SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 527/2012
Prishtinë/Priština
11 December 2012

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 20 November 2012 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judges Maria Martti Harsia and Horst Proetel and Kosovo Supreme Court Judges Valdete Daka and Emine Mustafa as panel members, with EULEX Legal Officer Holger Engelmann as Court Recorder,

In the presence of the

EULEX Public Prosecutor Judith Eva Tatraj, Office of the State Prosecutor of Kosovo (OSPK),

Defense Counsels:

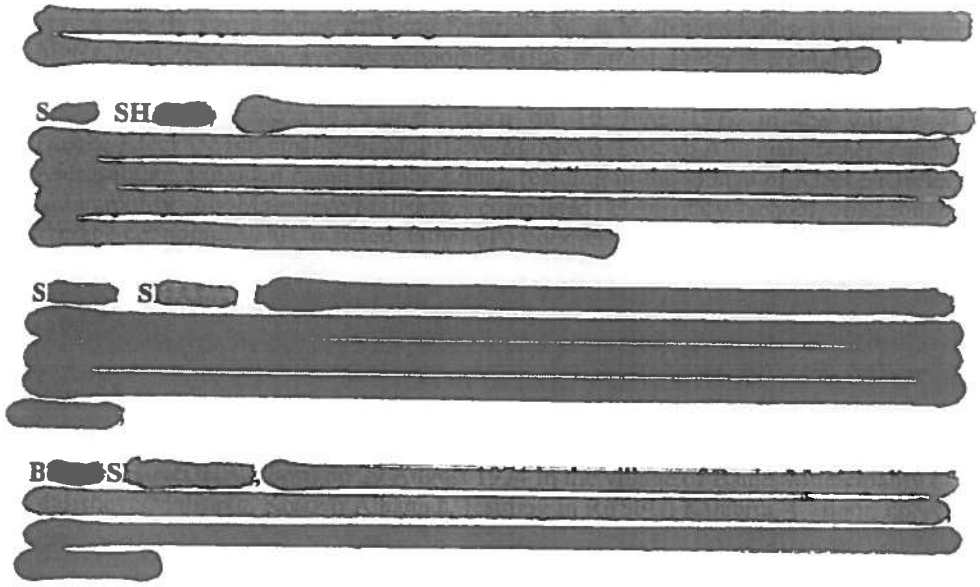
- Av. F[redacted] for the defendant A[redacted]
- Av. R[redacted] for the defendant B[redacted]
- Av. H[redacted] for the defendant R[redacted];
- Av. M[redacted] for the defendant S[redacted]
- Av. D[redacted] for the defendant S[redacted]
- Av. Q[redacted] for the defendant B[redacted]

In the criminal case number AP.-KŽ. 527/2012 against the defendants:

A[redacted]

B[redacted]

R[redacted]



In accordance with the Verdict of the first instance District Court of Prishtine/Pristina in the case no. P. Nr. 425/2011 dated 30 March 2012 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, **the defendants were acquitted from the following criminal offenses as charged with by the Indictment PPS No. 07/2010, dated 25 July 2011:**

1. A K:

Count 1: War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 142, 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), also foreseen in Articles 120, 121 of the Criminal Code of Kosovo (CCK), read in conjunction with Articles 22, 24, 26 CC SFRY and 23, 25, 26 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of Protocol II Additional to the four Geneva Conventions (APII); the Accused, in his capacity as KLA member, in co-perpetration with F I, N KR N K N S B L, B S, S SH, cooperative witness 'X', S S and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in Klecke/Klecka detention center, by keeping them in inhumane condition (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2: War Crime against Prisoners of War, under under Articles 22, 144 CC FSRY, currently criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4,

5(1) of APII; the Accused in his capacity of member of the KLA, in co-perpetration with N[redacted] K[redacted], N[redacted] S[redacted], R[redacted] M[redacted], N[redacted] KR[redacted] and cooperative witness 'X' participated in the killing of a Serbian military prisoner, detained in the Klecka detention center, and whose remains were found in a mass grave near Klecka, containing five bodies; more precisely, the defendant participated in the crime by providing N[redacted] S[redacted], the direct perpetrator of the killing, with a scythe, although he knew, because explicitly informed of N[redacted] S[redacted] intention to kill the prisoner with that scythe; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 3: War Crime against Prisoners of War, under under Articles 22, 144 CC FSRY, currently criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA, in co-perpetration with F[redacted] L[redacted], N[redacted] K[redacted] N[redacted] S[redacted] N[redacted] KR[redacted], B[redacted] L[redacted] and cooperative witness 'X', participated in the killing of N[redacted] D[redacted] and V[redacted] M[redacted], two Serbian Police officers, detained in the Klecke/Klecka detention center, who were executed by cooperative witness 'X' with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by marching the two prisoners to the execution spot and by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew (because explicitly informed of F[redacted] L[redacted] orders), or at least could easily foresee from the orders received (marching the two Serbian prisoners to a remote location in the woods) what would happen to them; in a location known as Livadhi I Canit near Klecke/Klecka, Lipjan/Lipjan, on or about 04/05 April 1999;

2. B[redacted] L[redacted]

Count 1: War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 CC SFRY, currently criminalized under Articles 23, 120 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as KLA member, in co-perpetration with F[redacted] L[redacted], N[redacted] KR[redacted], N[redacted] K[redacted], N[redacted] S[redacted] A[redacted] K[redacted], B[redacted] S[redacted], S[redacted] SH[redacted] cooperative witness 'X', S[redacted] S[redacted] and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in Klecke/Klecka detention center, by keeping them in inhumane condition (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2: War Crime against Prisoners of War, under Articles 22, 144 CC FSRY, currently criminalized under Articles 23, 120 CCK, in violation of

Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA, in co-perpetration with F[redacted] L[redacted], N[redacted] K[redacted] N[redacted] S[redacted] N[redacted] KR[redacted], A[redacted] K[redacted] and cooperative witness 'X', participated in the killing of N[redacted] D[redacted] and V[redacted] M[redacted] two Serbian Police officers, detained in the Klecke/Klecka detention center, who were executed by cooperative witness 'X' with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by marching the two prisoners to the execution spot and by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, (because explicitly informed of R[redacted] L[redacted] orders), or at least could easily foresee from the orders received (marching the two Serbian prisoners to a remote location in the woods) what would happen to them; in a location known as Livadhi I Canit near Klecke/Klecka, Lipjan/Lipjan, on or about 04/05 April 1999;

3. R[redacted] M[redacted]

Count 1: War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 CC SFRY, currently criminalized under Articles 23, 120 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as KLA member in co-perpetration with N[redacted] K[redacted], N[redacted] K[redacted] and N[redacted] S[redacted] killed A[redacted] A[redacted], a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre, more precisely, the defendant participated in the crime by keeping the victim at the disposal of the perpetrators and by pushing him into a hole in the ground where he was subsequently executed by N[redacted] KR[redacted] and N[redacted] K[redacted] with AK-47 firearms; in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2: War Crime against Prisoners of War, under Articles 22, 142, 144 CC SFRY, currently criminalized under Articles 23, 120 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as member of the KLA, in co-perpetration with N[redacted] K[redacted], N[redacted] S[redacted], N[redacted] KR[redacted] A[redacted] K[redacted] and cooperative witness 'X' participated in the killing of a Serbian military prisoner; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, N[redacted] S[redacted] although he knew, because explicitly informed about N[redacted] S[redacted] intention to kill the prisoner from the previous conversation between the latter and F[redacted] L[redacted] that the prisoner would be executed; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

4. S[redacted] SH[redacted]

Count 1: War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 CC SFRY, currently criminalized under Articles 23, 120 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as KLA member, in co-perpetration with F[redacted] L[redacted] N[redacted] KR[redacted] N[redacted] K[redacted], N[redacted] S[redacted], A[redacted] K[redacted], B[redacted] L[redacted] B[redacted] S[redacted] cooperative witness 'X', S[redacted] S[redacted] and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in Klecke/Klecka detention center, by keeping them in inhumane condition (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2: War Crime against Prisoners of War, under Articles 22, 144 CC FSRY, currently criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA and in co-perpetration with cooperative witness 'X', N[redacted] K[redacted] N[redacted] S[redacted], B[redacted] S[redacted], tortured four Serbian military prisoners, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as B[redacted] C[redacted], Z[redacted] R[redacted] and Z[redacted] T[redacted] by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

5. S[redacted] S[redacted]:

Count 1: War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 CC SFRY, currently criminalized under Articles 23, 120 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as KLA member, in co-perpetration with F[redacted] L[redacted] N[redacted] KR[redacted] N[redacted] K[redacted], N[redacted] S[redacted], A[redacted] K[redacted], B[redacted] L[redacted] B[redacted] S[redacted] S[redacted] SH[redacted] cooperative witness 'X' and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in Klecke/Klecka detention center, by keeping them in inhumane condition (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

6. B[redacted] S[redacted]

Count 1: War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 CC SFRY, currently criminalized under Articles 23, 120 CCK, in violation of common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as KLA member, in co-perpetration with F[redacted] L[redacted], N[redacted] KR[redacted] N[redacted] K[redacted] N[redacted] S[redacted], A[redacted] K[redacted] B[redacted] L[redacted], S[redacted] SH[redacted], cooperative witness 'X' and S[redacted] S[redacted] and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in Klecke/Klecka detention center, by keeping them in inhumane condition (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2: War Crime against Prisoners of War, under Articles 22, 144 CC FSRY, currently criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA and in co-perpetration with cooperative witness 'X', N[redacted] K[redacted], N[redacted] S[redacted] and S[redacted] SH[redacted] tortured four Serbian military prisoners, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as B[redacted] C[redacted], Z[redacted] F[redacted] and Z[redacted] T[redacted], by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

The first instance Judgment was to a decisive amount based upon the fact that in the Main Trial session on 21 March 2012 the panel issued a "Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries" and ruled them entirely inadmissible.

The Special Prosecutor of Kosovo (SPRK) timely filed an appeal dated 17 July 2012 against the Judgment of the District Court of Prishtine/Pristina, jointly also appealing the Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries dated 21 March 2012 as issued by the same Court. It was asserted that the Verdict contains multiple substantial violations of the criminal procedure as well as erroneous and incomplete establishment of the factual situation.

It was proposed:

1. To annul the "Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries", issued during the trial session on 21 March 2012;
2. To declare all of A[redacted] Z[redacted] statements and diaries listed in the "Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries", which were declared inadmissible, as admissible;

3. Consequently, to annul in its entirety the 30 March 2012 Judgment against N[redacted] KR[redacted] N[redacted] K[redacted] F[redacted] L[redacted] and N[redacted] S[redacted];
4. To send the case back for retrial before a different Trial Panel;
5. In any case, to annul the 30 March 2012 Judgment in the aprt declaring the evidence seized at F[redacted] L[redacted] and N[redacted] Kr[redacted] residences as inadmissible;
6. To declare the evidence seized at F[redacted] L[redacted] and N[redacted] Kr[redacted] residences as admissible.

The Office of the State Prosecutor of Kosovo (OSPK), with a response dated 4 October 2012 fully supported the appeal of the SPRK.

Based on the written Verdict of the District Court Prishtine/Pristina in case P. Nr. 425/2011 dated 02 May 2012 (filed with the Registry of that Court on the same day), the submitted written appeal of the SPRK, the opinion of the OSPK, the responses of the Defense, the relevant file records and the oral submissions of the parties during the hearing session on 11 December 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 11 December 2012, hereby issues the following:

RULING

The appeal filed on 18 July 2012 by the Special Prosecutor of the Republic of Kosovo against the Judgment P. No. 425/2011 of the District Court of Prishtinë/Priština, dated 30 March 2011, is GRANTED.

1. **The Judgment of the District Court of Prishtinë/Priština P. No. 425/2011, dated 30 March 2012, together with the „Ruling on Admissibility of A[redacted] Z[redacted] statements and diaries" issued during the main trial session on 21 March 2012 are ANNULLED. The statements and diaries mentioned in the Ruling are DECLARED ADMISSIBLE.**

2. **The Case is SENT FOR RE-TRIAL AND DECISION.**

3. **The evidence seized upon the search at N[redacted] KR[redacted] and F[redacted] L[redacted] premises is DECLARED ADMISSIBLE.**

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REASONING

Procedural History

1. Because of the late A Z (at a later stage known as well as 'witness X') voluntarily approaching and stating in front of EULEX Police War Crimes Investigation Unit (WCIU) on 20 and 30.November 2009 as well as on 03 December 2009 as a witness, police gained knowledge the very first time about everything A Z was about to tell them. As a consequence of preliminary police investigations in this context, investigations were started against the late A Z (at a later stage known as well as 'witness X') by SPRK Ruling PPS.07/2010, dated 02 February 2010, and have been expanded on 16 February 2010 for an additional Count.

2. With SPRK Ruling PPS 07/2010 dated 5 July 2010 investigation was expanded against the defendants S H, H H, U G, S SH, F L, I M, (against whom investigations were terminated on 25/10 2010) and N KR

3. With SPRK Ruling PPS 07/2010 dated 27 October 2010 and filed on 05 November 2010, investigations were initiated against the defendants B S, A K, B L, N K, X K, N S, H S, S SH, and S T

4. With SPRK Ruling PPS 07/2010, dated 27 October 2010 and filed on 10 November 2010, investigation was as well initiated against R M

5. By SPRK Ruling PPS 07/2010, dated as well 27 Octoer 2010 and filed on 15 November 2010, investigations were expanded against defendants B S, A K, B I, N K, X K, N S, H S, S SH, S T and R M

6. By Ruling PPS 07/2010, dated 01 February 2011 investigations were expanded against the defendant S S and by another SPRK Ruling from the same date investigations were expanded against defendants B S A K, N S, S SH and N K.

7. On 04, 09, 11, 16, 17 February, 15, 16, 25 March, 09 June and 20 August 2010 the SPRK Prosecutor conducted interrogations of A Z (alias witness 'X') as defendant.

8. On 05 July 2010 the SPRK Prosecutor filed an application to the Pre-Trial Judge of the District Court Prishtine/Pristina to grant A Z (alias witness 'X') the status of a cooperative witness;

9. On 25 August 2010 the Pre-Trial Judge granted the status of cooperative witness to witness 'X' and ruled his statements to be sealed in accordance with Article 299 paragraphs 2 and 3 of the KCCP.

10. On the 05 and 07 October 2010 the SPRK Prosecutor interrogated A Z as cooperative witness 'X'.

11. By letter dated 27 June 2012, the SPRK Prosecutor invited all Defense Counsels to examine cooperative witness 'X' alias A Z in the official Prosecution rooms on 05, 06, 07, and 09 July 2011 and to bring forward their own questions. In preparation of these examinations, in particular SPRK Binders A containing A Z statements to the SPRK Prosecutor dated 4, 9, 11, 16 and 17 February 2010, on 10, 16 and 25 March 2010, on 06 June, 20 August 2010, 05 and 07 October 2010 with relevant police statements and other attachments and SPRK Binder Bcontaining diverse SPRK and EULEX Police records from the hearings of numerous other witnesses and multiple attachments have been disclosed to the Defense in in view of the scheduled examination sessions. Moreover, between 11 May and 07 July 2011 all Klecka related exhumation reports as contained in SPRK Binders I and L as wellas – on 09 July 2011 – copies of A Z diaries 0096-09-EWC2/001, 002, 011, 013 and 014 were disclosed to the Defense Counsels. Within the referred timely context the Prosecutor did not disclose other material, as in particular contained in SPRK Binders C, D, F, H and M and KA Binder 1. A detailed list of all referred materials is drawn up in the challenged District Court Ruling on Admissibility of A Z Statements and Diaries dated 21 March 2012.

12. On 25 July 2011 the SPRK Prosecutor brought an Indictment (PPS No. 07/2010) against the defendants A K, B L, R M, S SH, S S and B S (as well as against N KR N K, F L and N S, and accused them for the Counts as listed before (from page no. 2 of this Judgment);

13. On the 24 and 25 August 2011; the Confirmation Judge at the District Court of Prishtine/Pristina conducted Confirmation Hearings, based upon which the Indictment entirely confirmed by Confirmation Ruling dated 26 August 2011.

14. On 28 September 2011, the cooperative witness 'X', A Z, was found dead near his place of residence in Germany, after he allegedly had committed suicide;

15. On 09 November 2011 the SPRK Prosecutor partially withdrew the Indictment, limited to Count 2 against the defendant A K.

16. The Main Trial commenced in front of a mixed panel of EULEX and Kosovo Judges at the District Court of Prishtine/Pristina through 18 sessions on 11 November, 01 and 14 December 2011, 16, 30 and 31 January, 06, 07, 09, 28 and 29 February, 01, 05, 06, 07, 21 and 30 March and 02 May 2012.

17. In the session on 21 March 2012 the panel issued a "Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries" and declared all statements given by the now late witness including his "war Diaries" as being inadmissible.

18. In the the session on 30 March 2012, the panel ruled for the charges against the defendants A[redacted] K[redacted], B[redacted] L[redacted], R[redacted] M[redacted] S[redacted] SH[redacted] S[redacted] S[redacted] and B[redacted] S[redacted] to be separated and issued the challenged Judgment on their acquittal.

19. Against the other four defendants the District Court held one more session on 02 May 2012, after which a Judgment was pronounced acquitting them from all charges.

20. On 18 July 2012, the SPRK, who had received the challenged Judgment on 6 July 2012, timely filed an appeal against that verdict in accordance with Article 398, paragraph 1 and Article 399, paragraph 1 of the KCCP and asserted and proposed as outlined before.

21. The SPRK also appealed the judgment against the other four initial co-defendants.

22. The OSPK filed its opinion and proposal dated 4 October 2012 with this Court, on the same day and fully supported the positions of the SPRK.

23. On 20 November 2012 the Supreme Court of Kosovo held a session in order to decide on the SPRK's appeal against the judgment acquitting the four other defendants N[redacted] KR[redacted], N[redacted] K[redacted] F[redacted] L[redacted] and N[redacted] S[redacted] On the same day it pronounced a ruling (Ap.-Kž. 453/2012) partially granting the appeal and returning the case for re-trial.

24. On 11 December 2012, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The representative of the OSPK made reference to the written appeal of the SPRK and to the written opinion of the OSPK, confirmed their proposals as announces there in writing and proposed to take all four defendant in detention on remand. The Defense Counsels also confirmed their written submissions and proposals and unanimously proposed to reject the OSPK request for detention on remand against the four defendants.

FINDINGS OF THE COURT

A. Admissibility Questions:

I. JURISDICTION OF THE SUPREME COURT TO DECIDE UPON THE SPRK APPEAL AGAINST THE DISTRICT COURT 'RULING ON ADMISSIBILITY OF A[redacted] Z[redacted] STATEMENTS AND DIARIES' AND TIMELY APPEAL OF THE SPRK PROSECUTOR

25. The Defense Counsel of the defendant N[redacted] KR[redacted] Av. F[redacted] V[redacted] in his oral submissions to the Appellate Panel on 20 November 2012 has challenged the jurisdiction of the Supreme Court, referring to Articles 319 and 154 of the KCCP. He in particular stressed that Article 319 paragraph 3 of the KCCP would be very precise, stating that Article 154 of the KCCP applies *mutatis mutandis* when it comes to the appeal against a ruling on inadmissibility of evidence issued during the main trial session. Despite that according to Article 154 paragraph 3 of the KCCP the deadline to appeal such ruling is limited to 48 hours from the receipt of the ruling, which in the case at hand had passed long time before, when the SPRK Prosecutor submitted his appeal on 21 August 2012, the appeal would have had to be decided upon by a pre-trial panel of the District Court.

26. The Supreme Court finds that the allegations of the Defense are without merits and therefore ungrounded in the case at hand. The referred Article 319 paragraph 3 of the KCCP expressly provides for the case that *'the presiding judge [...] renders a separate ruling to declare [...] evidence inadmissible'*, whilst in the case at hand the appealed 'Ruling on Admissibility of [redacted] s Statements and Diaries' dated 21 March 2012 was issued by the whole Main Trial Panel of the District Court.

For reasons as outlined before, deadlines and jurisdiction for appeals against *'rulings rendered in connection with the [...] judgment may only be challenged in an appeal against the judgment'*, as provided by Article 431 paragraph 3 of the KCCP.

II. ALLEGED DISQUALIFICATION OF THE SPRK PROSECUTOR'S LEGAL OFFICER IN THE SESSION OF THE SUPREME COURT DATED 20 NOVEMBER 2012

27. The Defense Counsel of the defendant N[redacted] S[redacted] has stressed at the end of the Supreme Court session on 20 November 2012 and in the course of his final speech only that as to his opinion the procedure had not been correct, since the Legal Officer assisting the representative of the OSPK during the session had been assisting before the SPRK Prosecutor during the Main Trial at the District Court and moreover is permanently assigned to the SPRK. Therefore, the Presiding Judge of the Supreme Court panel would have had to decide upon the disqualification of the Legal Officer in accordance with Article 45 paragraph 3 of the KCCP.

28. The Supreme Court finds that the allegation is without merits and therefore ungrounded. Despite that the referred Legal Officer did not take any active role in the course of proceedings in front of the Supreme Court, Article 45 paragraph 3 of the KCCP expressly and exclusively mentions recording clerks, interpreters, specialists and expert witnesses as persons who possibly could be excluded due to their alleged disqualification. The *ratio legis* of this provision is based on the fact that the support staff and expert witnesses mentioned there have an immediate impact on the conduct of the trial, the contents of the records, the common proper understanding of submissions to be translated to all parties and thus on the results of criminal proceedings, due to their specific tasks. Such situation does not exist with regards to a legal officer, who may upon request advise the prosecutor on the background of a very complex case, s/he is deeply involved with. A legal officer as such is not authorized to make statements during a court session on behalf of any party and has consequently no possibility to directly influence the proceedings in a court session. His or her status is comparable to an observer or adviser.

B. Substantial violation of the provisions of the Criminal Procedure

29. The SPRK Prosecutor in his joint appeal against the 'Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries' dated 21 March 2012 and the first instance Judgment dated 02 May 2012 has challenged violations of Article 403 paragraph 2 item 1 of the KCCP, because the District Court allegedly has interpreted and applied Articles 156 paragraph 2, 237 paragraph 4, 238 and 307 of the KCCP in an incorrect manner. In particular, the requirements of the Court regarding the legal level of an *'opportunity to challenge'* to be given to the Defense in accordance with Article 156 paragraph 2 of the KCCP would be too high and not in compliance with the *ratio legis* and the adjudication of the ECtHR. Moreover, the assessment of the Court with regards to the relations between Article 156 paragraph 2 and Article 237 paragraph 4 of the KCCP would be wrong.
In addition, the assessment of the Court as to the warnings provided to A[redacted] Z[redacted] in his different roles as defendant, witness and cooperative witness would be inappropriate and not in compliance with the law, since A[redacted] Z[redacted] had been properly warned in each stage of the proceedings.
Also the fact that not all pages of his written statements provided to the SPRK are signed by A[redacted] Z[redacted] but always only the last page of each statement, would have no impact on the validity and admissibility of these statements.
Because of all this, all statements of A[redacted] Z[redacted] including his 'war diaries' would be admissible evidence and the assessments of the District Court had violated in particular Article 403 paragraph 2 item 1 of the KCCP.

I. ALLEGED VIOLATION OF ARTICLE 156 PARAGRAPH 2 OF THE KCCP:

30. The Supreme Court of Kosovo finds that no inappropriate application of Article 156 paragraph 2 of the KCCP by the SPRK can be established with regards to the

interrogation of A[redacted]Z[redacted] as cooperative witness between 05 and 09 July 2011. The Supreme Court disagrees with the assessment of the District Court regarding the alleged requirements of an *"adequate and proper opportunity"* for the Defense to challenge the statements of the witness and in difference to the District Court also finds that not only the scope of the hearings A[redacted]Z[redacted] had to undergo was sufficient at the referred stage of proceedings. The Supreme Court also considers as groundless the allegations of the Court towards the SPRK Prosecutor allegedly misleading the Defense regarding possible future opportunities to further interrogate A[redacted] Z[redacted] There is also a severe responsibility of the Defense in each criminal procedure to carefully study the case, prepare their defense strategy and to assess – based upon life experience - possible future developments that may influence the conduct of criminal proceedings.

The referred Article 156 paragraph 2 of the KCCP stipulates as follows:

(2) A statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defence counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings.

1. **<u>Alleged improper use of Article 156 paragraph 2 of the KCCP by the SPRK:</u>**

31. The District Court is of the opinion that the SPRK Prosecutor has made inappropriate use of Article 156 paragraph 2 of the KCCP. Article 156 paragraph 2 of the KCCP would not be *"in itself a procedure. [...T]he KCCP does not foresee a procedure to be available to the Prosecution during the investigation stage to hold a witness examinations according to Article 156 (2)* [which the latter therefore would be] *a safety net"*(Ruling on Admissibility of A[redacted]Z[redacted]Statements and Diaries dated 21 March 2012, p.25 no.47 and 47 in its English version). Instead, the Special Prosecutor should have made use of Articles 237 paragraph 4 as read with Article 238 of the KCCP, thus presenting the evidence before the Pre-Trial Judge (Ruling on Admissibility of A[redacted] Z[redacted]Statements and Diaries dated 21 March 2012, p.33, no.58, 62-63). This would have amounted to a procedure and interrogation quality close to a main trial hearing.

32. The Supreme Court understands that the SPRK Prosecutor in his notice to the Defense about the examination sessions with A[redacted]Z[redacted] dated 27 June 2011, obviously has used the language from Article 156 (2) KCCP and agrees to the assessment of the District Court to the extent that this provision does not establish a procedure for defense questioning. However, comparing Article 156 paragraph 2 and Article 237 paragraph 4 of the KCCP, as the District Court does, means comparing Apples and Pears. Whilst Article 156 paragraph 2 of the KCCP constitutes an admissibility rule for witness statements given to the police or prosecutor, Article 237 paragraph 4 of the KCCP is a procedural option stipulating that '[t]*he public prosecutor **may** decide...*' for the examination of witnesses. Therefore, the assessment of the District Court that Article 156 paragraph 2 KCCP is a *"safety net"* does not meet the character of the norm nor is it helpful in the situation at hand and therefore deems meaningless.

Although a proper and valuable provision establishing a procedure for the questioning of a witness who may be unavailable during the main trial can be found in Article 238 of the KCCP, the applicability of this Article in the case at hand as discussed by the District Court in its 'Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries' dated 21 March 2012, is purely speculative. The provision, by its own language clearly labelled as an exception to the rule, is designed for the *'purpose of preserving evidence where there is a...**significant danger** that such evidence may not be subsequently available at the main trial'* and therefore opens an exceptional opportunity for a witness to be heard by the pre-trial judge upon proposal of the prosecutor or the defendant.

However, at the time in question there were no signs of a '*...significant danger that such evidence may not be subsequently available at the main trial*', as prescribed by Article 238 paragraph 1 of the KCCP. Since this pre-condition was not fulfilled there was no indication for the SPRK to consider the application of this extraordinary procedural provision. The Supreme Court finds that in early July 2011 when the Defense Counsels were invited to examine A[redacted] Z[redacted] in the lights of his previous statements there was no way of predicting that he would commit suicide and therefore be found dead two and a half months later. Moreover, there is nothing in the KCCP that prohibits the procedure utilized by the prosecutor.

2. Legal standards of *'opportunity to challenge'* as required by Article 156 paragraph 2 of the KCCP:

33. As to the legal standards of an '*opportunity to challenge*' as required by Article 156 paragraph 2 of the KCCP, the District Court in its 'Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries' dated 21 March 2012 and following to that also in the Judgment dated 02 May 2012 has interpreted the expression of the Law to be a legal term requiring to be filled with content by the Judge. It therefore has set up numerous additional requirements regarding the question, when such opportunity fulfils the standards of Article 156 paragraph 2 of the KCCP. In particular, the District Court has developed the idea that the content of *'opportunity'* amongst others would depend on the complexity of a case, the status of a possible witness as alleged co-perpetrator in the case s/he is stating at, the fact that a witness probably is the only witness available in a case, that there might be no corroborating evidence available as to decisive parts of a case (here regarding the identity of alleged perpetrators) and that – in the case at hand – the relevant witness, A[redacted] Z[redacted] is dead. Therefore, on a case-by-case basis, the requirements of *'opportunity'* pursuant to Article 156 paragraph 2 of the KCCP would be flexible and of varying intensity. In the case at hand, given that there allegedly is no corroborating evidence for all aspects addressed in A[redacted] Z[redacted] statements and that the latter moreover has passed away in September 2011, the legal standards of 'opportunity' *"may require almost as much as a full cross-examination as would occur at the main trial"* (Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries dated 21 March 2012, p.25 no.47 in its English version).

34. The Supreme Court of Kosovo finds that these additional requirements as developed by the District Court are baseless in their majority and therefore strongly disagrees. Under methodological aspects, the District Court has placed the cart squarely before the horse in that they attempt to increase alleged requirements regarding a *"flexibility of the legal level of opportunity"* for the admissibility of evidence, after a critical situation has come to reality and the witness in question has passed away unexpectedly. Moreover and in particular, despite the fact that the expression of *'opportunity'* in Article 156 paragraph 2 of the KCCP stands alone and without any additives like *"adequate and proper"* the additional standards as set up by the District Court in this regard deem to be in line with some argumentation of the Defense, according to which the court must assess reliability of the evidence in determining its admissibility. In difference to that, the requirements of an *'opportunity to challenge'* being adequate and proper have been developed by the ECtHR and therefore will be analysed with regards to their proper application at a later stage of this ruling (see below p.19 ff).

35. With regards to whatsoever piece of evidence it needs to be underlined in this context that as a rule there is a significant difference between admissibility and reliability, with the former referring to the manner in which evidence has been obtained, while reliability being the determination of the weight to be accorded to a certain piece of evidence in comparison to others. Reliability of a specific piece of evidence can only be assessed after all evidence has been presented and in the comparative view with all other evidence Despite discussions and differences regarding some details, all legal systems in Europe clearly distinguish between issues of admissibility and issues of well-founded reasoning, which difference also applies with regards to the assessment of evidence. Whilst the question of admissibility of evidence usually becomes relevant already at a quite early stage of proceedings such as the confirmation stage and may be re-considered by the main trial panel later on, the question of reliability goes together with the question of credibility of a witness and needs to be raised at a much later stage, usually at the end of the main trial, after all the admissible evidence was presented and assessed in conjunction with all other evidence in the case as required by Article 387 paragraph 2 of the KCCP. As a consequence, parts of the admissible evidence of a court case might be considered unreliable at the end of the evidence assessment and thus have an individual impact on the results of the case. However, the question of reliability cannot be considered as a condition for the admissibility of evidence.

Only in extreme cases it may come up as an exception that the questions of admissibility and reliability fall together. It may serve as an example that a statement was extorted by force, threat or a similar prohibited means; the statement would be considered inherently unreliable by definition and therefore inadmissible under Article 161 paragraph 4 of the KCCP.

In the case at hand, the Supreme Court cannot establish any reason that would amount to a level of joint inadmissibility and unreliability. The question whether or not there are serious inconsistencies in A[redacted] Z[redacted] statements, claims that possibly certain diary entries from 2004 may have been written by people other than him, that A[redacted] Z[redacted] had

a mental health history, that A[redacted]Z[redacted] apparently retracted his statements in a letter that was discovered after his death or that according to his former spouse G[redacted]T[redacted] some of his statements were made under duress – as raised by the Defense – may indeed open room for discussion and careful assessment of the evidence. It however does not automatically result in the inadmissibility of that evidence.

Therefore in particular, the question, whether or not there is any corroborative evidence available to support A[redacted]Z[redacted] statements in question, does not have any impact on the admissibility of the statements as such. Moreover, the status of a witness as alleged co-perpetrator and with regards to certain allegations the only witness available may be of interest for the court when it comes to the question of reliability and credibility. However, it has no immediate impact on the legal level of *'opportunity to challenge'*. Also the fact that the witness has passed away cannot have any relevance for the *'opportunity to challenge'*, since this is a fact that impossibly could have been known in advance by any of the parties including the SPRK Prosecutor. (With regards to the latter it is stressed again that this is the explicit meaning of Article 156 paragraph 2 KCCP, to secure the knowledge of the witness, who at a later stage may not be available anymore).

36. It needs to be underlined that Article 156 paragraph 2 of the KCCP does not require any cross-examination at all – neither based on its wording, nor resulting from interpretation in accordance with the. European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: ECHR).

Article 6 paragraph 3 item d of the ECHR requires as a minimum standard that everyone charged with a criminal offence has the right *'to examine or have examined witnesses against him... '*.

The European Court of Human Rights (ECtHR) stated:

> *'...it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d).'* [1]

In that regard the ECHR does not set a higher standard than the one provided by the provision of the domestic law.

37. For all these foregoing reasons, the required *"flexibility of the legal level of opportunity"* as imposed by the District Court cannot stand, as the Court in this way sets up standards, which cannot be measured in a reliable, secure and authentic manner.

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[1] In Lucà v. Italy, App. no. 33354/96), 27 Feb. 2001 para. 40; so also in Melnikov v. Russia, para. 65, App. no. 23610/03, 14 Jan. 2010 and very recently Hümmer v. Germany, App. no. 26171/07, 19 Jul. 2012, para. 38 ff.

3. **Sufficiency of disclosure of evidence to the Defense in the course of A[redacted] Z[redacted] examinations between 05 and 09 July 2012:**

38. The District Court moreover has made reference to certain adjudication of the ECtHR and requires that the *'opportunity to challenge'* must be *"adequate and proper"*, which would mean that *"it must be real, enabling the defense to engage substantively with the witness evidence"* ('Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries' dated 21 March 2012, p 14, no.35). This in particular and amongst others would include that appropriate preparation time for the Defense is granted, that the complexity of the case as well as the relative importance and the status of the witness are taken into consideration and that an adequate degree of disclosure of information is granted to the Defense, which at least needs to include all material that undermines the Prosecution case or might reasonably assist the Defense case. In particular the latter had not been given in the case at hand, because only SPRK Binders A and B as well as exhumation reports contained in Binder I and Binder L had been disclosed to the Defense in advance and in the course of the interrogations between 05 and 09 July 2011, whilst in particular the whole SPRK Binder C was not disclosed to the Defense in this context. Moreover, the SPRK had failed disclosing the ICTY statements of A[redacted] Z[redacted] in his capacity as witness to the Defense as well as the entire 'War Diaries' and A[redacted] Z[redacted] psychiatric records.

39. The Supreme Court of Kosovo fully agrees with the assessments of the District Court to the extent that the expression *'opportunity'* as used in Article 156 paragraph 2 of the KCCP includes that the opportunity must be real and meaningful, enabling the defense to engage substantively with the witness evidence. However, this is undisputed and was not challenged by either of the parties as well, since otherwise the right would be a hollow one.

40. The requirements of the opportunity for questioning being "adequate and proper" as interpreted by the District Court was developed by the ECtHR through numerous decisions, which is why in the context given it needs to be defined what the content of these requirements could be and whether or not they have been properly observed in the case at hand.

41. The Supreme Court also agrees with the assessment of the District Court as much as in particular an appropriate preparation time for the Defense is requested, which must be considered in relation to the complexity of the case and to the relative importance and the status of the witness. All this is needed in the interest of fair trial and equality of arms, both aspects being guaranteed by Article 6 of the ECHR and therefore beyond all doubts being European standards.

42. However, in the case at hand it needs to be taken into consideration that all Defense Counsels have been notified by the SPRK Prosecutor on 27 June 2011 that between the 05 and 09 July 2011 they would have the opportunity to examine A[redacted]

Z[redacted] at that time in his capacity as a cooperative witness. At the same time, a huge amount of relevant materials was provided to them by the SPRK Prosecutor as lined up in detail in the challenged *'Ruling on Admissibility of A[redacted] Z[redacted] Statements and Diaries'* dated 21 March 2012 (p. 15 no. 30 to p. 19 no. 40 of the English version). Therefore the Defense Counsels all knew the details of the prosecution's case and were enabled planning their questioning accordingly.

As it can be seen from the previous, the Defense – being well equipped with voluminous relevant material - has had more than seven days in advance of the very first examination session on 05 July 2011 for their preparation. In addition it must be noted that the total length of the four sessions was approximately 19 hours, during which period all Defense Counsels where present and had the possibility to participate in the questioning, to listen to the questioning by their colleagues and supplement their questioning in turn; that is to say, after an attorney had finished questioning the witness, he was able to ask further questions later on if he so wished. According to the minutes, also the defendants N[redacted] KR[redacted] N[redacted] K[redacted] and S[redacted] SH[redacted] have been present during all the sessions, whereas the defendant R[redacted] M[redacted] was present only on the 07 and 09 July 2011. The questioning was conducted before the Prosecutor who has a duty to consider exculpatory as well as inculpatory evidence pursuant to Article 46 paragraph 3 of the KCCP. The SPRK Prosecutor placed no restrictions whatsoever on the questions that could be asked, and therefore the Defense Counsels and defendants were free to ask any questions they wanted and in their vast majority did so. Only one Defense Counsel decided not to ask any questions due to his interpretation of the law, in particular of Article 338 of the KCCP. Indeed, over 1000 (one thousand) questions were asked, including over 500 questions by the Defense for F[redacted] L[redacted] and the questions and answers take up approximately 86 pages of transcripts in the English version. The sessions were also video recorded

The Supreme Court notes in the context given that the SPRK Prosecutor has not asked any questions to the witness, but has left the floor immediately and exclusively to the Defense. Although therefore this situation does not at all amount to the requirements of a *"cross-examination"* as required by the District Court, it nevertheless meets the requirements of an *'opportunity to challenge'* as provided for by Article 156 paragraph 2 of the KCCP. It needs to be underlined again that the referred provision does not ask for a *"cross-examination"* at all. It is also of no concern to the Supreme Court that in this way the Defense was not somehow 'led' by a catalogue of questions that could have been asked by the SPRK Prosecutor during the examinations. Despite that such a catalogue of questions would not be binding for any prosecutor during the further conduct of investigations and in front of a court, there is also no legal obligation for the prosecutor to proceed in such a manner. Last but not least in this context it is of utmost importance that the Defense was provided with all statements of A[redacted] Z[redacted] sufficiently before the examinations took place. Since all these statements are made up in the shape of questions asked by police and the SPRK Prosecutor and answers provided by A[redacted] Z[redacted] there was as sufficient basis for the Defense to prepare and understand, what the questions of the SPRK Prosecutor have been.

43. In the light of the foregoing the Supreme Court finds that the Defense has been provided with sufficient preparation time and material, also considering the complexity of the case at hand and the relative importance of A[redacted] Z[redacted] as a witness. Therefore, no violation of Article 6 of the ECHR can be established here.

44. **As much as the District Court has requested that an adequate degree of disclosure** of information is granted to the Defense, reference is made to what already was stated in this regard before. SPRK Binders A and B had been disclosed to the Defense in advance, containing all relevant statements of A[redacted] Z[redacted] as well as other relevant material. Moreover, the Defense in the course of the interrogations between 05 and 09 July 2011 has received exhumation reports as contained in Binder I and Binder L. The Supreme Court therefore finds that the Defense had in their possession all relevant critical materials, which have been provided to them in accordance with the requirements of the Law. It is noteworthy in this regard that pursuant to Article 307 of the KCCP the prosecutor is obligated to disclose all relevant materials to the Defense as long as the indictment is not yet filed. Since in the case at hand the indictment was filed only on 25 July 2011 and thus after the examination dates in question, there was no obligation of the SPRK Prosecutor to disclose all material in his possession to the Defense.

Having in mind that this practice during the investigation stage is fully in line with the adjudication of the ECtHR, according to which *"the [...] questioning can occur as early as when the statements are made.*[2]*"* and that nevertheless in the case at hand the Defense has received all critical material as needed to examine A[redacted] Z[redacted] it occurs as the only remaining question whether or not it is of any relevance that in particular the whole SPRK Binder C, amongst others containing statements of other witnesses, was not disclosed to the Defense in this context and that the SPRK has not disclosed also the ICTY statements of A[redacted] Z[redacted] in his capacity as witness to the Defense as well as the entire 'War Diaries' and A[redacted] Z[redacted] psychiatric records, as this was criticized by the District Court.

It is asserted that in general the KCCP does not require that all of the prosecution's materials must be available to other parties prior to an examination like in the case at hand.

45. **With regards to SPRK Binder C** in particular the Supreme Court finds that even in case the documents had not been disclosed prior to the filing of the indictment in accordance with Article 307 of the KCCP, this would remain unsanctioned by the KCCP. With regards to the 'War Diaries' the Supreme Court notes that at least all parts that deemed to be of relevance to the SPRK Prosecutor have been disclosed to the Defense. The fact that not the whole diaries have been disclosed cannot lead to the inadmissibility of the witness statements due to lack of *'opportunity to challenge'* them.

46. **As to the ICTY statements of A[redacted] Z[redacted] it needs to be stressed that those are** part of a different case and therefore do not fall under any obligation of the prosecutor to disclose case-relevant material for the examination of the cooperative witness.

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[2] Ibid.

47. **As to A[redacted] Z[redacted] psychiatric records,** it is noteworthy in the context given that they have not necessarily been of any relevance for the examination of the witness, since during the whole course of investigations and interrogations he allegedly has not shown any signs of mental health problems.

48. As much as the different assessment of the District Court might have been influenced by proposals of the Defense, according to which other lines of questioning would have become apparent if they had had unlimited access to all the materials in the prosecutor's possession, it needs to be stressed that the Defense never has substantiated which those other lines of questioning would have been, if so.

49. In any case, the Supreme Court feels the need to underline that pursuant to Article 142 of the KCCP the Defense Counsels were consistently entitled to inspect the Prosecutor's complete file, which right at least two of them made use of during the course of the investigation and prior to the questioning sessions in July 2011. It cannot be an argument supporting the idea of inadmissibility of the witness evidence now, that other Defense Counsels voluntarily chose not to inspect these files. It is noteworthy in addition that in the lights of not only Article 6 paragraph 1 of the ECHR but also Article 10 paragraph 1 of the KCCP, which both establish the principle of equality of arms in the Kosovo criminal procedure law, Defense Counsels were always free to request a hearing of A[redacted]Z[redacted] pursuant to Article 238 of the KCCP (which they never did).

The above view in addition is supported by the consistent jurisprudence of the ECtHR, according to which in particular a violation of the principle of equality of arms as also laid down in Article 6 paragraph 3 item (d) ECHR was established only in cases where the defense had had absolutely no opportunity to question a witness at all and in addition the conviction was solely or decisively based on such witness statements. In a number of relevant cases the ECtHR moreover has determined that even the lack of any confrontation of a witness with his written statements failed to constitute a violation of the principle of equality of arms as per Article 6 paragraph 1 and paragraph 3 item (d) ECHR.[3] and in a very recent case, the Court has even retreated from the sole or decisive prong, so long as there are sufficient counterbalancing factors in place that permit a fair and proper assessment of the reliability of the evidence[4].

However, as to the aspects under discussion in the case at hand the ECtHR in the recent judgment of *Melnikov v. Russia*[5] has outlined certain factors to be taken into consideration when assessing whether the opportunity to cross-examine a putative witness has been a proper and adequate one. In this case the defendant's conviction was to a decisive extent based on the pre-trial deposition of a co-accused who later absconded. During the pre-trial phase a confrontation between him and the defendant was set up before the investigator. The defendant's lawyer was not present at the confrontation

[3] See e.g. Asch v. Austria, App. no. 12398/86, Judgment of 26 Apr. 1991; Gossa v. Poland, App. no. 47986/99, Judgment 9 Jan. 2007; Ferrantelli v. Italy, App. no. 19874/92, Judgment 7 Aug. 1996.
[4] Al-Khawaja and Tahery v. The United Kingdom, App. nos. 26766/05 and 22228/06, 15 December 2011
[5] Melnikov v. Russia, App. no. 23610/03, Judgment of 14 Jan. 2010.

(thus in the absence of legal advice the defendant was unlikely to understand the confrontation procedure and could not effectively exercise his right); the confrontation was conducted by an investigator who had a large discretionary power to block questions; the responding Government did not show that every reasonable effort had been made to bring the witness before the trial court; and there was no video-recording of the witness's statement so that the trial court could observe his demeanour under questioning to form his own impression of reliability.

50. Considering these factors outlined by the ECtHR, the factual situation in the present case is diametrically opposite and leads to a contrary conclusion regarding the proper and adequate opportunity standard. As to the conclusions of the Supreme Court, full reference is made to what was stated before (chapter B I item 2, p. 18 of the Ruling in its English version).

4. **Alleged insufficient 'scope' of hearings of A[redacted] Z[redacted] between 05 and 09 July 2011:**

51. The District Court moreover has taken the position that the SPRK Prosecutor, when he invited the Defense to examine A[redacted] Z[redacted] between 05 and 09 July 2011, has played a much too passive and moreover misleading role in that he only repeatedly had stated that he was simply giving the Defense an opportunity to question A[redacted] Z[redacted] *"regarding the current* investigation*"*. The Special Prosecutor in particular had stated that *"this hearing was specifically scheduled to give you the opportunity to challenge the statements of the cooperative witness A[redacted] Z[redacted]* [...so...] *if you deem it necessary, you may ask him any questions regarding the current investigation against your clients"* and that *"it is an opportunity for you today that I am giving you. If you want to take it, fine, if not, it is up to you"* In this way and by stating that *"we do not know if we have a main trial"* and *"should we have a main trial we will meet the deadline"*, the Special Prosecutor was misleading the Defense regarding the importance of the examinations of A[redacted] Z[redacted] and had made them assuming that the latter would be available for further interrogation at a later stage of the proceedings again.

52. The Supreme Court disagrees to the assessment as made by the District Court in this regard. Reference is made to what was already stated before about *the 'opportunity to challenge'*, as granted by Article 156 paragraph 2 of the KCCP. In particular, it falls under the responsibility of the Defense to bring forward their case and to be prepared as much as possible for the questions in the course of the examination sessions provided to them. As to the alleged passive approach of the SPRK Prosecutor no obligation of the latter can be established to actively motivate the Defense Counsels to do a proper and careful research, which is in their own professional interest and in the interest of their clients. Also the *'duty of the public prosecutor to consider the inculpatory as well as the exculpatory evidence and facts during the investigation of criminal offences and to ensure that the investigation is carried out with full respect for the rights of the defendant'*, as laid down in Article 46 paragraph 3 of the KCCP, cannot be interpreted in such an extensive manner.

In the case at hand as already pointed out before, the Defense got the possibility to ask more than 1000 questions to A[redacted] Z[redacted] and the SPRK Prosecutor did not stop a single one of them , even if they had a leading/misleading character.

The argumentation of the District Court that the invitations of the Prosecutor to the Defense as outlined before had been misleading in that they gave the wrong impression that there would be other opportunities to challenge A[redacted] Z[redacted] remains fully cryptic. Despite that the cited formulations of the Prosecutor do not point into such direction at all, nobody, also not the SPRK Prosecutor, could have been expected being clair-voyant enough to know in advance that A[redacted] Z[redacted] would pass away at the end of the following September and that therefore he would not be available as witness during the main trial anymore.

Also the argument that the SPRK Prosecutor had included A[redacted] Z[redacted] into a witness protection program cannot be used to the detriment of the Prosecutor in this regard. The respective decision was made based upon previous experience in other, similar cases and under consideration of alleged repeated attempts to influence A[redacted] Z[redacted] not to continue his cooperation with police and prosecution services or make him retract his already given statements. In that A[redacted] Z[redacted] was included into a witness protection program, the Prosecutor took into consideration the abstract danger that somebody could attempt killing him or harming him in a way that would hamper the conduct of criminal proceedings in Kosovo. However, nobody could know that A[redacted] Z[redacted] would commit suicide.

II. ALLEGED INADMISSIBILITY OF A[redacted] Z[redacted] STATEMENTS DUE TO IMPROPER WARNING:

53. The District Court – amongst others – has based its opinion regarding the inadmissibility of A[redacted] Z[redacted] statements upon the assessment that A[redacted] Z[redacted] has received different warnings as to his rights and duties, always depending on the various statuses he had as a witness, defendant or cooperative witness. Since in the last round of examinations between 05 and 09 July 2012, when A[redacted] Z[redacted] was questioned as cooperative witness, the Special Prosecutor had failed to ask him repeating or confirming the contents of his previous statements, which would have to be considered inadmissible due to the different warnings he had received that time.
In addition, the statements of A[redacted] Z[redacted] given to the SPRK between 04 February and 29 August 2010 in his capacity as defendant would be inadmissible. The warning given to the defendant according to Article 231 paragraph 2 of the KCCP would be incomplete, since no reference was made to Article 231 paragraph 2 items 5 and 6 of the KCCP and the defendant was not warned that his statements could be used as evidence in front of a court and that he has had the right to present material for his own defence.

54. The Supreme Court of Kosovo finds that none of the statements of A[redacted] Z[redacted] is inadmissible due to improper warning provided to him in his capacity as witness, defendant or cooperative witness.

55. **A[redacted] Z[redacted] has stated in his capacity as witness in front of EULEX police WCIU** on the 20 and 30 November 2009 as well as on the 03 December 2009.

A review of the sealed statements shows that two protocols are dated 20 November 2009, but that attached to one of them there are sketches drawn by A[redacted] Z[redacted] which are dated 30 November 2009. It therefore is assumed that the whole statement was given at this later date and that the date of 20 November is a typographical error only.

The Supreme Court finds that the warnings given to A[redacted] Z[redacted] by the WCIU on 20 and 30 November and on 03 December 2009 are based upon Article 164 of the KCCP and therefore are in compliance with the law.

56. **A second round of statements was provided by A[redacted] Z[redacted] in his capacity as a suspect/defendant in front of the SPRK Prosecutor** through ten sessions on 4, 9, 11, 16 and 17 February 2010, on 10, 16 and 25 March 2010, on 06 June and on 20 August 2010. According to the first three of these statements dated 04, 09 and 11 February 2010, he merely confirmed the statements, paragraph by paragraph, already given to the EULEX police/WCIU in November and December 2009 with an admission of further criminal behaviour on his part regarding the murder of two Serbians. The remaining statements deal with his situation after the war, including his evolving theory concerning the defendants' negative involvement in his life, and with photo identification of the defendants and others.

Article 156 paragraph 1 of the KCCP indeed provides that '[a] *statement by the defendant given to the police or the public prosecutor may be admissible evidence in court only when taken in accordance with the provisions of Articles 229 through 236 of the present Code'*. Thus, a proper warning as provided in Article 231 paragraph 2 of the KCCP is crucial for the admissibility of evidence as obtained under described circumstances.

On all the aforementioned occasions A[redacted] Z[redacted] has received warnings pursuant to Article 231 paragraph 1 of the KCCP as appropriate for the interrogation of a defendant. However, all the warnings have been reduced to the aspects as addressed in Article 231 paragraph 2 items 1 through 4 of the KCCP, whereas A[redacted] Z[redacted] was not warned that his statements might be used as evidence before the court and that he may request evidence to be taken in his defence, as required by Article 231 paragraph 2 items 5 and 6 of the KCCP, which in particular was criticized by the District Court.

57. The Supreme Court finds that also these incomplete warnings as provided to A[redacted] Z[redacted] are sufficient and in particular do not result in the inadmissibility of these statements.

The essential purpose of the lacking part of the warning is to protect nobody else than the defendant from incriminating himself with his own words, which could come back to haunt him during a trial.

As to the Kosovo Law, this view is supported by the second sentence of Article 156 paragraph 1 of the KCCP which provides that statements given by a defendant to the police or prosecutor *'can be used to challenge the testimony of the defendant in court...'* and also Artice 157 paragraph 2 of the KCCP as already quoted before makes it clear that statements by a defendant to the police and prosecutor might be admitted into evidence.

58. The legal practice as outlined above is also in line with European standards, as it similarly can be found in numerous other continental European law systems. A provision quite similar to Article 231 paragraph 2 of the KCCP can be found i.e. in Article 136 paragraph 1 of the German Criminal Procedure Code (Strafprozessordnung (StPO)). It is almost common understanding amongst representatives of legal literature and court jurisprudence that a partial violation of warning requirements as outlined before does not result in the inadmissibility of the statement as evidence in case the defendant was aware of his rights situation also without warning[6]. It was recently confirmed by Judgment of the Federal Supreme Court of Germany (Bundesgerichtshof (BGH)) in the case 4 StR 455/08, dated 18 December 2008; item 16 and 18, which refers to permanent jurisprudence of the BGH that the failure to warn the defendant about the rights in question only can be of relevance in case the defendant was deprived of his protection against precipitant statements to his own detriment.

In the case at hand it is obvious that A[redacted] Z[redacted] was aware of the significance of his statements and knew that what he said could be used against him and against the defendants in court. A[redacted] Z[redacted] voluntarily had reported to EULEX Police/WCIU in November and December 2009 and as a consequence was interrogated by the SPRK Prosecutor in the official office rooms. It goes without saying that the SPRK Prosecutor does not conduct such hearings just for fun but for the purpose of investigation and finally filing an indictment to the courts. A[redacted] Z[redacted] who – as mentioned before – had repeatedly admitted his own participation in the commission of some of the crimes under discussion, was also aware that he was interrogated as defendant, due to the warnings received. Indeed, the very reason he came forward was to confess his own crimes and to implicate the defendants in those same crimes, with an eye towards providing the authorities with the necessary information to initiate an investigation and commence court proceedings. According to the Supreme Court's assessment, this is hardly a situation where an unwitting person makes statements which he has no idea will be used in future proceedings.

Considering moreover the fact that at a later stage of proceedings A[redacted] Z[redacted] was granted the status of cooperative witness, he from that time was not subject to criminal investigations and prosecution anymore with regards to the case at hand. Therefore, at least from that time on there was no interest anymore for A[redacted] Z[redacted] for protection as

[6] Meyer-Gossner, Lutz; Strafprozessordnung mit GVG und Nebengesetzen; Kurz-Kommentar; 47. Auflage, Muenchen 2004; Article 136; no. 20

provided by the warning requirements of Article 231 paragraph 2 items 5 and 6 of the KCCP. Despite all this and considering the fact that A[redacted] Z[redacted] has passed away and also therefore is not subject to any criminal investigation or court proceedings anymore, resulting in the fact that also under this aspect there is no more need to further discuss the needs for his protection, it is also in line with European standards that violation of warning requirements against one co-defendant (in the case at hand A[redacted] Z[redacted]) does not hinder the admissibility of the respective defendant's statements in course of the proceedings against the other co-defendants[7].

59. This legal tradition is relevant in particular with regards to the fact that according to the KCCP as well in all other continental European legal systems a defendant is not obliged to tell the truth regarding his participation in criminal activities when stating in front of the courts.

However, despite that the assessment of reliability of the defendant needs to be carried out by the court together with the assessment of all other admissible evidence at the end of the evidence procedure and not within a mix of admissibility and reliability questions, as it was elaborated before in this Judgment, it needs to be underlined that the right of the defendant to defend himself in silence or not to admit truthfully his participation in whatsoever criminal activities is a direct result of the principle of presumption of innocence as laid down for the Kosovo legal system in Article 3 paragraph 1 of the KCCP. It has not in turn that the defendant automatically is allowed to lie in front of the courts, in particular when it comes to alleged involvement of others into the commission of crimes. Also in Kosovo it is against the law to make a false report of a crime and punishable under Article 306 of the Criminal Code of Kosovo (CCK). Pursuant to Article 306 paragraph 1 of the CCK it in particular is a crime to falsely implicate other persons in the commission of a crime, as it would be considered a criminal offense for a person to report that he or she committed a crime under paragraph 3 of the said provision.

60. The Supreme Court therefore finds that the incomplete warnings provided to A[redacted] Z[redacted] before his interrogations on 4, 9, 11, 16 and 17 February 2010, on 10, 16 and 25 March 2010, on 06 June and on 20 August 2010 do not lead to the inadmissibility of the statements given therein.
If the first instance re-trial panel should nevertheless amount to have further factual doubts in this regard, the Supreme Court recommends taking into consideration to have the SPRK Prosecutor summonsed as a witness and state on whether or not a proper warning was provided to A[redacted] Z[redacted]

61. A[redacted] Z[redacted] **moreover has stated in his capacity as a cooperative witness to the SPRK** prosecutor on the 05 and 07 October 2010, after he was declared a cooperative witness by the Pre-Trial Judge upon request of the SPRK Prosecutor and following a hearing as required by Article 300 paragraph 1 of the KCCP.

[7] Amongst others BGH in Zeitschrift fuer Wirtschafts- und Steuerstrafrecht (wistra) 2000, p.311 (313); Meyer-Gossner; ibid., no.20

62. Though he was properly warned in accordance with Article 164 of the KCCP and moreover understood himself to be a cooperative witness, thus stating to the prosecutor as such, the District Court expressed concern that once A[redacted] Z[redacted] became a cooperative witness, the interviewing process had to start anew, and that all prior statements must be inadmissible under the quoted sentence.

63. The Supreme Court finds that this assessment is ungrounded. Although Article 300 paragraph 1 of the KCCP indeed stipulates in its last sentence that '[s]*tatements made to the judge during this examination cannot be used in criminal proceedings against the cooperative witness or against any other person as evidence to support a finding of guilt*', it is doubtless that this provision refers only to statements made to the judge during the examination under Article 300 of the KCCP aiming to determine if an application to award the status of cooperative witness is grounded. It however does not refer to any statements given previously or in any other examination. This illuminates from the language of the referred provision, which expressly talks about *'this examination'* as well as from its systematic position in the chapter on cooperative witnesses and its *ratio legis*, being limited to the procedure of determining the credibility of a person, here A[redacted] Z[redacted] to see if he qualifies as a cooperative witness under Article 298 KCCP.

Although it could certainly have been advisable for the SPRK Prosecutor to make sure that the now cooperative witness is re-interviewed with regards to all his previous statements, the KCCP does not require so. Moreover, no reason can be found, why statements that were included in the application for granting the status of cooperative witness, and which formed part of the basis for the pre-trial judge's ruling, should be inadmissible. Once a person is determined to be credible by the pre-trial judge on the basis of his testimony during the hearing and the materials contained in the prosecutor's application, including prior statements, it would make little sense to rule those prior statements inadmissible. Moreover, during all previous procedure stages A[redacted] Z[redacted] stated under various capacities as witness and defendant but was – as established before – always properly or at least sufficiently warned about his rights and duties, which fact already results in the admissibility of these statements. Thus, the District Court with its respective conclusion here has clearly drawn up a vicious circle of argumentation.

64. It may serve as an additional argument that – as discussed before - the Defense had copies of A[redacted] Z[redacted] various statements when they questioned him in July 2011. A[redacted] Z[redacted] after being warned to tell the truth, never wavered from his statements, which represents an obvious confirmation on its own.

65. Moreover, the District Court is concerned because the SPRK Prosecutor, so to say on his own authority and without involving the Pre-Trial Judge again, has disclosed the **statements of A[redacted] Z[redacted] as marked as B1-B9** to the Defense in preparation of the July 2011 examinations. The District Court's concern in particular is based upon the fact that according to the request of the Prosecutor the Pre-Trial Judge had ruled that the materials in the application, including statements marked as B1-B9, be kept secret, but that the ruling did not provide any time limit for the secrecy order.

66. The Supreme Court finds that despite all procedural errors this situation cannot amount to the inadmissibility of the respective statements.

It is clear that the purpose of the secrecy request and order under Article 298 of the KCCP was to protect the integrity of the on-going investigation of the Prosecutor and thus made good sense at the time when it was decided. Since the order was issued by the Pre-Trial Judge in accordance with the requirements of the Law, the Prosecutor should have obtained a court order permitting him to disclose the statements and thus has acted in violation of his competences, when he disclosed the documents on his own alleged authority and without formal vacation request to the Pre-Trial Judge. Nevertheless, the statements have long since become part of this case, and were used by the Defense when they questioned A[redacted] Z[redacted] in July 2011.

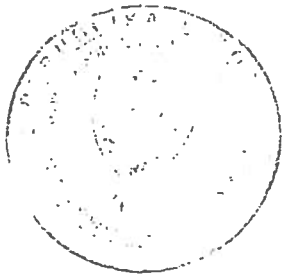
III. ALLEGED INADMISSIBILITY OF A[redacted] Z[redacted] STATEMENTS DUE TO LACK OF SIGNATURE AS REQUIRED BY LAW:

67. As an additional reason for the alleged inadmissibility of A[redacted] Z[redacted] entire statements the District Court has found that each of the referred statements has been signed by A[redacted] Z[redacted] at its last page only. This would be in contradiction to the requirements of Article 89 paragraph 2 of the KCCP, according to which the examined person is supposed to provide his/her signature under each single page of the statements. Also this would contribute to the inadmissibility of the referred statements.

68. The Supreme Court finds that the lack of A[redacted] Z[redacted] signatures at every single page of the statements does not harm their admissibility.

The purpose of Article 89 paragraph 2 of the KCCP is to make sure that the examinee has read and understood the written version of his or her statement. In the case at hand it is undisputed that no Albanian version of the written statements was provided to A[redacted] Z[redacted] but that all these documents were kept in English language only.

However, the Supreme Court finds that each statement was read to A[redacted] Z[redacted] in Albanian by an Albanian translator, before A[redacted] Z[redacted] signed. It is established that therefore each statement concluded with the following attestation or a variation thereof: *'The statement was read to me in English and translated verbatim in Albanian and I acknowledge it to be mine and I sign it without objection.'* Despite this, the failure of providing signatures at each page of a statement is not sanctioned by the KCCP. Thus, the verification as outlined before is sufficient for admissibility purposes.



IV. ALLEGED INADMISSIBILITY OF A[redacted]Z[redacted] 'WAR DIARIES':

69. The District Court has assessed also the 'War Diaries' of A[redacted] Z[redacted] as being inadmissible evidence, due to the fact that they have not been disclosed to the Defense in advance of the examinations between 05 and 09 July 2012 and therefore have been excluded to be subject of the *"cross-examinations"* of A[redacted] Z[redacted] pursuant to Article 156 paragraph 2 of the KCCP.

70. The Supreme Court finds that the diaries of A[redacted] Z[redacted] without any exception are admissible evidence.

The issue as raised by the District Court in the first place gains its relevance under the aspect that throughout the interviewing of A[redacted] Z[redacted] he repeatedly refers to his diaries, particularly the so-called 'war diaries' and so-called 'post-war diaries', which he provided to the EULEX police. It is worth of note that the German diary did not come to light until after his death. He however describes at various points in his statements how these diaries were kept and maintained. The question arises, whether or not the admissibility of the diaries depends on them being entirely provided to the Defense in preparation of the examinations in July 2011.

The Supreme Court finds that the diaries of A[redacted] Z[redacted] being not fully provided to the Defense cannot harm their admissibility as evidence at all. The diaries are documentary evidence, which is why their admissibility underlies requirements different from those of the witness statements. There are no indications that they were obtained unlawfully. The Supreme Court finds that them being not fully disclosed to the Defense before the hearings between 05 and 09 July 2011, despite there is no obligation of the Prosecutor to do so, cannot lead to their inadmissibility due to the fact that the witness has not been *"cross-examined"* regarding to their contents.

71. Another question as also addressed by the District Court is whether the diaries are inadmissible evidence, because they were not authenticated by an expert graphologist, even though the Defense Attorneys requested such expertise in a letter to the prosecutor on 15 July 2011 pursuant to Article 239 KCCP.

72. The District Court might have been driven by concerns of the Defense, that there would be many features of the diaries that raise serious questions about their authenticity. Despite the failure of the prosecutor to ever provide a response, it is hereby established that pursuant to Article 322 KCCP, the parties or their attorneys and thus the Defense in the case at hand may request that the Presiding Judge approves the collection of new evidence, including forensic expertise, even after the main trial has been scheduled. This also applies to handwriting expertise. In any case, the authenticity of the diaries again is a question belonging to the assessment of credibility of evidence and not admissibility, as outlined before in this Judgment.

C. Erroneous and incomplete determination of the factual situation

73. The SPRK Prosecutor has challenged the District Court Judgment dated 02 May 2012 due to alleged violation of Articles 405 and 403 paragraph 2 item 1 of the KCCP. In particular, the District Court panel had gone far beyond its competences when deciding that even if the statements of A[redacted] Z[redacted] and his 'War Diaries' had been declared admissible evidence, the defendants had to be acquitted nonetheless, since no sufficient corroborative evidence would be available. This would constitute a violation of Article 405 of the KCCP.
Moreover, the Court had been mistaken assessing that the confiscation of items in premises of F[redacted] L[redacted], which had not been covered by a search order, would lead to their inadmissibility as evidence.
Last but not least the Prosecutor has stressed that the District Court had misinterpreted the indictment, when assuming that defendants at hand had been indicted for them having acted with command responsibility.

I. EVIDENCE ASSESSMENT OF THE DISTRICT COURT BEYOND THE QUESTION OF ADMISSIBILITY OF A[redacted] Z[redacted] STATEMENTS:

74. The SPRK Prosecutor in his appeal has challenged the District Court Judgment dated 02 May 2012 for the fact that the reasoning stipulates: '[e]*ven if A[redacted] Z[redacted] evidence were in the file [...] the outcome of this Judgment would remain the same*', since the evidence given by A[redacted] Z[redacted] would not be corroborated by other evidence as to the identity of the perpetrators. In this way the Court would manifestly exceed its powers and thus had violated Article 405 of the KCCP.

75. The Supreme Court of Kosovo finds that indeed the challenged Judgment violates Article 405 of the KCCP.

76. The Supreme Court fully agrees to the concern raised by the SPRK Prosecutor. It is not under the competence of the District Court to assess, what the findings of an alternate court could be, given that the evidence as previously excluded as inadmissible had been considered admissible now.

This reasoning does show that the District Court was not at all sure about its own findings regarding the admissibility of evidence and tried to back it up with a prediction of an outcome of the decision if the evidence in question had been admissible.

77. Article 287 paragraph 2 of the KCCP makes the complete presentation and a full assessment of the presented evidence in relation to each other before concluding if a particular fact has been established a required precondition for every judgment. The court is not allowed hypothetic predictions on the outcome before having completed the mentioned procedure. In on one hand declaring a large amount of evidence as inadmissible and at the same time predicting that even if it had been admitted the

outcome would still be the same, the court not only violates Article 405 of the KCCP but indicates a preconceived opinion that a continuation of the evidentiary procedure would be futile in any case. Such an attitude puts into serious doubt the impartiality of the panel.

78. As much as the District Court obviously is of the opinion that there must be corroboration at least on the identity of the perpetrators, the Supreme Court finds that such interpretation of the requirements for corroboration is not supported by the Law.

Article 157 paragraph 4 of the KCCP only stipulates that the court *'shall not find any person guilty based solely on the evidence of testimony given by a co-operative witness'*. Thus, the Law does not require full corroboration of evidence with regards to all relevant facts or to a decisive extent. Just some corroboration is needed in order to make sure that the accusations raised by a cooperative witness are reflected also by other sources. The level of corroboration required is supposed to make sure that a cooperative witness does not state anything wrong to the detriment of others, just being led by personal interest.

79. Despite that the Judgment in its discussed part is based upon impermissible hypothetical contemplations, it sets forth the mistake of mixing questions of admissibility and reliability of evidence, as outlined above in this Ruling.

The question whether or not the evidence given by A[redacted] Z[redacted] is sufficiently corroborated is not related to admissibility aspects but belongs into the fields of reliability of witness evidence and thus can be evaluated only at the end of the evidentiary procedure, based upon an assessment of the entire evidence presented by the parties, one by one as well as in relation with all the other admissible evidence. Moreover and in particular, such an assessment needs to be carried out with utmost possible care and take into consideration all relevant aspects and details of evidence obtained, but cannot be conducted just in a summary manner at the end of a judgment reasoning.

II. ALLEGED INADMISSIBILITY OF EVIDENCE DUE TO INSUFFICIENT SEARCH ORDER:

80. The SPRK Prosecutor has challenged that in the first instance Judgment dated 02 May 2012 the District Court has treated the evidence confiscated in the residences of F[redacted] L[redacted] and N[redacted] KR[redacted] as being inadmissible due to the fact that allegedly there was no particular search order issued by the Pre-Trial Judge for the search of both residences.

81. The Supreme Court finds that no violation of Article 244 of the KCCP by the SPRK Prosecutor with regards to the referred search and thus no inadmissibility of the confiscated materials can be established in the case at hand.

What the District Court was concerned about was the fact that no particular search order was proposed by the SPRK and issued by the Pre-Trial Judge in the investigation case GJPP 25/10 (PPS 07/10), but that materials have been found and confiscated in result of a

search conducted upon a search order in the investigation case GJPP 91/10 (PPS 425/09), which subject crimes were not related to the Indictment in the case at hand. The District Court explicitly in its challenged Judgment pointed out that neither the ruling in the case GJPP 91/10 (PPS 425/09) nor the *'ruling expanding investigation against F[redacted] L[redacted] [...] indicated that investigation was expanded to F[redacted] L[redacted] as a result of the items seized in search on 28 April 2010. For Article 244 KCCP to apply, the objects must be such that point to another criminal offence and constitute grounds for initiation of investigation. The Prosecutor did not explain if that was the case'* (p.37 no.55 of the challenged Judgment in its English version). Therefore, the evidence obtained during this search would be inadmissible due to Article 246 paragraph 1 item 1 of the KCCP.

82. The Supreme Court finds that the assessment of the District Court is erroneous, considering the provision of Article 244 of the KCCP as well as the fact that according to Article 245 of the KCCP a search under certain circumstances is possible even without a search order.

Article 244 of the KCCP as relevant in the case at hand stipulates as follows:

If during a search of a person, house or premises objects are found which are not related to the criminal offence which justified the search but which point to another criminal offence prosecuted ex officio, these objects shall also be described in the record and confiscated [...]. A notification thereof shall be immediately sent to the public prosecutor so that he or she can initiate criminal proceedings [...].

83. The District Court misinterprets Article 244 of the KCCP in that the Judges allegedly understood that the additional evidence obtained needs to point at a completely new criminal offence, which was unknown until the evidence was obtained. Such an extremely formalistic interpretation of the provision would lead to the absurdity that evidence obtained by chance and on occasion of a search in a different case could not be used just because the case the evidence belongs to is not a new one but investigations have already been initiated. This cannot be what the Law wants, considering the *ratio legis* of Article 244 of the KCCP, which is just the opposite of what the District Court understands, namely to make sure that additionally obtained evidence is made accessible in the case it belongs to.

84. In the case at hand, criminal investigations have been technically initiated and expanded by ruling already in February 2010 and again expanded against other defendants in June 2010. Therefore, no 'other' Ruling on Initiation of Investigations was needed anymore.

85. As to the failure of the Prosecutor having missed to explain, where exactly the evidence was found (although it is clear from the case file that i.e medical health assessments regarding A[redacted] Z[redacted] were found in F[redacted] L[redacted] bedroom), the Retrial Court is invited to hear the Prosecutor as a witness.

D. Different Re-trial Panel:

86. As to proposal of the SPRK Prosecutor to *"send the case back for retrial before a different Trial Panel"*, the Supreme Court at first finds that Article 40 paragraphs 1 and 2 of the KCCP on reasons for disqualification of a judge does not expressly provide for a case to be sent to a retrial panel different from the one that was occupied with the case in the first round of first instance sessions. The only provision of the law making explicit reference to disqualification reasons because of previous engagement with the case at the same instance, Article 40 paragraph 2 item 4 of the KCCP, has in mind pre-occupancy as prosecutor, defense counsel, legal representative or authorized representative of the injured party or prosecutor, but does not mention the position of judge.

87. In accordance with Article 6 paragraph 1 of the ECHR making reference to *'[...] tribunal established by law'* and pursuant to the guidelines for case allocation adopted for each court in Kosovo[8], allocation of cases to individual judges as presiding and reporting judges as well as panel members should be done through a predetermined system based on objective criteria and in a transparent and reproducible way. The lack of an explicit authorization of a higher court to send back a case for retrial before a different panel is systematically intended by the law on criminal procedure. It would be a contradiction to these principles if a higher court would directly interfere with assignment of cases to individual judges.

88. The provisions in the law on disqualification of judges are sufficient to ensure the impartiality of a tribunal. However, they have to be observed by the judges assigned to the cases themselves or through requests of the parties to the proceedings, pursuant to Articles 42 ff. of the KCCP. Therefore an authorization for a higher court to *order* a retrial before a different panel or the exclusion of individual panel members is neither required nor intended by the law.

In regard to the requirement for impartiality of a tribunal the ECtHR as principle has established that:

> *'...it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.'*[9]

As to the standards for assessing if a panel is impartial the ECtHR elaborated:

> *'The Court reiterates that impartiality, within the meaning of Article 6 § 1 of the Convention, normally denotes absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists in seeking to*

[8] See exemplary Guidelines for Case Allocation for EULEX Judges in Criminal Cases at the Supreme Court of Kosovo adopted by the 14 Assembly of EULEX Judges on 24 March 2011.
[9] Ringeisen v. Austria, App. no. 2614/65, 16 July 1971, para.97

determine a particular judge's personal conviction or interest in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. ... In applying the first test, the personal impartiality of a judge must be presumed until there is proof to the contrary. ...
As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.'[10]

89. In the case at hand, the Supreme Court moreover makes reference to the general clause as stipulated in Article 40 paragraph 3 of the KCCP, according to which '[a] *judge [...] may also be excluded from the exercise of judicial functions in a particular case if, apart from the cases referred to in paragraphs 1 and 2 of the present article, circumstances that render his or her impartiality doubtful are presented and established*'. This provision of the domestic criminal procedure is to be interpreted corresponding with the aforementioned jurisprudence of the ECtHR.

90. As elaborated before, the District Court in the challenged Judgment has manifestly exceeded its competences in that it has assessed that due to the alleged absence of corroborative evidence as to the identity of perpetrators '*the outcome of this Judgment would remain the same [...] [e]ven if A[redacted] Z[redacted]evidence were in the file.* Based on that statement there is objectively justified concern that in the same composition of the panel an evaluation of evidence, including the now admissible new pieces, would be a foregone conclusion and no free and fair assessment would be possible.
Because of this, serious doubts regarding the impartiality of the judges of the previous main trial are established and the case shall not be adjudicated by the same judges again.

91. Therefore, the Supreme Court concludes that the case should be re-tried by a differently composed panel.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

[10] Lindon et al. v. France, App. nos. 21279/02 and 36448/02, 22 October 2007, para. 75 ff.

E. Summary

92. All evidence mentioned in the enacting clause is admissible in the re-trial. Doubts about the value of individual pieces of evidence are to be considered on the stage of final reliability assessment in accordance with Article 387 paragraph 2 of the KCCP.

93. The Supreme Court concludes that, based on the statements in the reasoning of the Judgment of the court of first instance, there is objectively justified concern that in the same composition of the panel an evaluation of evidence, including the now admissible new pieces, would be a foregone conclusion and no free and fair assessment would be possible. Consequently, serious doubts regarding the impartiality of the judges of the previous main trial are established and the retrial should be held before a differently composed panel.

94. Evidence seized during the search of the premises of N[redacted] KR[redacted] and F[redacted] L[redacted] is admissible in the current criminal proceedings based on the provisions of Articles 244 and 245 of the KCCP.

Presiding Judge:

Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk

Holger Engelmann
EULEX Legal Officer

Supreme Court of Kosovo
Ap.-Kz. No. 527/2012
Prishtinë/Priština
11 December 2012