moved the Court of Appeals to grant the Prosecution's appeal, to annul the first-instance judgment and to remit the case to the court of first instance for reconsideration and re-adjudication.

The judgment of the Court of Appeals

After analysing the case file, the first instance judgment, the allegations set forth in the appeal and the response to the allegations, the court of second instance found that the Prosecution's appeal was unfounded.

According to the findings of the Court of Appeals, no substantial violations of the provision of criminal procedure had been made when rendering the first instance judgment, nor had any other violations been made that the court of second instance had to take into account ex officio. The enacting clause was clear and specific and it could not be identical to the reasoning. The Court had determined in a precise and lawful manner all the relevant facts supported by the evidence presented at the main trial. The evidence adduced at the main trial did not establish that the Defendant had participated in any way in the attacks on the inhabitants of the village of Dushë/Duš.

According to the findings of the Court of Appeals, the allegations were not substantiated that the court of first instance had not assessed individually each piece of evidence presented before the court, and that it had not compared the statements one with another. The court of first instance had taken into account the discrepancies in the witnesses' testimonies, especially when they had dealt with relevant facts, and when the witnesses had not been so certain in their testimonies. Despite the reclassification which had been done while presenting the closing statement, the court of first instance had provided an adequate reasoning, in the judgment, in relation to the criminal offence the Defendant had been charged with in the amended indictment. The evidence presented had not proven that the Defendant had had any influence on the fact that the armed forces had been staying in his house. The circumstance that he had been part of those forces had not been confirmed too.

The Court of Appeals also found that the allegations regarding the erroneous and incomplete determination of the factual situation were unfounded. Following the evidence presented, the court of first instance had properly assessed the relevant facts regarding the criminal offence the Defendant was charged with, as well as the statements of the witnesses who had been heard during the main trial. The Court had also compared the testimonies given during the main trial with those given during the earlier stages of criminal proceedings.

According to the Court of Appeals, even if the Defendant, as a citizen of Serbia, had been mobilised and even though his house had been used by the armed forces, all of this could have happened without his will and consent. No evidence proved that the Defendant had participated in the attacks carried out by the mil-

itary and paramilitary forces on the Albanian population of the village, or in setting the houses on fire where the persons whose names were listed in the indictment had burnt to death.

By rendering the decision of the Court of Appeals, regular criminal proceedings against the Defendant Milorad Zajić were brought to an end.

The request for protection of legality
On December 18, 2019, the State Prosecution Office (Prosecutor Agron Qalaj) filed with the Supreme Court of Kosovo an application for extraordinary legal remedies - a request for protection of legality against the decisions of regular courts in *The Prosecutor v. Milorad Zajić* case: the judgment of the Serious Crimes Department of the Basic Court of Pejë/Peć dated March 8, 2019, and the judgment of the Court of Appeals dated October 1, 2019.

The request was filed on the grounds of substantial violations of the provisions of criminal procedure and violations of the criminal law. The Supreme Court of Kosovo was moved to grant the request and to find that the aforementioned judgments contained substantial violations of the provision of criminal procedure as well as violations of the criminal law.

The State Prosecution Office filed a request for protection of legality upon a written request by the SPRK competent prosecutor dated December 9, 2019.

According to the information available to the HLC Kosovo by the end of the reporting period, the Supreme Court of Kosovo did not rule on the case until the end of 2019. The proceedings before the Supreme Court will be covered by the 2020 Annual Report on the trials monitored.

The HLC Kosovo findings:
On the basis of the regular monitoring of the main trial in *The Prosecutor v. Milorad Zajić* case before the court of first instance, the analysis of the case files and all the stages of criminal proceedings before the Kosovo courts in 2019, the HLC Kosovo finds that the criminal proceedings were conducted in full compliance with the standards of a fair trial.

Moreover, the courts treated this case with efficiency and expediency, which is commendable. Court decisions are clear and concise, well-reasoned and based on the evidence presented in the case files. The way courts dealt with this war crimes case can serve as an example to the entire Kosovo judiciary of how to professionally prosecute a *war crime* as one of the most serious criminal offences.

The trial in this case has shown that justice and the right of injured parties to justice does in no way imply that they are entitled to incriminate as suspects those for whom they are not sure to be the perpetrators of the crime, and to claim so on the basis of unverified information or assumptions.

The only thing that casts a shadow over the criminal proceedings in this case is the very long investigation period from the filing of the criminal report by the injured parties in 2006 to the official opening of the investigation in 2014 by the SPRK EULEX Prosecutor. This delay can be explained, but not justified, by the fact that the case was first under the jurisdiction of UNMIK judicial office-holders, then transferred to EULEX, and, in the end, transferred to the national judiciary.

However, what is relevant in this case and what the HLC Kosovo also welcomes is the position of the courts of both instances that no one can be convicted of such a serious criminal offence as a *war crime* without the evidence that would prove the defendant's liability beyond any reasonable doubt.

By acquitting the Defendant of criminal liability, the victims and their families could not exercise their right to justice. The judicial authorities should continue to investigate into the case in order to identify the perpetrators of serious crimes with fatalities that occurred in the summer of 1998 in the village of Dushë/Duš, Klinë/Klina municipality.

1.3.4. The Case: *The Prosecutor v. Remzi Shala*

The Special Department of the Court of Appeals, sitting in an Appellate Panel presided over by Judge Vaton Durguti[108], held a session on November 26, 2019 in *The Prosecutor v. Remzi Shala* case to consider the parties' appeals filed against the judgment of the Serious Crimes Department of the Basic Court of Prizren announced on July 3, 2019 (K/P No. 181/2016) wherein the Defendant Remzi Shala was found guilty of the criminal offence of *War Crimes against the Civilian Population*[109] for which he was sentenced to fourteen (14) years of imprisonment.

In their judgment dated November 26, 2019, the Appellate Panel partially upheld the Defendant's appeal by modifying the judgment of the Serious Crimes Department

[108] Members of the Appellate Panel: Judges Kreshnik Radoniqi (Reporting Judge) and Burim Ademi.

[109] Provided for under Article 142 in conjunction with Article 22 of the CC SFRY, as read with Article 3 (1a) of the Fourth Geneva Convention of 1949, also punishable under Article 152 in conjunction with Article 32 of the CCRK.

of the Basic Court of Prizren regarding the legal classification of the offence and the gravity of the sentence imposed. The Court of Appeals found that the actions of the now convicted Remzi Shala contained the elements of the criminal offence of *War Crimes against the Civilian Population* under Article 142 in conjunction with Article 22 of the CC SFRY (applicable at the time of the crime), and read with Article 3 (1a) of the Fourth Geneva Convention of 1949, for which he was sentenced to ten (10) years of imprisonment. The remainder of the judgment remained unchanged.

The judgment rejected as unfounded the appeal of the legal representative of the injured parties, attorney Asdren Hoxha from Prishtinë/Priština.

By rendering this judgment, regular criminal proceedings against the Defendant were brought to an end.

The course of criminal proceedings[110]

With regard to the forced taking away of Haxhi Përteshi from his home in the village of Duhël/Dulje by armed and uniformed KLA members on June 26, 1998 on suspicion that he had been cooperating with the Serbian forces, as well as with regard to his unresolved death that occurred several days later (his corpse was found on July 1, 1998 next to the road in the foregoing village), criminal proceedings against Shala were initiated by the statements his family members had given to the prosecution authorities, i.e. to UNMIK police investigators (in 2002 and 2003).

In 2009, EULEX investigators continued to run the investigation. As possible suspects, KLA members were mentioned, the then suspect Remzi Shala and B.Q against whom an official investigation was launched in 2014 by a ruling of an EULEX Prosecutor.

The case files were transferred to the jurisdiction of local SPRK prosecutors in the summer of 2015, who continued their investigation against B.Q and Shala. Shortly after, in the absence of evidence, the investigation against the suspect B.Q was suspended.

The indictment

Following the investigation, SPRK Prosecutor Haki Gecaj filed an indictment on October 19, 2016[111] against the Defendant Remzi Shala in relation to the criminal

[110] The criminal proceedings in *The Prosecutor v. Remzi Shala* case was the subject of the analyses published in the 2016, 2017, 2018 Annual Reports. These can be found on the HLC Kosovo's official website. Within the annual report on the trials monitored in 2019, part of the criminal proceedings that took place in the reporting year will be presented in detail with a brief overview of the procedural actions taken in previous years.

[111] This has been the first war crimes indictment filed by a local SPRK prosecutor following the narrowing of EULEX's mandate on June 15, 2014.

offence of *War Crimes against the Civilian Population*[112] committed in complicity with unknown perpetrators during the armed conflict in Kosovo. The indictment alleged that in the evening of June 26, 1998, in the village of Duhël/Dulje, Suharekë/Suva Reka municipality, he had taken away Haxhi Përteshi from his house, whose body had been found in the village several days later (July 1 1998) near the regional road in the village of Duhël/Dulje, Suharekë/Suva Reka municipality.

An initial hearing started before the Basic Court of Prizren on November 21, 2016. The second hearing was also held, when the subject of adjudication was the Defendant's request to dismiss the indictment and the objections to the evidence. The indictment assessment procedure was completed by a ruling of this Court, dated March 6, 2017, wherein the requests were rejected as unfounded. In a ruling dated March 23, 2017, the Court of Appeals rejected as unfounded the Defendant's appeal against the ruling of the Basic Court.

Following the indictment assessment procedure, the main trial was opened on May 12, 2017. The Trial Panel was in session for thirty-seven (37) days, when thirty (30) witnesses proposed by the parties were heard as well as those proposed ex officio by the Trial Panel [twenty-three (23) as proposed by the Prosecutor, four (4) proposed by the injured parties, and three (3) proposed by the Court]. During the part of the main trial which was taking place in 2018, upon the motions of the parties to the proceedings, the Trial Panel organised eleven (11) sessions of witness confrontations in order to clarify certain issues.

During the reporting period, the main trial was planned to continue on January 9, 2019, when the Defendant, who had been previously released pending the main trial, did not appear in court although he had been legally informed of the date when the main trial was to continue. The Court issued an order that he be brought before the Court. As the competent agencies were not able to apprehend him, an international arrest warrant was issued against him. In accordance with the foregoing warrant, he was arrested on May 24, 2019. In order to secure his presence in court, he was placed into detention on remand. In the course of the trial held in 2019, material evidence was presented. The Defendant answered only to the questions of his Defence Counsel. In the remaining part of his testimony before the Court, he remained silent. He stood by his statements given during the earlier stages of the proceedings, which the Panel read as evidence. The parties to the proceedings presented their closing statements.

[112] Provided for under Article 142 in conjunction with Article 22 of the CC SFRY, as read with Article 3 (1a) of the Fourth Geneva Convention of 1949, also punishable under Article 152 in conjunction with Article 32 of the CCRK.

In his closing statement, the SPRK Prosecutor emphasised, inter alia, that the evidence presented at the main trial, especially the witnesses' testimony, undoubtedly confirmed the grounded suspicion that the Defendant had committed the charged criminal offence. The Prosecutor presented the testimony of each individual witness who had testified during the main trial, as well as the case presented by the Defendant. The Prosecution witnesses, i.e. the injured parties, had confirmed that the Defendant had been present in the courtyard of their home, from where their father was taken away on the critical night. The testimonies of the remaining Prosecution witnesses had confirmed the afore-mentioned testimonies. In their closing statement, the Prosecution also provided an assessment of the case presented by the Defendant. In his statements (mainly from the earlier stages of the proceedings), he had described his involvement with the KLA from the moment he had joined them, and had denied that he had been in the village of Duhël/Dulje during the armed conflict and that he had kidnapped the victim on the critical day, i.e. that he had known any of the members of the Përteshi family. He emphasised that he had been an ordinary soldier during the armed conflict. The Prosecution proposed that the Court reject the Defendant's account as unfounded on the basis of the evidence presented, which showed that the Defendant had committed, in complicity, the charged criminal offence. According to the Prosecution, there were no circumstances in the case that would preclude his criminal liability. The Court was asked to find Shala guilty and to punish him in accordance with the law.

In his closing statement, the legal representative of the injured parties, attorney Asdren Hoxha, stated, inter alia, that during the numerous sessions of the Panel in the course of the main trial, the Prosecution had managed to confirm, beyond any doubt, the thesis set forth in the indictment, i.e. the factual situation described in the indictment and that the Defendant had committed the charged criminal offence. The facts had been confirmed by the evidence and the injured parties' testimonies that were interrelated. The evidence adduced confirmed beyond any doubt that the Defendant had committed the charged criminal offence. In his closing statement, the legal representative analysed in detail the circumstances under which the criminal offence had been committed, as well as the duties of the Defendant as a KLA member and his role in the commission of the charged offence. In his closing statement, the legal representative, too, carried out a thorough analysis of the testimonies of all the witnesses heard during the main trial and moved the Court to find him guilty and to punish him by the law. If the Defendant would be punished, justice would be met, at least somewhat, for the injured parties, who, in addition to the loss of a dear family member, had also suffered from a tarnished reputation in their community.

In his closing statement, the Defence Counsel for the Defendant, attorney Natal Bullakaj from Suharekë/Suva Reka, stated, inter alia, that after the closing statements had been presented by the Prosecutor and the legal representative of the injured parties, the Defence continued to support the arguments in the motion to dismiss the indictment and the objection to the evidence, arguing that the indictment was unfounded, that it was based on unconvincing evidence that could not determine the individual actions committed by his client, or those committed in complicity. The indictment did not contain any evidence that would link his client to the actions described in the indictment. The actions described in the indictment had not been confirmed, nor had there been any evidence to confirm that the Defendant had been present at the home of the injured party's family on the critical day. The Prosecution and the law enforcement agencies failed, in the beginning, to investigate the case well and to obtain convincing evidence that would serve as a basis for the indictment. The indictment had been filed on the basis of a single piece of evidence, i.e. the statement of witness Agron Përteshi, which was also confirmed during the trial. No other evidence had corroborated the allegations set forth in the indictment.

In his closing statement, the Defence Counsel, too, analysed the testimonies of all the witnesses heard during the main trial, as well as their statements from the earlier stages of the criminal proceedings. According to the Defence Counsel, the witnesses who had testified in favor of the indictment had been prepared and instructed by the injured party on how to testify, i.e. these witnesses had been promised a financial reward or other benefits in order to testify in favor of the indictment. The Defence Counsel also insisted on the examination of an anonymous witness whose statement had been completely different from the ones given by the other witnesses and who, according to the Defence, had had the information about the murder of the late Haxhi Përteshi.

The Defence Counsel presented the case of his client who stood by his statements from the earlier stages of the proceedings wherein he had explained his involvement with the KLA. He emphasised that he had had nothing to do with civilians. According to the Defence Counsel, the element of complicity had not been confirmed too, because the Prosecution had failed to determine who the accomplices had been. He proposed to the Court to acquit the Defendant in the absence of evidence.

The Defendant supported his Defence Counsel's closing statement and reiterated that he was proud to have been a member of the KLA. He reiterated that during the armed conflict he had had nothing to do with civilians.

The first instance judgment

In the judgment announced on July 3, 2019, the Defendant was found guilty of committing the criminal offence of *War Crimes against the Civilian Population*[113] because, during the armed conflict, as a uniformed and armed KLA member, on June 26, 1998, at 23:00, in the village of Duhël/Dulje, Suharekë/Suva Reka municipality, in complicity with other 5-6 KLA members, he deprived a civilian, Haxhi Përteshi, of his liberty, who had been suspected of cooperating with the Serbian armed forces. His corpse was found by the road in the center of the village several days later.

The Defendant was sentenced to fourteen (14) years of imprisonment. The measure of detention on remand was extended until the judgment became final. The injured parties were instructed to pursue their property claims in civil litigation. The Defendant was also obliged to cover the costs of criminal proceedings in the amount of EUR 500 as well as to transfer EUR 50 to the victims' compensation fund, no later than fifteen (15) days after the judgment became final.

In the judgment, the Court thoroughly analysed the evidence presented during the main trial, as well as the Defendant's case (who had remained silent during the main trial) and his statement given to the police and the prosecution wherein he had presented his involvement with the KLA.

On the basis of the evidence presented during the main trial, the witnesses' testimonies, the case of the Defendant who denied that he had committed the charged criminal offence, and the analysis of all the foregoing, the Court created the victim's profile, i.e. that he was humane and always ready to help, as proven by many witnesses.

Based on the evidence presented, the Court found it indisputable that during the armed conflict, KLA members had been arresting civilians and had been harassing certain people who had been suspected by some KLA members to be collaborators of the Serbian armed forces, i.e. spies. In reaching such a conclusion, the Court had conducted a detailed analysis of the testimonies of the witnesses, who had not been directly related to the subject of the indictment; however, on the basis of the analysis of their testimonies, certain circumstances that had existed during the armed conflict in Kosovo could be understood and clarified. On the basis of the evidence presented, the Court also established the circumstances of how the KLA had been organised and how it had operated during the armed conflict.

[113] Committed in complicity, provided for and punishable by Article 142 in conjunction with Article 22 of the CC SFRY, as read with Article 3 (a) of the Fourth Geneva Convention, also punishable by Article 152, Paragraphs 1 and 2, in conjunction with Article 31 of the CCRK (2012).

Moreover, it was indisputable from the evidence presented that the victim had been taken away from his house by the KLA members - the event witnessed by some members of his family. It was also established that one of the KLA members was the Defendant Shala who had not been wearing a mask on the critical evening, like the other KLA members who had been with him, as witnessed by the family members who had been present. It was established that the late Haxhi Përteshi had been found dead several days after being taken away by the KLA. The Court had no evidence on who had killed him. The statements of the witnesses who had testified before the Court about this event were mutually congruent, therefore they were indisputable. It was also undisputed that the victim's body had been found a few days later by the road in the centre of the village. He had been buried the same day. Most of the villagers, for fear of their own safety, had not attended the funeral nor had they extended their condolences. The family had reported the case to the authorities to determine the circumstances of why their father had been killed even though he had been aiding the KLA with whatever they had been in need of, because, at the time, his large family had had the financial capacity to support and assist. According to the judgment, the administered evidence confirmed the allegations set forth in the indictment.

The Court did not accept the thesis presented by the Defendant and his Defence Counsel that the judgment was rendered on the basis of a single piece of evidence, i.e. the statement of witness Agron Përteshi, the victim's son, who had been present on the critical day when his father had been taken away by the KLA members.

According to the Court, the murder of Haxhi Përteshi occurred during the war and the time of drafting the list of those who did not support the KLA, or those who were suspected of cooperating with the enemy. A group of soldiers was formed to act on the list and to enforce the decisions and orders of their superiors. The Defendant Remzi Shala was also one of the members of the group, according to the evidence presented during the trial. The group was allowed to visit the population, to communicate with the people and to request mobilisation. The group had been in possession of the information and data on each village resident.

According to the findings of the Panel, the Defendant's actions contained the elements of the criminal offence of *War Crimes against the Civilian Population* in violation of international regulations. According to the findings of the Court, the Defendant knowingly committed the criminal offence in wartime, in the evenings when there was no light or electricity, and when the population in general feared the people wearing masks.

In imposing the sentence, the Court took into account the aggravating and mitigating circumstances. According to the Court's findings, the gravity of the sentence imposed was affected by the type of the charged offence, as well as by the circumstances under which the offence was committed. The Court found that the sentence imposed would achieve the purpose of punishment.

The appellate proceedings

The first instance judgment was appealed by the Defendant and his Defence Counsel on the grounds of substantial violations of the provisions of criminal procedure, violations of the criminal law, an erroneous and incomplete establishment of the factual situation, as well as the decision on criminal sanctions. The legal representative of the injured parties challenged the first instance judgment due to the sentence imposed.

The Defence Counsel challenged the merits of the indictment and the judgment, arguing that no evidence had confirmed that the Defendant had committed the charged criminal offence on his own or in complicity. The Court had not clarified what evidence and facts it had considered proven, while the reasoning of the judgment had contradicted itself and the enacting clause of the judgment. The Court had not stated in a convincing and clear manner the relevant facts on the basis of which it had found the Defendant guilty.

The reasoning of the judgment only described the statements of the privileged witnesses from different stages of the proceedings, which were contradictory, tendentious, one-sided, completely unconvincing and not substantiated by material evidence. There was no material evidence during the main trial, no crime scene inspection, or possible exhumation of the victim's remains in order to find the evidence that would indicate how the crime had been committed or that would show that the victim had died from natural causes. The first instance judgment was completely vague and contradictory to the evidence presented at the main trial, which was why there were circumstances for its annulment. The judgment also contained procedural violations because it had not been drafted in accordance with the legal provisions, i.e. with Article 370 of the CPCRK.

In the Defence's view, the court of first instance had erroneously established the factual situation during the main trial. Not a single piece of evidence had confirmed that the criminal offence had been committed. The Court described the witnesses' testimonies in the reasoning, but had failed to analyse what had been decisive for giving credence to a particular testimony. Instead, the Court had merely stated that the facts were indisputable, without giving the reasons which facts it had deemed decisive in determining the Defendant's guilt.

According to the appeal, the court of first instance had not established the facts in a fair manner when it had found the Defendant guilty of having committed the charged offence in complicity, without specifying who the accomplices, or potential accomplices, had been. The Court had based its decision on the indictment of the Special Prosecution Office and the statements of the injured parties, who had slandered and fabricated facts in order to achieve certain goals. According to the appeal, various methods and manners had been used by the victim's family members to gather evidence (by offering employment or money) which had convinced the investigators that the Defendant had kidnapped their father. On the basis of one such statement, the Court had found the defendant guilty, without justly establishing the facts and the evidence in favour of the Defendant.

According to the Defence, the Court had not given credence to the Defendant's statement and the evidence presented by the Defence. The Court had violated the criminal law by finding the Defendant guilty of the criminal offence of *war crime*, although no evidence presented during the course of the trial had proven that his actions had contained the elements of the criminal offence of which he was found guilty. Moreover, the judgment was not fair in relation to the Defendant; it was based on substantial violations of criminal procedure and an erroneous establishment of the factual situation. The Court had not taken into account the evidence in favour of the Defendant, nor had it adequately assessed the mitigating circumstances. According to the Defence, the sentence imposed was too severe, especially given the allegations set forth in the appeal. Therefore, it was proposed to the court of second instance to grant the Defendant's appeal, to annul the first instance judgment and to remit the case to the court of first instance court for reconsideration and re-adjudication, or to modify the judgment and acquit the Defendant.

The legal representative of the injured parties, attorney Asdren Hoxha, appealed the first instance judgment due to the decision on criminal sanctions, and moved the court of second instance to grant the injured parties' appeal, to amend the first instance judgment dated July 3, 2019, and to impose a more severe imprisonment sentence on the Defendant.

In his reasoning of the appeal, the injured parties' representative stated, inter alia, that the facts had been sufficiently clarified and that the first instance judgment did not contain substantial violations of procedure. Bearing in mind the gravity of the criminal offence and its consequences for the injured parties (suffering and irreparable damage), the injured parties deemed that the punishment imposed could not fulfill the purpose of punishment, i.e. that such punishment did not give sufficient satisfaction to the injured parties, or that it sent a general message to the public.

In their submission dated October 20, 2019 (KTŽ/PPA No. 504/19), the Appellate Prosecutor proposed to the court of second instance to grant the appeal of the injured parties' representative and to impose a more severe sentence on the Defendant, as well as to reject the appeal of the Defendant and his Defence Counsel as unfounded.

The judgment of the Court of Appeals

An Appellate Panel of the Court of Appeals held a session pursuant to Article 390, Paragraph 1 of the CPCRK, which was attended by the parties to the proceedings, the Defendant Remzi Shala with his Defence Counsel, attorney Natal Bullakaj, as well as the injured parties Agroni and Zenel Përteshi and their representative, attoreny Asdren Hoxha. The session was not attended by the Appellate Prosecutor, although he had been duly summoned.

After reviewing the first instance judgment, the appeals and the case files, the Appellate Panel found that the Defence Counsel's allegations were partially founded, while the appeal of the injured parties' representative was unfounded.

The Court of Appeals found that the first instance judgment did not contain substantial violations of criminal procedure that would lead to its annulment. In the judgment, the court of first instance had presented clear and complete reasons pertaining to the relevant facts in relation to the commission of the crime of which the Defendant was found guilty. The judgment presented all the facts and circumstances surrounding the Defendant's illegal actions that constituted a criminal offence. The Appellate Panel found no contradiction between the enacting clause of the judgment and its reasoning.

The Court of Appeals found that the first instance judgment had properly established the factual situation which had been presented in detail. In their judgment, the Court of Appeals also presented the witnesses' statements used to establish the factual situation, as well as the circumstances surrounding the conditions under which the civilian population had lived in the village, confirming that the court of first instance had properly and completely established the factual situation, in particular, the statement of witness Agron Përteshi, who had identified the Defendant as one of the persons who had taken his father away on the critical evening. The statement of this witness had also been supported by the statements of the other witnesses who had testified in the case.

The Court of Appeals denied the Defence's arguments regarding the circumstances that the court of first instance had not identified the co-perpetrators. The first instance judgment had clearly specified the actions of the Defendant. Although

no accomplices had been identified in this specific case, the Defendant's participation had existed (the actions of the Defendant had clearly been identified) in the commission of the charged criminal offence.

According to the Court of Appeals, the court of first instance had not violated the criminal law. The facts had been clearly established in the judgment. The evidence presented, and contained in the case file, had established that the Defendant had undertaken illegal actions during the armed conflict that had violated the Geneva Convention. The criminal offence had been committed against a civilian victim during an internal conflict wherein the Defendant had participated. International regulations had also been violated. The judgment of the Court of Appeals detailed and analysed the circumstances under which the crime had been committed, as well as the Defendant's participation in it.

The court of second instance also conducted an analysis of the application of the criminal law with regard to the classification of the charged criminal offence. According to the findings of the Court of Appeals, the Defendant's action contained the elements of the criminal offence of *War Crimes against the Civilian Population* under Article 142 of the CC SFRY that was in force at the time of the commission of the criminal offence. The said article stipulated that it was possible to commit this criminal offence also by taking hostages. By committing this criminal offence, international regulations were also violated. According to the findings of the Appellate Panel, on the critical day, the Defendant, in complicity with others, had taken the victim Haxhi Përteshi hostage, who had been found dead several days later.

The Court of Appeals found that the criminal offence the Defendant was charged with could not be classified as it had been done in the indictment, i.e. that it can be classified both under the law applicable at the time of the offence (CC SFRY), and under the law in force at the time of amending the indictment. The Court also considered the circumstances of applying a more favorable law. According to the findings of the Court, the law that was in force at the time of the commission of the crime, i.e. the CC SFRY, was more favorable to the Defendant. Under this law, the criminal offence the Defendant was charged with carried a term of imprisonment of five (5) years, or a death penalty (which was abolished by UNMIK Regulation 1999/24 of 12 December 1999). It was possible to replace the death penalty with a twenty (20) year sentence of imprisonment. The Kosovo Criminal Code provided for a sentence of imprisonment of five (5) years or life imprisonment for the charged offence. Accordingly, the SFRY Criminal Code was more favorable to the perpetrator. The Court found that the court of first instance had erroneously described the Defendant's actions as *deprivation of liberty*, which was not provided

for both by the CC SFRY and the Geneva Convention. According to the said legal provisions the Defendant's actions may be classified as *hostage taking*.

The Court of Appeals found that the court of first instance had erred in assessing the aggravating and mitigating circumstances that had affected the gravity of the sentence. The Court noted that the Defendant had not been found guilty of killing the victim but only of taking the victim hostage, although the victim had been found dead several days later. There was no evidence to support that Defendant had deprived the victim of his life. According to the findings of the Court, the sentence of ten (10) years of imprisonment imposed by the Court of Appeals was adequate to the gravity of the committed criminal offence and to the Defendant's degree of responsibility. It would achieve the purpose of punishment, i.e. the Defendant would not re-offend or commit a new criminal offence. Moreover, the judgment would have a preventive effect on other potential perpetrators.

The HLC Kosovo findings

The analysis of the HLC Kosovo covers the part of the criminal proceedings that took place before the court of first instance during the reporting period, as well as the appellate proceedings following the decision of the court of first instance.

In the analysis of the evidence, the court of first instance fulfilled all the requirements provided for by the legal provisions and, thereby, rendered a convincing judgment that can sustain the appeals before the court of second instance.

The rights of the parties to the proceedings were respected; hence, it can be said that the first instance trial in *The Prosecutor v. Remzi Shala* case was fair. The only objection that can be addressed to the court of first instance in relation to the part of the criminal proceedings that took place during the reporting period is that the panel of the court of first instance, after announcing their decision in the case, did not present the arguments and the evidence they had been guided by in reaching the decision, as foreseen in the provisions of the CPCRK[114].

The HLC Kosovo was not able to attend the session of the Appellate Panel of the Court of Appeals because it had not been informed of the date of this session. Thus, the HLC Kosovo analysed the appellate proceedings on the basis of the available court documents.

[114] Article 366, Paragraph 2 of the CPCK: „The single trial judge or presiding trial judge shall read the enacting clause of the judgment in open court and in the presence of the parties, their legal representatives and authorised representatives and defence counsel, after which he or she shall give a brief account of the grounds for the judgment."

According to the findings of the HLC Kosovo, the judgment of the Special Department of the Court of Appeals is clear and precise. In their judgment, the Court of Appeals addressed and reasoned in detail the allegations set forth in the parties' appeals. This judgment may set an example to other similar and difficult cases.

The HLC Kosovo welcomes the effectiveness of the appellate proceedings that took place before the newly established Special Department of the Kosovo Court of Appeals which held a session of the Appellate Panel in this case one and a half month after the Defendant's appeal had been submitted to the Basic Court of Prizren.

Finally, it should be noted that the announcement of the judgment by the court of first instance was done in an unusual way as it was, with the consent of the court that addressed the media request, broadcast live by the media. With all due respect to the principle of transparency in the work of the judiciary, the HLC Kosovo is not certain if such a practice, if continued, will be beneficial or harmful to the trial panels that will be adjudicating on the most serious criminal offences, as judges will be unnecessarily exposed to the media pressure. Judicial transparency can be very well respected if trials are open to the public and members of the profession.

1.4. Extraordinary legal remedies

1.4.1. The Case: *The Prosecutor v. Skender Bislimi*

On 26 December 2019, in *The Prosecutor v. Skender Bislimi* case, a panel of the Supreme Court of Kosovo, presided over by Judge Valdete Daka[115], rejected as unfounded the request for protection of legality filed by the Defence for the convicted Skender Bislimi against the judgment of the Serious Crimes Department of the Basic Court of Prishtinë/Priština, dated October 25, 2018, and against the judgment of the Serious Crimes Department of the Court of Appeals, dated August 20, 2019.

In the judgment of the Basic Court, the convicted Bislimi was found guilty of the criminal offence of *War Crimes against the Civilian Population* committed in complicity[116], and sentenced to ten (10) years of imprisonment. Acting upon the appeal, the Court of Appeals upheld the sentence imposed on the convicted person.

The course of criminal proceedings[117]
Criminal proceedings in relation to the events of March 26, 1999, which took place during the Kosovo armed conflict in Fushë Kosovë/Kosovo Polje, at the place called the "Intersection", when a large number of Albanian civilians were subjected to physical and psychological ill-treatment, detention and hostage-taking by members of the Serbian armed forces, were officially initiated against the convicted Ivan Radivojević[118] and Skender Bislimi by the Prosecutor's ruling on initiation of investigation dated November 8, 2012.

[115] Members of the Panel adjudicating on the request: Judges Agim Maliqi and Rasim Rasimi.

[116] Provided for and punishable under Article 142, in conjunction with Article 22 of the CC SFRY; at the filing the indictment, punishable under Article 152 as read with Article 31 of the CCRK, in violation of Articles 3 and 4 of the Geneva Conventions of 12 August 1949 and Articles 4 and 5(1) of the Second Protocol of 8 June 1977 additional to the 1949 Geneva Conventions.

[117] This annual report will present in detail the criminal proceedings against the Defendant Bislimi which took place in the course of 2019. The previous phases of the criminal proceedings were presented in the 2016, 2017 and 2018 Annual Reports which can be found on the HLC Kosovo's website: www.hlc-kosovo.org.

[118] The indictment for the criminal offence of *War Crimes against the Civilian Population* was filed against the convicted Radivojević on September 24, 2013. The main trial was opened on January 15, 2014. The judgment was announced on February 12, 2104. Radivojević was found guilty of committing the criminal offence of *War Crimes against the Civilian Population* and sentenced to eight (8) years of imprisonment. In the judgment dated March 24, 2015, the Court of Appeals rejected the appeal of the Defence Counsel filed on behalf of Radivojević, but it amended ex officio the first instance judgment and sentenced Radivojević to six (6) years of imprisonment that credited the time spent in detention since July 26, 2013.

In order to bring the, now, convicted persons to justice, an international arrest warrant was issued against them, in accordance to which Radivojević was arrested on July 26, 2013, while Skender Bislimi was arrested on July 30, 2016 in Bosnia and Herzegovina.

Following the investigation against Bislimi, an international prosecutor[119] filed an indictment against him on January 4, 2017 for the criminal offence of *War Crimes against the Civilian Population* due to the following: on March 26, 1999, at the bus station in Fushë Kosovë/Kosovo Polje, in complicity with at least one known perpetrator[120], as well as with other unknown perpetrators, acting as a member of the Serbian armed forces (reserve police and paramilitary units), Bislimi violated the bodily integrity and health of more than 40 men, Albanian civilians from Kosovo, by applying measures of intimidation and terror, as well as by illegally detaining people and taking them hostages (including the victims Bujar and Hakim Bajrami).

An initial hearing

An initial hearing in *The Prosecutor v. Skender Bislimi* case was opened on April 28, 2017. The second hearing was held on May 31, 2017. The hearings were conducted by Judge Arben Hoti of the Serious Crimes Department of the Basic Court of Prishtinë/Priština. The Defendant and his Defence[121] did not request a rejection of the indictment nor did they object to the supporting evidence. They proposed that three alibi witnesses be heard and a psychiatric observation of the Defendant performed.

The main trial

The main trial before the Trial Panel[122] presided over by Judge Hoti was opened on October 10, 2017. Following the indictment assessment procedure, the Trial Panel was in session for ten (10) days[123]. During the trial, five (5) prosecution witnesses and one (1) defence witness were heard. One prosecution witness was heard in his house, as he was not able to appear in court due to his/her health condition. Material evidence was administered and statements of individual witnesses were read out. The Defendant testified before the Trial Panel, challenging

[119] International Prosecutor Charles Hardaway, in charge of the investigation, filed the indictment and represented it in court till the end of the executive mandate of EULEX in Kosovo.

[120] Details on the criminal proceedings against Ivan Radivojević can be found in footnote 118.

[121] Attorneys Nebojša Vlajić and Miro Delević represented the Defendant during the criminal proceedings.

[122] The Trial Panel was presided over by Judge Arben Hoti; members of the Panels were Shpresa Hasaj Hyseni and Suzana Qerkini.

[123] During the main trial, one (1) witness was heard outside the court building due to his/her health condition. Two (2) sessions were postponed due to technical reasons.

the allegations set forth in the indictment. The parties to the proceedings presented their closing arguments after the completion of the evidentiary proceedings.

The first instance judgment

In the first-instance judgment, announced on October 25, 2018[124], the Defendant Skender Bislimi was found guilty of the following: on March 26, 1999, in Fushë Kosovë/Kosovo Polje, Kosovo, at the bus stop where a large number of Albanian civilians had gathered as they had been forced to leave their homes as a result of violence, the Defendant Bislimi, in concert with at least ten (10) other, known and unknown perpetrators, in complicity with members of the Serbian armed forces (police and paramilitary), had violated the bodily integrity and health of more than 40 men, Albanian civilians, by applying measures of intimidation and terror – first, he had separated the men from the women and children, then he had ordered the men to get on their knees, and then he had beaten them and had forced them to sing Serbian songs. Afterwards, Bislimi had participated in unlawful arrests and hostage taking. Given that Haki Bajrami had been his first neighbour, he had played a major role in Bislimi's identification. He had indicated which persons were to be arrested, after which, Haki Bajrami and Bujar Bajrami had been separated and taken to a *Lada Niva*. Bujar had been released after the intervention of one of his fellow citizens, while Haki had been taken away in the said vehicle. The remains of Haki Bajramia had been found in a mass grave at Arbëra/Dragodan in Prishtinë/Priština after the war.

The Defendant Bislimi was sentenced to ten (10) years of imprisonment that credited the time he had spent in detention since December 9, 2016, when he had been handed over to the Kosovo prosecuting authorities, following the completion of the extradition procedure, and when he had been ordered the measure of one-month detention by a Pre-Trial Judge.

In the judgment announced on October 25, 2018, the Court stated that the Defendant had committed the criminal offence he had been found guilty of on the basis of the evidence administered during the main trial - the witnesses' testimonies, the material evidence, the analysis of each piece of evidence individually and in relation to each other.

The Court found that the Defendant's actions were specified by the law in force at the time of the commission of the criminal offence, namely by Article 142 of the CC SFRY, as well as by the law in force at the time of the trial, i.e. Article 152 of the CCRK. The Defendant's actions were classified as a *War Crime against the*

[124] A copy of the written judgment was served on the parties in the first half of 2019.

Civilian Population in serious violation of Article 3 common to the 1949 Geneva Conventions and the Second Protocol to the 1977 Conventions. The Court emphasised, in particular, that according to the foregoing legal regulations and international conventions it was not obligatory for the perpetrator to be a member of any military, paramilitary or any other formation. The Court also did not dispute that the victim (the late Haki Bajrami) had been found in a mass grave at Arbëra/Dragodan and had been identified on August 17, 2000.

Based on the evidence presented and the testimony of witnesses, it was found that the Bajrami family, like many other families, had been forced to leave their home on the critical day and head for Prishtinë/Priština, where they had thought they would have felt safer because they had received direct threats from different people of Serbian or Roma nationality. It was a fact that the Defendant had been present at the scene - the bus stop in Fushë Kosovë/Kosovo Polje - on the relevant day and that he had been recognized by the witnesses - his first neighbours. Prior to the armed conflict, the Defendant had intensively socialised with Albanian neighbours, everyone had known him well, and he had well known the people who had been at the scene on the critical day. According to the witnesses, that was the reason why he had participated in the segregation of the population, by indicating whom to take away, i.e. the people believed to be a danger to the regime at that time. According to the witnesses, on the relevant day, the Defendant had been wearing plain clothes and holding a stick, and had been accompanied by armed persons and not the population who had been waiting for the bus at the station in order to leave. On the critical day, he had been separating the men from the women and children, forcing the men to kneel, kicking them and forcing them to sing nationalistic Serbian and Chetnik songs.

The Court established on the basis of the foregoing evidence that, on the critical day in Fushë Kosovë/Kosovo Polje, the civilian, unarmed population, including the late Haki Bajrami, had been exposed to insults and violation of the bodily integrity and to ethnic-based humiliation. On that occasion, several Albanian men had been taken hostages and taken away in vehicles. Haki Bajrami, who had later been killed, had been one of them. The Defendant had had a decisive role in separating the late Haki Bajrami, whom he had known as his first neighbour. At one point, he had ordered the victim to give away his little (eight-month old) girl from his arms, after which he had separated him in order for him to be killed. Haki Bajrami had been an activist of the Democratic Alliance of Kosovo (DAK). Numerous meetings of this party, which had tried to oppose the Milošević regime in a peaceful manner, had been organized in his house during that period.

On the basis of the administered evidence, it was established that the witnesses had identified the Defendant Bislimi on a photo line-up shown to them during the 2012

investigation. Some witnesses had mentioned him in their statements during the main trial in *The Prosecutor v. Ivan Radivojević* case, held in 2013 and 2014.

The Court also analysed the claims of the Defence Counsel who alleged that the Defendant had been living with his family in the Republic of Serbia during the critical period. The evidence the Defendant and his Defence had presented to the Court to support his alibi consisted of a birth certificate of one of the Defendant's children. According to the Court's findings, the evidence submitted did not confirm the Defendant's alibi. The birth certificate referred to 1998, that is, nine (9) months before the critical event. The fact that the Defendant's wife had lived with their children in Kruševac (Serbia) did not in any way deny the fact that the Defendant had been at the crime scene on a critical day, especially given the fact that members of the Roma national minority had been allowed to move freely during the critical period in this region.

The appellate proceedings

The Defence Counsel filed with the Serious Crimes Department of the Basic Court of Prishtinë/Priština an appeal against the judgment dated October 25, 2019 wherein the Defendant Skender Bislimi was sentenced to ten (10) years of imprisonment for the criminal offence of *War Crimes against the Civilian Population*. Attorney Nebojša Vlajić from Mitrovicë/Mitrovica challenged the judgment due to an erroneous determination of the factual situation, violations of the criminal law and the decision on punishment.

According to the allegations in the appeal, an erroneous determination of the factual situation existed when a decisive fact had been erroneously established by the Court. The erroneous determination of the factual situation had led the Court to reach an erroneous conclusion and to classify the offence as a *war crime*. This constituted a violation of the criminal law as what the Defendant Bislimi was charged with did not constitute a criminal offence he was convicted of, but could be another offence (e.g. murder, aggravated murder, incitement, abduction). The erroneous determination of the factual situation had led to the erroneous application of the criminal law and the Geneva Conventions.

In his appeal, Attorney Vlajić stated, inter alia, that the Court, when rendering their decision, had not taken into account the arguments of the Defence stated in the closing statement; hence, he stated them in the appeal once again so that the Court of Appeals would reconsider them. According to the appeal, even if Skender Bislimi had been present at the crime scene, he could not have been a perpetrator of any criminal offence, especially the criminal offence of *War Crimes against the Civilian Population*, which according to Article 142 of the CCSFRY

could be committed only by "*a member of the military, police or administration and, naturally, by a person, in their service. If a person, deemed as not belonging to such an organizational system, committed any of the acts referred to in this Article (e.g. murder, pillaging), s/he would not be held liable for a war crime, but for the relevant offence, regardless of the fact that it was committed in wartime*".

In his appeal, the Defence Counsel presented the discrepancies in the testimonies of the prosecution witnesses given during the main trial and the testimonies from the earlier stages of the proceedings, as well as the fact that the witnesses had not been precise in their testimony in describing the role of the Defendant on the critical day at the scene and even in proving his presence.

According to the Counsel, even if the Defendant had been present at the scene, clod in a uniform and carrying rifle, that would not be sufficient for a conviction. Mere presence at the scene did not make anyone a perpetrator i.e. a criminal. Everything the witnesses had stated in their testimonies did not confirm anything that was punishable.

In his appeal, the attorney supported the statement of a defence witness. According to the appeal, the witness made it clear where her family had been living during the armed conflict in Kosovo, when they had left Fushë Kosovë/Kosovo Polje, and which children had been born in Serbia where the Defendant and the witness had been living.

According to the allegations in the appeal, the Defendant's actions did not contain the elements of the criminal offence of which he was found guilty. When deciding on the appeal, the court of second instance must, therefore, take into account the final judgment in relation to the events of March 26, 1999 rendered against Ivan Radivojević, as his role was disproportionate to that of the Defendant Bislimi. He had been a uniformed member of the police force, who had participated in many actions but had been given a more lenient sentence. The Defence wondered whether it was because an international panel had been adjudicating in Radivojevic's case while it had been a local one adjudicating in Bislimi's case.

In the end, the attorney proposed that, given the foregoing, the Court of Appeals should grant the appeal, render a judgment of acquittal, terminate the Defendant's detention, or impose a more lenient sentence in view of the allegations set forth in the appeal.

The judgment of guilty rendered by the Basic Court of Prishtinë/Priština was also impugned by the Defendant's Counsel, attorney Miro Delević from Zveçan/

Zvečan due to substantial violations of the provisions of criminal procedure, violations of the criminal law and an erroneous and incomplete determination of the factual situation. He moved the Court of Appeals to modify the first instance judgment, acquit the Defendant or remit the case to the court of first instance for reconsideration and re-adjudication.

According to the Defence Counsel, the first instance judgment did not clearly explain the relevant facts on the basis of which the judgment was rendered as they were unclear and incomprehensible. The enacting clause of the judgment was contradictory to the facts and reasons stated in the reasoning of the judgment. In support of his allegations, attorney Delević stated the legal provisions that explained the errors of the Court during the criminal proceedings and while drafting the written judgment.

Attorney Delević objected to the Court's findings and conclusions, as well as to the evidence on which the Trial Panel rendered the judgment of conviction. In this appeal, too, there were objections to the assessment of the testimony of the alibi witness and non-admission of the alibi evidence.

The Defence Counsel also stated that the Defendant had not completed his military service, that he had not been a member of the armed forces, that he had been an ordinary citizen, a peasant, not educated at all, a person who had not been aware of the legal provisions or international regulations. Even if it was true that he had insulted or beaten the civilians with a stick, his sole aim was to adulate the authorities - the armed forces - in order to get some food for his big family. From the psychological point of view, he had not been aware of the actions that constituted *War Crimes,* nor had he wanted to commit them. If he had been aware, he would not have consented to such behaviour. According to the Defence Counsel, the court of first instance had also violated the provision of criminal procedure in relation to the deadline for serving the written judgment, which had been rendered on October 25, 2018, while it had been delivered to the parties on June 20, 2019, i.e. eight (8) months after the announcement.

The Court of Appeals' judgment

Acting upon the appeals of the Defence Counsels Nebojša Vlajić and Miro Delević in *The Prosecutor v. Skender Bislimi* case, the Appellate Panel of the Serious Crimes Department of the Court of Appeals, presided over by Judge Abdullah Ahmeti[125], rendered a judgment in a session held on August 20, 2019 wherein the Defence Counsels' appeals filed against the judgment of the Serious Crimes

[125] Members of the Appellate Panel: Judges Driton Muharremi and Vaton Durguti.

Department of the Basic Court of Prishtinë/Priština, dated October 25, 2018 were rejected as unfounded and the first instance judgment affirmed.

The session of the Court of Appeals was organised pursuant to Article 390, Paragraph 1 of the CPCRK[126]. The session of the Court of Appeals was attended by the Defendant (who was brought from the detention centre), his Defence Counsel and some of the injured parties. The session was not attended by the Appellate Prosecutor although he had been duly summoned.

During the session, the Defence Counsels stood by the written appeals submitted to the Court. The Defendant supported the allegations of his Defence Counsels during the session, noting that he had not committed the charged criminal offence. He asked the Court of Appeals to acquit him.

In a letter dated July 17, 2019 (KTŽ/PPA No. 321/2019), the Appellate Prosecutor moved the court of second instance to reject the Defence Counsels' appeals as unfounded and to uphold the first instance judgment.

After analysing the evidence, the Court of Appeals found that the Defence Counsels' appeals were unfounded. According to the findings of the Court of Appeals, the judgment appealed by the Defence Counsels did not contain violations of the provisions of criminal procedure, or the violations that the court had had to take into account ex officio. In their judgment, the Basic Court had reasoned all relevant facts, each individual piece of evidence as well as their interrelation. The Court had established the facts in a proper and lawful manner. The facts had been established on the basis of the material and immaterial evidence, by hearing both the prosecution and the defence witnesses. Moreover, during the proceedings, the statements of individual witnesses had been read with the consent of the parties.

According to the findings of the court of second instance, the allegations set forth in the Defence Counsels' appeals were unsubstantiated. The judgment contains brief accounts of the witnesses' statements affirming the first instance judgment.

The Court of Appeals also found that the Defence Counsels' allegations presented in the appeals in relation to the decision on the punishment imposed on the Defendant were unfounded. According to the Court of Appeals, the appeals did not present any new circumstances that had not been considered by the court of first instance when sentencing. The Court found the Defence Counsels' assessment of the sentence as

[126] Article 390, Paragraph 1 of the CPCRK: "When an imprisonment sentence was imposed on the accused, the notification of the session of the appeal panel shall be sent to the state prosecutor, to an injured party, and to the accused and his/her defence counsel".

unfounded and insufficiently reasoned. According to the court of second instance, aggravating and mitigating circumstances had been considered in detail in the process of sentencing. The sentence imposed by the court of first instance is in harmony with the intensity of the social danger the criminal offence may pose as well as with the degree of the criminal liability of the Defendant. The purpose of the punishment could be achieved within the meaning of Article 41 of the CCRK.

The request for protection of legality

After receiving the judgment of the Court of Appeals dated August 20, 2019 wherein the Defence Counsels' appeals were rejected as unfounded (whereby the judgment of the Serious Crimes Department of the Basic Court of Prishtinë/Priština dated October 25, 2018 became final), the Defence Counsel for the now convicted Skender Bislimi, attorney Miro Delević from Zveçan/Zvečan, submitted to the Supreme Court a request for protection of legality against the judgment of the Serious Crimes Department of the Basic Court of Prishtinë/Priština, dated October 25, 2018, and the judgment of the Serious Crimes Department of the Court of Appeals dated August 20, 2019, on the grounds of substantial violations of criminal procedure and violations of the criminal law. The Defence moved the Supreme Court of Kosovo to grant the request, amend the judgment of the Basic Court, acquit the Defendant of the criminal offence of *War Crimes against the Civilian Population* or annul the said judgment and remit the case to a retrial and re-adjudication.

In their opinion dated December 13, 2019 (ZZZ/KML no. 245/2019), the State Prosecutor's Office proposed that the request for protection of legality filed by the Defence Counsel for the convicted Bislimi be rejected as unfounded.

In his request, the Defence Counsel emphasised that the criminal proceedings against the Defendant had not respected the provisions of criminal procedure. The judgment violated Article 1, Paragraph 2 of the CPCK as well as the Constitution of Kosovo. The foregoing Article of the Criminal Procedure Code stipulates that no innocent person shall be convicted, and that a punishment shall only be imposed on a perpetrator under the conditions provided for by the Criminal Code after fair and lawful proceedings have been carried out.

The Code also foresees that all participants in criminal proceedings (court, prosecution, police) have a duty to truthfully and completely establish the facts that are important for rendering a decision; to establish with equal attention the facts against the defendant as well as those in his or her favor, and to make available to the defence all the facts during all phases of the proceedings.

The detention measure may be ordered only under conditions and in accordance with legal provisions. The duration of detention must always be as short as possible. In cases where the defendant is in detention, all authorities involved in the proceedings have the duty to act with extreme urgency.

In the judgment, all proven or unproven circumstances must be exhaustively presented. The court is obliged to pay special attention to the contradictory evidence, as well as to the reasons why it did not admit some of the evidence, and what reasons it was guided by when dealing with legal issues, especially in cases of a criminal offence and criminal liability of the accused. According to the request for protection of legality, the first instance judgment stated that it had been rendered after the facts had been established on the basis of the witnesses' testimonies and the evidence presented during the main trial, although, as set forth in the request, the material evidence had not been presented during the trial.

According to the request, only members of the military or other formations could commit the criminal offence of *War Crimes against the Civilian Population*. The perpetrator of the said offence could be a person issuing orders or a direct executor and not every person as claimed in the first instance judgment. According to the Defence Counsel, the Defendant, in any case, could not have been the perpetrator of the charged offence as he had not completed his military service, he was uneducated and unemployed. He could have committed other offences, but not a *war crime*, for, in order for a *war crime* to exist, it was necessary that the provisions of international law and international conventions were violated, which obliged active participants to abide by the rules of war. As the Defendant had not been an active participant on either side of the conflict, ha could not have been the perpetrator of the charged offence.

The request stated that the enacting clause of the judgment was contradictory to the reasoning part. The judgment alleged that the Defendant had violated the bodily integrity and health of forty men, although the names of the victims were not listed. The Defendant's actions did not contain the elements of the charged offence. Even if he had acted as stated in the judgment, his actions did not have the character of inhumane treatment; no injuries had been inflicted on the injured person and no suffering had been caused.

The Supreme Court judgment

After reviewing the request for protection of legality and analysing the case file, the Supreme Court concluded that the Defence Counsel's request was unfounded. The judgments against which the request was filed did not contain substantial violations of criminal procedure or the criminal law.

The court of first instance clearly presented its findings in the reasoning of the judgment in respect of the criminal offence the convicted person was charged with by reference to the provisions of Article 142 of the CC SFRY. The charged offence was also punishable under the provisions of Article 152 of the CCRK. This Court found that the Defendant's actions manifested objective and subjective elements of the charged criminal offence.

According to the findings of the Supreme Court, the court of first instance had properly assessed the provisions of Article 142 of the CC SFRY. That criminal offence could have been committed by anyone. It was not necessary for the perpetrator to be a member of a particular armed military, paramilitary or other formation. However, in that particular case, it was important to establish the intent of the convicted person. According to the first instance judgment, it followed that the convicted person had been among ten (10) other known and unknown persons who had acted in concert with members of the Serbian armed forces, and that they had violated the bodily integrity and health of Albanian male civilians. They had ordered them to kneel and they had beaten them. The role of the convicted person in identifying the late Haki Bajrami, who had subsequently been taken by car to an unknown direction and whose whereabouts had not been known until his remains had been found in a mass grave in Prishtinë/Priština had been particularly described. The court of first instance had properly assessed the actions of the convicted person containing the elements of the offence he had been found guilty of and for which he had been punished. His actions had been directed against the civilian population.

As to the allegation that the enacting clause of the first instance judgment was unclear, i.e. that the names of all the victims were not mentioned in it, the Supreme Court found that the said circumstance did not make the enacting clause of the judgment unclear.

The request for the protection of legality was filed on the grounds of substantial violations of criminal procedure. In fact, the request also emphasised the circumstances relating to the erroneous and incomplete determination of the factual situation, which the Supreme Court did not consider, having applied Article 432, Paragraph 2 of the CPCRK[127]. The Supreme Court did not also consider the allegations related to Article 370, Paragraph 7 of the CPCRK[128], as it stated that

[127] Article 432, Paragraph 2 of the CPCRK: "A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon".

[128] "The court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. The court shall also, in particular, make an evaluation of the credibility of conflicting evidence, the grounds for not approving individual motions of the

the request did not emphasise a specific violation, but that it only cited the legal provision.

The HLC Kosovo findings

This analysis of *The Prosecutor v. Skender Bislimi* case has covered the criminal proceedings following the announcement of the first instance judgment on October 25, 2018.

In the first-instance judgment it was ruled that the time spent in detention on remand, on the basis of the respective orders issued by the court of first instance after December 9, 2016, would be credited towards the sentence imposed. However, the time Bislimi spent in extradition detention following his arrest on July 30, 2016 in Bosnia and Herzegovina upon an international warrant issued against him by EULEX would not be credited towards the sentence[129].

The HLC Kosovo has no official information when a written copy of the first instance judgment in the Albanian language was prepared. According to the information in the case file, i.e. the documentation from the appellate proceedings, the Defence Counsels submitted to the court their appeals against the first instance judgment in early July 2019. As the deadline for filing an appeal is fifteen (15) days, it follows that the judgment was served on the parties in the second half of June 2019[130]. When drafting the 2018 report, the HLC Kosovo was in possession of the information that the drafting of the judgment was delayed due to the excessive workload of the Presiding Trial Judge. Even then, we had no information whether there were any formal decisions wherein the deadline for drafting the judgment was extended. Pursuant to the provisions of the Criminal Procedure Code, courts must always keep in mind the deadlines for serving the judgments and must act with urgency in cases where the defendants are in detention on remand.

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parties, and the reasons by which the court was guided in settling points of law and, in particular, in establishing the existence of a criminal offence and the criminal liability of the accused, as well as in applying specific provisions of criminal law to the accused and his or her act."

[129] Article 83, Paragraph 1 of the CCRK which entered into force on January 1, 2013, as well as Article 79 of the CCRK which entered into force in mid-April 2019 provide for the following: "Time served in detention, house arrest as well as any period of deprivation of liberty related to the criminal offence shall be included in the punishment of imprisonment and of a fine".

[130] Article 369, Paragraph 1 of the CPCRK: "The judgment shall be drawn up in writing within fifteen (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 thirty (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 sixty (60) more days for the judgment to be drawn up".

Analysing the entire criminal proceedings against Bislimi - the court documentation of the case in the languages in which the proceedings took place - the HLC Kosovo finds that the Serbian translation of the Court of Appeal's judgment does not coincide with the original judgment. Some parts are missing or have been completely omitted from the translation, while some of the existing parts have been modified in relation to the authentic Albanian text, which is unacceptable, both from the point of view of the rights of the convicted person, who is an equal party to the proceedings, but also from the standpoint of language equality.

The judgment of the Supreme Court of Kosovo rendered upon extraordinary legal remedies is also brief; however, it does contain all the elements provided for by the law.

However, in addition to the courts that ruled during the earlier stages of the proceedings, this Court too, did not deal with the legal provisions regarding sentencing. Therefore, the following remains unknown: what law was applied to sentencing, which law was more favorable to the convicted person, and what punishment was foreseen by the law for the criminal offence for which Bislimi was convicted.

CASES PERTAINING TO WAR CRIMES, ETHNICALLY AND POLITICALLY MOTIVATED CRIMES

2.1.1. The Case: *The Prosecutor v. Nedeljko Spasojević et alia*[131]

On December 30, 2019, an initial hearing was held before the Presiding Trial Judge of the Special Department of the Basic Court of Priština/Prishtinë, Valon Kurtaj[132], in *The Prosecutor v. Nedeljko Spasojević et al.*[133] case upon the SPRK indictment dated December 2, 2019 (KTRS/PPS No. 24/2018), as amended on December 27, 2019.

The Defendants were charged with one or more criminal offences which they had committed as members of a criminal group, that is, they were accused of participating or aiding and abetting the commission of the criminal offence of *Aggravated Murder* - the killing of a Serbian politician Oliver Ivanović on January 16, 2018.

The Defendants Nedeljko Spasojević and Žarko Jovanović were also charged with the criminal offence of *Unauthorised Ownership, Control or Possession of Weapons*[134].

The course of the preliminary criminal investigation
An official investigation into the murder of Oliver Ivanović, that took place on January 16, 2018, shortly after 8:00 a.m. in Mitrovicë/Mitrovica (64 Sutjeska Street) in front of the headquarters of the Civic Initiative "Freedom, Democracy, Justice" (FDJ), was initiated on the same day.

On October 17, 2018, the Kosovo Police Serious Crime Investigation Directorate (SCID) filed with the SPRK a criminal report against unknown persons who had taken part in Ivanović's murder on January 16, 2018.

According to the criminal report, on the critical date, around 08:14 hrs., fire was opened from a 9mm caliber weapon from an *Opel Astra* vehicle that was on the move, with no registration plates and with tinted windows. Six (6) bullets were fired at Ivanović while he was going to work. He sustained grievous bodily harm

[131] A part of the preliminary criminal investigation against the then suspects Nedeljko Spasojević, Marko Rošić and Dragiša Marković was presented in the 2018 Annual Report.

[132] Acting as a Single Trial Judge at the hearing.

[133] Co-Defendants: Marko Rošić, Silvana Arsović, Dragiša Marković, Žarko Jovanović and Rade Basara.

[134] Provided for and punishable under Article 374, Paragraph 1 of the CCRK (2012).

and soon died in the regional hospital in the northern part of Mitrovicë/Mitrovica. The vehicle from which the shots were fired was found on fire 1,500 meters away from the place where the murder was committed.

In addition to unknown persons, the criminal report included the suspects Nedeljko Spasojević, Marko Rošić and Silvana Arsović.

According to the foregoing criminal report, the suspect Nedeljko Spasojević assisted unknown perpetrators in the commission of the crime of *Aggravated Murder*, before and after the crime was committed, by creating conditions and removing obstacles to the commission of the criminal offence. The suspect Spasojević was charged with the possession a weapon in the course of the investigation, on November 23, 2018, when he was arrested, which he had kept without any licence from the competent authorities.

As stated in the criminal report, the suspect Rošić aided the commission of the murder by closely collaborating with the suspects prior to the commission of the offence.

In the criminal report, Silvana Arsović is suspected of having collaborated closely with the perpetrators of the murder, knowingly and intentionally assisting the murder by creating conditions and removing obstacles to the murder of Oliver Ivanović. She had knowledge of the fact that the cameras in the premises of the Civic Initiative had been forcibly shut down, so that neither the murder nor the perpetrators of the murder could be recorded. According to the report, she turned the cameras on two (2) minutes after the murder and after the perpetrators had left the scene.

Acting upon the criminal report, on November 23, 2018, the SPRK issued a ruling to detain the suspects Nedeljko Spasojević (a KP member, an investigator at the North Mitrovicë/Mitrovica Police Station), Marko Rošić and Dragiša Marković (a KP member). The suspects were arrested on the same day. The Prosecution Office filed with the Serious Crimes Department of the Basic Court of Prishtinë/Priština an application for detention on remand against the arrested persons on suspicion of their involvement in the commission of the criminal offence of *Aggravated Murder*.

A hearing was held before the foregoing department of the Basic Court on November 24, 2018 to consider the Prosecution's application for ordering security measures. On the same day, a ruling was rendered on one-month detention on remand against the suspects Spasojević and Rošić on suspicion of having committed the criminal offence of aiding and abetting the commission of the criminal offence of

Aggravated Murder[135], and against the suspect Marković on grounded suspicion of having committed the criminal offence of *Disclosing Official Secrets*[136].

Through their Defence Counsels, the suspects impugned the ruling on the detention measure. At a session held on December 4, 2018, the Appellate Panel of the Serious Crimes Department of the Court of Appeals, presided over by Judge Xhevdet Abazi[137], issued a ruling wherein the suspects' appeals were granted and the ruling of the Basic Court dated November 24, 2018 annulled ex officio. According to the Court of Appeals, the court of first instance had not clearly reasoned the decisive facts in their ruling on ordering the detention measure against the suspects. The case was remitted to the court of first instance to re-adjudicate and reconsider the ruling on the detention measure. In their decision, the Court of Appeals proposed that the suspects remain detained pending a new decision on the application for detention on remand.

Following the instructions of the court of second instance, Isuf Makolli, a Pre-Trial Judge of the Serious Crimes Department of the Basic Court of Prishtinë/Priština, held a new hearing on December 17, 2018 to reconsider the Prosecution's application for detention on remand against the suspects and issued a ruling on the basis of which this measure remained in force.

The detention measure against these three suspects had regularly been extended until February 19, 2019, when the detention measure[138] against the suspect Dragiša Marković was terminated. The rulings on detention on remand against the suspects were challenged in the appeals filed by their Defence Counsels that were rejected as unfounded. In the ruling rendered by the court of second instance, the requests of the Defence Counsels to release the suspects pending trial were rejected, inter alia, due to a risk of flight, as all the suspects were citizens of the Republic of Serbia and could very easily leave the territory of Kosovo.

According to the indictment, the SCID filed its first criminal report on February 12, 2018, against the suspects Žarko Jovanović[139] and Dragiša Marković on suspicion that they had tampered with evidence, that they had failed to secure the crime scene, even though they had been the first to arrive and, that they had disclosed

[135] Provided for and punishable under Article 179, Paragraph 3, in conjunction with Article 33, Paragraph 2 and Article 34, Paragraph 2, and Article 34 of the CCRK.

[136] Provided for and punishable under Article 433, Paragraph 2 of the CCRK.

[137] Members of the Appellate Panel: Judges Mejreme Memaj and Nenad Lazić.

[138] Co-Defendants Spasojević and Rošić are still in detention on remand.

[139] During the investigation, the suspect was apprehended and placed in 48-hour detention in line with the police order.

confidential information from the scene. Jovanović was suspected of having manipulated the evidence on the critical day by taking one bullet case from the spot and by putting it in his pocket, and of being in possession of a weapon on February 18, 2018 for which he had not obtained the licence from the competent authorities[140].

On February 11, 2019, the aforementioned Kosovo Police Directorate filed a supplement to the criminal report against the suspects Milan Radoičić, Nedeljko Spasojević and Marko Rošić on suspicion that they had committed several criminal offences as members of a criminal group. According to the supplement, the suspect Spasojević had closely collaborated with the criminal group led by Milan Radoičić and Zvonko Veselinović, and he, as a member of the criminal group, had cooperated with the perpetrators of the murder of Oliver Ivanović, before and after the killing, by allowing them to move freely and to leave the scene, as well as by facilitating that, when the members of the group in northern Mitrovica, led by Radojčić and Veselinović, would commit criminal offences, no investigation would be conducted against them.

On October 10, 2019, the Serious Crime Investigation Directorate filed a supplement to the criminal report against the Defendant Željko Bojić and Rade Basara. Bojić was accused of close collaboration with Radoičić's and Veselinović's criminal group, while Basara, a member of the foregoing group, was accused of failure to carry out official duties which he, as an investigator at the North Mitrovicë/Mitrovica Police Station, was supposed to perform in the cases where the suspects were perpetrators of certain criminal offences.

The indictment dated December 2, 2019

On December 2, 2019, SPRK State Prosecutor Sylë Hoxha filed an indictment against Nedeljko Spasojević, Marko Rošić, Silvana Arsović, Dragiša Marković, Žarko Jovanović and Rade Basara in relation to the murder of Oliver Ivanović.

The Defendants Nedeljko Spasojević, Marko Rošić and Rade Basara were charged with the following: together with the suspects who were on the run, (Milan Radoičić, Zvonko Veselinović and Željko Bojić), they were acting within an organised criminal group (hierarchically organised and structured, with well-defined roles), i.e. a group that was not accidentally established as far as in 2011, and led by Zvonko Veselinović and Milan Radoičić. Within this group, all the Defendants acted in complicity - continuously, knowingly and intentionally – in order to reach the objectives of the organization. They committed many criminal offences that carried a term of imprisonment of minimum four (4) years. They

[140] The HLC Kosovo does not have any information on what steps the Prosection Office took after the criminal report had been filed.

actively participated in the criminal activities of the group, knowing that their participation would contribute to the realization of the criminal activities of that group, for the purpose of obtaining direct or indirect financial or other material gain, such as expanding control of the territory, as well as political control in the northern part of Mitrovicë/Mitrovica. This group committed the criminal offences of *Aggravated Murder*, aiding and abetting the criminal offence of *Aggravated Murder*, *Abusing Official Position* and *Causing General Danger* in the territory of the Republic of Kosovo. Each of the members of the group carried out criminal activities, which, in the specific case, led to the death of Oliver Ivanović.

According to the indictment:

a) Acting within the group, the Defendant Nedeljko Spasojević aided and abetted the commission of the criminal offence of *Aggravated Murder*, i.e. he created the conditions and removed the obstacles by transporting unknown perpetrators the day before the crime to the outskirts of the town, to the place where the *Opel Astra* vehicle had been parked from which shots were fired at the victim the following day;

b) Acting as a member of the criminal group and having a specific role, the Defendant Marko Rošić aided and abetted the commission of the criminal offence of *Aggravated Murder*. Prior to the murder of Oliver Ivanović he had been monitoring the movement of the victim by using his Santa Fe vehicle with the registration plates KM-014-FZ;

c) Acting as a member of the criminal group and at the same time being a police investigator, the Defendant Rade Basara, by using his official position and authority in order to obtain profit for himself or others, did not perform official duties he was required to carry out. Under the influence of the leader of the criminal group, he was selecting cases, removing evidence and hiding clues so that the cases wherein the suspects were members of the foregoing criminal group would not be resolved or investigated. By doing so, he did not perform the duties he was required to by the law.

The alleged actions of the Defendants were classified by the Prosecutor as the criminal offence of *Participation in an Organised Criminal Group*[141].

In the indictment dated December 2, 2019, the Defendant Nedeljko Spasojević was also charged with having facilitated the movement of direct perpetrators of

[141] Provided for and punishable under Article 283, Paragraph 3, as read with Paragraph 1 of the CCRK.

the murder of Oliver Ivanović on the day the latter was killed. On the critical day, the Defendant Spasojević, together with two other police officers who first arrived at the scene, Žarko Jovanović and Dragiša Marković, did not complete the tasks and duties he was obliged to perform at the scene, i.e. they did not prevent unauthorised persons from taking photographs and damaging possible evidence at the scene where the murder of Oliver Ivanović had taken place. Thereby, he committed the criminal offence of *Abusing Official Position or Authority*[142].

Acting in close cooperation with unknown suspects, the Defendant Nedeljko Spasojević knowingly and intentionally aided and abetted unknown perpetrators in the commission of the criminal offence of *Aggravated Murder*, i.e. he facilitated the conditions for this offence by removing the obstacles and allowing the unknown perpetrators to drive an official police vehicle as well as a blue *Opel Astra* with tinted windows from which shots were fired in the direction of Oliver Ivanović. The Defendant allowed free movement of the vehicle. On the critical day, the Defendant Spasojević, together with two other police officers who first arrived at the scene, Žarko Jovanović and Dragiša Marković, did not undertake actions to secure the crime scene, but allowed unauthorised persons to take photographs and destroy evidence at the scene where the murder had taken place. Thereby, he committed the committing the criminal offence of aiding and abetting *Aggravated Murder*[143].

According to this indictment, on November 23, 2019, the Defendant Spasojević was in possession of the following weapons in his house: an AK-47 7.62x39 automatic rifle, an AK-47 magazine, 106 7,62x39 mm bullets, one hand grenade, an AK-47 grenade launcher and one military vest - without any licence issued by the competent authorities. Thereby, he committed the criminal offence of *Unlawful Ownership, Possession and Control of Weapons*[144].

The Defendant Marko Rošić is charged with close collaboration with the Defendants Nedeljko Spasojević and Rade Basara, as well as the suspected fugitives Milan Radoičić, Zvonko Veselinović and Željko Bojić. He knowingly and intentionally aided and abetted the commission of the criminal offence of *Aggravated Murder* by monitoring the victim's movement from his car. Following the murder, a piece of paper was found in the pocket of the late Oliver Ivanović containing the registration number of the vehicle owned by the Defendant (a black SUV *Santa*

[142] Provided for and punishable under Article 422, Paragraph 2, item 2.2 of the CCRK.

[143] Provided for and punishable under Article 179, Paragraph 1, as read with Article 33, Paragraph 2 of the CCRK.

[144] Provided for and punishable under Article 374, Paragraph 1 of the CCRK.

Fe, registration plates KM-014-FZ). Following the murder of Oliver Ivanović, the same vehicle also followed his brother, Miroslav Ivanović. Thereby, he committed the criminal offence of aiding and abetting the commission of the criminal offence of *Aggravated Murder*[145].

The Defendant Rade Basara, in his capacity of an official – an investigator at the North Mitrovicë/Mitrovica Regional Unit, did not perform the duties he was required to do. Through Željko Bojić who has been on the run, he closely collaborated with the organised crime group of Milan Radoičić, and did not undertake any investigative actions he should have undertaken in the cases where the offences had been committed by members of the group. He was concealing or destroying the evidence of the criminal offences committed by members of the group in order for the cases to remain unresolved. Thereby, he committed the criminal offence of *Abusing Official Position or Authority*[146].

In close collaboration with the Defendants who coordinated the murder of Oliver Ivanović, the Defendant Silvana Arsović aided and abetted the commission of the criminal offence of *Aggravated Murder* by providing the conditions and removing the obstacles to the commission of this criminal offence. At the time of the attack on Oliver Ivanović, i.e. his murder, she was aware that the security cameras in the FDJ premises had forcibly been disconnected from the power grid, so that the moment of Ivanović's murder would not be recorded. On January 16, 2018, at 8:16 a.m., a few minutes after Ivanović's murder, she activated the security cameras in the FDJ premises, where she worked as an administrative assistant. According to the indictment, she was the only person in the office at the time of the murder. Thereby, she committed aiding and abetting the criminal offence of *Aggravated Murder*[147].

The Defendant Dragiša Marković is charged with the following: on the critical day, after the murder of Oliver Ivanović, acting as a police officer, he, without any authorisation, disclosed from the crime scene the information that was an official secret by conveying it to a Serbian police officer in order for this information to be released or used outside the Republic of Kosovo. Thereby, he committed the criminal offence of *Disclosing Official Secrets*[148].
Acting in their capacity of police officers, the Defendants Dragiša Marković and

[145] Provided for and punishable under Article 179, in conjunction with Article 33, Paragraph 2 of the CCRK.

[146] Provided for and punishable under Article 422, Paragraph 1, as read with Paragraph 2, item 2.2, in conjunction with Article 31 of the CCRK.

[147] Provided for and punishable under Article 179, in conjunction with Article 33, Paragraph 2 of the CCRK.

[148] Provided for and punishable under Article 433, Paragraph 2 of the CCRK.

Žarko Jovanović abused their official position on the critical day in order to obtain profit for themselves or others by intentionally not taking the actions they, as police officers, were obliged to take after the murder of Oliver Ivanović. They immediately left the scene without taking the actions they were supposed to take; they did not secure the scene, and, by doing so, they allowed other persons to intervene on the spot, to damage material evidence and to leave the scene. Thereby, they committed the criminal offence of *Abusing Official Position*[149].

In their official capacity, the Defendants Dragiša Marković and Žarko Jovanović went to the crime scene on the critical day immediately after the murder of Oliver Ivanović in order to remove or hide and damage the evidence so that the evidence could not be used during the evidentiary proceedings. The Defendant Marković pointed his finger at the evidence - a bullet case, which Žarko Jovanović took and put in his pocket, after which they left the scene. Thereby, they committed the criminal offence of *Tampering with Evidence*[150].

The Defendant Žarko Jovanović was in possession of a TT 7.62 mm weapon, serial number C-91769, with nine (9) same caliber bullets, which was found during the search of his apartment on February 10, 2018, for which he, at the time of the search, did not have a licence issued by the competent authorities. Thereby, he committed the criminal offence of *Unauthorised Ownership, Control or Possession of Weapons*[151].

In the indictment, the Prosecutor proposed that the detention measure be extended against the Defendants who had already been detained (Nedeljko Spasojević, Marko Rošić, Rade Basara) and that the measure of house detention be ordered against the Defendants Silvana Arsović, Dragiša Marković and Žarko Jovanović.

An initial hearing:
Acting upon the indictment, Judge Valon Kurtaj of the Special Department of the Basic Court of Prishtinë/Priština scheduled an initial hearing for December 30, 2019.

Prior to the scheduled initial hearing, on December 27, 2019, the SPRK submitted a new indictment to the Special Department of the Basic Court of Prishtinë/Priština against the same Defendants. The new indictment was compiled on the basis of the same evidence; yet, it was modified.

[149] Provided for and punishable under Article 422, Paragraph 1, as read with Paragraph 2, item 2.2, in conjunction with Article 31 of the CCRK.

[150] Provided for and punishable under Article 397, Paragraph 1, in conjunction with Article 31 of the CCRK.

[151] Provided for and punishable under Article 374, Paragraph 1 of the CCRK. In the indictment, the Special Prosecutor classified the Defendants' actions under the 2012 CCRK.

The new indictment charged the Defendants Nedeljko Spasojević, Marko Rošić, Rade Basara and Silvana Arsović with the following: in complicity with Milan Radoičić, Zvonko Veselinović and Željko Bojić (who were on the run), they were acting within an organised criminal group, hierarchically organised and structured, with well-defined roles, i.e. a group that was not accidentally established and that was active since 2011. The group was led by Zvonko Veselinović and Milan Radoičić. Members of the group acted in complicity - continuously, knowingly and intentionally – with the goals and activities of the organised criminal group aimed at committing one or more criminal offences. They participated in the criminal activities of the group, knowing that their participation would contribute to the criminal activities of that group, for the purpose of obtaining direct or indirect financial or other material gain, as well as of expanding control of the territory where they had business operations, as well as political control in the northern part of Mitrovicë/Mitrovica.

This group committed the criminal offences of *Aggravated Murder*, aiding and abetting the commission of the criminal offence of *Aggravated Murder*, *Abusing Official Position* and *Causing General Danger* in the territory of Kosovo. This criminal group organised the murder of Oliver Ivanović by undertaking the activities described in respective enacting clauses of the indictment dated December 2, 2019. By doing so, the Defendants committed the criminal offence of *Participation in or Organisation of an Organised Criminal Group*[152] in connection with the criminal offences of aiding and abetting the commission of the criminal offence of *Aggravated Murder*, *Abusing Official Position* (the Defendant Nedeljko Spasojević), the criminal offence of aiding and abetting the commission of the criminal offence of *Aggravated Murder*, (the Defendant Marko Rošić), the criminal offence of *Abusing Official Position* (the Defendant Rade Basara) and aiding and abetting the commission of the criminal offence of *Aggravated Murder* (the Defendant Silvana Arsović).

In the new indictment:
- Nedeljko Spasojević was charged with the commission of the criminal offence of *Unauthorised Ownership, Control or Possession of Weapons*, where the description of the actions remained the same as in the original indictment;
- Dragiša Marković was charged with the commission of the criminal offence of *Disclosing Official Secrets*, where the description of the actions remained the same as in the original indictment;
- Dragiša Marković and Žarko Jovanović were charged with the commission of the criminal offences of *Abusing Official Position* and *Tampering with Evidence*, in complicity; and

[152] Provided for and punishable under Article 283, Paragraph 3, as read with Paragraph 1 of the CCRK.

- Žarko Jovanović was charged with the commission of the criminal offence of *Unauthorised Ownership, Control or Possession of Weapons*, where the description of the actions remained the same as in the original indictment.

In the indictment, it was also proposed that detention on remand be extended against the Defendants Spasojević, Rošić and Basara, and that the measure of house detention be ordered against the Defendant Arsović, as well as against the Defendants Marković and Jovanović.

The previously scheduled initial hearing under the indictment dated December 2, 2019 was opened before the Presiding Trial Judge, Valon Kurtaj, on December 30, 2019 (Monday). The hearing was attended by the Defendants who had been placed in detention on remand as well as by the other Defendants[153]. State Prosecutor Blerim Isufaj represented the indictment during this hearing.

The Presiding Trial Judge informed those present that on December 27, 2019 (Friday) the indictment, whose enacting clause and the reasoning part had been amended, had been submitted to the Court.

The Defence Counsels stated that there were no conditions for holding the hearing because the Defendants and their Defence had not been served with the amended indictment in none of the languages. Until the opening of the hearing, the Defendants and their Defence Counsels had not received the Serbian translation of the original indictment or the supporting evidence (more than 10,000 pages). As stated by the Defence, when serving the original indictment, the Defence was given a CD containing the Prosecution's documents in the Albanian language, which could not be opened. The Defence also emphasised that, if the Prosecution considered that the legal obligation to disclose the evidence to the other party[154] was fulfilled by serving the documents on the CD, then the Court should provide the conditions for using the CD, that is, access to computers.

In response to the Defence's allegations, the Prosecutor noted, inter alia, that the Prosecution did not want to deny the rights anyone was entitled to, that the material was being translated and that it would be served on the Defendants after the

[153] At the time of compiling the present report, the HLC Kosovo did not have the information that, upon the Prosecutor's motion, the measure of house detention was ordered against the Defendants who appeared in court together with their Defence Counsels.

[154] Article 244 of the CPCK provides that no later than at the filing of the indictment the State Prosecutor shall provide the Defence Counsel with the material in their possession, by respecting the right of the defendants to use their mother tongue. The State Prosecutor shall provide the Defence Counsel with any new materials within ten (10) days of their receipt. The said article stipulates that any disclosure of evidence must not violate the rights of injured parties and witnesses.

translation had been completed. He could not state exactly when the documentation would be translated.

The initial hearing was adjourned as there were no conditions for holding it. The continuation of the hearing was scheduled for February 11, 2020 at 10:00 a.m.

The HLC Kosovo observations:
The HLC Kosovo deems that the Prosecution's failure to provide the Defendants and their Defence Counsels with access to the documentation in their mother tongue constitutes a substantial violation of the Defendants' fundamental rights and a violation of legal provisions and international regulations.

Looking at the indictment, it can be noted that the legal classification of the criminal offences the Defendants were charged with was carried out under the criminal code in force until mid-April 2019, which was more favorable to the perpetrators only in relation to the criminal offence of *Abusing Official Position* (which carries a more severe sentence of imprisonment in the applicable law). The indictment did not state the reason for the application of the 2012 Criminal Code of Kosovo, which ceased to apply after the entry into force of the new 2019 Criminal Code of Kosovo.

The indictment dated December 27, 2019 was submitted to the Court as a new document, not as an amended and more specified indictment[155].

During the part of the initial hearing that was open to the public, there was no discussion in relation to the Prosecutor's motion in the indictment to extend the measure of detention on remand against the Defendants who had been already been detained or to order the measure of house detention against individual defendants.

2.1.2. The Case: *The Prosecutor v. Emrush Thaqi et al.*

Following the indictment assessment procedure in *The Prosecutor v. Emrush Thaqi et al.* case[156], the Serious Crimes Department of the Basic Court of Prishtinë/

[155] The latest Criminal Code of Kosovo was published in the Official Gazette of Kosovo on January 14, 2019. It entered into force three (3) months after it was published. Article 433 of this Code foresees as follows: „The Criminal code no. 04/L-082 of the Republic of Kosovo amended and supplemented with the Law no.04/L-129 and the Law no. 04/L-273 shall cease to have effect upon the entry into force of this Code.

[156] Co-Defendants: Shemsi Hajrizi, Sami Lushtaku, Sahit Jashari, Ismet Haxha, Mërgim Lushtaku, Dardan Geci, Bashkim Dervisholli, Valon Behramaj, Argjent Behramaj, Ylber Blakaj, Gëzim Ahmeti, Xhevdet Zena, Mervete Hasani Lushtaku, Agim Ukaj, Ismail Dibrani, Sami Gjoka, Nexhib Shatri, Rrustem Rukolli, Rexhep Xhota, Fatmir Mjaku, Skender Tahiri, Sheremet Jashari and

Priština, sitting in a Trial Panel presided over by Judge Shashivar Hoti[157], opened the main trial on the SPRK indictment dated November 17, 2016[158] (KTS/PPS, No. 67/2014).

The course of criminal proceedings[159]

Criminal proceedings related to the escape of Sami Lushtaku, Ismet Haxha and Sahit Jashari from the University Clinical Centre of Kosovë/Kosovo in Prishtinë/Priština on May 20, 2014, where they had been hospitalised in the capacity of detainees[160], and influence witnesses in the case "Drenica", were instituted immediately. The investigation was soon extended to include other persons who, according to the evidence obtained by the Prosecution during the investigation, aided or facilitated the Defendants in implementing their decision to leave the clinical centre in order to avoid responding to the court summons in the criminal proceedings against them and other persons before the Basic Court of Mitrovicë/Mitrovica in relation to the criminal offence of *War Crimes against the Civilian Population*.

The indictment

On the basis of the evidence obtained during the investigation, on November 17, 2016[161], an indictment was filed against twenty-four persons who, directly or indirectly, had aided the escape of the Defendants Lushtaku, Haxha and Jashari from the premises of the University Clinical Centre of Kosovë/Kosovo in Prishtinë/Priština, or had facilitated and assisted that escape after it had been carried out. According to the indictment, the escape of the three Defendants from the hospital had had a direct impact on the main trial in the K/P 938/13 case which had been scheduled to begin on May 22, 2014 before the Basic Court of Mitrovicë/Mitrovica.

Bajram Dibrani.

[157] Members of the Trial Panel: Judges Beqir Kalludra and Lutfi Shala.

[158] The indictment was filed by International Prosecutor Romulo Mateus, who took part in the investigation and represented the indictment during the assessment procedure.

[159] During 2017 and 2018, the HLC Kosovo monitored the criminal proceedings on the SPRK indictment in this case as it was linked to the criminal case on charges of *War Crimes against the Civilian Population*.

[160] The Defendants were in detention on remand in accordance with the ruling of the Presiding Trial Judge in *The Prosecutor v. Sabit Geci et al.* case (also known as Drenica 1, K/P. 938/13) that was ongoing before the Basic Court of Mitrovicë/Mitrovica in 2014 and 2015 on charges of *War Crimes against the Civilian Population* against a number of persons. Details of the criminal proceedings in that case can be found on the HLC Kosovo's official website: https://www.hlc-kosovo.org/category/publications/.

[161] The allegations set forth in the indictment, as well as the descriptions of the criminal offences against the twenty-four (24) Defendants, were elaborated on in the 2017 report on the trials monitored - "War Crimes Trials – What Comes Next?". The report is also available on the HLC Kosovo's official website.

The assessment of the indictment dated November 17, 2016 officially started before the Serious Crimes Department of the Basic Court of Prishtinë/Priština on September 25, 2017 by holding an initial hearing, more than ten months[162] after the indictment had been submitted to the Court. Due to a large number of Defendants and their Defence Counsels, the indictment assessment procedure took an unusually long time, mainly because it was difficult to organise the hearing and to ensure the simultaneous presence of all Defendants and their Defence Counsels before the court. During the course of the proceedings, the second hearing was held (January 19 and February 2, 2018) when all the Defendants pleaded not guilty to the indictment. In between the initial and the second hearing, the majority of the Defendants[163], through their Defence Counsels, challenged the indictment by filing their motions to dismiss the indictment and the objections to the admissibility of the evidence in support of the indictment.

Having held the sessions and considered the case file, the Presiding Trial Judge, Shashivar Hoti, in his ruling dated April 5, 2018, rejected as unfounded the Defendants' motions and objections to the indictment. According to the findings of the Court, the indictment had been drafted in accordance with legal provisions, it had been supported by the evidence and the conditions for the opening of the main trial had been met.

The Defendants and their Defence Counsels appealed the ruling of the Presiding Trial Judge. Following the appeals, an Appellate Panel[164] of the Serious Crimes Department of the Court of Appeals held a session on June 12, 2018, wherein it rendered a ruling rejecting the appeals of the seventeen Defendants[165] as unfounded.

The main trial

There was an attempt to open the main trial before the Panel [166] as late as on August 28, 2019. All the Defendants appeared in court at the time when the trial was scheduled to open. Some of the Defence Counsels were late. The parties to

[162] Article 242, Paragraph 4 of the CPCK: "The single trial judge or presiding trial judge shall immediately schedule an initial hearing **to be held** within thirty (30) days of the indictment being filed".

[163] The Defendants Dardan Geci, Argjent Behramaj and Myrvete Hasani-Lushtaku did not submit to the Court their requests to reject the indictment or the objections to the supporting evidence.

[164] Members of the Appellate Panel: Judges Mejreme Memaj (Presiding Trial Judge), Afrim Shala and Fillim Skoro (Panel members).

[165] Emrush Thaqi, Shemsi Hajrizi, Sami Lushtaku, Sabit Jashari, Ismet Haxha, Mergim Lushtaku, Bashkim Dervisholli, Valon Behramaj, Argjent Behramaj, Gëzim Ahmeti, Xhevdet Zena, Ismail Dibrani, Sami Gjoka, Nexhib Shatri, Rrustem Rukolli, Skender Tahiri and Sheremet Jashari.

[166] Article 285 of the CPCK clearly specifies the duties of a Single Trial Judge or a Presiding Trial Judge in relation to the scheduling of the main trial if it has not been scheduled at the second hearing.

the proceedings did not object to the composition of the Trial Panel. During the scheduled opening of the main trial, the indictment was not read. A Prosecutor[167] who was not in charge of the case appeared in court as a substitute. The main trial was postponed to September 24, 2019 when it was officially opened and when the indictment was read. All the Defendants stated that they understood the indictment and they pleaded not guilty to the charges.

The main trial continued with the opening statements of the parties to the proceedings. The Prosecutor and some of the Defendants[168] submitted their opening statements in writing. Thirteen (13) Prosecution witnesses were heard during the trial. The Trial Panel was in session for eight (8) days during the reporting period.

During the part of the trial that took place in 2019, the Trial Panel severed the proceedings against several defendants for failing to respond to the summons, i.e. for failing to appear at certain sessions (the proceedings against the Defendants who failed to appear in court). However, at the next or the one after the next session, when the Defendants did appear in court, the criminal proceedings against them were joined with the proceedings that had been taking place in relation to the other Defendants. Thus, the Defendants in respect of whom the proceedings had been severed had not been present when certain procedural actions had been taken[169].

Severance of the proceedings in relation to the Defendant Merveta Hasani-Lushtaku

In the part of the main trial that was taking place in 2019, the proceedings against the Defendant Mervete Hasani-Lushtaku were severed in accordance with the ruling of the Trial Panel. The ruling was rendered during a session held on December 2, 2019. The severance of the proceedings was initiated by a motion filed by the Defence Counsel for the Defendant, attorney Visar Rrecaj from Prishtinë/Priština. The Defence Counsel informed the competent prosecutor, outside the court session, about the Defendant's motion to plead guilty to the criminal offence: *Facilitating the Escape of Persons deprived of Liberty*[170].

[167] SPRK Prosecutor Habibe Salihu.

[168] The Defendants: Emrush Thaqi, Shemsi Hajrizi, Mërgim Lushtaku, Ylber Blakaj, Ismajl Dibrani, Nexhib Shatri, while the remaining Defendants submitted to the Court their written opening statements.

[169] Article 36 of the CPCRK provides for the reasons for the severance of proceedings. The severance of proceedings can be granted for justifiable reasons, e.g. in order to conduct an expertise or to take other actions that are expected to take a lot of time so as not to delay the proceedings in relation to the other defendants - e.g. severance following a plea agreement. A ruling on the severance of proceedings is always rendered after hearing the parties to the proceedings.

[170] Provided for and punishable under Article 406, Paragraph 1 of the CCRK.

During the trial, the Prosecutor informed the court that the parties had reached a plea agreement in accordance with legal provisions. According to the Prosecutor, the written agreement was timely submitted to the Court in order to be accepted.

Addressing the Court, the Defendant Hasani-Lushtaku stated that she had knowingly signed the plea agreement with the Prosecution, with prior agreement and consultation with her Defence Counsel. She also stated that she was aware of the benefits and consequences of pleading guilty. She also fully accepted the guilt.

The Special Prosecutor also stated that she stood by the motion to plead guilty, which was filed with the Prosecution on November 25, 2019, and by the agreement reached between the Prosecution and the Defendant Merveta Hasani-Lushtaku and her Defence Counsel. The agreement had been drafted in accordance with legal provisions. Before the agreement had been signed, the Defendant had been heard. She had been familiarised with the privileges of pleading guilty and she had signed the agreement willingly, without pressure, after consulting with her Counsel. The agreement had been reached between her Defence Counsel and Acting SPRK Chief Prosecutor Afrim Shefkiu.

During the trial, the Defence Counsel, Visar Rrecaj, also stated his position about the agreement. He stated before the Court that the agreement had been reached after consultation with the Defendant to whom the Prosecution explained in detail, before filing the motion, the advantages and consequences of signing the agreement and its possible impact on the whole process. According to the attorney, the Defendant had knowingly accepted the terms of the agreement. The Defence Counsel also stated that, while the terms had been negotiated with the Prosecution, the sentence had also been agreed upon. He moved the Court to accept the agreement on the terms under which it had been reached with the Prosecution, and to render a judgment against the Defendant in the case.
In an oral ruling that entered the record, the Trial Panel accepted the plea agreement of the Defendant Merveta Hasani-Lushtaku in relation to the criminal offence she had been charged with in the indictment dated November 17, 2016.

The Prosecution informed the Court that none of the documents held by the Prosecution contained the Defendant's surname Lushtaku. It did not appear in her personal documents either, hence, the judgment should be addressed to Merveta Hasani.

The judgment following the plea agreement
In a separate session held on December 4, 2019, only in relation to the Defendant Mervete Hasani, the Trial Panel rendered a judgment finding the Defendant Hasani guilty of the following: on September 22, 2015, at approximately 12:30, within the

compound of the University Clinical Centre of Kosovë/Kosovo, driving a silver Mercedes Benz owned by Merveta Hasani, she transported Sami Lushtaku from the compound of the clinical centre in order to help him escape the supervision of correctional officers, in violation of the ruling of the Basic Court of Mitrovicë/Mitrovica dated May 27, 2015 whereby Sami Lushtaku was ordered the measure of detention on remand. By doing so, she aided and abetted the escape of a person in detention on remand on the basis of a lawful court decision. She, thereby, committed the criminal offence of *Facilitating the Escape of Persons deprived of Liberty*.

For the commission of the foregoing criminal offence, the Court imposed a six-month prison sentence on the Defendant which, as stated in the plea agreement, was replaced with a fine of three thousand five hundred (3,500) Euros.

The Defendant was warned by the Court that in the event of failure to pay the fine, it would be replaced with a term of imprisonment. If the fine is to be replaced with imprisonment, one day in prison shall amount to twenty (20) Euros.

In the reasoning of the judgment, the Court stated the circumstances under which the parties to the proceedings had reached the agreement. In relation to the sentence imposed, the Court stated, inter alia, that the Court had adhered to the agreement reached between the parties to the proceedings - the Prosecution and the Defendant - as well as that it had taken into account both the aggravating and mitigating circumstances, i.e. her family circumstances, the fact that a plea agreement had been reached upon the initiative of the Defendant, and that she had had no previous convictions. The Court had found no aggravating circumstances.

The main trial was taking place in the Albanian language. The official record was kept verbatim. The minutes were dictated by the Presiding Trial Judge.

During the trial, the indictment was represented by SPRK Prosecutor Florida Shamolli.

The main trial is due to continue on January 8, 2020.

The HLC Kosovo findings

The Trial Panel in *The Prosecutor v. Emrush Thaqi et al.* case scheduled the main trial after more than a year following the decision of the Court of Appeals which upheld the ruling of the Presiding Trial Judge of the Basic Court Prishtinë/Priština, dated June 12, 2018, wherein the motions to dismiss the indictment and the objections to the evidence in support of the indictment dated November 17, 2016 had been rejected.

In addition to this apparent and unacceptable delay, the HLC Kosovo has noted that, so far, many other violations of the Criminal Procedure Code have marked the main trial in the case, starting from the moment the indictment was submitted to the Court. The initial hearing was scheduled ten months later (10) i.e. after all the legal deadlines foreseen for the initial hearing, although the law stipulates that the hearing must be held within 30 days from the date of receipt of the indictment.

Following the indictment assessment procedure, which took an unusually long time, there was a delay in the opening of the main trial. The trial was opened 34 months after the indictment had been filed. All this left an extremely bad impression on the Court's willingness and readiness to cope with one of the largest trials in the reporting period.

During the part of the main trial that was taking place in the second half of 2019, the Trial Panel, contrary to the legal provisions, severed the proceedings in relation to individual Defendants who had not appeared in court, and then, when these Defendants attended the following court session, the Trial Panel decided to join the proceedings although the Defendants had not attended the presentation of some of the evidence. In its provisions, the CPCRK clearly sets out the conditions under which criminal proceedings may be severed. The Trial Panel rendered the decisions on the severance of proceedings without having heard the parties to the proceedings and their position on the severance, which is also unacceptable.

The HLC Kosovo has also noted that, even after the opening of the main trial, some court sessions were adjourned due to an insufficient preparedness of the substitute Prosecutor to take procedural steps during the trial. According to the information available to the HLC Kosovo in the preparatory phase for the opening of the main trial, the parties to the proceedings were informed in due time of the date of the opening of the trial. However, the prosecutor in charge, who had been assigned to the case following the end of EULEX's mission, did not appear in court but was replaced by a substitute prosecutor.

The HLC Kosovo also finds that the parties to the proceedings had objections to the conditions in which the main hearing was held, for example, that they could not provide their clients with adequate and legally prescribed defence, that they could not adequately access the case files during the trial and that they could not adequately take notes.

In the view of the HLC Kosovo, before the opening of the main trial, given the number of the Defendants and their Defence Counsels, the Trial Panel should have provided basic conditions for the normal conduct of the main trial. The

parties to the proceedings must enjoy an equal treatment with regard to working consitions, not only the Prosecution, but also the Defence, in order to provide their clients with professional defence guaranteed by the law. There were instances during the trial that the Defence Counsels and their clients were sitting together with the public, which is disrespectful and unacceptable. It is true that there is no courtroom in the premises of the Palace of Justice which would provide adequate working conditions in cases involving large numbers of defendants and attorneys, but this does not relieve the Court of its responsibility to turn an adequate room into a courtroom and allow equal working condition to all the parties, especially the Defendants.

2.1.3. The Case: *The Prosecutor v. Ivan Todosijević*

On December 5, 2019, following the main trial in *The Prosecutor v. Ivan Todosijević* case opened on the SPRK Indictment dated June 28, 2019 (KTS/PPS No 26/2019), the Trial Panel of the Special Department of the Basic Court of Prishtinë/Priština, presided over by Judge Musa Kongjeli[171], rendered a judgment wherein the Defendant was found guilty of committing the criminal offence of *Inciting national, racial or religious hatred, discord and intolerance*[172], and sentenced to two (2) years of imprisonment.

After reading the enacting clause of the judgment and the sentencing part in front of the Trial Panel, the Presiding Trial Judge did not present the reasons or the evidence that guided the Panel in rendering a judgment of conviction. It was announced that a reasoned judgment would be served on the parties within the legal deadline. The parties were also informed of the right to appeal the judgment within fifteen (15) days of receipt of the written judgment.

The course of criminal proceedings

Following the media coverage of the speech of the then Minister of Administration and Local Self-Government of the Kosovo Government, Ivan Todosijević, at a rally in Zveçan/Zvečan on March 24, 2019 to mark the 20th anniversary of the start of the NATO air campaign, when he stated that the massacre in Reqak/Račak was a fabrication, and when he named Kosovo Albanians as terrorists and killers who had committed most of the crimes in Kosovo during the armed conflict, the SPRK ordered the KP Directorate for Investigation of Serious Crimes

[171] Members of the Trial Panel: Special Department Judges Valbona Musliu Selimaj, Valon Kurtaj.

[172] According to the indictment, provided for and punishable under Article 147, Paragraph 2 as read with Paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK) No. 04/L-082 that entered into force on January 1, 2013.

(KP DICS) to carry out certain investigative activities, to verify the information published in electronic written media outlets and to gather the necessary information about the specific event. In the course of the investigative measures taken, the Defendant Todosijević was also heard as a suspect.

He said that on the critical day, March 24, 2019, he was one of the thirty participants in a gathering held in Zveçan/Zvečan on the occasion of the 20th anniversary of the start of the NATO intervention in Kosovo. The gathering was mainly attended by family members of the victims of the armed conflict. He was one of the speakers who addressed the participants of the rally, but he did not remember the details of his speech, noting that he had always respected people regardless of their nationality, that he had not distinguished between victims, be they Serbs or Albanians, and that living in peace could be possible only of there were only tolerance, understanding and trust.

On May 23, 2019, the State Prosecutor issued a ruling to open an investigation against the Defendant for the criminal offence of *Inciting national, racial or religious hatred, discord and intolerance*.

As part of the investigation, the Prosecutor heard the Defendant on May 30, 2019. In his statement to the Prosecutor, he reiterated the allegations he had given to the police: he did not remember exactly what he had said on that particular day; he disputed the intention that he had wanted to hurt anyone in his political speech and he was sorry for what he had said and done. At no point had he wanted to hurt or offend any member of any nation, especially given the suffering the Kosovo people had experienced.

Due to his inappropriate language, the Accused Todosijević was impeached by the then Prime Minister of Kosovo on April 9, 2019 as Minister of Administration and Local Self-Government.

The indictment

On June 28, 2019, the SPRK filed an indictment against Todosijević. The indictment charged him with abusing his position and authority as Minister of Administration and Local Government, by knowingly inciting and publicly spreading racial, religious hatred, discord or intolerance among ethnic groups living in the territory of the Republic of Kosovo.

He committed the offence as follows:
- On March 24, 2019, in Zveçan/Zvečan, King Milutin Street, as a speaker at a rally of citizens gathered to mark the anniversary of the 1999 NATO intervention in

Kosovo, in memory of the victims of the NATO bombing, he said: "The reason for an aggression against our country was the so-called humanitarian catastrophe in Kosovo and Metohija [...] the Raçak/Račak massacre was a fabrication [...] Albanian terrorists were the ones who invented it, who committed the greatest crimes in Kosovo and Metohija [...] to this day no one has been held responsible [...] they committed crimes before the NATO aggression, they killed good Serbs and police officers while on duty [...] and they continued to be bloodthirsty during the aggression and after the arrival of the so-called peacekeeping missions in Kosovo and Metohija". As stated in the indictment, such statements could endanger public order and peace or cause other grave consequences in the territory of the Republic of Kosovo.

The indictment assessment procedure

The SPRK filed the indictment dated June 28, 2019 with the Special Department of the Basic Court of Prishtinë/Priština which, thereafter, held an initial hearing on July 19, 2019. The hearing was held before a judge of this department, Musa Kongjeli, who acted as the Presiding Trial Judge. The hearing was attended by the Accused, his Defence Counsel, Attorney Nebojša Vlajić from Mitrovicë/Mitrovica, and Prosecutor Atdhe Dema, who had initiated and run the investigation, and who had filed the indictment in the case.

The hearing was closed to the public.

Following the opening of the hearing, the Defence Counsel for the Defendant, Attorney Vlajić objected to the territorial jurisdiction of the Special Department of the Basic Court of Prishtinë/Priština. He also stated that the case should not be assigned to any Trial Panel of the Basic Court Prishtinë/Priština. According to the Defence Counsel, the criminal offence his client was charged with had been committed in the territory of the Basic Court of Mitrovicë/Mitrovica, hence, this Court was having jurisdiction over the indictment, despite the fact that the criminal proceedings had been initiated by an SPRK prosecutor. The Defence Counsel added that prosecutors of the Special Prosecution Office could represent cases before all courts in Kosovo, including the one in Mitrovicë/Mitrovica.

The Defendant stood by the motion of his Defence Counsel.

Prosecutor Dema did not dispute that the investigation in the case had been initiated by a ruling of the Basic Court of Mitrovicë/Mitrovica. At the time of launching the investigation against the Defendant, the Special Department was established in Prishtinë/Priština by the Law on Courts, however, it had not become operational yet. After this Department had started to be operational, the

indictment was submitted to this Department and he was of the opinion that the trial should continue before this Department.

Following the views expressed by the parties to the proceedings, the Presiding Trial Judge, who acted as a Single Trial Judge during the hearing, stated that, in relation to the jurisdiction of the Special Department of the Basic Court of Prishtinë/Priština, this Department had the jurisdiction over the indictments of the SPRK Office[173].

Upon the motion of the Defence Counsel who was in possession of the Serbian version of the indictment, the indictment was read only in Albanian. The Defendant stated that he had understood it and reiterated that he had not had any intention to offend anyone, or to provoke national or religious hatred and intolerance. As Minister of Local Self-Government, he had treated Albanians and Serbs with great respect and had never discriminated anyone on any grounds. He once again apologised if he had hurt anyone, on any ground, during his speech on the critical day. He pleaded not guilty to the indictment and stated that he would object to the indictment within the thirty (30) day period provided for by the law.

The Defendant's request to reject the indictment and the objections to the supporting evidence

In his request to reject the indictment dated August 19, 2019, Attorney Vlajić argued that the actions the Defendant Todosijević was charged with did not constitute a criminal offence for many formal and substantive reasons. The Defendant's action had not jeopardized public order and it had not disturbed the public, with the exception of several Kosovo newspapers that had reported about it one or two days afterwards, when the case had completely been forgotten.

As stated in the request to reject the indictment, the incriminating action had not caused riots, violence or other grave consequences, as envisaged by the more severe form of Article 147, Paragraph 2 of the CCRK. In the present case, there was not even a basic form of this criminal offence. The Defendant Todosijević had not abused his position or authority. He had never acted as Minister of Local Self-Government at the rally in Zveçan/Zvečan. It was clear that a Kosovo minister could not hold speeches at such rallies. The Prosecutor stated so in the Indictment only to charge the Defendant with a more serious form of the offence and to put the Defendant in a more difficult situation, which was unacceptable in the opinion of the Defence. What the Defendant had said or what the indictment alleged that the Defendant had said was not a criminal offence. Such an indictment allowed for a comeback of verbal delict to Kosovo. Everyone had the right to say

[173] The Kosovo Law on Courts: https://md.rks-gov.net/desk/inc/media/F6BADB4F-6CD7-42F2-9E54-9D01B98A778E.pdf

what they thought, even if others believed it was improper. There was no criminal liability in the actions of the Defendant, but it could not be said that there was no political responsibility. Hence, the Court should grant the request to reject the indictment, since the actions the Defendant was charged with did not constitute a criminal offence.

The ruling of the Special Department of the Basic Court of Prishtinë/Priština
In his ruling dated September 3, 2019, Presiding Trial Judge Kongjeli rejected as unfounded the request to reject the indictment filed by the Defence Counsel. The Court found that the conditions for rejecting the indictment had not been met. The request did not state any reasons justifying the rejection of the indictment at this stage of the criminal proceedings. In order to confirm the allegations of the parties to the proceedings, it was necessary to confront the contradictory views of the parties during the main trial, to present evidence that would establish whether or not there the Defendant's actions contained the elements of a criminal offence charged in the indictment. The existing evidence in the case files provided sufficient grounds for opening the main trial, where the proposed evidence would be adduced, as well as other evidence if need be.

The Defendant's appeal against the ruling of the Special Department of the Basic Court
In their appeal, the Defendant and his Defence challenged the Special Department's ruling to reject the request due to an erroneous and incomplete determination of the factual situation and violations of the criminal law, since the actions the Defendant was charged with did not have the character of a criminal offence.

The appeal reiterated the allegations set out in the request to reject the indictment, i.e. it stated that the actions the Defendant was charged with did not constitute a criminal offence. On the critical day, the actions of the Defendant had not endangered public order, provoked violence, or caused grave consequences. The Defendant was aware that his statement may have been interpreted differently, but he had not intended to offend anyone by his statements.

The Defence Counsel also stated in his appeal that he reiterated the allegations set forth in the request to reject the indictment which, according to the Defence's findings, had not adequately been considered and assessed, nor had they been well reasoned. He moved the court of second instance to consider them thoroughly. According to the Defence, the Defendant's action did not have the character of a criminal offence, the incriminating actions had not jeopardised public order, as stipulated in Article 147, Paragraph 2 of the CCRK. The Defendant had not abused his official position or powers by acting so. Being a member of the

Srpska lista and a local Serb politician, the Defendant had addressed the gathered persons in that capacity. Addressing the citizens in the foregoing capacity, there was no position he could have abused. What was alleged in the indictment to have been said by him did in no way constitute a criminal offence.

The appeal proposed that the Defence's request be granted and a ruling rejecting the SPRK's indictment dated June, 28 2019 be rendered.

In a motion dated October 10, 2019, the Appellate Prosecutor requested the court of second instance to reject the Defence Counsel's appeal as unfounded and to uphold the impugned ruling.

The Court of Appeal's ruling

At the session held on October 17, 2019, the Appellate Panel of the Court of Appeals[174] rendered a ruling wherein the Defence Counsel's appeal was rejected as unfounded and the ruling of the Special Department of the Basic Court of Prishtinë/Priština dated September 3, 2019 was affirmed.

After reviewing the case file, the Panel of the Special Department of the Court of Appeals found the appellate allegations to be unfounded. When rendering the ruling, the court of first instance had duly considered, assessed and adequately reasoned the allegations presented in the appeal. According to the findings of this Panel, the indictment had been filed in accordance with the factual situation, it was supported by evidence and was admissible by the law. It followed that there was a grounded suspicion that the Defendant had committed the charged criminal offence.

According to the findings of the Special Department of the court of second instance, the evidence in the case files confirmed the grounded suspicion. Only after the proposed evidence had been administered during the main trial before the court of first instance, and assessed, would it be possible to establish whether the Defendant's actions constituted a criminal offence.

Following the decision of the Court of Appeals, legal conditions had been met for the main trial to be opened before the Trial Panel of the Special Department of the Basic Court of Prishtinë/Priština, that was announced for November 11, 2019. Due to a death in the family of the Presiding Trial Judge, the opening of the main trial was postponed to December 2, 2019.

[174] Judge Kreshnik Radoniqi, Presiding Trial Judge, Judges Gordana Vlašković and Ferit Osmani, members of the Appellate Panel.

The main trial
The main trial was opened on December 2, 2019 by respecting the formalities prescribed by the law and by reading the SPRK's indictment in relation to which the Defendant stated: "The event did take place, it was recorded and covered by cameras and journalists, this I cannot dispute, however, as I have previously stated, I plead not guilty."

Opening statements by the parties to the proceedings
In his opening statement, the State Prosecutor stated, inter alia, that the Indictment contained a complete factual description and the circumstances that constituted a criminal offence. The court of first instance had assessed the indictment as lawful and supported by evidence, which had also been upheld by the ruling of the Court of Appeals.

In his opening statement, the State Prosecutor added that the Defendant had committed the charged criminal offence on the critical day, which he had not disputed at any stage of the hitherto proceedings. The indictment specified the Defendant's actions which were illegal. It was supported by the proposed evidence. The subjective element of the crime was also specified.

The Defence Counsel for the Defendant, Attorney Vlajić, stated, inter alia, that, in that specific case, the parties to the proceedings had conflicting views on the facts, that is, there were legal disagreements as to whether there was a criminal offence in the specific case or an instance of freedom of speech. During the proceedings, it would be established that there were no elements of the criminal offence in this case, that the elements did not exist, because the Defendant's actions had not endangered public order, nor had any harmful consequences occurred. It was also undisputed that the Defendant had not abused his official position. What he had said on the critical day might be offensive to someone, but not punishable.

The Defendant supported his Counsel's allegations.

The main trial continued with the presentation of material evidence, such as the footage taken at the rally on the critical date in Zveçan/Zvečan, numerous newspaper articles published in relation to the critical event, as well as other Prosecution documents.

The parties to the proceedings did not file any motion to hear witnesses or to present new evidence.

The Defendant and his Defence objected to the Prosecution's evidence. The Defendant answered only the direct questions of his Defence Counsel during the proceedings. By doing so, he stood by his testimony given at earlier stages of the criminal proceedings. On the critical day, he had held a speech at the rally as a member of the "Srpska lista" party, not in his capacity of Minister of the Government of Kosovo. He reiterated what he had previously stated in relation to this speech. In the remaining part of the trial, he enjoyed his right not to answer any questions of other parties to the proceedings, i.e. he remained silent.

Closing statements by the parties to the proceedings

In his closing statement, the State Prosecutor stated, inter alia, that the evidence presented during the main trial had fully confirmed the allegations set forth in the Indictment. The Defendant's guilt had been confirmed as well as his criminal liability. The Defendant had intentionally committed the charged criminal offence. On the critical day, the Defendant had been *de jure* and *de facto* a Minister of the Government of Kosovo, which had not denied him the right to participate in rallies. Despite being a Kosovo citizen, he had spoken against the entire people of Kosovo, claiming that all Albanians were terrorists, that they had fabricated everything, that they had committed major crimes in Kosovo. Throughout the course of the criminal proceedings, the Defendant had not disputed that he had presented his views specified in the Indictment. At the time of the criminal offence, he had first been a minister, and only then, a citizen. It was irrelevant whether his speech had or had not caused disorder; he could have provoked disorder by his speech, as he had offended the whole nation. The allegations of the indictment had been confirmed by the evidence presented. He moved the Court to find the Defendant guilty and to punish him in accordance with the law.

In his closing statement, the Defence Counsel expressed his disagreement with the Prosecutor's statement. In this specific case, there was no guilt, as there was no criminal offence. The indictment was in contradiction with the Kosovo Criminal Code and the European Convention on Human Rights and Fundamental Freedoms, which addressed the freedom of expression and which was applicable in Kosovo. The indictment was also in contradiction with the Constitution of Kosovo. The Defence Counsel then moved on to elaborate the defence strategy he had presented while addressing the Court at different stages of the proceedings. He claimed that the Defendant had acted, inter alia, as a citizen on the critical day, that his speech had not caused any consequences, that public order had not been disturbed, and that the actions his client was charged with did not have the character of a criminal offence.

The Defendant stood by the closing statement presented by his Defence Counsel and enjoyed his right to remain silent.

The main trial lasted for three (3) days, including the initial hearing, On December 5, 2019, the judgment was rendered, wherein the Defendant was found guilty of committing the charged criminal offence and sentenced to two years of imprisonment. When announcing the judgment, the Presiding Trial Judge read, in the presence of the public, the decision the Court rendered after the trial held. He said that, based on the evidence presented, the Court found that the Defendant was liable for the commission of the charged criminal offence. The Trial Panel did not state how it had assessed the proposed evidence, nor the reasons that had guided them to render the foregoing sentence - what they were required to do by the law.

The main trial was public. Court monitors and media representatives was allowed to attend. At the request of the Defence Counsel, visual recording was not allowed. The Court did not make any video or audio recordings of the main trial as there were no technical conditions.

The first instance judgment
Until the end of the reporting period, the HLC Kosovo did not have access to the written and reasoned judgment.

The HLC Kosovo findings
1. The *Prosecutor v. Ivan Todosijević* case has been highly politicised in the public, especially after the judgment of conviction was announced. Particularly sharp were the reactions and outcries from the Serbian public in northern Kosovo and in Serbia, but there were also reactions of support for the trail and conviction of Todosijević coming from the Albanian public. Such politicisation is, objectively, a great pressure on the judiciary and it can impact and interfere with the work of the judiciary. Courts must be independent in law enforcement and must not be subject to any political pressure or blackmail when their work is not to the liking of someone in power. For example, Goran Rakić, the president of the political organization "Srpska lista", said on the day the judgment was announced: "Should Teodosijević's sentence of imprisonment be affirmed, we shall withdraw from all institutions". Such statements constitute direct political blackmail and conditionality through direct interference with the independence of the judiciary.

During the brief main trial, it was indisputably stated that the Defendant had held the speech at the rally on the critical day, but it was also an indisputable fact that, at that point, he had been in charge of a Ministry of the Government of Kosovo. This means that Todosijević should have been aware of the fact that, in whatever capacity he were to speak, it would have been attributed to him that he was a Minister or that he spoke in the capacity of Minister. This means that he, like any other high ranking politician, could not, under any circumstance, hold a speech

as a common citizen and use that capacity to defend himself. Todosijević is not the first political official, irrespective of his/her nationality, who, in order to score political points, would adapt his rhetoric to daily political needs - the rhetoric that was not immune to accusations from the other side. However, no politician has yet been prosecuted for doing so.

2. Although the Trial Panel professionally conducted the criminal proceedings in *The Prosecutor v. Ivan Todosijević* case, the HLC Kosovo notes that the Panel did not completely adhere to the law while announcing the decision. Pursuant to Paragraph 2 of Article 366 of the CPCRK , when announcing the judgment, the Court is obliged to give a brief account for the grounds of the judgment, so that the Defendant and the public present during the announcement of the judgment are aware of the evidence the Court was guided by in rendering its decision.

In this context, it should be noted that it has become a common practice for Trial Panels in Kosovo, after they have announced their decision, not to give a brief presentation of the arguments and the evidence they used to render their decision following the main trial.

Failure to present the reasons and the evidence on which the Court based its decision makes it difficult for us to articulate the views and to assess the merits of the Court's decision in the particular case, especially given that this was the case wherein the material evidence was read for the record. While analysing this case and the sentence of two (2) years of imprisonment imposed on the Defendant, the questions that arise and which cannot be answered for the time being are as follows: *Has the Court properly assessed the available evidence?*, *How was the sentencing conducted (aggravating and mitigating circumstances)?* and *Has the Court properly assessed the purpose of the sentence (preventive and educational)?*

3. Pursuant to the Criminal Code, the criminal offence the Defendant was found guilty of (Article 147, Paragraph 2 as read with Paragraph 1, for the more serious form, Paragraph 2) carries a term of imprisonment of one (1) to eight (8) years[175]. Paragraph (2) of the said Article foresees that the criminal offence may be committed in several ways: a) in a systematic manner; b) by taking advantage of his or her position or authority; c) when the offence resulted in disorder, violence, or other grave consequences.

[175] Basic form: Paragraph 1, Article 147 of the CCRK: "Whoever publicly incites or publicly spreads hatred, discord or intolerance between national, racial, religious, ethnic or other such groups living in the Republic of Kosovo in a manner which is likely to disturb public order shall be punished by a fine or by imprisonment of up to five (5) years."

Having analysed the foregoing ways of committing the offence, the HLC Kosovo has reached the following conclusions:
a) The criminal offence was not committed in a systematic manner;
b) There is room for reaching an assessment that the criminal offence was committed by taking advantage of the Defendant's position or authority at the time when he was in charge of a Ministry of the Government of Kosovo, by presenting, in his (un)political speech, the facts and circumstances that were not suitable to a minister in a multinational environment, where he represented all citizens and not just his community;
c) The Defendant's speech given on the critical day did not cause disorder, but it did provoke reactions and wranglers, especially in the media. There were also reactions from senior political officials, giving support to one side or the other, while the public was divided on a national basis.

Freedom of thought[176] and speech[177] is guaranteed by the highest legislative acts[178] and international regulations, but this freedom is not absolute, it must be enjoyed responsibly, especially by holders of office.

The HLC Kosovo does not want to interfere with the independence of the judiciary, nor with the freedom of courts to assess evidence, as foreseen by the law, but the HLC Kosovo believes that the sentence imposed on the Defendant is more

[176] Article 9 of the European Convention on Human Rights and Fundamental Freedoms:
- Paragraph 1: "Everyone has the right to freedom of thought, conscience and religion… ".
- Paragraph 2: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

[177] Article 10 of the European Convention on Human Rights and Fundamental Freedoms:
- Paragraph 1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…."
- Paragraph 2: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." https://www.echr.coe.int/Documents/Convention_ENG.pdf

[178] Article 40 of the Constitution of the Republic of Kosovo:
- Paragraph 1: "Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment".
- Paragraph 2: "The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion". http://www.kryeministri-ks.net/repository/docs/Constitution-1Kosovo.pdf

severe than it should be. In the present case, the Defendant's speech did not provoke the consequences as foreseen by the law, except for the polarisation on a national basis. It is also true that the families of the victims of the aforementioned criminal offence were offended, however, Todosijević's punishment could serve as an example even if a more lenient sentence was imposed.

According to the HLC Kosovo, in this particular case, there should have been a reaction of the Kosovo law enforcement agencies, as in recent years, it has been observed that state officials have been presenting their stances that have caused polarization and that do not contribute to peaceful multiethnic co-existence in Kosovo. *The Prosecutor v. Ivan Todosijević* case needs to serve as an example to law enforcement agencies which should always react in similar cases, irrespective of the nationality of the perpetrator of this criminal offence. The purpose of sentencing is, inter alia, preventive. The judgment imposed on Todosijević should have an impact on any possible perpetrator of this criminal offence in the future, who, while addressing the public, should not disturb the public, particularly in multinational environments, and who should keep in mind that their public speeches always have great political importance, even when they act as citizens, and not as government representatives.

The HLC Kosovo's recommendations for the 2019 Annual Report:

On the basis of the regular monitoring of war crimes trials (as well as some trials related to these crimes), available court documents and analyses of the cases taking place in 2019, the Kosovo Humanitarian Law Centre (HLC Kosovo) finds it appropriate to propose to Kosovo institutions specific recommendations that identify the existing problems in the judiciary and outline possible ways to overcome them as quickly and successfully as possible in order to improve the work of Kosovo judicial institutions.

In drafting the recommendations, the HLC Kosovo kept in mind that the reporting year was very important for assessing the performance of the judicial system, as it was the first year, after the armed conflict, when Kosovo judicial institutions, fully independently and without international judges and prosecutors, dealt with the most serious criminal cases like those on war crimes charges.

Some of the most recent recommendations have been reiterated, as they were proposed in our previous reports, but have not been or have been partially fulfilled. We will reiterate the recommendations here as, for the efficient and professional work of the Kosovo judiciary, it is important to put them into practice.

To Kosovo institutions, judicial authorities

During the reporting period, three (3) Prosecutors of the SPRK's War Crimes Departments were directly involved in the investigation and prosecution of war crimes. At the same time, six (6) Judges of the newly established Special Department of the Basic Court of Prishtinë/Priština and three (3) Judges of the Special Department of the Court of Appeals were tasked with adjudicating on war crimes charges and SPRK's indictments. In addition to other causes, the foregoing staffing figures also explain, to some extent, a modest output of the judicial system in prosecuting the most serious crimes during the reporting year. In 2019, fourteen (14) war crimes cases were the subject of adjudication at various stages of proceedings. In the course of 2019, six (6) war crimes cases filed in 2018 (or in previous years) were dealt with and only two (2) that were filed during the reporting period. The remaining cases were at the stage of preliminary criminal investigation.

Kosovo went through an armed conflict in which there were over 12,500 killed or missing persons (from February 28, 1998 to June 20, 1999). Most of them were

civilians who did not participate in armed operations and their death could not be justified by military operations. UNMIK and EULEX, as two major international missions tasked with judicial office after the armed conflict, investigated over 1,100 war crimes cases (from filing criminal reports, through issuing rulings on investigations to filing indictments). By the end of 2018, all pending cases (about 900) had been transferred to the jurisdiction of the local judiciary. The pace that the prosecution authorities have so far taken in resolving these cases is not promising. It can be concluded that the judiciary as a whole is only at an initial stage of a huge task of providing justice for the victims and their families, as well as of identifying the perpetrators of these crimes and of punishing them according to the law.

► The executive functions of EULEX were terminated with a political rationale that the Kosovo judiciary was capable of taking over prosecution of war crimes and that international assistance in this field was no longer required. Unfortunately, the past year has shown that this assessment was premature. And this is not a mistake that can be attributed only to a few prosecutors and judges who bear this burden on their back, but to the legislative and executive authorities, the competent judicial institutions, which need *to invest much more in professional resources and staffing*. For these reasons, *increasing the number of judges and prosecutors who will exclusively deal with war crimes* is the first and priority recommendation of the HLC Kosovo. In addition to increasing the number of judges and prosecutors, an adequate growth and specialised training of police departments in charge of investigating war crimes should be ensured, as well as the auxiliary departments in Prosecution Offices and Courts responsible for prosecuting war crimes. This will be a major incentive to the judiciary to leave a bleak start in prosecuting war crimes and move forward.

► Along with enhancing the staff of the prosecutorial and judicial systems, one of the priorities in strengthening the capacities of the two systems in resolving the most serious crimes is their *continuing professional development for prosecuting war crimes*, as poor professional preparedness of holders of judicial office constitute one of the most serious problems of the Kosovo judiciary. The prosecutors and judges currently competent to investigate and prosecute war crimes are generally insufficiently experienced in prosecution of these crimes, which are inherently very specific, and require a good knowledge of international standards, the application of gained experience, and promptness in case adjudication.

To Kosovo judicial authorities, Prosecution Offices and Courts

During the reporting period, amendments to the Criminal Procedure Code were adopted and entered into force, which allowed for trials *in absentia* in relation to

the criminal offences against international humanitarian law and international criminal law, committed between January 1990 and June 1999.

► The HLC Kosovo was against the amendments to the Criminal Procedure Code No. 04/L-123, which entered into force on July 19, 2019, with regard to trials *in absentia* in relation to the criminal offences against international humanitarian law and international criminal law, committed between January 1990 and June 1999, *and continues to take the stance that trials in absentia violate the provisions of international regulations and conventions (in particular Article 6 of the European Convention on Human Rights and Fundamental Freedoms with regard to a fair trial), the Pact on Human Rights and Freedoms, as well as international standards.*

To Kosovo institutions, judicial authorities

On May 5, 2019, at the plenary session of the Kosovo Assembly, the draft Criminal Procedure Code was adopted in general. The Code passed the second reading and entered the stage of consideration by the competent committees of the Kosovo Assembly. The third reading is to follow. The procedure has not been completed as the Assembly was dissolved. According to the Kosovo Assembly rules of procedure, the draft Code may enter the third reading or be remitted to the newly formed government for reconsideration.

The newly elected justice minister, Albulena Haxhiu, announced in the media the introduction of new provisions in the draft Criminal Procedure Code, which would allow for trials *in absentia* for all other criminal offences too. This amendment has been integrated into the draft Criminal Procedure Code, which is available on the official website of the Kosovo Assembly.

► The HLC Kosovo still maintains the previously stated stand on opposing trials *in absentia*, irrespective of the type of criminal offence. For these reasons, *the HLC Kosovo proposes that the Legislative Committee of the Kosovo Assembly remove the envisaged provisions relating to trials in absentia from the draft Criminal Procedure Code*.

The HLC Kosovo is of the opinion that *the provisions of the draft* Criminal Procedure Code, *with regard to trials in absentia, are general, imprecise and unclear, especially in relation to the actions that the court should take before deciding to organise a trial in absentia*. For example, Article 306, Paragraph 5, item 5.3 states that a trial *in absentia* shall be organised: 'if reasonable efforts have been made to locate the defendants'. Such proposals, without clearly specified provisions to be adhered to by the competent authorities, allow for analogous interpretation and application. Criminal proceedings can take the form of minor offence proceed-

ings, except that defendants (who are equal before the court with the prosecuting party and are considered innocent until the judgment becomes final) can be given very severe and long-term imprisonment sentences. The same Article, Paragraph 8 foresees that a person convicted of a criminal offence that is not time-barred has the right to request a retrial. This confirms our view that the introduction of the institute of trials *in absentia* can lead to a new and additional burden in the already overloaded Kosovo judiciary.

► *With regard to the foregoing provisions, it is of great importance that criminal and international law experts, law, as well as those with extensive practical judicial experience be involved in the follow-up work of the Assembly's mechanism dealing with the amendments to the Criminal Procedure Code that is before the new Government of Kosovo, in order to prepare good quality provisions of the Criminal Procedure Code. The Assembly needs a strong expertise to allow for a professional and comprehensive consideration of the draft for any possible application of the institute of trials in absentia and its justification.*

The Albanian version of the draft Criminal Procedure Code contains certain provisions that are unclear, while the Serbian translation lacks professional standards. There is a lack of knowledge of general and legal terminology. In some cases, English language terms were used in the Serbian translation.

To the Kosovo Academy of Justice

► The Kosovo Academy of Justice should continue its work on providing professional trainings to judges and prosecutors. The trainings should cover a longer period of time and should be organised in cooperation with the Kosovo Judicial Council and the Kosovo Prosecutorial Council in order to specify for what areas the trainings are mostly needed. International experts with proven experience in international criminal tribunals should be involved in the professional training of judges and prosecutors competent to handle war crimes cases. *The trainings should also be attended by assisting staff of judges and prosecutors, such as legal officers and legal assistants. These trainings should be mandatory*. According to our observations (the HLC Kosovo representatives attended a few of the trainings), the Academy's training sessions were rarely attended by judges and prosecutors dealing with war crimes.

► The Kosovo State Prosecution Office, in particular the SPRK, should *intensify professional cooperation with international judicial institutions*, especially with the International Residual Mechanism for Criminal Tribunals, as well as with the Specialised Chambers and the Specialised Prosecutor's Office, to exchange experiences in war crimes prosecution.

To the Kosovo Judicial Council and Courts

► The main trials on war crimes indictments that took place during the reporting period lasted for an unacceptably long time, even in cases where the defendants were in detention. When adjudicating in these cases, the Trial Panels *should adhere to the strict provisions of the Criminal Procedure Code regarding the duration of the main trial when the defendants are in detention*. The provisions of the European Convention on Human Rights and Fundamental Freedoms regarding a fair trial also foresee that trials be completed within a reasonable time in cases where the defendants are in detention. Furthermore, after the completion of the indictment assessment procedure, Trial Panels should, at the stage of the opening of the main trial, make adequate preparations so that the main trials are completed within the deadlines as prescribed by the law. Long-lasting main trials, not justified by a large number of witnesses, should be avoided. The trials must be completed within the deadlines prescribed by the law. Each extension predetermines the decision on punishment.

► The HLC Kosovo also finds that Trial Panels should introduce *a mandatory practice of providing a brief reasoning when announcing a judgment*, which is also strictly provided for by the Criminal Procedure Code (Article 366, Paragraph 2 of the CPCRK). To date, Trial Panels have, in most cases, failed to comply with this duty. Parties to the proceedings, family members of the defendants or the injured parties, monitors present and the general public have the right to be briefly informed of the evidence that the court used when rendering their decision.

► Kosovo courts should introduce into criminal proceedings *the practice of ruling on the property claims filed by injured parties, especially when they have the opportunity to do so on the basis of uncontested material evidence*. Courts should abandon the general practice, applied so far, that the injured parties, irrespective of the specific circumstances, are instructed to pursue their property claims in civil litigation that lasts for an extremely long time.

► A few years ago, Kosovo courts started uploading their court decisions to the official website of the Kosovo Judicial Council. However, the search of these judgments is very difficult, even in cases where a court case number is available. *Setting uniform and simplified standards for searching court decisions* (which have been redacted) and facilitating access to these judgments would be of great benefit to both the professional and general public.

To judicial institutions

Based on the monitoring of court sessions in war crimes cases, as well as on other charges in which the defendants were mostly Serbs, the HLC Kosovo has noted that

interpretation during the sessions of Trial Panels, as well as the translation of court documents into Serbian, continued to be poor during this reporting year. In some cases, the court documents translated into Serbian are even incomprehensible.

► The Kosovo Judicial Council and the Kosovo Prosecutorial Council *must urgently address the issue of translation of court and prosecutorial decisions into minority languages, as well as take measures to improve the quality of interpretation during court sessions or prosecution hearings, as interpretation into Serbian at court sessions during* the reporting period was completely unintelligible. A positive example in this context is the Serious Crimes Department of the Basic Court of Prizren, where interpretation during the sessions held before this Department, as well as translation of court documents into Serbian, were carried out much more professionally.

To the Government of Kosovo

The HLC Kosovo has repeatedly emphasised in the recommendations that it would be of utmost importance if legal co-operation between Kosovo and Serbia was established, given the current political situation of intensive activities with the involvement of the international community that insists on the continuation of political negotiations with Serbia. We believe that it would be very important if the issues of *international legal cooperation with Serbia and the provision of mutual legal assistance* were put on the agenda of these negotiations. International legal co-operation is crucial to establishing communication between the judicial institutions of Kosovo and Serbia and a more successful prosecution of war crimes.

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