

## CONVICTED WITHOUT EVIDENCE

### Legal Analysis of the Mazreku Trial

The Humanitarian Law Center points out that the District Court in Niš sentenced two Kosovo Albanians to long terms of imprisonment in spite of the lack of any incriminating evidence against them. After a trial which lasted a year, the five-man panel of the District Court on 18 April 2001 unanimously found Luan and Bekim Mazreku from Mališevo guilty of terrorism under Article 125 of the federal Criminal Code (CC) and, pursuant to Article 139 (2) of the CC, sentenced them both to 20 years, the maximum term envisaged by law. The Court ordered the Mazrekus to be remanded to custody until the sentence became final.

#### The Indictment

Luan and Bekim Mazreku were sentenced on the basis of indictment Kt. 167/98 – amended in 3 April 2001, which charged them with acts of terrorism under Art. 125 CC and punishable under Art. 139 (2). In the indictment, Prosecutor Miodrag Surla alleged:

*Luan in March and Bekim in May of 1998 joined the terrorist organization called “Lumi.” Luan Mazreku participated in the attack on Orahovac from 17 to 22 July 1998 in which Andjelko Kostić and Rajko Nikolić were killed and, in the same period, abducted 43 persons who, together with other abducted persons, i.e. 100 abducted persons in all, were taken to Klečka where they were tortured. On this occasion, Luan raped a Serb girl between the age of 12 and 15, and severed the ear of an eight-year-old boy. Bekim Mazreku raped several women after which, together with another 18 members of the KLA [Kosovo Liberation Army] they committed a mass execution by shooting.”*

#### The Trial

The Mazreku trial opened before the District Court in Niš on 3 April 2000. The panel was made up of Judge Milimir Lukić (presiding), Judge Dragoljub Žarković, and three lay judges. Owing to adjournments which lasted over a month, it commenced *de novo* twice more, on 20 September 2000 and 23 January 2001.

The original indictment, brought by the Priština District Prosecutor’s Office (Kt. 167/98) in which Luan and Bekim Mazreku were charged with seditious conspiracy (Art. 136 (2), CC) in conjunction with terrorism (Art. 125, CC) was read on 3 April and 20 September:

*With the intent of threatening the constitutional order and security of the Federal Republic of Yugoslavia, they engaged in acts of violence against members of the police force, Yugoslav Army and civilian population, acts which created a feeling of insecurity among civilians; became members of*

*the terrorist gang called Lumi and, as such, abducted and murdered two Albanians – Agim Thaqi and Faik Bitiqi - and abducted and shot to death several tens of Orahovac citizens.”*

After reading of the indictment, Luan and Bekim Mazreku pleaded not guilty to all counts and alleged that the statements they had made to the investigating judge were coerced from them. On 6 April 2000, Luan Mazreku told the Court:

*When we were arrested, they beat us with nightsticks. They took us from Mališevo to Glogovac where police, soldiers and even civilians beat us. We were there for about two hours and then we were taken to Priština. They beat us until the police inspectors came. It was there that we were separated and didn't see each other again. Two days later, they gave me some papers and made me sign them, promising to let me go if I did. I signed the papers with my hands tied. Then they gave me a paper with typewriting on it and said I was to learn what it said by heart. I read the text and saw it was the same rigged thing and refused to learn it. They gave me two injections to make me learn the text. They went on beating me and threatening to kill me; they cut my left ear. After this torture, I agreed to learn the text they had given me. The next day, they took me and Bekim to Klečka where, with beatings and threats, they made me say the text I had learned in front of the cameras.*

Bekim Mazreku stated that he was beaten by police, one of whom stubbed out a cigarette on his penis and then pierced it with an electric wire. He said gun barrels were pushed into his mouth, breaking two of his teeth, that his nose was cut, and that he was forced to sign his purported statement, which was written up by police. When at first he refused, he was given a cup of coffee in which police had dissolved two pills, after which he signed. He said he was then taken to Klečka where he was forced to make another statement, and that he did not know he was being filmed. “The statement said I killed 10 people. After the torture I went through, any man would have backed down,” Bekim Mazreku told the Court.

The first expert witness to appear was Slaviša Dobričanin, a pathologist with the Priština Institute of Forensic Medicine, who examined the skeletal remains recovered at Klečka. The pathologist contradicted himself with regard to the time of death of the persons whose remains were found, stating first that death occurred in July 1998 and then saying he was unable to fix the exact time. Nor did he specify how many deaths were involved, saying only, “We were talking about six or seven corpses.”

The statements made by Luan and Bekim Mazreku to the investigating judge, and two Priština Police Department lists of missing persons – those who disappeared in Kosovo from 1 January to 21 September 1998, and those who went missing in the Orahovac area in the 17-22 July 1998 period – were introduced as evidence.

At the first two sessions, the Court denied all requests by the defense to present evidence. It was only on 23 January 2001, when the trial commenced for the third time, that some of these previously denied motions were allowed, to wit:

1. To admit as evidence the UNMIK-issued death certificates of Agim Thaqi (deceased in 1981) and Faik Bitiqi (deceased on 19 April 2000).
2. That the defendants be medically examined and that the Court hear the results of the examination. (Testifying subsequently, Radovan Karadžić and Miodrag Zdravković, the forensic specialists who examined Luan and Bekim Mazreku, said they had established scars but were unable to determine when or how they were inflicted.)
3. To admit as evidence a news report headlined “Aslan Klečka Killed” published by the *Politika Ekspres* daily on 10 September 1998. The report includes a photograph found in Klečka, copies of which were handed out to news reporters who were told it was of persons who had committed the Klečka crime. Luan and Bekim Mazreku were not on the photograph.
4. That the Court take note of the decision of the Priština District Court (Ki-143/98) whereby defense counsel Aziz Rexha was denied the right to be present during the interrogation of his clients and some of the investigative procedures, a clear violation of the defendants’ right to counsel during the investigatory stage of the proceedings.
5. To admit as evidence the medical report of Dr Selatin Hakush dated 25 December 1998 stating that Luan Mazreku’s intelligence quotient was below the average.
6. To admit as evidence the 2 July 1998 custody order issued by the Priština Police Department for Bekim and Luan Mazreku and the 2 July 1998 certificate on their admission to jail, in view of the fact that they were charged with a criminal offense committed after the date of their arrest, i.e. in the 17-22 July 1998 period.
7. To admit as evidence the 28 August 1998 on-site investigation report (Kio-143/98) since it differs from the report introduced at the trial.
8. To admit as evidence the findings and opinion of a team of 15 Finnish forensic experts who conducted DNA tests on the bones recovered at Klečka and established that they were of three men of middle age and that the time of their death could not be determined with certainty. The Finnish experts concluded that several years might have passed from the time of death to the moment when the DNA tests were done.

The Court accepted a joint motion by the prosecution and defense to view the video tape of the on-site investigation at Klečka. The tape, which included the questioning of the defendants on the location by Investigating Judge Danica Marinković was shown in a news bulletin on Serbian Television. The Mazrekus stated that they made the statements in front of

the cameras after being tortured at the police station where they were given the text of what they were to say when being filmed.

In spite of the objections of the defense, the Court also viewed a video-tape taken on the premises of the State Security Service in Priština by Priština Television reporter Dragan Lukić. The tape was to be used in making a special report on the Klečka incident and, Lukić said, excerpts were shown on Novi Sad Television. The tape run in Court had obviously been cut in places and the reporter posed his questions not as a journalist who wished to establish what happened at Klečka but as someone who already knew all the details and only wanted confirmation. For their part, Luan and Bekim Mazreku said they could not identify Lukić as the reporter who interviewed them, and said they did not even remember giving the interview.

In accordance with the Criminal Procedure Code (CPC), the Court ruled the second video tape inadmissible. The harm, however, had already been done as the tape could have led the public in the courtroom as well as the panel itself to believe the defendants were guilty.

The Court denied a defense motion for another forensic examination of the remains found in Klečka by any specialized institution of its choosing. Defense counsel considered that another examination was necessary as the findings of the Priština Forensic Medicine Institute differed from those of the team of Finnish pathologists. According to the Finnish experts, the Klečka remains were of three middle-aged men whereas the Priština Institute said the bones of six persons between the ages of five and 60 were recovered on the site. The Priština experts were definite that the time of death was July 1998 while their Finnish colleagues concluded that the precise time could not be established and that death might have occurred two years before the Klečka incident. The Finnish pathologists further said that bullet traces were found only on one set of skeletal remains, in contrast to the Priština pathologists who said all the victims were shot to death.

The Court also denied a defense proposal to call as a witness Zeqir Ademi, guard commander at the Priština District Prison, in order to determine whether or not Luan and Bekim Mazreku were subjected to torture during police custody and the pre-trial proceedings.

After the closing of evidence, Prosecutor Miodrag Surla amended the indictment, dropping the counts of seditious conspiracy and murder of the two ethnic Albanians, but retaining that of terrorism. The amended indictment was translated into Albanian and, on hearing the charges, the Mazrekus again pleaded not guilty, standing by their previous defense.

### Closing Arguments

In his closing argument, Prosecutor Surla moved that the Court admit as evidence the statements made by the Mazrekus to the investigating judge, assessing their defense at the trial as “illogical, implausible and somewhat

naive.” He went on to say that the “flimsy defense of the accused is evident from the fact that the trial had commence anew three times” and that “the defendants kept contradicting themselves at all the sessions.”

*I am confident the Court will accept as true and convincing the statement he [Bekim Mazreku] made during the investigation, a statement that was the result of his remorse... The fact that he presented two different defenses confirms that he was not coached or coerced into saying what he thought was best for him.*

The prosecutor concluded by calling on the newly formed courts and prosecutor’s offices in Kosovo to summon Fatmir Limaj, Hysni Hilaj and Gani Krasniqi, persons named by Luan and Bekim Mazreku in their coerced statements as leaders of the KLA headquarters in Mališevo, and to ask them only one question: “What happened in Klečka?” He urged the Court to find the defendants guilty and sentence them to prison terms.

The defense in its closing argument pointed to a series of violations during the entire proceedings:

- Presumption of innocence was not respected as Luan and Bekim Mazreku were declared guilty by the media while the investigation was still under way;
- Although the burden of proof is on the prosecution, the defense was continually in the position of having to prove the innocence of the defendants;
- The indictment was based solely on the statements made by Luan and Bekim Mazreku to the investigating judge and on evidence that a crime had in fact been committed in Klečka but now evidence was presented that the perpetrators were the Mazrekus.
- The defense also noted the discrepancies between the original on-site investigation report and the report presented at the trial, which, the prosecutor explained, had been written on the basis of the recollection and notes of Investigating Judge Danica Marinković. It remained unclear how a report relying on recollection could contain more detail than one written up on the site and during the investigation itself. The original report mentioned several lime-kilns at the location while the subsequent one specified only one kiln, in the ashes of which skeletal remains were found. There was, however, no reference to skeletal remains in the original report.
- Evidence presentation was not in accordance with the standards of a fair trial as the panel, though it did not possess professional expertise on the subject, did not allow obtaining of additional expert opinion on the findings of the Priština Forensic Medicine Institute and the findings of the Finnish pathologists.
- The defense pointed out that the custody order of Bekim Mazreku bore the date 2 July 1998 while he was charged with an offense that occurred

in the 17-22 July period, and that the date on both the order and certificate of admission to jail of Luan Mazreku was changed from 2 July to 2 August 1998.

Defense counsel concluded that no incriminating evidence against the defendants was presented during the trial and urged the Court to find them not guilty.

Sentencing was scheduled for 12 April. However, when the Court convened it informed those present that a witness, who was among those abducted on the road to Orahovac on 17 July 1998 and held at Mališevo, had come forward during its deliberations. The Court decided to hear the testimony of this eyewitness of events in Orahovac and Mališevo *ex officio*.

It also ruled that the testimony would be given *in camera* on the grounds that, if made public, it could endanger the witness's family members who were also abducted on the Orahovac road. Presiding Judge Milimir Lukić said the witness believed the family was still being held by the abductors and, as an additional reason for excluding the public, cited the possibility of the testimony disturbing the Serb population. After the witness was heard, Prosecutor Surla said the new evidence substantiated the charges set out in the indictment. He said the witness's description of what happened in Mališevo tallied fully with the statements made by the defendants to the investigating judge and queried how the defendants could have described the incident so accurately unless they had been present when it occurred.

Stating that the witness's testimony was a moving account of the fate of a family and their imprisonment in Mališevo, the defense noted that the witness did not identify the defendants as the abductors although recalling all the details of the abduction: time, models and number of vehicles, location to which they were driven.

The defense considered that, if the defendants had been among the abductors, the witness would certainly have been able to identify them and said this testimony only confirmed that the abductions in Orahovac did take place but not who the abductors were.

### The Judgment

On 18 April 2001, the panel of the Niš District Court by unanimous decision found Luan and Bekim Mazreku guilty of the criminal offense of terrorism under Art. 125 of the CC and, pursuant to Art. 139 sentenced them to 20 years in prison, the maximum term envisaged by law. The Mazrekus were ordered remanded to custody until the sentence became final, in accordance with Art. 353 (1) of the CPC under which custody is mandatory when defendants have been sentenced to five or more years in prison.

Setting out the reasons for the Court's decision, Presiding Judge Lukić said:

***“Upon receiving the case of Luan and Bekim Mazreku and reading the description of the acts with which they are charged, I could not believe that anyone could commit such atrocious crimes in the name of any cause. However, the facts established at this trial were incontrovertible that terrible crimes were committed in Klečka village and uncovered the perpetrators – Luan and Bekim Mazreku.***

***The guilt of the defendants has not been construed nor have they been framed, as they claimed in their defense. Guilt has been established individually and precisely through the confession of the defendant Luan Mazreku.***

***His was not a common confession but a clear and logical narrative giving the sequence of events and specific details and descriptions of the location, buildings, objects and persons that can be given only by a person who actually took part in those events. In their defense, the defendants alleged that the confession was planted by inspectors of the Serbian police force and made under the influence of stupor-inducing drugs. This was proved untrue when another person who was present at this tragedy came forward and whose eyewitness testimony together with details, description of the location, buildings, objects and persons was identical to Luan Mazreku’s confession. The scope of this testimony was naturally limited by the eyewitness’s physical presence during the event and ability to observe the details cited, but even so it unambiguously demonstrates that the event occurred as described by the defendant Luan Mazreku in his confession and only thus.***

***There are no eyewitnesses here of the most reprehensible act of this tragedy, the mass shooting of civilians, women and children, for none survived to testify about it. The only witnesses are their executioners, two of whom were on trail here.***

### **Findings and Recommendations**

#### **Impartiality of courts**

**Judicial bodies are bound to refrain from prejudging the outcome of trials. Impartiality means that judges may not have prejudices with regard to the subject matter of a trial or act in a way that would favor either of the parties to the proceedings. The two trial judges in this case as well as the prosecutor are all displaced persons from Kosovo, with all the negative implications of such a status.**

**The exposition of the presiding judge was not a factual explanation of the judgment but rather denoted his personal attitude toward the Klečka incident, a further confirmation that the Court was not impartial. In his closing argument, the prosecutor called on courts in Kosovo to uncover the perpetrators of the Klečka crime, a clear indication of his awareness that there was no evidence that Luan and Bekim Mazreku had committed**

the crime they were charged with, but that he considered them responsible because they are ethnic Albanians.

#### **Right to defense**

The right of an accused person to defend himself includes the right to an attorney of his own choice, and the right of that attorney to be present when his client is questioned and makes statements in the investigative stage of the proceedings. Although this right is guaranteed by the Criminal Procedure Code, the Priština District Court did not allow the Mazrekus' attorney Aziz Rexha to be present when they were interrogated or during certain investigative procedures. Nor was the attorney able during the investigative stage to freely discuss the case or the defense he would present with his clients. Luan and Bekim Mazreku were only permitted ask him to convey personal messages to their families.

#### **Prohibition of torture and extraction of statements**

Physical or mental abuse, torture or inhuman or degrading treatment of a person who has been taken into custody is strictly prohibited by both national law and international acts, and no exceptional circumstances whatsoever may be invoked as a justification of torture. Luan and Bekim Mazreku, however, were severely tortured in order to extract confessions from them, and testified in court to this effect.

They were beaten, subjected to electric shocks, and cut with knives to force them make the statements desired by the police and to sign confessions that they had committed the Klečka crime. And then they were tortured again to make sure that they would repeat to the investigating judge these extracted statements.

#### **Right to trial within a reasonable time**

Everyone who has been arrested or detained on criminal charges has the right to trial within a reasonable time. Luan and Bekim Mazreku were arrested on 2 August 1998 and went on trial on 3 April 2000 – one year and eight months after being taken into custody.

#### **Right to proceedings without undue prolongation**

Under Art. 14 of the Yugoslav Criminal Procedure Code, courts have a duty to conduct trials without unduly prolonging them. That this principle was not respected in the Mazreku case is evident from the fact that intervals of four or five months passed between sessions of the court.

#### **Right to use one's own language**

The defendants' right to use their own language in court was respected only partially at the first two sessions. The indictment was translated into Albanian whereas other pertinent evidence such as the expert witness's statements, findings and others were not.

It was only at the third session that the defendants were able to fully exercise the right to use their own language. This time the indictment, witness statements, closing arguments of the prosecution and defense and exposition of the judgment were translated into Albanian.

#### **Presumption of innocence**

It is a hallowed principle of criminal law that everyone shall be presumed innocent until proved guilty by a court a law (Art. 3, CPC). Luan and Bekim Mazreku were, however, declared guilty long before they went on trial by the media whose sensational reporting led the general public to believe them guilty. In their coverage of the trial itself, reporters almost always referred to the defendants as “the monstrous terrorists from Klečka.” The video of the purported confession was shown by Serbian Television in its prime time news bulletin.

The panel itself also failed to observe this principle. When denying some defense motions, the presiding judge would state, “You can set that out in the appeal.” His attitude indicated that it was known beforehand what verdict would be returned.

#### **Right to a fair trial**

One of the most important stages in a criminal trial is the presentation of evidence when, acting on the motions of the parties or *ex officio*, the court must determine fully and accurately the facts of the case. The substantive truth principle (Art. 15, CPC) stipulates that courts have a duty bring out truthfully and completely evidence of consequence to the determination of the action, and Art. 322 (2) of the CPC states that presentation of evidence pertains to all facts the court deems of consequence for the proper rendering of the verdict. The panel trying the Mazrekus obviously was not governed by this principle, denying at the first two sessions all the defense motions and allowing those of the prosecution.

When the trial started anew for the third time, some of the previously denied defense motions were allowed, including introduction of the Finnish pathologists’ findings and opinion. However, this turned out to be a mere formality as the Court did not uphold the defense proposal to obtain another forensic opinion to decide whether credence should be given to the Priština Institute’s or the Finnish team’s report. Had the evidence presentation been in accordance with the standards of a fair trial, the Court would have *ex officio* sought a third opinion.

The Court denied a defense motion to hear Zeqir Ademi in order to establish whether or not Luan and Bekim Mazreku had been subjected to torture during police custody and the pre-trial stage. It thereby disregarded its obligation to determine how the defendants’ statements had been obtained as both national law and internationally recognized standards deem inadmissible statements made under any kind of duress.

The trial proceeded in entirety on the basis of the recollection of the investigating judge and reconstructed documents since the original record, which remained at the Priština District Court, was inaccessible. It would therefore have been logical and in accordance with the CPC for the Court to have granted defense counsel's motions for the introduction of evidence which could have helped to clarify the facts.

Where confessions are concerned, courts must under Art. 32 of the CPC evaluate their credibility and establish whether they are borne out by other evidence.

The indictment as well as the judgment were based solely on the statements made by Luan and Bekim Mazreku to the investigating judge in spite of the many contradictions and inconsistencies they contained, as did also their statements in court. However, neither the investigating judge in the pre-trial stage nor the panel made any attempt to establish which of them were true. When questioned by the investigating judge, the Mazrekus admitted to abducting and murdering two Albanians, Agim Thaqi and Faik Bitiqi, and the original indictment contained this count. When the defense was able to prove that Thaqi committed suicide in 1981 and Bitiqi died in 2000, the prosecutor withdrew the charge. The Court's decision to accept this and other amendments to the indictment clearly demonstrates the inequality of arms in this case. The practice at all trials of Kosovo Albanians was to place the burden of proof on the defense instead of the prosecution.

The Mazrekus confessed to abducting a man who committed suicide long before they allegedly kidnapped him, and another who died of natural causes almost two years afterwards. Would it then not have been justified to doubt the credibility of the rest of the Mazrekus' statements, especially in view of their allegation of torture at the hands of the police in Priština? The panel, however, made no attempt to weigh the statements as a whole, preferring to accept the parts which supported the prosecution's case.

A specific of this trial was the belated appearance of the eyewitness, on the very day the Court had scheduled the sentencing. The panel ruled to hear the eyewitness without the presence of the public in the court room and postponed the sentencing.

The exposition of the court's decision given by the presiding judge indicates that the panel handed down a conviction based solely on the testimony of this eyewitness who, however, was not able to identify the defendants, and the confession of Luan Mazreku to the investigating judge. It is only logical that the statements coerced from the defendants and the eyewitness's testimony tallied as the descriptions of the location, buildings, and objects found there and the events that took place were established by police and the investigating judge during the on-site investigation.

All the prosecution was able to prove was that a crime had been committed at Klečka. It presented no evidence to prove that the Mazrekus had committed this crime, and this was sufficient grounds for the Court to find them not guilty. Instead, it handed down a conviction solely on the basis of the confessions coerced from the defendants.

#### **Recommendation**

Both international acts and national law guarantee a fair trial to all, irrespective of the ethnicity of the accused, the acts of which they are accused and the manner in which those acts were committed. The District Court in Niš disregarded this guarantee only because Luan and Bekim Mazreku are ethnic Albanians.

The decision in this case has not yet become final. The Serbian Supreme Court should set aside the lower court's ruling and order a retrial as well as the release of the Mazrekus pending the new trial. The Supreme Court should also instruct the District Court to apply all the legal provisions that would guarantee the fairness of the new trial.