

**IN THE NAME OF THE PEOPLE**

**THE DISTRICT COURT OF PRISTINA** in the Trial Panel composed of EULEX Judge Jonathan Welford-Carroll, presiding, Judge Shqipe Qerimi and EULEX Judge Dean Pineles, panel members, assisted by EULEX Legal Officer Zane Ratniece, recording officer, in the criminal case against:

- I. **NK**, nickname 'BF, father's name XX, mother's name XX, born on XX, in Village, XX Municipality, Kosovo Albanian, residing in XX Village, XX Municipality, attended law faculty, inspector at PTK; charged according to the Indictment of the EULEX Special Prosecutor PPS no. 07/10, dated and filed with the Registry of the District Court of Pristina on 25.07.2011 (**Indictment**) with the criminal offences:

Count 1: **War Crime against the Civilian Population and War Crime against Prisoners of War**, under Articles 22, 142, 144 Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23, 120 of the Criminal Code of Kosovo (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 and commander, and as a person holding a position of responsibility over Klecke/Klecka detention center, in co-perpetration with FL, NXK, NS, AK, BL, BS, SS, cooperative witness X, SHS 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 the Klecke/Klecka detention center, by keeping them in inhumane conditions (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 the Civilian Population**, under Articles 22, 142 CCSFRY, 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 NXK, NS and RM, **killed AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention center, by shooting at him with an AK-47 firearm; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 3: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 and in co-perpetration with NXK, NS and two unidentified KLA soldiers, **participated in the killing of four Serbian military prisoners** detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka and identified through DNA as BC, ZF and ZT, who were executed with several rounds of AK-47 firearm by a group composed by NK, NXK, NS, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 4: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 NXK **violated the bodily integrity and health of a Serbian military prisoner**, detained in the Klecke/Klecka detention centre, by repeatedly beating him; the victim was subsequently killed and his remains were found in a mass grave near Klecke/Klecka containing five bodies; in

Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 5: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 of member of the KLA, in co-perpetration with NXK, NS, RM, AK and cooperative witness X **participated in the killing of a Serbian military prisoner**, mentioned under Count 4 above; 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, NS, although he knew, because explicitly informed about NS's intention to kill the prisoner from the previous conversation between the latter and FL, that the prisoner would be executed; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 6: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 FL, NXK, NS, AK, BL and cooperative witness X, **participated in the killing of ND and VM, 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 keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about FL's intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

II. **NXK**, call sign during the war 'Sxxx', father's name XX, mother's name XX, born on XX, in YY Village, XX Municipality, Kosovo Albanian, residing at YY, attended law school, police officer; charged according to the Indictment with the criminal offences:

Count 1: **War Crime against the Civilian Population and Prisoners of War**, under Articles 22, 142, 144 CCSFRY, 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 FL, NK, NS, AK, BS, SS, cooperative witness X and SHS 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 the Klecke/Klecka detention center, by keeping them in inhumane conditions (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 CCSFRY, 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 and in co-perpetration with cooperative witness X, NS, SS, BS, **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 BC, ZF and ZT, by repeatedly beating them; 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 Articles 22, 144 CCSFRY, 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 and in co-perpetration with NK, NS and two unidentified KLA soldiers, **participated in the killing of four Serbian military prisoners**, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka, three of whom identified through DNA as BC, ZF and ZT, who were executed with several rounds of AK-47 firearm by a group composed by NK, NXK, NS, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 4: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 NK **violated the bodily integrity and health of a Serbian military prisoner**, detained in the Klecke/Klecka detention center, by repeatedly beating him; the victim was subsequently killed and his remains were found in a mass grave near Klecke/Klecka containing five bodies; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 5: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 of member of the KLA, in co-perpetration with NK, NS, RM, AK and cooperative witness X **participated in the killing of a Serbian military prisoner**, mentioned under Count 4 above; 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, NS, although he knew, because explicitly informed about NS's intention to kill the prisoner from the previous conversation between the latter and FL, that the prisoner would be executed; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;

Count 6: **War Crime against the Civilian Population**, under Articles 22, 142 CCSFRY, 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 NK, NS and RM, **killed AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention center, by shooting at him with an AK-47 firearm; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 7: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 FL, NK, NS, AK, BL and cooperative witness X, **participated in the killing of ND and VM, 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 keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about FL's intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

III. **FL**, nickname 'CD', father's name XX, mother's name XX, born on XX, in XX Village, XX Municipality, Kosovo Albanian, residing at ZZ, attended faculty of law, member of the Assembly of Kosovo; charged according to the Indictment with the criminal offences:

Count 1: **War Crime against the Civilian Population and War Crime against Prisoners of War**, under Articles 22, 142, 144 CCSFRY, 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 and

commander, and as a person exercising overall control over the Klecke/Klecka detention center, in co-perpetration with NK, NXX, NS, AK, BL, BS, SS, cooperative witness X, SHS 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 the Klecke/Klecka detention center, by keeping them in inhumane conditions (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 CCSFRY, 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 and commander, **tortured a Serbian military prisoner**, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave containing five bodies near Klecke/Klecka, by punching and kicking him during an interrogation; 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 Articles 22, 144 CCSFRY, 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 and commander, in co-perpetration with NXX, NS, NK, AK, BL and cooperative witness X, **participated in the killing of ND and VM, 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 ordering cooperative witness X to execute the prisoners; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

IV. **NS**, nickname 'FT', father's name XX, mother's name XX, born on XX, in XX Village, XX Municipality, Kosovo Albanian, residing at QQ, attended faculty of economy, economist; charged according to the Indictment with the criminal offences:

Count 1: **War Crime against the Civilian Population and War Crime against Prisoners of War**, under Articles 22, 142, 144 CCSFRY, 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 holding a position of responsibility within the Klecke/Klecka detention center, in co-perpetration with FL, NK, NXX, AK, BL, BS, SS, cooperative witness X, SHS 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 the Klecke/Klecka detention center, by keeping them in inhumane conditions (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 CCSFRY, 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 and in co-perpetration with cooperative witness X, NXX, SS, BS, **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 BC, ZF and ZT, by repeatedly beating them; 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 Articles 22, 144 CCSFRY, 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 and in co-perpetration with NK, NXK and two unidentified KLA soldiers, **participated in the killing of four Serbian military prisoners**, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka, three of whom identified through DNA as BC, ZF and ZT, who were executed with several rounds of AK-47 firearm by a group composed by NK, NXK, NS, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;
- Count 4: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 of member of the KLA, in co-perpetration with NK, NXK, RM, AK and cooperative witness X **killed a Serbian military prisoner**, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka containing five bodies, by inflicting several blows to his body (and in particular to his neck) with a scythe; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999;
- Count 5: **War Crime against the Civilian Population**, under Articles 22, 142 CCSFRY, 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 NK, NXK and RM, **participated in the killing of AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention center; 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 NK and NXK with AK-47 firearms; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 6: **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, 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 FL, NK, NXK, AK, BL and cooperative witness X, **participated in the killing of ND and VM, 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 keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about FL's intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

AFTER having held the Main Trial sessions open to the public on 11 and 14 November 2011, 01 and 14 December 2011, 16, 30 and 31 January 2012, 06, 07, 09, 28 and 29 February 2012, 01, 05, 06, 07, 21 and 30 March 2012; all held in the presence of Accused NK, his Defence Counsel Florin Vertopi and Xhafer Maliqi, Accused NXK, his Defence Counsel Mahmut Halimi and Betim Shala, Accused FL, his Defence Counsel Karim A. A. Khan, QC and Tahir Rrecaj, Accused NS, his Defence Counsel Bajram Tmava; except for the sessions when Defence Counsel sent their substitutes;<sup>1</sup> and in the presence of EULEX Special Prosecutor Maurizio Salustro of the Special Prosecution Office of Kosovo (except the session on 30 March 2012<sup>2</sup> when he sent his substitute<sup>3</sup>);

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<sup>1</sup> The sessions were held in the presence of the other Accused and their Defence Counsel until the proceedings were severed on 30 March 2012.

<sup>2</sup> At the session on 30 March 2012, the judgment was rendered with regard to the other Accused in the case, AK, BL, RM, SS, SHS and BS.

<sup>3</sup> At the session on 30 March 2012 EULEX Special Prosecutor Maurizio Salustro was substituted by EULEX Special Prosecutor Charles Hardaway.

AFTER the Trial Panel's deliberation and voting held on 02 May 2012;

PURSUANT to Article 392 of the Kosovo Code of Criminal Procedure (KCCP) on this day of 02 May 2012, in open court and in the presence of the Accused and their Defence Counsel and EULEX Special Prosecutor Maurizio Salustro;

*renders the following*

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## JUDGMENT

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- I. **NK**, with personal details above, in detention on remand from 16 March 2011 until 21 March 2012, is found as follows:

pursuant to Article 390 3) KCCP

- Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners)
- Count 2: **NOT GUILTY** of War Crime against the Civilian Population (killing of AA)
- Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of four Serbian military prisoners)
- Count 4: **NOT GUILTY** of War Crime against Prisoners of War (violation of the bodily integrity and health of a Serbian military prisoner)
- Count 5: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of a Serbian military prisoner)

Count 6: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of ND and VM, two Serbian police officers)

II. **NXK**, with personal details above, in detention on remand from 16 March 2011 until 21 March 2012, is found as follows:

pursuant to Article 390 3) KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and Prisoners of War (violation of the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners)

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of four Serbian military prisoners)

Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of four Serbian military prisoners)

Count 4: **NOT GUILTY** of War Crime against Prisoners of War (violation of the bodily integrity and health of a Serbian military prisoner)

Count 5: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of a Serbian military prisoner)

Count 6: **NOT GUILTY** of War Crime against the Civilian Population (killing of AA)

Count 7: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of ND and VM, two Serbian police officers)

III. **FL**, with personal details above, under house arrest from 22 September 2011 until 21 March 2012, is found as follows:

pursuant to Article 390 3) KCCP

- Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners)
- Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of Serbian military prisoner)
- Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of ND and VM, two Serbian police officers)

IV. **NS**, with personal details above, in detention on remand from 16 March 2011 until 21 March 2012, is found as follows:

pursuant to Article 390 3) KCCP

- Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners)
- Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of four Serbian military prisoners)
- Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of four Serbian military prisoners)
- Count 4: **NOT GUILTY** of War Crime against Prisoners of War (killing of a Serbian military prisoner)
- Count 5: **NOT GUILTY** of War Crime against the Civilian Population (participation in the killing of AA)

Count 6: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of ND and VM, two Serbian police officers)

#### COSTS OF CRIMINAL PROCEEDINGS

Pursuant to Article 103 (1) KCCP the costs of criminal proceedings under Article 99 (2) 1) to 5) KCCP, the necessary expenses of the defendant and the remuneration and necessary expenditures of defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources as per applicable rates.

#### PROPERTY CLAIM

No property claim has been filed. Therefore, no decision is rendered pursuant to Article 396 (4) KCCP.

## REASONING

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## I. INTRODUCTION

1. The Indictment of the EULEX Special Prosecutor PPS no. 07/10, dated and filed with the Registry of the Court on 25.07.2011 (Indictment), brings charges against the Accused AK, NK, NXX, BL, FL, RM, NS, SS, SHS and BS, for the crimes allegedly committed by them and other members of the Kosovo Liberation Army (KLA) from early 1999 until mid-June 1999 against Serbian and Albanian civilians and Serbian military prisoners in and near Klecke/Klecka in Kosovo.

2. The Indictment alleges that an undefined number of Serbian and Albanian civilians and Serbian military prisoners were detained in an improvised KLA detention centre located in the Klecke/Klecka Village under inhumane conditions and routinely subjected to beatings. The Indictment names fourteen persons who allegedly were detained. Two of the named detainees



were allegedly executed with several gun shots in a location known as Livadhi i Canit near Klecke/Klecka on or about 04/05 April 1999. One of the named detainees was allegedly tortured and later executed with a scythe in April 1999, not before 11 April 1999. Four of the named detainees were allegedly beaten for one full day and a few days later they were executed by shooting in Klecke/Klecka in April 1999, not before 11 April 1999.

3. The Indictment alleges that another named detainee, after release, was allegedly executed by shooting in Klecke/Klecka on or about 03/04 April 1999.

4. These allegations support 34 counts against the Accused all together, of War Crimes against the Civilian Population and Prisoners of War, in violation of Articles 142, 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), also foreseen in Articles 120, 121 of the Criminal Code of Kosovo (CCK), read in conjunction with Articles 22, 24, 26 CCSFRY 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), all rules of international law effective at the time of the internal armed conflict in Kosovo.

5. One count against the Accused AK was withdrawn by the EULEX Special Prosecutor.<sup>4</sup>

6. During course of the trial the proceedings were severed.<sup>5</sup> On 30 March 2012 the Trial Panel announced the judgment against the Accused, AK, BL, RM, SS, SHS and BS. The judgment of 30 March 2012 found them not guilty of 11 counts and rejected one count against AK, which had been withdrawn by the Prosecution. The present Judgment is made with regard to the 22 counts in total against the Accused, NK, NXK, FL and NS.

7. The Accused, with respect to whom the present Judgment is made, NK, NXK, FL and NS, are charged with individual criminal liability, for allegedly committing and to varying degrees participating in the commission of the crimes. The Accused FL is further charged as a

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<sup>4</sup> SPRK partial withdrawal of the Indictment, 09.11.2011, PPS 07/10, Court trial binder 4.

<sup>5</sup> Minutes 30.03.2012, para.10, Court trial binder 9.

commander and as a person exercising overall control over the Klecke/Klecka detention centre in respect to violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, and as a commander with respect to torture of a Serbian military prisoner and killing of two Serbian military officers, detained in the Klecke/Klecka detention centre. The Accused NK is charged also as a commander and a person holding a position of responsibility over the Klecke/Klecka detention centre with regard to violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners. The Accused NS in commission of the said crime is further charged in his position of responsibility within the Klecke/Klecka detention centre.

8. The Accused have pleaded not guilty to all the counts against them.<sup>6</sup>

## II. JURISDICTION

9. According to Article 23 1) KCCP, 'a district court shall have jurisdiction to adjudicate at first instance a criminal offence punishable by imprisonment of at least five years or by long-term imprisonment'. The Indictment of the EULEX Special Prosecutor charges the Accused with War Crime against the Civilian Population and War Crime against the Prisoners of War, which is punishable by imprisonment of at least five years. Therefore, the present Court has subject matter jurisdiction over the case.

10. The alleged crimes were allegedly committed in and near Klecke/Klecka, Lipjan/Lipljan Municipality in Kosovo. Lipjan/Lipljan Municipality falls within the Prishtine/Pristina District.

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<sup>6</sup> Minutes 11.11.2011, paras.44-65, Court trial binder 3.

Accordingly, the present Court has territorial jurisdiction over the case as per Article 27 (1) KCCP.

11. Article 3.2 of the Law no.03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo envisages jurisdiction of EULEX Judges over the cases prosecuted by the SPRK. Article 5.1 of the Law no. 03/L-052 on the Special Prosecution Office of the Republic of Kosovo provides SPRK the exclusive competence to investigate and prosecute War Crimes. Consequently, the case is within jurisdiction of EULEX Judges.

### **III. LAW**

#### **A. Existence and qualification of armed conflict**

12. The Indictment charges each of the Accused with criminal offences of War Crime against the Civilian Population and War Crime against the Prisoners of War.

13. Pursuant to UNMIK Regulation 1999/24 on the Applicable Law (12 December 1999), as amended by UNMIK Regulation 2000/59 (27 October 2000), the substantive criminal law provisions applicable in this case are the provisions of the Criminal Code of Socialist Federal Republic of Yugoslavia (CCSFRY) with the amendments as promulgated by the mentioned UNMIK Regulations.<sup>7</sup>

14. Pursuant to Article 142 CCSFRY, the criminal offence of War Crime against the Civilian Population is committed by 'whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings,

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<sup>7</sup> The capital punishment was abolished pursuant to Article 1.5. Pursuant to Article 1.6 of UNMIK Regulation 2000/59 for each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the death penalty is converted into a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years.

torture, inhumane treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labor, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts’.

15. Pursuant to Article 144 CCSFRY the criminal offence of a War Crime against the Prisoners of War is committed by ‘whoever, in violation of the rules of international law, orders murders, tortures or inhumane treatment of prisoners of war, including therein biological experiments, causing of great suffering or serious injury to the bodily integrity or health, compulsive enlistment into the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial, or who commits some of the foregoing acts’.

16. The Indictment stipulates that the Accused have acted in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 (Common Article 3 GC 1949)<sup>8</sup> and Articles 4

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<sup>8</sup> Common Article 3 of the Geneva Conventions 1949 reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

and 5(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 08 June 1977 (Additional Protocol II or APII 1977).<sup>9</sup>

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(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

<sup>9</sup> Article 4 of Additional Protocol II 1977 (inhumane treatment) reads:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being. Article 5(1) of Additional Protocol II 1977 (Persons whose liberty has been restricted) reads: In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained;

(a) the wounded and the sick shall be treated in accordance with Article 7;

(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

(c) they shall be allowed to receive individual or collective relief;

(d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;

17. In order to determine whether the alleged criminal offences constitute War Crimes, the Trial Panel must first determine whether, during the asserted period in 1999 the situation in Kosovo amounted to an armed conflict. Only the existence of an armed conflict (as opposed to internal disturbances) will trigger the application of Articles 142 and 144 of the CCSFRY. In other words, for the criminal offences to amount to War Crimes, a link with armed conflict must be established.<sup>10</sup>

18. Under the Geneva Conventions *international armed conflict* is defined as ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’. ‘Armed conflict’ as such is not defined in the Geneva Conventions.

19. The most widely utilized definition of *non-international armed conflict* is the definition formulated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*: ‘An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.’<sup>11</sup>

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(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

<sup>10</sup> For discussion and references to case law see e.g. Antonio Cassese, *International Criminal Law*, Oxford University Press 2008, p.82 ff and Antonio Cassese, Guido Acquaviva, Mary De Ming Fan, Alex Whiting, *International Criminal Law: Cases and Commentary*, Oxford University Press 2011, p.119 ff.

<sup>11</sup> *Prosecutor v. Duško Tadić*, ICTY, Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 02.10.1995, para.70.

20. Internal disturbances and tensions (such as riots, isolated and sporadic acts of violence, or other acts of a similar nature) do not amount to a non-international armed conflict.

21. Common Article 3 GC 1949 requires that the armed conflict not be of 'an international character' and it must occur 'in the territory of one of the High Contracting Parties'.

22. The threshold under Additional Protocol II, on the other hand, is higher. Pursuant to Article 1.1, the Protocol only applies to conflicts between the armed forces of a High Contracting Party 'and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations'. The Article also requires the same as Common Article 3 GC 1949, in that the conflict takes place 'in the territory of a High Contracting Party'.<sup>12</sup>

23. The available information and evidence concerning the KLA's structure and activities in Kosovo in 1998 and 1999, as noted by the ICTY Trial Chamber, starting from at least mid-1998, illustrates that the KLA was an 'organized armed group'. While different aspects of the KLA's organization and activities developed at different paces during the period, there was a gradual progression towards centralization of authority and coordination of efforts against the FRY/Serbian forces. During 1998 the KLA established a general staff and subordinated seven zone headquarters under it, established regulations governing troop structure and military discipline, carried out coordinated attacks on FRY/Serbian forces, established a financial operation, smuggled and/or purchased significant weapons stocks, instituted the use of a distinctive KLA emblem, and implemented strategic policies to further their aims.<sup>13</sup>

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<sup>12</sup> The Manual on the Law of Non-International Armed Conflict With Commentary, International Institute of Humanitarian Law, San Remo 2006, available at: <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf> (last accessed on 07 May 2012).

<sup>13</sup> *Prosecutor v. Milan Milutinović*, ICTY, Trial Judgment, 26.02.2009, para.840.

24. The jurisprudence of the ICTY and the Supreme Court of Kosovo has established that there was an ongoing armed conflict in Kosovo at least since early spring 1998 onwards between the (governmental) Serbian armed forces and the KLA, continuing into 1999.<sup>14</sup> The ICTY in *Milutinović* and *Đorđević* explicitly held that the armed conflict continued until June 1999.<sup>15</sup>

25. With regard to the period covered by the Indictment in the present case, the existence of an armed conflict has been established also by the Supreme Court of Kosovo in the *Kolasinac* Decision of 05 August 2004 and in the *LG* Decision of 21 July 2005.

26. In light of the established international and domestic jurisprudence as to the existence of an armed conflict in Kosovo during the relevant period of time, the Trial Panel is satisfied that a state of internal armed conflict existed within the territory of Kosovo at the material time. The Trial Panel additionally observes that the Defence raised no objections as to the existence of the armed conflict or the applicable rules asserted by the EULEX Special Prosecutor in his Indictment, thus conceding that there was indeed an armed conflict taking place in Kosovo throughout the stated period.

27. While the qualification of the armed conflict as internal armed conflict prior to the NATO involvement is well established, the question arises whether following the commencement of NATO air strikes in March 1999 the conflict elevated to an international armed conflict. The ICTY Trial Chamber in *Đorđević* addressed this issue and answered in the affirmative. The ICTY Trial Chamber concluded: 'The Chamber is satisfied that as of the end of May 1998 an armed conflict existed in Kosovo between Serbian forces, in particular, forces of the VJ and the MUP, and the KLA. This armed conflict continued until at least June 1999. On 24 March 1999 NATO

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<sup>14</sup> See e.g. *Prosecutor v. Milan Milutinović*, ICTY, Trial Judgment, 26.02.2009, paras.840-841; *Prosecutor v. Vlastimir Đorđević*, ICTY, Trial Judgment, 23.02.2011 para.1579 ff; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, ICTY, Trial Judgment, 30.11.2005, para.171 ff (the Trial Chamber was concerned with a period in 1998, but also remarked that the armed conflict continued long after July 1998); *Prosecutor v. Ramush Haradinaj Idriz Balaj, Lahi Brahimaj*, ICTY, Trial Judgment, 03.04.2008, para.100 (the Appeals Chamber on 21 July 2012 ordered a partial retrial of the case that is currently ongoing).

<sup>15</sup> See the respective cases referenced *ibid.*



commenced its military operations in the FRY. On the same day the government of the FRY declared a state of war. On this basis the Chamber is satisfied that from 24 March 1999, until the end of hostilities in June 1999, an international armed conflict existed in Kosovo between Serbian forces and the forces of NATO.<sup>16</sup>

28. For the purpose of determining the applicable law in this case, the Trial Panel, however, does not need to make a determination as to the nature of the existing armed conflict. Even if the armed conflict following involvement of NATO is to be qualified as an international armed conflict between Serbian forces and the forces of NATO, the content of obligations enshrined in Common Article 3 GC 1949 and AP II 1977 would continue to apply in the internal armed conflict between Serbian forces and the KLA. The value of Common Article 3, as routinely emphasized by commentators, is not limited to internal armed conflict. The latter represents the *minimum* which must be applied in the least determinate of conflicts, therefore, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Geneva Conventions are applicable.<sup>17</sup>

#### **B. Elements of prohibited conduct: murder, torture, inhumane treatment**

29. The Indictment alleges that the Accused have committed one or more of the following acts: torture, inhumane treatment, killings (murder). As noted above, for these acts to constitute War Crime pursuant to Articles 142 and 144 CCSFRY there must be a nexus between the criminal conduct and the armed conflict. Further, the criminal conduct must have been directed towards a protected person (civilian or prisoner of war).

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<sup>16</sup> *Prosecutor v. Vlastimir Đorđević*, ICTY, Trial Judgment, 23.02.2011 paras.1579, 1580 (the appeal in the case is currently pending before the Appeals Chamber).

<sup>17</sup> ICRC Commentary to Common Article 3, available at: <http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument> (last accessed on 07 May 2012).

30. It is necessary to briefly outline the main legal features of the prohibited conduct as alleged in the Indictment, namely the acts of torture, inhumane treatment, killings (murder).

31. International law distinguishes between torture and inhumane treatment. *Actus reus* elements of both crimes are the same and require the existence of severe suffering. Torture requires an additional purposive element.

32. Article 1.1 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1980 (Torture Convention) defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected to of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

33. ICTY has noted that there is a tendency to regard the above definition included in the Torture Convention as 'representative of customary international law'.<sup>18</sup> In *Kunarac* the ICTY enumerated the following essential criteria for the crime of torture:

- (1) The infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- (2) The act or omission must be intentional; and
- (3) The act must be committed with a view to obtain information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.<sup>19</sup>

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<sup>18</sup> *Prosecutor v. Anto Furundžija*, ICTY, Trial Judgment, 10.12.1998, paras.160-161.

<sup>19</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic*, ICTY, Appeal Judgment, 12.06.2002, paras.142, 144.

34. The 'inhumane treatment' is defined in the Elements of Crimes for the International Criminal Court (ICC) as the infliction of 'severe physical or mental pain or suffering'.<sup>20</sup> As mentioned above, the element that distinguishes inhumane treatment from torture is the absence of the requirement that the treatment be inflicted for a specific purpose.<sup>21</sup>

35. Human rights bodies also apply a definition which is similar to the definition adopted by the ICC, and stressing the severity of the physical or mental pain or suffering. 'They have found violations of the prohibition of inhumane treatment in cases of active maltreatment but also in cases of very poor conditions of detention, as well as in cases of solitary confinement. Lack of adequate food, water or medical treatment for detained persons has also been found to amount to inhumane treatment.'<sup>22</sup>

36. The act of murder or killing refers to deprivation of another person's life, a straightforward definition, also included in the CCSFRY and current Article 146 CCK.

37. The *mens rea* of the crime is in some instances specified by the particular international rule explicitly or implicitly, as is the case of torture (intent). In other instances, it has been proposed that what is required is the subjective element prescribed for the underlying offence.<sup>23</sup>

#### IV. CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

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<sup>20</sup> ICC Elements of Crimes (Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 03-10 September 2002 and Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010 ), available at: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (last accessed on 08 May 2012).

<sup>21</sup> ICRC Study on Customary International Humanitarian Law 2005 (and updated), Rule 90, Customary IHL Database, available at: [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule90](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90) (last accessed on 08 May 2012).

<sup>22</sup> *Ibid.*

<sup>23</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press 2008, p.93.

## A. Evidence of Cooperative Witness

38. In the present case, the Trial Panel is faced with an unparalleled set of circumstances. The Indictment expressly states that ‘in the instant case, the well-grounded suspicion against all the defendants arises mainly from the declarations of Cooperative Witness X, formerly a suspect within the same investigation’. At the session on 30 January 2012 the EULEX Special Prosecutor in the context of Cooperative Witness X’s evidence noted: ‘The admissibility issue is preliminary to that, otherwise there is no trial.’<sup>24</sup> In relation to these assertions of the Prosecutor, the Trial Panel notes Article 157(4) KCCP, which places limitations upon extent as to which the evidence of cooperative witness may be relied upon, in that ‘the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness’.

39. Cooperative Witness X (AZ)<sup>25</sup> had various statuses in the case with witness, defendant, and, lastly, cooperative witness. He committed suicide on 28 September 2011 and was unavailable for the main trial. AZ was a member of the KLA joining in about April 1998 (nickname ‘MZ’). He was assigned to the KLA 121<sup>st</sup> Brigade. In various statements to the EULEX Special Prosecutor and the Police, AZ gave an account of events in Klecke/Klecka that he had witnessed and taken part in. Throughout the period of his KLA service AZ asserted that he maintained a diary. The entries in that diary were said to have been made broadly contemporaneously with the events described by AZ himself. AZ asserted that he preserved and hid his diaries from the end of the conflict, until he handed them over to the Police.

40. The Defence challenged admissibility of AZ’s statements and diaries. The Trial Panel, upon hearing arguments of the Parties, thoroughly examined the admissibility of AZ’s evidence. The analysis assessed, *inter alia*, whether the Defence had been given an opportunity to challenge AZ’s accusations, and whether that opportunity had been ‘adequate and proper’, in accordance

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<sup>24</sup> Minutes 30.01.2012, paras.76, 101, 103, 105, Court trial binder 6.

<sup>25</sup> Trial Panel Order on Disclosure, 20.01.2012, Court trial binder 5. The Order revoked the protected status of AZ. The Order *inter alia* noted that identify of Cooperative Witness X had become widely known as a result of his death and press reporting of his diaries and other documents.

with Article 156(2) KCCP and with due regard to Article 6(3)(d) of the European Convention on Human Rights (ECHR). The Trial Panel with the ruling of 21 March 2012 declared AZ's evidence inadmissible. The ruling of 21 March 2012 spells out in detail the grounds for exclusion of AZ's evidence.<sup>26</sup>

## **B. Burden of proof**

41. In the present Judgment, the Trial Panel is to determine whether the evidence submitted by the Prosecution establishes the guilt of each of the four Accused in respect of each count that each Accused is charged with in the Indictment, i.e., six counts against NK, seven counts against NXK, three counts against FL and six counts against NS.

42. The Trial Panel refers to Article 6(2) ECHR, which enshrines the presumption of innocence to which Accused are entitled. The presumption of innocence is also spelled out in Article 3(1) KCCP. This presumption places on the Prosecution the burden of establishing the guilt of the Accused, a burden which remains on the Prosecution throughout the entire trial.

43. In the Indictment the Prosecution proposed 30 witnesses, besides the Cooperative Witness, to be heard in the Main Trial. After exclusion of AZ's evidence from the file, the Prosecution deemed it unnecessary to call any witnesses and was ready to proceed to closure of the Main Trial. Upon agreement by the Parties the written evidence submitted by the EULEX Special Prosecutor was read into the minutes.<sup>27</sup> Upon agreement by the Parties all witnesses' statements<sup>28</sup> were considered read. In putting forward the evidence, the Prosecutor referred to

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<sup>26</sup> Trial Panel Ruling on Admissibility of AZ's Statements and Diaries, 21.03.2012, Court trial binder 8. The Ruling constitutes part of the minutes of the session on 21.03.2012.

<sup>27</sup> Minutes 21.03.2012, Court trial binder 8.

<sup>28</sup> During course of the Main Trial the Defence argued that Prosecution was not entitled to conduct interviews with witnesses after confirmation of the Indictment and asked that such witnesses' statements be declared inadmissible. The Trial Panel with the Ruling, dated 20.01.2012, rejected that Defence motion as ungrounded and ruled that the witnesses' statements shall remain in the file: Ruling on Motion of Defence to Exclude Witness Statements Obtained by the Prosecutor after Confirmation of the Indictment, 20.01.2012, Court trial binder 6.

the list he had previously filed with the Court.<sup>29</sup> That list specified the documents which the Prosecutor intended to rely on and which the Prosecutor did not intend to rely on. At the main trial session on 30 March 2012 the Prosecutor did not specify as to whether or not the Prosecution initial assessment was effective. Considering that all such documents were filed with the Court in support of the Indictment, the Trial Panel considered the Prosecution list and the evidence in full. The evidence submitted by the Prosecutor has been listed in **ANNEX I**, which forms an integral part of the Judgment.

44. The evidence submitted by the Defence and admitted by the Trial Panel during course of the Main Trial has been listed in the **ANNEX II** which forms an integral part of the Judgment.<sup>30</sup>

45. As a result, no *viva voce* witnesses were heard by the Trial Panel. The Trial Panel notices that such a direction in putting forward the Prosecution case was adopted by the EULEX Special Prosecutor immediately after the Trial Panel's decision to exclude AZ's evidence. As such, it left the impression that Prosecutor in fact withdrew from the further prosecution of the case at first instance in order to advance rapidly to the completion of the Main Trial. This may well be done in order to exercise the Prosecution rights of appeal, particularly, in bringing the matter of AZ's admissibility to the Supreme Court. The KCCP stipulates the roles of the Prosecution and the Trial Court. The Court while being placed with a task to '... truthfully and completely establish the facts which are important to rendering a lawful decision' (Article 7(1), (2) KCCP), may not engage in substituting the Prosecution in the proceedings, which would be overstepping the role of the Court. Independence and impartiality of the Court is a core element of the notion of a fair trial.

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<sup>29</sup> SPRK list, documents which the Prosecution intends to rely on and documents which the Prosecution does not intend to rely on, Court trial binder 4.

<sup>30</sup> The list of the evidence submitted by the Defence does not contain the purported parts of AZ's diary. In particular, Defence Exhibit D (FL) 1, 2, 2a, purported to be parts of AZ's Diary, contained in the Defence exhibits binder I, and Defence Exhibit D (FL) 5c purported to be AZ's diary, contained in the Defence exhibits binder I. The said evidence has been excluded from the list, in view of the Trial Panel's Ruling, dated 21.03.2012, declaring AZ's evidence inadmissible.

46. Further, the Trial Panel refers to Article 379 KCCP. It stipulates that ‘in his or her closing statement the prosecutor shall present his or her evaluation of the evidence taken at the main trial, explain his or her conclusions concerning facts which are important for the decision, and shall present and justify his or her proposal regarding the criminal liability of the accused ...’. With the consent of all the Accused, their Defence Counsel and Prosecution, the Parties were called to present their closing statements in writing.<sup>31</sup> The Trial Panel verified that Parties had taken an adequate use of the right to give closing statements.<sup>32</sup> The EULEX Special Prosecutor in his closing statement proposed that the Trial Panel finds ‘... all the Accused guilty of the offences charged in the Indictment and to sentence them in accordance with the law’.<sup>33</sup> As justification for this proposal the EULEX Special Prosecutor put forward that ‘the Prosecution believes that this evidence’ (i.e., exhumation evidence from the grave site KER01, where five bodies were recovered), ‘combined with all the other evidence which was read into the minutes at the 22<sup>34</sup> March 2012 hearing, suffices to prove the criminal responsibility of all the Accused’. No further justification was provided by the EULEX Special Prosecutor for his proposal to find all the Accused guilty of the charges against them.

47. In this regard, the Trial Panel recalls the obligation placed upon the Prosecutor pursuant to Article 379 KCCP, which requires that Prosecutor justifies his proposal. For the justification to be meaningful it must set out in sufficient detail what particular evidence or parts of the evidence the Prosecution relies on, how such evidence relates to the proposed guilt of each of the Accused, for each of the counts. Only such justification meets the purpose and function of Article 379 KCCP. The justification that EULEX Special Prosecutor gave in his closing statement was general, without any specification, and thus failed to meet the requirement of Article 379 KCCP.

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<sup>31</sup> Minutes 21.03.2012, paras.42-48, 51-55, Court trial binder 8.

<sup>32</sup> Minutes 30.03.2012, paras.6-9, Court trial binder 9.

<sup>33</sup> Final Written Submissions of the Prosecution, 22.03.2012, Court trial binder 8.

<sup>34</sup> Prosecution must have intended to refer to the 21<sup>st</sup> day of March 2012, when the hearing was held; there was no hearing on the 22<sup>nd</sup> day of March 2012.

48. As such, the Trial Panel was placed in a difficult situation. As noted previously, the Trial Panel is under the obligation to ‘... truthfully and completely establish the facts, which are important to rendering a lawful decision’, Article 7(1) KCCP. Therefore, the Trial Panel, irrespective of the Prosecution failing to justify the proposed criminal responsibility of the Accused, undertook a detailed examination of the evidence filed with the Court. As a result of that examination, the Trial Panel deemed it necessary and justified to re-open the proceedings against the Accused, NK, NXK, FL and NS, pursuant to Article 385(1) KCCP.<sup>35</sup> However, in response to that decision of the Trial Panel, the Prosecution restated its previous stance that ‘... the evidence contained in the case file is more than sufficient to allow the Trial Panel to reach an informed and fair decision regarding the criminal responsibility of the Accused’ and that ‘the Prosecutor will not present further evidence, or request that further evidence is collected at the Main Trial’. ‘Therefore, the Prosecutor moves the Trial Panel to reach a decision based on the available evidence’.<sup>36</sup>

49. Proceeding with calling witnesses *ex officio*, in the circumstances of the present case, would result in the Trial Panel overstepping its competency and placing itself in the role of the Party to the proceedings. As such, the Trial Panel has been left with the written evidence filed with the Court, and the Prosecution argument as set out in the Indictment. With regard to the written evidence, the Trial Panel observes that the written witnesses’ statements were considered read based upon the agreement by the Parties. Furthermore, the Defence did not avail itself of the right to request that witnesses be called to the Main Trial. That position was maintained by the Defence also after the Trial Panel announced the re-opening of the proceedings.<sup>37</sup>

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<sup>35</sup> Minutes 30.03.2012, para.9, Court trial binder 9.

<sup>36</sup> SPRK submission, 04.04.2012, PPS no.07/10, Court trial binder 9.

<sup>37</sup> It is noted that Defence of FL in the submission, dated 27.03.2012, stated: ‘The Defence have not called any witnesses or confronted the remainder of the Prosecution evidence in this case. This is not necessary due to the unique circumstances of the present case.’ Defence final submissions on behalf of FL, 27.03.2012, para.16, Court trial binder 9.

That position was not changed by the Defence after 30 March 2012, when the Trial Panel announced the decision to re-open the proceedings against the Accused, NK, NXK, FL and NS.



### **C. Assessment of the evidence**

50. In respect of each count charged against each Accused in the Indictment, the standard to be met for a conviction to be entered is that of proof beyond reasonable doubt. Article 396(7) KCCP stipulates that ‘the court shall state clearly and exhaustively which facts it considers proven or not proven, as well as grounds for this’. Accordingly, the Trial Panel must determine in respect of each of the counts charged against each of the Accused, whether it is satisfied beyond reasonable doubt, on the basis of the whole of the evidence, that every element of that crime has been established. The Trial Panel pursuant to Article 7(1), (2) KCCP ‘... must truthfully and completely establish the facts which are important to rendering a lawful decision’ and ‘... has a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in ... favour ...’.

51. Following the direction adopted by the EULEX Special Prosecutor in not calling the Prosecution witnesses to be examined in the Court, the Trial Panel in examination of the allegations in the Indictment can only assess the written evidence submitted by the Prosecutor. The Trial Panel notes that in principle all evidence must be produced in the presence of the Accused at a public hearing with a view to adversarial argument. Assessment of solely written evidence, particularly witnesses’ statements, inherently places limitations upon the Trial Panel, not having heard the Prosecution witnesses and not having had an opportunity to observe their demeanour. In circumstances where witnesses were assessed on the basis of written statements, the Trial Panel can draw particular conclusions only as far as clearly attested by the evidence, with particular caution if the written witnesses’ statements go to proof of conduct of the Accused.

### **D. Evidence seized in search**

52. The Defence of NK at the session on 14 November 2011 argued that the search conducted at the NK's property in XX, XX was conducted without adequate judicial authorization.<sup>38</sup> At the session on 01 December 2011 the EULEX Special Prosecutor stated that no court search order was obtained and the search was carried out based on Article 245 (1),(2) and Article 243 (2),(7) KCCP.<sup>39</sup> The Prosecutor stated that he did not intend to rely on the evidence seized in the search of NK's property in XX, XX. However, the evidence filed with the Court by the Prosecutor includes also material which originates from that search. The Trial Panel finds that it cannot be established that any of the circumstances in Article 245 (1) KCCP existed. It is noted by the Trial Panel that with regard to NXK, NS, RM, BL and SS the EULEX Special Prosecutor applied for the search order.<sup>40</sup> As such, it remains unclear why the Prosecutor did not apply for the search order with regard to NK. The Prosecutor did not indicate which particular circumstances made it necessary to conduct the search without the court order.

53. Therefore, the Trial Panel does not find the search justified, and the material which originates from that search and has been filed with the Court is declared inadmissible and excluded from the file, pursuant to Article 246 1) KCCP. The excluded evidence is listed in **ANNEX III** to this Judgment, which forms an integral part of the Judgment.

54. The Defence of FL, at the session on 07 March 2012 argued that the search conducted at the residence of FL was conducted without a proper judicial authorization.<sup>41</sup> The Prosecution has filed with the Court the SPRK binder G containing material obtained in search of 'FL's residence'. That evidence is adduced in support of the Indictment. The Trial Panel finds that the Court file contains no search order of the pre-trial judge in the investigation case GJPP 25/10 (PPS 07/10), which has resulted in the present Indictment against the Accused in this case. The Defence of FL submitted to the Court a search order, issued by the pre-trial judge in another

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<sup>38</sup> Minutes 14.11.2011, paras.148-152, Court trial binder 4.

<sup>39</sup> Minutes 01.12.2011, para.28, Court trial binder 4.

<sup>40</sup> SPRK application for search order, 16.03.2011, PPS no.07/10, GJPP binder 3.

<sup>41</sup> Minutes 07.03.2012, paras.46, 48, 68, Court trial binder 8.

investigation case GJPP 91/10 (PPS 425/09) into the crimes unrelated to the allegations in the Indictment. That search order was admitted into evidence at the session on 07 March 2012.<sup>42</sup> According to the search order of the pre-trial judge the search, as for FL, was authorized in three different addresses, including the property in ZZ, and another in XX, XX. The evidence submitted by the Prosecution in the SPRK binder G does not contain an index identifying which evidence was seized in which property, it merely refers to 'FL's residence'. Furthermore, the Defence of FL submitted to the Court the seized property schedule of the EULEX Organized Crime Investigation Unit, and it appears that items were seized also in a fourth address in LL.<sup>43</sup> This address does not appear in the order of the pre-trial judge in another investigation.

55. The Prosecutor during course of the trial did not explain the grounds based on which items were seized for the present case. Neither the Court file nor the material submitted by the Prosecutor to the Court contained the search order issued in the other investigation. Quite opposite, it was Defence that produced a copy of the search order in the other investigation GJPP 91/10 (PPS 425/09). The Trial Panel observes that at the time when the search order was issued in the other investigation on 28 April 2010, the Prosecutor was already in possession of evidence from AZ incriminating FL. Also, the ruling expanding investigation against FL did not indicate that investigation was expanded to FL 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. The ruling expanding investigation to FL did not contain that identification either. Therefore, from the material before the Court, the Trial Panel is unable to verify existence of circumstances in Article 244 KCCP. The Trial Panel notes that the Prosecutor in his list, attached to the minutes of 01 December 2011 (documents which the Prosecution intends to rely on and documents which the Prosecution does not intend to rely on, Court trial binder 4), did not indicate any of the seized items, contained in the SPRK binder G, FL's residence, as evidence on which the Prosecutor intends to rely in allegations against the

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<sup>42</sup> D(FL)4d, District Court of Pristine/Pristina, search order, 28.04.2010, GJPP 91/10 (PPS 425/09), Defence exhibits binder.

<sup>43</sup> D(FL)4b, EULEX Organized Crime Investigation Unit, seized property schedule, Defence exhibits binder.

Accused. However, in view of the foregoing, the Trial Panel finds that in the present case there was no search order issued by the pre-trial judge for the search of FL's residence. The provisions of the KCCP are strict as to consequences of the search in violation of the KCCP. Article 246 1), 6) KCCP stipulates that evidence obtained without a search order in breach of the provisions of the Code and in breach of Article 245 (1), (3), (4) and (5) of the Code shall be inadmissible. Consequently, the evidence contained in the SPRK binder G and listed in **ANNEX III** to this Judgment is declared inadmissible. ANNEX III forms an integral part of the Judgment.

## **V. FINDING ON THE CHARGES**

### **A. Summary**

56. The witnesses' statements contained in the evidence carried testimonies on purported KLA places of custody in the locations other than Klecke/Klecka, and events taking place elsewhere than Klecke/Klecka. Some of the accounts revealed evidence into events that possibly could amount to crimes. However, the Trial Panel examined the witnesses' statements only in relation to the allegations in the Indictment. On some occasions, particularly, when referring to the protected witnesses' statements, the Trial Panel, as much as possible, has refrained from reciting the details of their narration, to preserve their anonymity either from the Accused and Defence or general public.

57. In light of the body of the evidence submitted by the Prosecution the Trial Panel is persuaded that a prison, referred to also as a detention centre, was maintained by the KLA in

the Klecke/Klecka Village in 1999. The Trial Panel was unable to conclude that conditions in the detention centre *per se* were such as to amount to cruel treatment.<sup>44</sup>

58. From the individuals named in the Indictment, the Trial Panel found that Anonymous Witness H and his brother were subjected to cruel treatment in the KLA detention centre in Klecke/Klecka, likely in February 1999, and SA, sometimes in March 1999 until 03 April 1999. The evidence has not been sufficient for the Trial Panel to determine that other crimes as alleged in the Indictment were committed in the KLA custody in Klecke/Klecka detention centre or near the Klecke/Klecka detention centre. Remains of some of the victims were found in the Klecke/Klecka Village and evidence attested to their disappearance, however, further particular circumstances of their disappearance remained unclear.

#### **B. Existence of a KLA prison in the Klecke/Klecka Village**

59. The acts charged in the Indictment are alleged to have occurred at or in relation to a KLA prison, also described as a detention centre, established in the village of Klecke/Klecka, where Albanian civilians suspected of collaboration with the Serbian regime, Serbian civilians and Serbian police and militaries were detained. The Klecke/Klecka prison also served as a detention centre for KLA soldiers investigated or sentenced for disciplinary offences. Several witnesses stated that they were not aware of the existence of a prison in Klecke/Klecka or did not see any prisoners there.<sup>45</sup> It is necessary, therefore, for the Trial Panel to determine

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<sup>44</sup> The Indictment of the EULEX Special Prosecutor has referred to 'inhumane' conditions in the KLA detention centre in Klecke/Klecka Village. In this Judgment the Trial Panel has used the terms 'inhumane treatment' and 'cruel treatment' interchangeably. In *Naletilic and Martinovic* the ICTY Trial Chamber regarded: 'The jurisprudence of the Tribunal shows that the offences of inhumane treatment and cruel treatment are residual clauses under Articles 2 and 3 of the Statute respectively. Materially, the elements of these offences are the same.' *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, ICTY, Trial Judgment, 31.03.2003, para.246.

In *Kordic and Cerkez* the ICTY Trial Chamber confirmed that 'the cruel treatment is equivalent to the offence of inhumane treatment in the framework of the grave breaches provisions of the Geneva Conventions'. *Prosecutor v. Dario Kordic and Mario Cerkez*, ICTY, Trial Judgment, 26.02.2001, para.265. See also *Prosecutor v. Tihomir Blaškić*, ICTY, Trial Judgment, 03.03.2000, para.186.

<sup>45</sup> Witness E, 28.10.2010, SPRK record of the witness hearing in an investigation, pp.3, 4; Witness G, 11.01.2011, EULEX Police interrogation statement of the witness, pp.3, 4, SPRK binder B;AQ, 07.06.2011, EULEX Police *P 425/11 AK et al Judgment / 2*

whether it has been established that a KLA prison existed in Klecke/Klecka and whether individuals were detained there at the time material to this Indictment.

60. While not entirely clear, the evidence indicates that during the material time the Village of Klecke/Klecka was within the Pashtrik/Pastrik operational zone.<sup>46</sup> The command of the 121<sup>st</sup> Brigade, also known as 'Kumanova' Brigade,<sup>47</sup> was located in Klecke/Klecka. BL (Accused in Klecke/Klecka judgment one) stated that he was a soldier in the 121<sup>st</sup> Brigade from the beginning until the end of the conflict. He also testified that command of the 121<sup>st</sup> Brigade was located in Klecke/Klecka.<sup>48</sup> Also, the Accused NS testified that headquarters of the 121<sup>st</sup> Brigade were based in Klecke/Klecka in 1999.<sup>49</sup> SS (Accused in Klecke/Klecka judgment one) confirmed that his house in Klecke/Klecka was used by KLA in 1998. Sometimes in 1998 Klecke/Klecka was burnt by Serbian forces. From January 1999 until June 1999 he was assigned to the 121<sup>st</sup> Brigade in Luzhnice/Luznica. As it follows from the statement of SS, commander of the 121<sup>st</sup> Brigade in April 1999 was based in Klecke/Klecka.<sup>50</sup> BS (Accused in Klecke/Klecka judgment one) declared that he was a member of the 121<sup>st</sup> Brigade. He had been to Klecke/Klecka and the headquarters of the 121<sup>st</sup> Brigade were based in Klecke/Klecka.<sup>51</sup> According to AK (Accused in Klecke/Klecka judgment one) in 1999, until he was injured on 18 April 1999, he went to Klecke/Klecka when it was requested by the headquarters or by the command of the 121<sup>st</sup> Brigade. From the statement of the Accused AK it is not entirely clear if the general headquarters of the KLA were also based in Klecke/Klecka or only the headquarters of the 121<sup>st</sup> Brigade.<sup>52</sup> Several witnesses, Anonymous Witness M,<sup>53</sup> BAZ,<sup>54</sup> ST,<sup>55</sup>FK,<sup>56</sup> AQ,<sup>57</sup> AO,<sup>58</sup> testified

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interrogation statement of the witness, pp.3, 5, SPRK binder C; IA, 07.04.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; BZ, 05.04.2011, SPRK record of the witness hearing in an investigation, p.4, SPRK binder C; DD, 04.04.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; BEK, 08.01.2011, EULEX Police interrogation statement of the witness, p.4, SPRK binder C; AO, 30.11.2010, EULEX Police interrogation statement of the witness, p.5, SPRK binder C.

<sup>46</sup> AQ, *ibid*, p.3; NK, 12.05.2011, SPRK record of the suspect hearing in an investigation, p.7, SPRK binder O.

<sup>47</sup> QK, 14.06.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; IA, *supra* note 45, p.3; NH, 02.12.2010, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; Witness G, *supra* note 45, p.3.

<sup>48</sup> BL, 11.05.2011, SPRK record of the suspect hearing in an investigation, p.3, SPRK binder O.

<sup>49</sup> NS, 11.05.2011, SPRK record of the suspect hearing in an investigation, p.3, SPRK binder O.

<sup>50</sup> SS, 11.05.2011, SPRK record of the suspect hearing in an investigation, pp.3, 4, SPRK binder O.

<sup>51</sup> BS, 12.05.2011, SPRK record of the suspect hearing in an investigation, p.4, SPRK binder O.

<sup>52</sup> AK, 14.04.2011, record of the hearing on detention on remand, Court trial binder GJPP binder 3.

that either the headquarters of the 121<sup>st</sup> Brigade or the 121<sup>st</sup> Brigade was based in Klecke/Klecka. BEK testified that in 1999 he was in the KLA base in Klecke/Klecka.<sup>59</sup> Former KLA member IZ stated that he had not been to Klecke/Klecka but heard that a KLA base was located there.<sup>60</sup> BZ noted that sometimes the headquarters of the 121<sup>st</sup> Brigade would move also to Berishe/Berisa.<sup>61</sup>

61. Several witnesses<sup>62</sup> and also Accused NK, NS and FL<sup>63</sup> have indicated that KLA general headquarters were located in the Village of Divjake/Divljaka. According to BZ from January 1999 until mid-April 1999 he was the chief of staff of the KLA general headquarters. The headquarters were in the Village of Divjake/Divljaka until April 1999 and thereafter moved to Devetak, near Shtime/Stimlje. Witness A, amongst others, was based in the KLA general headquarters in Divjake/Divljaka. Witness A was in charge of the military court, and in his work was assisted by Witness E. While BZ did not know if there was a prison in Klecke/Klecka, he knew that a disciplinary centre was in the Village of Lladroc/Ladrovac. The centre was under responsibility of the military court and the military police was guarding the prison and prisoners.<sup>64</sup>

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<sup>53</sup> Anonymous Witness M, 20.05.2011, SPRK record of the witness hearing in an investigation, p.3, SPRK binder D.

<sup>54</sup> BZ, 23.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

<sup>55</sup> ST, 25.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

<sup>56</sup> FK, 31.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

<sup>57</sup> AQ, *supra* note 45, p.3.

<sup>58</sup> AO, *supra* note 45, p.3.

<sup>59</sup> BEK, *supra* note 45, p.3.

<sup>60</sup> IZ, 19.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

<sup>61</sup> BZ, *supra* note 45, p.5.

<sup>62</sup> It is noted that KLA general headquarters could be spread also in other locations.

Witness W described ill-treatment in another location, where he said were KLA headquarters: Witness W, 16.06.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

BZ testified that until April 1999 the general headquarters were in Divjake/Divljaka and then moved to Devetak, near Shtime/Stimlje: BZ, *supra* note 45, p.2.

The Accused FL testified that from November 1998 until the end of the war part of the general headquarters was in Divjake/Divljaka and other parts in other villages: FL, 17.05.2012, SPRK record of the suspect hearing in an investigation, p.5, SPRK binder O.

<sup>63</sup> NK, 11.05.2011, SPRK record of the suspect hearing in an investigation, p.5, SPRK binder O; NS, *supra* note 49, p.4; FL, *supra* note 62.

<sup>64</sup> BZ, *supra* note 45, pp.2, 3.

62. According to the statement of the Accused NK there was a prison in Klecke/Klecka, which was under the jurisdiction of the military court. NK, within the framework of the military police, dealt with the cases of soldiers and, occasionally, members of the military police. NK worked directly with head of military court, Witness A. If NK deemed that grounded suspicion existed for any person, he would take that person to Witness A, who would further consider if there were reasons for detention. NK was occasionally in the prison in Klecke/Klecka either to take individuals there or to conduct interrogation. Even though NK did not indicate particular instances, he testified that it was possible that also civilians would be taken to the prison.<sup>65</sup>

63. According to NM, at the end of 1998 he was appointed to the KLA headquarters in Divjake/Divljaka. NM states that BZ was the chief of staff of the KLA general headquarters. Also the legal department was based in Divjake/Divljaka. He recalled that Witness A and Witness E worked there.<sup>66</sup> AH, who joined the KLA military police in the end of December 1998 or beginning of January 1999 recalled that A was a judge of the military court, and on one occasion he escorted an arrested soldier to A.<sup>67</sup> Also, SB knew A as a judge, who gave him some forms or templates at a meeting which took place either in Klecke/Klecka or Divjake/Divljaka.<sup>68</sup>

64. This is corroborated by Witness A, who stated that in the end of 1998 he took up the duties of a director of the legal department in the KLA, in Divjake/Divljaka. He served as the only judge in the Divjake/Divljaka area until April 1999. Military trials were held, also with participation of a military prosecutor HK, and an *ex officio* defence counsel Witness E.<sup>69</sup> The statement of Witness E confirms that he stayed with A in Divjake/Divljaka, near Klecke/Klecka for a certain period of time. He assisted A in drafting legal documents and acted in defence for the accused KLA soldiers.<sup>70</sup> The statement of HK confirms that he stayed with A from December 1998 until March/April 1999 in Divjake/Divljaka, near Klecke/Klecka, but they did not do any

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<sup>65</sup> NK, *supra* note 46, pp.6, 7, 8, SPRK binder O.

<sup>66</sup> NM, 05.04.2011, SPRK record of the witness hearing in an investigation, SPRK binder C.

<sup>67</sup> AH, 27.05.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.

<sup>68</sup> SB, 27.05.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.

<sup>69</sup> Witness A, 23.09.2010, SPRK record of the witness hearing in an investigation, SPRK binder B.

<sup>70</sup> Witness E, *supra* note 45.



work.<sup>71</sup> According to HK close to Klecke/Klecka there was a prison where he saw people being detained.<sup>72</sup>

65. Further, also Witness A stated that he often visited the Klecke/Klecka prison, just outside Divjake/Divljaka. According to A, not many prisoners were in the Klecke/Klecka prison. Improvised prisons were also in the other areas of the Pashtrik/Pastrik operational zone, Lladroc/Ladrovac and Kervasari/Kravasarija.<sup>73</sup> Particularly, A recalled the case of BKU, a commander of the brigade, who had been sentenced to death on grounds of deserting. BKU was sent to the Klecke/Klecka prison pending enforcement of the sentence.<sup>74</sup> Also, other witnesses, HK,<sup>75</sup> Witness E<sup>76</sup> knew to varying degrees about the case of BKU. While BZ knew the case of BKU, as far as he knew, BKU was held in Lladroc/Ladrovac.<sup>77</sup> BKU confirmed that he was commander of the 123<sup>rd</sup> Brigade, and later, on 15 or 16 January 1999 was arrested and detained until 23 March 1999. BKU, however, refused to specify the location where he was detained.<sup>78</sup> In this regard, the Trial Panel notes that Witness V testified that he had been a KLA member and later was accused of being a spy and at a certain point taken to the prison in Klecke/Klecka. There V saw imprisoned BKU along with other prisoners.<sup>79</sup>

66. Besides Witness V, Witness F also testified that in March 1999 he was arrested by KLA and taken to a house in Klecke/Klecka, and kept in a room, which looked like a basement, together with other five or six detainees. Witness F was detained because of the rumours that he was against the KLA. In the house in Klecke/Klecka he was questioned and later released.<sup>80</sup> Anonymous Witness B stated that in the end of April or beginning of May 1999 he acted as a village guard and was taken by surprise by Serbian forces and escaped to nearby mountains.

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<sup>71</sup> HK, 20.10.2010, SPRK record of the witness hearing in an investigation, SPRK binder C.

<sup>72</sup> *Ibid.*

<sup>73</sup> Witness A, *supra* note 69, pp.3, 4.

<sup>74</sup> *Ibid.*, pp.1, 5, 6.

<sup>75</sup> HK, *supra* note 71.

<sup>76</sup> Witness E, *supra* note 45, pp.4, 5.

<sup>77</sup> BZ, *supra* note 45, p.4.

<sup>78</sup> BKU, 04.10.2010, SPRK record of the witness hearing in an investigation, p.2, SPRK binder B.

<sup>79</sup> Witness V, 18.04.2011, interview to Swiss Deputy Federal Prosecutor, SPRK binder C.

<sup>80</sup> Witness F, 02.01.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder B.

After a few days B was arrested by a Serbian foot patrol, blindfolded and taken to a house, where he was interrogated and hit with hard objects all over the body and asked questions about KLA. Anonymous Witness B had to tell them what he knew. After approximately three days B was released and after a few days approached Klecke/Klecka for aid. B was asked to report to the headquarters in Klecke/Klecka. In Klecke/Klecka, in a two storey house, B was put in one of the two rooms in the basement. After five or six days B was brought upstairs and questioned. B explained what had happened and what he had told to Serbian forces. A few days later B was given a court decision, imposing B thirty days in custody.<sup>81</sup> At the interview to the EULEX Special Prosecutor B was also presented a document, dated 17 May 1999, 'decision on detention', issued by the KLA military court. The decision bears the name of the investigative judge PU.<sup>82</sup> In this regard the Trial Panel notes that Witness A stated that the name of 'PU was used by A instead of his real name, in order to shield himself from any possible retaliation by the accused. Witness A also confirmed that it was his signature on the said decision of the KLA military court.<sup>83</sup>

67. Anonymous Witness C declared that in March 1999, in the KLA headquarters in Llapushnik/Lapusnik he was told that his son was held in Klecke/Klecka. C walked to Klecke/Klecka and from there was driven to Terpeze/Trpeza Village and kept detained. After six days C was taken back to Klecke/Klecka and put in a basement. C spent about seven days there and was eventually released on 03 April 1999.<sup>84</sup> Also, Witness M stated that he was arrested in March or April 1999 and taken to Klecke/Klecka. There M was questioned by KLA members and also by a judge, and after some time released.<sup>85</sup> Witness O testified that he was taken together with Witness P, Witness Q and SOS, who all were civilians, by KLA soldiers in 1998 or 1999. First they were taken to Likoc/Likovac and held there for two days. Thereafter, they all four were taken to Klecke/Klecka and put in a room with other three men, one of whom was BKU. O was

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<sup>81</sup> Anonymous Witness B, 04.12.2010, EULEX Police interrogation statement of the witness, pp.4, 5, SPRK binder B.

<sup>82</sup> *Ibid*, p.5.

<sup>83</sup> Witness A, *supra* note 69, pp.2, 8.

<sup>84</sup> Anonymous Witness C, 21.09.2010, SPRK record of the witness hearing in an investigation, pp.2, 3, 4, SPRK binder B.

<sup>85</sup> Anonymous Witness M, 30.03.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

kept in Klecke/Klecka for one month.<sup>86</sup> While Witness Q could not recall a particular date when they were arrested, Q stated it was in winter of 1999 and there was still snow on the ground. Also, Witness Q declared that first they were taken to Likoc/Likovac, and held for two days and thereafter taken to Klecke/Klecka. Also Q stated that in Klecke/Klecka they were put in a room together with other three men, one of whom was BKU.<sup>87</sup> The statement of Witness P supported the statements of O and Q, in that they and SOS were arrested and first taken to Likoc/Likovac and then Klecke/Klecka. P said that during that time his eyesight was poor, but he recalled that in Klecke/Klecka they were put in a room with other prisoners, who could have been two.<sup>88</sup> All three Witnesses O, P and Q declared that they were released at the same time and SOS was released later.

68. In view of the combined effect of the body of evidence above, the Trial Panel is satisfied that a prison existed in the Village of Klecke/Klecka where individuals were detained by members of the KLA. Based on the statements of the witnesses the Trial Panel has been able to identify as a minimum the description of the building which was used to detain individuals (paras.72-85 below), in that it was a family/residential building with two floors. One floor looked like a ground floor, but was, at least partially, built under ground level. There were two rooms, where individuals were detained, with at least one window looking outside. The toilet was located outside in the yard. The floor above was used by KLA members and it was also used to interview the detained individuals.

69. The Indictment states that in addition to the 'official' Klecke/Klecka prison, KLA used other facilities in the Klecke/Klecka Village to detain prisoners. Such facilities consisted of burnt houses, lacking the most fundamental basic living requirements, and in which prisoners were sometimes kept chained.<sup>89</sup> Based on the written evidence, the Trial Panel has not been able to conclude that such other burnt houses were used to detain individuals or to identify the

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<sup>86</sup> Witness O, 24.05.2011, EULEX Police interrogation statement of the witness, pp.2, 3, 4, SPRK binder D.

<sup>87</sup> Witness Q, 26.05.2011, EULEX Police interrogation statement of the witness, pp.2, 3, 4, SPRK binder D.

<sup>88</sup> Witness P, 25.05.2011, EULEX Police interrogation statement of the witness, pp.2, 3, 4, SPRK binder D.

<sup>89</sup> Indictment, p.23.

conditions of detention in such burnt houses. The written evidence attested to a building as stated in para.68 above, and that the lower floor of the building was used to detain individuals.

70. Circumstances of the detention are considered in this Judgment further.

**C. Violation of the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**

71. The Indictment makes a general allegation as to conditions of detention in Klecke/Klecka, that an undefined number of Serbian and Albanian civilians and Serbian military prisoners were kept in inhumane conditions, including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition and frequent beatings. Further the Indictment names particular persons, subjected to ill-treatment, for which responsibility of the Accused is alleged.

1. Conditions of detention

72. Based on the statements of witnesses, the Trial Panel observes that while conditions of the detention were difficult, the conditions in and of themselves did not amount to cruel treatment.

73. Witnesses F, O, P and Q, who said to be detained in Klecke/Klecka, indicated that they were provided sponge mattresses to sleep on and also blankets.<sup>90</sup> None of the witnesses testified to be deprived of food. Anonymous Witness C said that very little food was given every

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<sup>90</sup> Witness F, *supra* note 80; Witness O, *supra* note 86; Witness P, *supra* note 88; Witness Q, *supra* note 87. Anonymous Witness B testified that metal beds were provided for sleeping.

24 hours,<sup>91</sup> Witnesses D, F, and Anonymous Witness B said that food was given more times a day.<sup>92</sup> Also, none of the witnesses said to be prevented to use a toilet. Witnesses D, O, P, Q and F recalled that there was no toilet inside, but they would be escorted to the toilet in the yard.<sup>93</sup> Only Anonymous Witness C said that during his detention of about seven days in Klecke/Klecka he was never let out of the cell. He also described the cell looking like a stable, with running water inside the cell.<sup>94</sup>

74. Similarly, Anonymous Witness M said that there was no floor, only soil and the water was running.<sup>95</sup> Others, P and Q, recalled that floor was covered with wooden planks.<sup>96</sup> In view of the contradicting statements as to whether or not the floor consisted of soil and occasionally was covered with mud, the Trial Panel was unable to make a concrete determination in this regard.

75. Only Witness P said that it smelled of manure inside the room.<sup>97</sup> No other witness mentioned the smell. While only one witness said that there were no windows,<sup>98</sup> several other Witnesses O, Q, P and V, and Anonymous Witness I recalled one or more windows.<sup>99</sup> It was only on I's evidence that he saw 30 persons detained in Klecke/Klecka detention centre.<sup>100</sup> No such high number of prisoners is found in other witnesses' statements. It is not attested by the witnesses' statements that prisoners were kept chained. Witness A who visited the prison in Klecke/Klecka regularly gave evidence that prisoners did not complain of the treatment in the

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<sup>91</sup> Anonymous Witness C, *supra* note 84, pp.2, 3, 4.

<sup>92</sup> Witness D, 18.01.2011, SPRK record of the witness hearing in an investigation, SPRK binder C and 24.12.2010, EULEX Police interrogation statement of the witness, SPRK binder C; Witness F, *supra* note 80; Anonymous Witness B, *supra* note 81.

<sup>93</sup> Witness D, *ibid.* Witness O, *supra* note 86; Witness P, *supra* note 88; Witness Q, *supra* note 87; Witness F, *supra* note 80.

<sup>94</sup> Anonymous Witness C, *supra* note 84, pp.2, 3, 4.

<sup>95</sup> *Ibid.* Anonymous Witness M, *supra* note 53 and *supra* note 85.

<sup>96</sup> Witness P, *supra* note 88; Witness Q, *supra* note 87.

<sup>97</sup> Witness P, *supra* note 88.

<sup>98</sup> Witness F, *supra* note 80.

<sup>99</sup> Witness O, *supra* note 86; Witness Q, *supra* note 87; Witness P, *supra* note 88; Witness V, *supra* note 79; Anonymous Witness I, 22.11.2010, EULEX Police interrogation statement of the witness, SPRK binder B.

<sup>100</sup> Anonymous Witness I, *ibid.* Exhibit P6, Anonymous Witness I, 02.11.2011, SPRK record of the witness hearing in an investigation, Prosecution exhibits binder P1-P31.

prison, except for one prisoner who was tired of staying inside his cell all day and asked A to be allowed to perform some work.<sup>101</sup>

76. In particular, it can be inferred from the statement of Witness D, who was a soldier in the Serbian army, that he was taken to Klecke/Klecka and put in the same room in the basement as SA (paras.88-93 below). Also his description of the house generally matched the description given by other witnesses. D recalled that it was a two storey house. Prisoners were kept in the basement, there was no toilet and for their needs the prisoners would be escorted to a makeshift toilet in the yard, which consisted of a hole in the ground, surrounded by wooden planks. D recalled that one of the prisoners 'SH' was subjected to beating in front of the other prisoners. The Trial Panel notes that 'SH' was a nickname of SA (para.92 below). 'SH' was also taken upstairs and D could hear him screaming. Other prisoners were not ill-treated in D's presence. Also, D himself was never ill-treated. While D regarded conditions of imprisonment as 'pretty bad', he testified that they were provided food twice a day, morning and afternoon. According to D, all prisoners were kept untied.<sup>102</sup> Further D gave evidence that prisoners had to sleep on a sponge mattress on a concrete floor. Sometimes in the morning a bucket of water would be provided so that prisoners could wash themselves. They could also burn some wood inside the room.<sup>103</sup>

77. Witness F was arrested by KLA members in March 1999 and taken to Klecke/Klecka, to a house which looked like a family house. As far as F recalled, the room, where he was put in, did not have any windows and it looked like in a basement. But the snow was high outside. There were other five or six detainees. F said that they all were treated well, did not suffer any beatings, got food three times a day. They had mats on the ground to sleep on and also blankets. There was also a wooden stove burning in the room, which kept the room warm. The detainees were kept in the room with the door closed but not locked during the day. It was

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<sup>101</sup> Witness A, *supra* note 69, p.4.

<sup>102</sup> Witness D, *supra* note 92.

<sup>103</sup> *Ibid.*

locked during the night. When detainees needed to go to the bathroom, they knocked on the door and would be let to the toilet outside the house.<sup>104</sup>

78. According to the statements of Witnesses O, P and Q, they were arrested by KLA members and detained in Klecke/Klecka, at the same time, and in the same room, together with SOS. Witnesses O and Q recalled that in the room there were three other prisoners, one of whom was BKU. Witness P said he had poor eyesight during that time and it may have been that the other two prisoners were in the same room with him, O, Q and SOS. All three Witnesses O, P and Q testified that none of the prisoners were mistreated. They could use the toilet outside, a few metres away. The door of the cell was kept locked, but they could knock on the door and would be escorted to the toilet. Witness Q described the toilet as a hole in the ground, with pieces of timber on the sides and overhead. P said that he could smell remains of manure in the room. O, P and Q said they had sponge mattresses to sleep on and also had blankets. O and Q differed as to whether or not there was any furniture in the room. Also with regard to number of the windows in the room Witnesses gave varying information, one or more windows. According to P and Q, the floor was covered with wooden boards. Both, P and Q, stated that during their imprisonment in Klecke/Klecka they were afraid of being killed. However, the Trial Panel notes that such fear may not with certainty be linked to their detention in Klecke/Klecka. P, Q and O described that first they had been taken to Likoc/Likovac, and then driven to Klecke/Klecka by KLA soldiers. On the way to Klecke/Klecka at a certain point they were asked to step out of the vehicle and line up, also masked and armed KLA soldiers got out of the vehicle. O said that it was since then that he was in fear of being killed.<sup>105</sup>

79. Witness V, who was detained in Klecke/Klecka for 56 days, said that the building consisted of a basement and a floor. At yard level there were two rooms and above there was another floor which the military police was occupying. From the cell, V could see the yard. Above the cell door there was an opening and he could see who was coming and going. BKU and two KR

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<sup>104</sup> Witness F, *supra* note 80.

<sup>105</sup> Witness O, *supra* note 86; Witness Q, *supra* note 87; Witness P, *supra* note 88.

brothers were in his cell. Later the third brother was brought in, who was released immediately. BKU was interrogated on the upper floor several times. V never saw that BKU would be maltreated. V could see marks on his hands and shoulders, but BKU said that he had hurt himself. Once BKU had a breakdown, which was after he received a letter. V thought that BKU was sentenced to death. Witness recalled that also two KR brothers received letters ordering death sentences on accusations of being spies. V also recalled a young man 17 years of age, from the Village of Obri, he stayed in their room for two days because he had stolen some things. KLA soldiers beat him up, especially BH. BH (called also 'GJ') was described as a 'butcher', he was the only one beating without mercy. In the other cell there were two Serbs, father and a son. They were never maltreated. Personally V was never maltreated in Klecke/Klecka, 'only received two kicks with the knee'.<sup>106</sup>

80. The Trial Panel notes that the written statement of Witness V in some parts is not clear. Witness V declared that when he was in the prison in Klecke/Klecka MS addressed life threats to V. Further V continued: 'He dragged me out of the cell with a sack over my head and he threatened my life. When I was in prison, MS, together with his cousin and three other persons came three times in my cell. On one occasion they threatened me and on another occasion they kicked me.'<sup>107</sup> In the same statement V gave evidence: 'Personally I was never physically maltreated in Klecke/Klecka. I only received two kicks with the knee in my stomach. I would like to add that on one occasion my father was allowed to visit me in Klecke/Klecka.'<sup>108</sup>

81. Anonymous Witness B stated that in May 1999 he was detained in Klecke/Klecka, in a two storey house. The upper floor appeared to be used by the KLA military police. B was put in one of the two rooms in the basement. B was able to go out in the yard, where he met other two detained KLA soldiers and was able to talk to them. B later moved into the cell with the other two detainees. B described conditions as good. They had three metal beds, they were able to

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<sup>106</sup> Witness V, *supra* note 79.

<sup>107</sup> Witness V, *ibid*, p.4.

<sup>108</sup> Witness V, *ibid*, p.7.



eat some food and shave and wash regularly. The door to the cell was kept open during the day and they were able to stay outside in the yard. During the night the door was kept locked.<sup>109</sup>

82. Anonymous Witness M, a civilian, stated that in March or April 1999 he was arrested by KLA and taken to a two storey house in Klecke/Klecka and put in one of the two rooms in the basement. The basement was dark, there was no floor, only soil, and water and mud on the ground. After some two hours M was questioned. First M testified that he was threatened with some wooden sticks but was not hit. Further M declared that he did not witness any crimes in the house in Klecke/Klecka but heard certain persons screaming as they were questioned on the first floor. They looked beaten after they came back, though he could not see them bleeding. With regard to his interrogation in the house in Klecke/Klecka, later Anonymous Witness M testified that after his questioning ended a person with a mask hit him with a stick on the back twice.<sup>110</sup>

83. Anonymous Witness L testified that in 1999 he left the 121<sup>st</sup> Brigade and wanted to join the 123<sup>rd</sup> Brigade. L was not satisfied with the commanders of his unit in the 121<sup>st</sup> Brigade. Later Anonymous Witness L was arrested by a member of the KLA military police and taken to Klecke/Klecka, and put in a sort of a garage or basement of a private house. The basement was on the ground floor. The building also had another floor. L saw another imprisoned KLA soldier in his cell. It was clear that he had been badly beaten. L spent a night in the basement and the following morning he was questioned by a KLA soldier named ON. L was told that he should not have joined another brigade without a certain person's approval. Thereafter, L was released.<sup>111</sup>

84. Anonymous Witness I, a KLA soldier, was in Klecke/Klecka in May, June 1999. Witness recalled that in Klecke/Klecka there was detention centre. It was a two storey house. On one occasion Anonymous Witness I passed by and looked through the window with bars from outside and saw around 30 prisoners inside. They were all in the basement. From outside it

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<sup>109</sup> Anonymous Witness B, *supra* note 81.

<sup>110</sup> Anonymous Witness M, *supra* note 53.

<sup>111</sup> Anonymous Witness L, 12.04.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.

looked like a ground floor but actually it was a basement. The military police used to stay on the top floor. Witness I personally did not witness any crimes in Klecke/Klecka.<sup>112</sup>

85. Witness N, possibly, in May 1999 was taken by KLA soldiers either to Klecke/Klecka or Berishe/Berisa to a one storey house with a basement. N was put in a room in the basement. There were sponges on the floor. The toilet was outside in the yard. On the fourth day N was taken upstairs for interview. During three days N was given food, taken outside to the toilet. N was not mistreated and he did not witness any crimes. N had a feeling that he was taken because of rumours that he was collaborating with Serbs. After interview N was released.<sup>113</sup>

86. The Trial Panel notes that some of the witnesses testified that certain other prisoners were or looked beaten. The Trial Panel however is not persuaded that detained individuals were subjected to mistreatment on a systematic basis by way of an arbitrary selection of detainees for abuse. The witnesses' statements are not sufficient to infer that by reason of being detained in Klecke/Klecka they would be under a constant fear of being subjected to physical abuse or death. In light of the foregoing evidence, the Trial Panel finds that conditions of detention *per se* did not amount to cruel treatment.

87. Whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis.<sup>114</sup> In this regard, the Indictment names individuals subjected to inhumane treatment, the former prison director SA, the former police officer YG, the three brothers BK, EK and NXX, the civilians Anonymous Witness H and his brother, the five Serbian militaries DT, DV<sup>115</sup>, BC, ZF, ZT, VM and ND. The evidence submitted by the Prosecutor indicates that certain other individuals possibly were subjected to cruel treatment. However,

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<sup>112</sup> Anonymous Witness I, *supra* note 99.

<sup>113</sup> Witness N, 04.01.2011, EULEX Police interrogation statement of the witness, SPRK binder C.

<sup>114</sup> *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, ICTY, Trial Judgment, 30.11.2005, para.232.

<sup>115</sup> It is noted by the Trial Panel that on the page 24 of the Indictment, which contains the Prosecution allegations as to inhumane treatment of the prisoners in Klecke/Klecka the Prosecution has named amongst others DEV. However, elsewhere in the Indictment the Prosecution refers to DV. Also, evidence on the site KER01 refers to DV. Therefore, the Trial Panel has taken it as a spelling mistake on the page 24 of the Indictment, and that the Prosecution intended to refer to DV.

these have not been listed by the Prosecutor in the Indictment. The Trial Panel is limited to the allegations in the Indictment and is restricted from expanding the Indictment. Consequently, the alleged cruel treatment of the individuals, which are named in the Indictment, is examined further.

## 2. SA and YG

88. As considered in the Judgment previously (para.67 above) Anonymous Witness C testified that after imprisonment in Terpeze/Trpeza, on 26 March 1999, he was taken and put in a cell in Klecke/Klecka. The cell was in the basement. C spent there around seven days. In the cell there were other four prisoners. C recalled that one of the prisoners was called SA and one was from Prizren called I/Y. C stated that the cell was like a stable, he was never let out of the cell during his stay there. They had running water inside the cell and got very little food, every 24 hours some bread or so. From time to time the prisoners were taken upstairs and interrogated. C recalled that it was someone by name H who would come and take the prisoners upstairs for interrogation and beat them. All of C's cellmates were badly beaten. C himself was not beaten or interrogated in Klecke/Klecka. C testified that there were soldiers coming and going in Klecke/Klecka, but he could not recognize any of them. On 03 April 1999, C was released by 'MZ' / [name redacted], who C thought was a director of the prison.<sup>116</sup>

89. Witness A (paras.64-65 above) recalled seeing SA in Klecke/Klecka. SA was under investigation, but his case never reached Witness A. There were rumours that SA was a director of a prison in Vushtrri/Vucitrn or Mitrovice/Mitrovica and had tortured political prisoners. Witness A testified that SA was kept in one of the two rooms on the ground floor, but A did not know what happened to him.<sup>117</sup>

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<sup>116</sup> Anonymous Witness C, *supra* note 84, pp.4, 5.

<sup>117</sup> Witness A, *supra* note 69, p.6.

90. Unlike Anonymous Witness C, Witness A did not give evidence on the conditions of detention in Klecke/Klecka or whether SA had any marks of physical violence. At the same time, it was A's evidence that SA was in the KLA custody in Klecke/Klecka. Whereas, ill-treatment of SA is corroborated by the statement of Witness D.

91. Witness D, a soldier in the Serbian army, stated that on 03 March 1999 he was arrested by KLA members. D was taken to several locations and after some time to a two storey house and put in a basement. There were around six other prisoners, all Albanians. They were in a bad condition and one could immediately see that they had been beaten. D recalled a prisoner, an old man, who others called 'SH'. Other prisoners said that before the conflict he was a director of Smrekonice/Smrekovnica prison. Several times KLA soldiers came to their room and beat 'SH' in front of everyone. They would also take 'SH' upstairs and prisoners could hear him screaming. No other prisoners were mistreated in the presence of Witness D.<sup>118</sup>

92. Witness R testified that SA, with a nickname 'SH' or 'SHK', disappeared on 15 March 1999, and was last seen in Mitrovice/Mitrovica. SA worked for 25 years as a director in Smrekonice/Smrekovnica district prison in Mitrovice/Mitrovica. Witness R did not know further details of disappearance of SA.<sup>119</sup>

93. In light of the foregoing evidence the Trial Panel is persuaded that SA was detained in the detention centre in Klecke/Klecka run by KLA, in March 1999, likely, until 03 April 1999. The Trial Panel also accepts that SA was not taking an active part in hostilities during that time. Although the Trial Panel is unable to assess the full extent of beating that SA was subjected to, the Trial Panel is persuaded that the beating amounted to cruel treatment. The Trial Panel observes that both, Anonymous Witness C and Witness D described the treatment as 'bad beating'. It emerges from C's statement that SA was beaten also in front of the other prisoners, in the cell, and when SA was taken upstairs his screams could be heard from the upstairs in the cell.

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<sup>118</sup> Witness D, *supra* note 92.

<sup>119</sup> Witness R, 22.12.2010, EULEX Police interrogation statement of the witness, SPRK binder C.

94. Leaving aside for the present the question of the criminal responsibility of the Accused, the Trial Panel is satisfied that SA was mistreated in a way which caused him serious mental and physical suffering, and constituted a serious attack on human dignity.

95. With regard to YG, the Trial Panel notes that only Anonymous Witness C recalled I/Y detained in Klecke/Klecka. While there is a possibility that this could refer to YG, there is no further evidence. As such, evidence of Anonymous Witness C is not sufficient to support allegations in the Indictment that YG was detained in Klecke/Klecka, or that he was subjected to cruel treatment.

### 3. Brothers BK, EK and NXK

96. Witness V stated that in the end of 1997 he became a full member of the KLA. Later V was arrested three times by KLA. On one occasion he was taken to Klecke/Klecka and kept there for 56 days. During this time he was in one room with BKU, and at some point also with two brothers, IS and EL, who were from Caralluke/Crni Lug. The third brother was brought later and immediately released. The two brothers, IS and EL, stayed in the prison between 20 and 30 days, and then were transferred to another prison. The two brothers told V that they were accused of being spies. V testified that IS and EL were subjected to beating two or three times, but V did not know by whom. IS and EL were kicked, slapped and beaten with baseball bats. Usually those who beat them arrived in the evening. HS and 'MZ' checked who came in and out of the prison.<sup>120</sup>

97. The Trial Panel notes the discrepancy in the name of one of the brothers as recalled by V and stated in the Indictment.

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<sup>120</sup> Witness V, *supra* note 79.

98. Witness A recalled that three KR brothers were taken by military police to the Klecke/Klecka prison. One of the brothers was called BA. A could not recall if it was him or the military police who interrogated the three KR brothers. They were accused of collaborating with Serbs. They were never transferred to A for trial. Witness A heard that three KR brothers were released by FL.<sup>121</sup>

99. Witness T knew three brothers, BK, EK and NXK, who lived in Caralluke/Crni Lug. It follows from the T's statement, two brothers, EL and NX were arrested by KLA in 1999, possibly, February 1999. BA was arrested by KLA one month later. Witness T met NX a couple of days after the brothers were released. T stated that he could not see any wounds on NX. NX also said that nothing was done to him. Later T heard on the radio that the NX family was killed by Serbian forces.<sup>122</sup>

100. The Trial Panel is satisfied that three brothers BK, EK and NXK were taken into KLA custody in Klecke/Klecka. The Trial Panel also accepts that the brothers were not taking an active part in hostilities during that time. The evidence on their treatment in the KLA prison in Klecke/Klecka, however, is very limited. Only Witness V gave evidence on ill-treatment and only for two brothers, and lacking a precise identification of one of the two brothers. Furthermore V's evidence is contradicted by T's evidence. Therefore, the written evidence in the file is not sufficient to conclude that brothers BK, EK and NXK were subjected to cruel treatment in the KLA prison in Klecke/Klecka.

#### 4. Anonymous witness H and his brother

101. Anonymous Witness H testified that he and his brother, on 27 February 1999, were taken by a group of four or five men, three of whom were in KLA uniforms and two in civilian clothes. Anonymous Witness H and his brother were blindfolded and taken to a certain location. There

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<sup>121</sup> Witness A, *supra* note 69, p.4.

<sup>122</sup> Witness T, 03.05.2011, EULEX Police interrogation statement of the witness, pp.4, 5, 6, SPRK binder C.

H was interrogated. As H was answering questions, he was constantly beaten with sticks and fists. H was surrounded by four or five men who were taking turns in hitting him with whatever they could. As H was falling down on the ground they would pick him up and continue beating. When H fell unconscious on the ground, the men started hitting his feet with sticks while continuing to kick his whole body. As H could not stand up because of the beating, he was lifted up and taken outside the house and thrown in the mud and snow. H regained consciousness due to the cold and could hear his brother's screams coming from inside the house. After a while they came and picked up H, taking him to the top floor where his brother was lying. They both were handcuffed with the hoods still on. Later two men in KLA uniforms took the hoods off. That same night some men came up and carried H downstairs into the basement as he was unable to walk. His brother was dragged down the stairway by his legs. In the basement they were laid on thin sponge mattresses. H could see injuries on his brother and also a deep cut on his forehead. H was very weak and could barely reach for a nearby bottle of water in order to give some water to his brother. When H managed to reach the bottle and tried to give some water to his brother, he was unable to swallow the water. As H's brother was dying, H screamed for help but nobody came. H tried to revive his brother with a mouth to mouth breathing and tried to massage his heart with an elbow, but his brother died. H held his brother in his arms for an indefinite period of time. It was daylight when a group of persons came down, lead by a civilian around 55 years of age, who addressed H in Serbian Language asking if H was tortured and if his brother's death was caused by torture. H responded that he and his brother were tortured and his brother had died as a result of torture. Witness H testified that the man apologized and said that he would provide a doctor. The next day, a larger group of KLA members came to the basement. Some of them tried to put boots on H but that was not possible as H was swollen all over and was in pain. That same day a group of KLA members transferred H and the dead body of his brother to OSCE. H could not identify the route through which he was taken as H had a hood on his head all the time. OSCE personnel immediately took H to a hospital. For the first two days H was in the intensive care due to several fractures in his

face, shoulder and hands, and overall condition. H stayed in the hospital for ten days and later received treatment in another hospital.<sup>123</sup>

102. While H, being blindfolded for most of the time, could not identify the location where he and his brother were detained, Witness A testified that he was informed of two Serb prisoners who were in Klecke/Klecka. Witness A immediately went to the prison in Klecke/Klecka. When A arrived, one of the Serb prisoners was already dead, and it was evident that the other prisoner had been beaten as his face was swollen. A spoke to him in the Serbian Language. The Serb prisoner said that he was not military and that the other prisoner was his brother, who was a soldier. A recalled that both prisoners wore uniforms. Witness A called a physician who prepared a medical report. The Serb prisoner who was still alive was in a very bad condition. A gave him some medication. After consulting with BZ, who was the head of the general headquarters, Witness A ordered that the two prisoners be handed over to the OSCE.<sup>124</sup> BZ recalled that Witness A spoke to him about two Serbs, but said that they had been taken to the detention centre in Lladroc/Ladrovac. A told him that one of them had died. BZ suggested that a doctor should visit the Serbs and certify the cause of death. He also recalled that both were handed over to some international organization.<sup>125</sup>

103. The Trial Panel finds that evidence of Anonymous Witness H is consistent with the evidence given by Witness A. The Trial Panel notes that also BZ was informed by Witness A about two Serbs, one of whom had died. BZ stated that they were detained in Lladroc/Ladrovac. However, BZ did not personally see Anonymous Witness H and his brother in the detention centre and was likely relying on information given by others. Therefore, such hearsay does not discredit evidence of Anonymous Witness H and Witness A that Anonymous Witness H and his brother were detained in Klecke/Klecka. The Trial Panel is satisfied that Anonymous Witness H and his brother were taken into KLA custody in the Klecke/Klecka

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<sup>123</sup> Anonymous Witness H, 24.08.2010, EULEX Police interrogation statement of the witness, SPRK binder B.

<sup>124</sup> Witness A, *supra* note 69, p.5.

<sup>125</sup> BZ, *supra* note 45, p.4.



detention centre. The Trial Panel also accepts that H and his brother were not taking an active part in hostilities during that time.

104. Leaving aside for the present the question of the criminal responsibility of the Accused, the Trial Panel is persuaded that Anonymous Witness H and his brother were beaten in a way as described by Anonymous Witness H and further corroborated by Witness A. Such beating combined with Anonymous Witness H witnessing his brother dying in his arms as a result of severe physical mistreatment, without H being able to seek medical assistance and with no medical assistance being provided, amounted to cruel treatment of Anonymous Witness H and his brother.

5. DT, DV<sup>126</sup>, BC, ZF, ZT, VM and ND

105. As for the allegations regarding conditions of detention, and severe beating of DT, DV, BC, ZF, ZT, VM and ND, the Indictment does not specify what evidence the Prosecution is relying upon in order to establish those allegations.<sup>127</sup>

106. The Trial Panel notes that for the other charges in the Indictment the Prosecution as for DT, DV, BC, ZF, ZT, VM and ND has relied upon the evidence of Cooperative Witness AZ.

107. Apart from AZ's evidence, the file contains exhumation reports and further DNA identifications from two sites in Klecke/Klecka, KER01 and KEQ01.

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<sup>126</sup> It is noted by the Trial Panel that on the page 24 of the Indictment, which contains the Prosecution allegations as to inhumane treatment of the prisoners in Klecke/Klecka the Prosecution has named amongst others DEV. However, elsewhere in the Indictment the Prosecution refers to DV. Also, evidence on the site KER01 refers to DV. Therefore, the Trial Panel has taken it as a spelling mistake on the page 24 of the Indictment, and that the Prosecution intended to refer to DV.

<sup>127</sup> Indictment, pp.23-26.

108. In the site KER01 the remains of five bodies were recovered,<sup>128</sup> and in the site KEQ01 the remains of two bodies were recovered.<sup>129</sup> The bodies recovered from the site KER01 through DNA identification were found to belong to DT, DV, BC, ZF and ZT.<sup>130</sup> The two bodies recovered from the site KEQ01 through DNA identification were found to belong to VM and ND.<sup>131</sup>

109. Further, the Prosecution has submitted to the Court the written statement of TM. TM testified that in April 1999 he was a commander of the Prizren Military Section in the Army of Yugoslavia. As to knowledge of TM, on 09 April 1999 two members of the reserve forces of the Army of Yugoslavia, ZF and ZT, deliberately left their unit and went to abandoned houses where Muslims and Albanians lived and stole some goods, following which ZF and ZT were ordered to be taken to the court martial in Prishtine/Pristina. On 11 April 1999, TM issued an order for the travel. DV and BC provided escort. Of the persons who set out on the trip, DT was direct subordinate of TM. Later TM learned that the vehicle did not take the designated route, but took a turn to Novak/Novake Village, and then possibly took the road to Gjinoc/Djinovce Village. The same day, around 16:00 hrs, a KLA member who identified himself as 'BJ' sent a radio call stating that a vehicle with soldiers of the Army of Yugoslavia was abducted and that DV was having a coffee with him at that particular moment. 'BJ' did not mention other individuals who were kidnapped. TM did not know what happened to the soldiers. Later he read an article about the kidnapped soldiers published by 'Vecernje Novosti', which had a photograph with KLA soldiers holding decapitated human heads. TM did not recognize anyone in the picture.<sup>132</sup> It is noted that in a later interview on 11 April 2005 TM differed from his initial

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<sup>128</sup> EULEX police, exhumation police report, 30.09.2009, case no.0068-09-ECW4, SPRK binder H; EULEX police, assessment police report, 24-26.08.2009, case no.0068-09-ECW4, SPRK binder H.

<sup>129</sup> SPRK binder I.

<sup>130</sup> UNMIK Office on Missing Persons and Forensics, 05.02.2010, KER01-001B, MPU 2000-010251 (ZF), SPRK binder L; Ministry of Justice of Kosovo, KER01/004B, MPU 2000-000251 (ZT), SPRK binder L; Ministry of Justice of Kosovo, Office of Missing Persons and Forensics, KER01-005B, MPU 1999-000047 (BC); UNMIK Office on Missing Persons and Forensics, KER01-006B, MPU 1999-010047 (DV), SPRK binder L; UNMIK Office on Missing Persons and Forensics, KER01-007B, MPU 2000-020251 (DT); International Commission on Missing Persons, list of DNA matching reports for: UNMIK-OMPF, 001/10, 186/09, 178/09, 177/09, 168/09, SPRK binder H.

<sup>131</sup> EULEX Office on Missing Persons and Forensics, confirmation of identity, KEQ01-002B, MPU 1999-000043 (VM), SPRK binder I; EULEX Office on Missing Persons and Forensics, confirmation of identity, KEQ01-001B, MPU 2001-000001 (ND), SPRK binder I.

<sup>132</sup> Exhibit P21b, TM, Department for Combating Organized Crime, Ministry of Interior of Republic of Serbia, record, 27.01.2005, Prosecution exhibits binder P1-P31.

declaration in that the radio call on 11 April 1999 said that DT was kidnapped, and also ZF, ZT, DV and BC.<sup>133</sup> In his further statement TM gave evidence that 'BJ' commanded the KLA 'Black Eagles' and was known also as 'TR'. His first name was IT, and his commander was RH. They both were stationed in Gllareve/Iglarevo.<sup>134</sup>

110. Anonymous Witness I in the interview to the EULEX Special Prosecutor stated that in April 1999 he was in Klecke/Klecka and saw that four KLA soldiers, MS, BKA, SK and MK, brought four Serbian officers, whom they had arrested earlier that day. Anonymous Witness I saw that the Serbian officers did not have their hands tied but their weapons were taken away. The military police members took charge of the Serbian officers and put them in the basement of the house. Anonymous Witness I was told that name one of the officers was DM or 'something like that'. Anonymous Witness I did not know what happened to them later.<sup>135</sup>

111. The Trial Panel finds that evidence does not suffice to support precisely the Prosecution allegations that the Serbian officers were subjected to inhumane treatment in the KLA custody in the Klecke/Klecka detention centre.

112. However, it emerges from the evidence that the Serbian officers DT, ZF, ZT, DV and BC disappeared on 11 April 1999. On the evidence of TM, the said Serbian officers were kidnapped by members of the KLA. On the same day of 11 April 1999 TM in relation to the kidnapping was contacted by a member of the KLA called 'BJ' who was based in Gllareve/Iglarevo. It was evidence of Anonymous Witness I that in April 1999 in the KLA base in Klecke/Klecka he saw that four arrested Serbian prisoners were brought in. Anonymous Witness I recalled that the name of one of the officer's was DM or 'something like that', which as for the first name, is similar to the name of DM. Further, the bodies of the five officers were recovered in the site KER01 in Klecke/Klecka. In view of this body of evidence, the Trial Panel deems that it is an

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<sup>133</sup> Exhibit P21c, TM, Department for Combating Organized Crime, Ministry of Interior of Republic of Serbia, record, 11.04.2005, Prosecution exhibits binder P1-P31.

<sup>134</sup> Exhibit P21b, TM, *supra* note 132; Exhibit P 21c, TM, *ibid*.

<sup>135</sup> Exhibit P6, Anonymous Witness I, *supra* note 100.

overwhelming likelihood that DT, ZF, ZT, DV and BC were brought to the KLA detention centre in Klecke/Klecka in April 1999. It further results from the evidence that they were murdered.

113. With regard to VM and ND the evidence is not sufficient for the Trial Panel to draw inferences on their disappearance and their later killing, which results from the post mortem reports in relation to the site KEQ01.

#### **D. Torture of four Serbian military prisoners**

114. The Indictment alleges that in mid / late April 1999 four Serbian military reservists were taken to the KLA main house in Klecke/Klecka and put in the main house on the ground floor. There they were beaten up for one full day. NS and NXK were asking them questions while beating them. SS and BS also took part in the beatings. The same day, the prisoners were transferred to one of the burnt houses, and a few days later, the same prisoners were executed and buried. As it follows from the Indictment, the remains of the four prisoners were found in the mass grave containing five bodies (KER01) (para.108 above).

115. The Indictment exclusively relies on the evidence provided by the Cooperative Witness AZ. Apart from his evidence, the file contains exhumation reports and further DNA identifications from the site in Klecke/Klecka, KER01. In the site KER01 the remains of five bodies were recovered, which through DNA identification were found to belong to DT, DV, BC, ZF and ZT (para.108 above).<sup>136</sup>

116. As noted previously (para.109 above), TM testified that in April 1999 he was a commander of the Prizren Military Section in the Army of Yugoslavia. On 11 April 1999 two members of the reserve forces of the Army of Yugoslavia, ZF and ZT were escorted by DV, BC and DT to the martial court in Prishtine/Pristina. The same day, around 16:00 hrs, a KLA

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<sup>136</sup> *Supra* note 130.

member who identified himself as 'BJ' sent a radio call and told that a vehicle with soldiers of the Army of Yugoslavia was abducted and that DV was having a coffee with him at that particular moment. 'BJ' did not mention other individuals who were kidnapped. TM did not know what happened to the soldiers. Later he read an article about the kidnapped soldiers published by 'Vecernje Novosti', which had a photograph with KLA soldiers holding decapitated human heads. TM did not recognize anyone in the picture. It was noted that in a later interview on 11 April 2005 TM differed from his initial declaration in that the radio call on 11 April 1999 said that TD was kidnapped, and also ZF, ZT, DV and BC. In his further statement TM gave evidence that 'BJ' commanded the KLA 'Black Eagles' and was known also as 'TR'. His first name was IT, and his commander was RH. They both were stationed in Gllareve/Iglarevo.<sup>137</sup>

117. It was evidence of Anonymous Witness I that in April 1999 he was in Klecke/Klecka and saw that four KLA soldiers, MS, BKA, SK and MK, brought four Serbian officers, whom they had arrested earlier that day. Anonymous Witness I saw that the Serbian officers did not have their hands tied but their weapons were taken away. The military police members took charge of the Serbian officers and put them in the basement of the house. Anonymous Witness I was told that the name of one of the officers was DM or 'something like that'. Anonymous Witness I did not know what happened to them later.

118. The Trial Panel finds that evidence does not suffice to support precisely the Prosecution allegations that the Serbian officers were subjected to torture in the KLA custody in the Klecke/Klecka detention centre.

119. However, as concluded above it emerges from the evidence that the Serbian officers DT, ZF, ZT, DV and BC disappeared on 11 April 1999. On the evidence of TM, the said Serbian officers were kidnapped by members of the KLA. On the same day of 11 April 1999 TM in relation to the kidnapping was contacted by a member of the KLA called 'BJ' who was based in Gllareve/Iglarevo. It was evidence of Anonymous Witness I that in April 1999 in the KLA base in

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<sup>137</sup> Exhibit P 21, TM, *supra* note 126 and *supra* note 127.

Klecke/Klecka he saw that four arrested Serbian prisoners were brought in. Anonymous Witness I recalled that the name of one of the officer's was DM or 'something like that', which as for the first name, is similar to the name of DV. Further, the bodies of the five officers were recovered in the site KER01 in Klecke/Klecka. In view of this body of evidence, the Trial Panel deems that it is an overwhelming likelihood that DT, ZF, ZT, DV and BC were brought to the KLA detention centre in Klecke/Klecka in April 1999. It further results from the evidence that they were murdered.

#### **E. Killing of four Serbian military prisoners**

120. The Indictment states that the four Serbian military reservists, who in mid / late April 1999 were taken to the KLA main house in Klecke/Klecka and detained there (para.114 above) were later executed by a group of five KLA members in a nearby field. The Indictment relies on the evidence of Cooperative Witness AZ in that the four Serbian military reservists were taken by NS, NXK and NK and two other KLA members whose names AZ could not recall. AZ could not see the actual shooting, but only saw the four prisoners being marched to the execution spot and then heard the gunshots.

121. Leaving aside the evidence of AZ, the file contains exhumation reports and further DNA identifications from the site in Klecke/Klecka, KER01. In the site KER01 the remains of five bodies were recovered, which through DNA identification were found to belong to DT, DV, BC, ZF and ZT (para.108 above).<sup>138</sup> According to post mortem reports, the cause of death of BC, ZF and ZT, were gunshots to the head, and DT: cut of the neck, blunt force trauma to the chest and to the right forearm, and DV: cut of the neck by a sharp instrument. Further, as observed

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<sup>138</sup> *Supra* note 130.

previously (para.109 above), TM attested to disappearance of DT, DV, BC, ZF and ZT on 11 April 1999, and that with regard to their disappearance TM was contacted by the member of KLA, 'BJ'. Anonymous Witness I (para.110 above) testified that in April 1999 he saw four Serbian officers being brought to Klecke/Klecka.

122. In light of this evidence, the Trial Panel deems that it is an overwhelming likelihood that DT, ZF, ZT, DV and BC were brought to the KLA detention centre in Klecke/Klecka in April 1999. With regard to their disappearance, the Trial Panel is able to conclude no more than they were killed and the cause of their death was as provided in the post mortem reports.

#### **F. Torture of a Serbian military prisoner**

123. The Indictment claims that a Serbian prisoner, dressed in civilian clothes, was brought to the Klecke/Klecka prison towards the end of April 1999 and executed a few hours later. The Prosecution relies on the evidence of Cooperative Witness AZ in that the Serbian prisoner, before being executed, was interrogated and punched and kicked by FL. AZ was present when FL interrogated the prisoner, along with other KLA members, including NS, NXK, NK, BL, SS and BS. The Indictment, by citing the evidence of AZ, alleges that before being executed, the prisoner was beaten again by NK and NXK.

124. Further, the Indictment states that, at the present stage, it is not possible to establish whether the Serbian prisoner who was tortured and later killed was DT or DV, whose remains were found in a mass grave near Klecke/Klecka, KER01.

125. The Trial Panel makes an observation that no further evidence attests to the alleged torture of the Serbian military prisoner precisely as claimed by the Prosecution in the Indictment. AZ's evidence being excluded, the Trial Panel refers to exhumation evidence in the site KER01 and post mortem reports for DT and DV. Based on this evidence, the Trial Panel

concludes that DT and DV were killed and cause of their death was as described in the post mortem reports, DV: cut of the neck by a sharp instrument,<sup>139</sup> and DT: cut of the neck by a sharp instrument, blunt force trauma to the chest and to the right forearm.<sup>140</sup>

### **G. Killing of a Serbian military prisoner**

126. The Indictment alleges that in April 1999, not before 11 April 1999 a Serbian military prisoner was brought to Klecke/Klecka prison and executed a few hours later by NS with a scythe, upon instruction of FL. Cooperative Witness AZ found a scythe for NS to slash the prisoner. The Indictment states that Cooperative Witness AZ passed the scythe to the Accused AK, who further gave it to NS. In relation to the Accused NS, NK and NXK, the Indictment claims that they were part of the group which marched the prisoner to the execution spot and placed the victim at the disposal of the perpetrator and also prevented his escape.

127. The said description of events is based upon the statements of Cooperative Witness AZ given to the Police and the Prosecution. The evidence of AZ has been declared inadmissible and therefore may not be taken into consideration by the Trial Panel in passing this Judgment. Furthermore, the Trial Panel refers to the partial withdrawal of the Indictment, filed by the EULEX Special Prosecutor on 11 November 2011, which dismissed the aforementioned allegations against the Accused AK. In the partial withdrawal of the Indictment the EULEX Special Prosecutor stated that Accused 'AK provided to the Prosecution documents (including medical certificates and pictures), related to his alleged wounding during the war'. 'In particular, a medical certificate indicates that on 18 April 1999 Mr. KR received several gunshot wounds in multiple parts of his body, including his throat.' 'The documents presented by Mr.

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<sup>139</sup> UNMIK Office on Missing Persons and Forensics, Department of Justice, autopsy report, Klecka grave site, 29.10.2009, case no. KER01/006B, SPRK binder L; Department of Justice, Office of the Medical Examiner, death certificate, DV, 12.12.2009, case no. KER01-006B, MPU 1999-010047, SPRK binder L.

<sup>140</sup> UNMIK Office on Missing Persons and Forensics, Department of Justice, autopsy report, Klecka grave site, 29.10.2009, case no. KER01/007B, SPRK binder L; Department of Justice, Office of the Medical Examiner, death certificate, DT, 04.03.2010, case no. KER01-007B, MPU 2000-020251, SPRK binder L.



KR, which were not known to the Prosecution at the time of the Indictment, create a conflict in terms of dates with AZ's recount.<sup>141</sup>

128. AZ's evidence left aside, the evidence contains exhumation and post mortem reports and further DNA identifications from the site in Klecke/Klecka, KER01. In the site KER01 the remains of five bodies were recovered, which through DNA identification were found to belong to DT, DV, BC, ZF and ZT. The post mortem report for DV indicates the cause of death: cut of the neck by a sharp instrument.<sup>142</sup> The post mortem report for DT provides the cause of death: cut of the neck by a sharp instrument, blunt force trauma to the chest and to the right forearm.<sup>143</sup> Further, the exhumation reports from the site in Klecke/Klecka, KER01 attest that a scythe was found between the human remains.<sup>144</sup> On the evidence of the forensic doctor at DFM MG those injuries could be caused by using a sickle or a scythe.<sup>145</sup> Forensic anthropologist at DFM TF gave evidence that the found injuries were compatible with the use of an instrument like the scythe found in the site.<sup>146</sup> Forensic archaeologist at DFM CC gave her assessment that the blade was probably put in the grave at the same time as body 001B.<sup>147</sup>

129. The evidence is not sufficient to establish that DT or DV were murdered in the precise circumstances as described in the Indictment, in particular, by whom and on whose orders. Apart from inferences drawn above in relation to DT, DV, BC, ZF and ZT (para.112), the Trial Panel based on the post mortem reports accepts that DV and DT were killed and cause of their death was as described in their post mortem reports.

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<sup>141</sup> SPRK partial withdrawal of the Indictment, *supra* note 4.

<sup>142</sup> UNMIK Office on Missing Persons and Forensics, Department of Justice, autopsy report, Klecka grave site, 29.10.2009, case no. KER01/006B, SPRK binder L; Department of Justice, Office of the Medical Examiner, death certificate, DV, 12.12.2009, case no. KER01-006B, MPU 1999-010047, SPRK binder L.

<sup>143</sup> UNMIK Office on Missing Persons and Forensics, Department of Justice, autopsy report, Klecka grave site, 29.10.2009, case no. KER01/007B, SPRK binder L; Department of Justice, Office of the Medical Examiner, death certificate, DT, 04.03.2010, case no. KER01-007B, MPU 2000-020251, SPRK binder L.

<sup>144</sup> Exhumation Police report, *supra* note 122.

<sup>145</sup> MG, 20.01.2010, SPRK record of the expert witness hearing in an investigation, p.3, SPRK binder L.

<sup>146</sup> TF, 20.01.2010, SPRK record of the expert witness hearing in an investigation, p.3, SPRK binder L.

<sup>147</sup> Exhibit P23, CC, 06.12.2011, SPRK record of the expert witness hearing in an investigation, p.3, Prosecution exhibits binder P1-P31.

## H. Killing of ND and VM

130. The Indictment alleges that on 03 April 1999 Cooperative Witness AZ was told that FL had ordered the killing of ND and VM, two Serbian police officers who had been detained in the burnt houses in Klecke/Klecka for about three months. After AZ sought a confirmation with FL personally, FL was surprised that the two were still alive. The next day FL went to the Klecke/Klecka prison with NXK, NK and NS. There, he ordered the prisoners to be taken out of the burnt house and to bring them to a location known as Livadhi i Canit. Cooperative Witness AZ, the Accused AK and BL escorted the prisoners to the spot. There, FL ordered the Cooperative Witness to personally shoot the two prisoners. As for the Accused NXK, NK and NS, the Indictment states that Accused contributed to the crime in maintaining the victims at the disposal of the perpetrator, by preventing any possibility of escape; and, through their presence, making FL's order even more compelling for the Cooperative Witness.

131. The said description of the events is based on the statements given by AZ. Leaving aside that description, the file contains exhumation and post mortem reports and further DNA identifications from the site in Klecke/Klecka, KEQ01. In the site KEQ01 the remains of two bodies were recovered. The two bodies recovered from the site KEQ01 through DNA identification were found to belong to VM and ND.<sup>148</sup> The post mortem report for VM provides the cause of death: gunshot to the head and trunk.<sup>149</sup> The post mortem report for ND states the cause of death: gunshots to the head.<sup>150</sup> The death certificates of VM and ND state the place of death: Klecka, Lipljan Municipality.<sup>151</sup>

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<sup>148</sup> EULEX Office on Missing Persons and Forensics, confirmation of identity, 10.12.2010, case no. KEQ01-002B, MPU 1999-000043 (VM), SPRK binder I; EULEX Office on Missing Persons and Forensics, confirmation of identity, 10.12.2010, case no. KEQ01-001B, MPU 2001-000001 (ND), SPRK binder I.

<sup>149</sup> Ministry of Justice of Kosovo, Office on Missing Persons and Forensics, autopsy report, Malisheva grave site, 14.09.2010, case no. KEQ01/002B, SPRK binder I.

<sup>150</sup> Ministry of Justice of Kosovo, Office on Missing Persons and Forensics, autopsy report, Malisheva grave site, 14.09.2010, case no. KEQ01/001B, SPRK binder I.

<sup>151</sup> EULEX Office on Missing Persons and Forensics, death certificate, 14.12.2010, VM, MPU 1999-000043, KEQ01-002B, SPRK binder I; EULEX Office on Missing Persons and Forensics, death certificate, 14.12.2010, ND, MPU 2001-000001, KEQ01-001B, SPRK binder I.

132. There is no further evidence on circumstances of the death of VM and ND.

133. Therefore, the Trial Panel finds that allegations precisely as in the Indictment cannot be established and the Trial Panel is able to conclude no more than VM and ND were killed.

#### **I. Killing of AA**

134. The Indictment alleges that on or about 03/04 April 1999, AA, a civilian prisoner was executed with firearm shots by a group composed of NK, NXK, NS and RM in the immediate vicinities of the Klecke/Klecka prison. As for the Accused NS, the Indictment states that the Accused was part of the group which escorted AA, kept AA at the disposal of the perpetrators, preventing his escape, and participated in the collective action of pushing AA in the hole, where AA was shot. The Indictment claims that Accused NK and NXK shot at AA with their AK-47's and thereby causing his death.

135. The foregoing description of the events in the Indictment is based upon the statements of Cooperative Witness AZ to the Police and the Prosecution.

136. Leaving aside the evidence of AZ, Anonymous Witness C gave evidence that on 26 March 1999 he was put in a cell in Klecke/Klecka. In the cell there were other four prisoners, including an Albanian named AA. He told C that the Serbian army used him to show the locations of Albanian villages and KLA positions, and therefore he was considered to be a collaborator. C stated that all of his cellmates were beaten (para.88 above). Further, C gave evidence that on 03 April 1999 he was released together with other prisoners, including AA. C escorted AA to Sankoc/Stankovce Village and handed him over to the chief of the village or coordinator, SI, and

asked him to escort AA to the village of 'Dobrashevc', where AA's family was. The next day the Serbian offensive started, and C thought that AA tried to reach 'Dobrashevc' on his own.<sup>152</sup>

137. The Indictment states that AA was released together also with Witness D. In this regard the Trial Panel makes an observation that D was able to recall 'SH' (para.91 above), and said that he was released together with other three prisoners, two of whom were father and a son, but he could not recall the name or place of origin of the third prisoner.<sup>153</sup>

138. The Trial Panel finds that evidence as to AA is limited. Only Anonymous Witness C declared that he was released together with AA from Klecke/Klecka detention centre. AA remains missing.<sup>154</sup> While even absent a body of the deceased, a crime of murder can be established,<sup>155</sup> the evidence in the particular case does not allow the Trial Panel to draw a conclusion that AA was killed in a way as described in the Indictment.

## VI. FINDINGS ON THE RESPONSIBILITY OF THE ACCUSED

### A. Mode of responsibility

139. At the outset the Trial Panel is compelled to address the deficiencies contained in the Indictment as to the alleged mode of responsibility against the Accused.

140. Count 1 against NK reads that NK is charged '... in his capacity as KLA ... **commander**, and as a person holding a **position of responsibility** over the Klecke/Klecka detention centre ...'.

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<sup>152</sup> Anonymous Witness C, *supra* note 84.

<sup>153</sup> Witness D, *supra* note 92.

<sup>154</sup> Exhibit P3, memo of the EULEX Department of Forensic Medicine, 12.10.2011, 2011-DFM-129, Prosecution exhibits binder P1-P31.

<sup>155</sup> *Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, Dragoljub Prcać*, ICTY, Appeal Judgment, 28.02.2005, para.326; *Prosecutor v. Sefer Halilović*, ICTY, Trial Judgment, 16.11.2005, para.37; *Prosecutor v. Radoslav Brđanin*, ICTY, Trial Judgment, 01.09.2004, para.385.

Count 1 against FL reads that FL is charged ‘... as KLA ... **commander** and as a person **exercising overall control** over the Klecke/Klecka detention centre ...’. Count 2 and Count 3 charge FL also in his capacity ‘as KLA **commander**’. Count 1 against NS reads that NS is charged ‘... in his capacity as KLA member holding a position of **responsibility** within the Klecke/Klecka detention centre’.<sup>156</sup>

141. None of the counts against NXK alleged command responsibility with regard to the Klecke/Klecka detention centre or in any other way. However, the evidence reviewed by the Court appeared to support an allegation that NXK did in fact hold a position of command responsibility *vis a vis* the detention centre. Accordingly, the Court invited the Prosecutor to consider amending the Indictment to include such an allegation against him. Following the session on 30 March 2012, when the proceedings were severed, the Prosecution, with its submission, dated 04 April 2012, declined to amend the Indictment, and maintained that the Trial Panel should proceed on the basis of the Indictment in its present form, and moved the Trial Panel ‘... to reach a decision based on the available evidence’.

142. The aforementioned wording of the Indictment entails that Indictment alleges superior (command) responsibility of Accused, NK, FL and NS. However, no legal basis is invoked in the Indictment for that mode of responsibility. The Indictment only refers to the provisions of the CCSFRY and CCK on complicity, as termed in Article 22 CCSFRY, or co-perpetration, as termed in Article 23 CCK. The same Counts allege also co-perpetration for the same crimes.

143. Article 22 CCSFRY and Article 22 CCK therefore substantiate only that part of the same Count which allege that Accused committed the same crime in co-perpetration.

144. Further, the Indictment fails to sufficiently specify the cause of the charges with regard to superior (command) responsibility. Article 6(3)(a) ECHR gives an accused person the right to be informed of the cause of the accusation, i.e. the acts with which he is charged and on which the

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<sup>156</sup> Indictment, pp.3, 9, 11.

indictment is based, and of the nature of the accusation, i.e. the legal classification of the acts in question. In addition, the information about the nature and cause of the accusation must be adequate to enable the accused to prepare his defence accordingly.<sup>157</sup>

145. Article 305(1)(3)(4)(5) KCCP explicitly requires that indictment must contain the legal classification of the criminal offence with a citation of the provisions of the criminal code; the circumstances to determine the criminal offence **with precision**; and an explanation of the grounds for filing the indictment on the basis of the results of the investigation and the evidence which establishes the key facts.

146. By 1977 the doctrine of superior (command) responsibility was accepted as customary international law and was codified in the Additional Protocol I to the Geneva Conventions, relating to the international armed conflicts. Its status as customary international law was confirmed with the explicit inclusion of superior (command) responsibility in Article 7(3) of the Statute of the ICTY and Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR), as well as Article 28 of the Rome Statute for ICC.<sup>158</sup> It should be noted that international law recognizes the principle of command responsibility both, in *international* and in *internal* armed conflict.<sup>159</sup>

147. The elements of superior responsibility under customary international law have been elaborated by the ICTY in the *Celebici* case as follows:

- 1) the existence of a superior-subordinate relationship;
- 2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

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<sup>157</sup> See *Ayçoban and others v. Turkey*, ECtHR, Judgment, 22.12.2005, para.21, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71817>.

<sup>158</sup> The Rome Statute indeed includes the most recent treaty based statement of this legal principle. It should however be noted that Article 28 of the Rome Statute does not necessarily, though, entirely reflect customary international law.

<sup>159</sup> See Humanitarian Law center, *Command Responsibility: Contemporary Law*, available at <http://www.hlc-rdc.org/uploads/editor/Command%20Responsibility.pdf> (last accessed 28.06.2012); *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, ICTY, Trial Judgment, 30.11.2005, para.519

- 3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>160</sup>

148. In accordance with the jurisprudence of the ICTY, where superior criminal responsibility is alleged the material facts which must be pleaded in the indictment are:

- 1) (i) that the accused is the superior of (ii) subordinates sufficiently identified (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct and (iv) for whose acts he is alleged to be responsible;
- 2) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible; and
- 3) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.<sup>161</sup>

149. A superior may possess the *mens rea* for superior responsibility where:

- 1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit the crimes; or
- 2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional

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<sup>160</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Trial Judgment, 16.11.1998, para.346; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, ICTY, Trial Judgment, 30.11.2005, para.520.

<sup>161</sup> *Prosecutor v. Tihomir Blaškić*, ICTY, Appeal Judgment, 29.07.2004, para.218; *Prosecutor v. Miroslav Deronjić* Decision, para.15 (ordering the Prosecution to clearly plead the position forming the basis of the superior responsibility charges); *Prosecutor v. Milorad Krnojelac*, ICTY, Trial Chamber Decision on Preliminary Motion on Form of Amended Indictment, 11.02.2000, para.18; *Prosecutor v. Radoslav Brdjanin and Momir Talic*, ICTY, Trial Chamber Decision, 20.02.2001, para.19.

investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.<sup>162</sup>

150. With respect to the *mens rea*, there are two ways in which the relevant state of mind may be pleaded:

- 1) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or
- 2) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.

Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication. This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the legal prerequisite.<sup>163</sup>

151. Against the foregoing background, the Indictment in the present case substantiate the charges where superior responsibility of the Accused is alleged with the following:

- 1) NK was among those responsible for the management of the Klecke/Klecka prison, including the admission and registration of prisoners. NK was a 'zone police officer', in charge of investigating anyone he wanted. NK interrogated prisoners and on one occasion beat up a prisoner.<sup>164</sup>
- 2) FL exercised overall command and control over the Klecke/Klecka prison. FL was head of the KLA military police in the area. FL ordered where prisoners be detained. FL participated in interrogation. FL had the power to order the release of prisoners. FL at least on one occasion personally tortured a Serbian prisoner in Klecke/Klecka.

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<sup>162</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Trial Judgment, 16.11.1998, para.383; and *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Appeal Judgment, 20.02.2001, paras.223, 241.

<sup>163</sup> *Prosecutor v. Tihomir Blaškić*, ICTY, Appeal Judgment, 29.07.2004, para.219; *Prosecutor v. Radoslav Brdjanin and Momir Talic*, ICTY, Trial Chamber Decision, 20.02.2001, para.48.

<sup>164</sup> Indictment, p.25.



FL had the power to order that certain prisoners be killed.<sup>165</sup> FL ordered Cooperative Witness AZ to execute VM and ND.<sup>166</sup>

- 3) NS was among those responsible for the management of the Klecke/Klecka prison, including the admission and registration of prisoners. Prisoners were handed over to NS's responsibility. NS was allowed to enter the KLA general headquarters in Divjake/Divljaka.<sup>167</sup>

152. No further material facts are pleaded in the Indictment for the charges where superior responsibility of the Accused is alleged.

153. On this point, the Trial Panel is compelled to discuss, particularly, Counts 1 against Accused, NK, FL and NS and Count 2 against FL.

154. Count 1 alleges the superior responsibility of the Accused as 'KLA commanders' and/or 'KLA members holding a position of responsibility' within the Klecke/Klecka detention centre, in the crime of violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka prison. The Indictment, as discussed above (para.87), also names concrete individuals subjected to inhumane treatment. In Count 1 against each of the Accused, the Prosecutor has not pleaded any further material facts than described in para.151 above of the Judgment.

155. Furthermore, under Count 2 FL's is charged as 'commander' in the crime of torture of a Serbian military prisoner, detained in the Klecke/Klecka detention centre.<sup>168</sup> However, the Indictment contains only material facts on FL's active participation in the crime. In particular, the Indictment states that FL interrogated, punched and kicked the Serbian military prisoner, along with other specified Accused.<sup>169</sup>

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<sup>165</sup> Indictment, p.26.

<sup>166</sup> Indictment, p.27.

<sup>167</sup> Indictment, p.25.

<sup>168</sup> Indictment, p.9.

<sup>169</sup> Indictment, pp.29, 30.

156. As such, it is instructive upon the Trial Panel to address absence of presentation of the material facts underlying the allegations of superior responsibility of the Accused. The Indictment for Counts 1 against NK, FL and NS and Count 2 against FL, generally, fail to plead and demonstrate material facts on the existence of a superior-subordinate relationship; and that the Accused knew or had reason to know that the criminal act was about to be or had been committed; and that the Accused failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

157. The Trial Panel must stress that in the cases where superior responsibility is alleged the relationship of each of the Accused to his subordinates is essential. The threshold to be reached in establishing a superior-subordinate relationship is that of effective control over a subordinate - the material ability to prevent or punish criminal conduct, however that control is exercised.<sup>170</sup>

158. Further, it is material to demonstrate the Accused's knowledge of the crimes and the necessary and reasonable measures that Accused failed to take to prevent the crimes or to punish his subordinates.

159. In addition, where the Prosecutor pleads superior responsibility, it is not proper to support that responsibility by allegations of the Accused's active participation, including ordering other perpetrators. Charges of superior responsibility seek to establish the responsibility for **omissions** - where superior responsibility is rightfully pleaded, an accused is held responsible for having failed to take necessary and reasonable measures to **prevent** certain acts, or for having **failed to punish** the perpetrators thereof. Where subordinates are

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<sup>170</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Appeal Judgment, 20.02.2001, para.256.

alleged to have followed the orders of the Accused, the charge is not one of command responsibility.<sup>171</sup>

160. Where the Accused are charged both, with superior criminal responsibility and active participation (personal responsibility), the Indictment must separate these acts clearly because the same facts cannot simultaneously give rise to the two types of responsibility.<sup>172</sup>

161. All such shortcomings in the Indictment ought have been eliminated at the confirmation stage of the Indictment. The Confirmation Judge at no point returned the Indictment to the Prosecutor pursuant to Article 306(2) KCCP. As such, the Trial Panel is left with the Counts against the Accused, alleging superior responsibility, but without sufficient material facts attesting in full to all the elements of the superior responsibility; and with the same Count alleging the superior responsibility, along with the active participation of the Accused in the crime. In particular, Counts 1 against NK, FL and NS and Count 2 and Count 3 against FL.

162. While faced with these difficulties, the Trial Panel, however, remains bound by Article 396(7) KCCP to ‘... state clearly and exhaustively which facts it considers proven or not proven, as well as grounds for this’. Therefore, the Court has fully examined the evidence with regard to allegations on the Accused superior responsibility as well as active participation, where claimed in the Indictment. In assessing the superior responsibility, the Trial Panel has considered the elements of the mode of responsibility as established in customary international law and discussed above. In this regard, the Trial Panel observes that it has been held by the European Court of Human Rights (ECtHR) in *Kononov v. Latvia*, that there is no violation of *nullum crimen, nulla poena sine lege* (Article 7(1) ECHR), when at the time of the charged acts, they constituted

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<sup>171</sup> *Prosecutor v. Protais Zigiranyirazo*, ICTR, Trial Chamber Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion objecting to the Form of the Recast Indictment, 02.03.2005, para.19, <http://www.unictr.org/Portals/0/Case/English/Zigiranyirazo/decisions/020305.pdf>.

<sup>172</sup> *See Prosecutor v. Joseph Kanyabashi*, ICTR, Trial Chamber Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31.05.2000, paras.5.8-5.11, <http://www.unictr.org/Portals/0/Case/English/Kanyabashi/decisions/defect.pdf>.

offences defined with sufficient accessibility and foreseeability by the laws and customs of war.<sup>173</sup>

163. In assessing the superior responsibility, the Trial Panel with care analysed the evidence and if the evidence attested to superior responsibility of the Accused. In this examination it has been essential for the Trial Panel to consider what role the Accused, NK, FL and NS held with regard to the Klecke/Klecka detention centre. The Trial Panel bears in mind that 'in order for the principle of superior responsibility to be applicable, it is necessary that the superior has effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences'.<sup>174</sup>

164. Further, the Trial Panel examined the evidence with regard to allegations on active participation of the Accused, NK, NXX, FL and NS in commission of the crimes.

## B. NK

165. The Indictment alleges that NK, as a KLA member and commander, and as a person holding a position of responsibility over the Klecke/Klecka detention centre, and in co-perpetration with other specified Accused, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre. The Trial Panel was unable to conclude that conditions in the detention centre *per se* were such as to amount to cruel treatment. However, it was a

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<sup>173</sup> *Kononov v. Latvia*, ECtHR, Grand Chamber, Judgment, 17.05.2010, paras.211, 213, 238, 244.  
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669>.

<sup>174</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Trial Judgment, 16.11.1998, paras.377-378; and affirmed in *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Appeal Judgment, 20.02.2001, para.197.

finding of the Trial Panel that of the specific individuals named in the Indictment Anonymous Witness H, his brother and SA were subjected to cruel treatment.

166. Further, the Indictment alleges that NK, acting in co-perpetration, killed AA; participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison; violated the bodily integrity and health of a Serbian military prisoner detained in the Klecke/Klecka prison; and thereafter participated in the killing of the Serbian military prisoner; and participated in the killing of VM and ND.

#### 1. NK's role in the Klecke/Klecka prison

167. Several witnesses, including QK,<sup>175</sup> and BZ,<sup>176</sup> knew NK as a member of the 121<sup>st</sup> Brigade ('Kumanova' Brigade). During course of the Main Trial NK confirmed that his nickname was 'BF'.<sup>177</sup>

168. BZ, who was chief of staff of the KLA general headquarters from January 1999 until April 1999, stated that after November/December 1998 commander of the 121<sup>st</sup> Brigade became HS. It was the recollection of BZ, that 'BF was a member of the 121<sup>st</sup> Brigade under command of FL and later under command of HS (see discussion below).<sup>178</sup>

169. On the point of command, the Trial Panel observes that on the evidence of Anonymous Witness C, in the KLA headquarters in Llapushnik/Lapusnik, it was a Muslim judge who ordered the soldiers to handcuff and arrest C. Thereafter C was driven to Terpeze/Trpeza. Anonymous Witness C recalled that one of the KLA soldiers was addressed as 'BF' or 'N'. 'BF was one of the

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<sup>175</sup> QK, *supra* note 47, p.4.

<sup>176</sup> BZ, *supra* note 45, p.5.

<sup>177</sup> Minutes 11.11.2011, para.25, Court trial binder 3. At the detention hearing on 16 March 2011, NK indicated that nickname 'BF' he had during the war. See Record of the hearing on the detention on remand 16.03.2011, p.1, GJPP binder 2.

<sup>178</sup> BZ, *supra* note 45, pp.2, 4, 5.

three KLA soldiers who drove C to Terpeze/Trpeza, and imprisoned C in Terpeze/Trpeza, interrogated him and was present when C was beaten and took part in beating, and later released and took C to Klecke/Klecka.<sup>179</sup>

170. As such, C's evidence suggested that 'BF acted upon the order of a Muslim judge in Llapushnik/Lapusnik. However, the Trial Panel is unable to draw an inference that it was precisely Accused NK who acted upon orders of the Muslim judge, as C's statement is unclear on the identity of 'BF. C declared that after the war he tried to find out who 'BF was and came to learn that his name was NS.<sup>180</sup> As such, the Trial Panel is also unable to infer from C's evidence that it was Accused NK who drove C to Klecke/Klecka, which could serve to indicate of NK's functions with regard to Klecke/Klecka.

171. In relation to Klecke/Klecka, it was recollection of BZ that he saw 'BF at the headquarters of the 121<sup>st</sup> Brigade in Klecke/Klecka or Berishe/Berisa, as the headquarters were moving at times.<sup>181</sup> The evidence of BZ, however, did not provide further details on NK's role in the Klecke/Klecka detention centre, so as to enable the Trial Panel to draw any inferences.

172. NK stated that he had been in the prison in Klecke/Klecka occasionally, either to take persons there or to conduct interrogation but not to inspect the prison. He also visited Klecke/Klecka because command of the 121<sup>st</sup> Brigade was located there. According to NK his work consisted of cases against KLA soldiers, however, he did not recall that civilians were taken to the Klecke/Klecka prison, although it was possible. NK never saw any Serbian civilians or soldiers in Klecke/Klecka. As it follows from the statement of NK, he worked closely with Witness A and in his work followed A's instructions.<sup>182</sup>

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<sup>179</sup> Anonymous Witness C, *supra* note 84, pp.2, 3, 4.

<sup>180</sup> Anonymous Witness C, *supra* note 84, p.3.

<sup>181</sup> BZ, *supra* note 45, pp.2, 4, 5.

<sup>182</sup> NK, *supra* note 46.

173. Witness A gave evidence that on certain occasions he would order individuals into detention in the Klecke/Klecka prison. In particular, A referred to the case of BKU, who was accused of desertion and A ordered that BKU be detained in the Klecke/Klecka prison pending enforcement of his sentence. However, on A's evidence the prison was under the physical control of the KLA military police, and a certain person was in charge of the prison- a prison 'director'- whose name A could not recall. At the same time, Witness A knew 'BF', but only as a military police officer. A saw him in Klecke/Klecka and also in general headquarters, and A issued to 'BF' guidelines on behaviour of the military police.

174. It did not emerge from A's evidence that NK ('BF') exercised command over the Klecke/Klecka prison. The Trial Panel observes, that, even though A stated that he visited the Klecke/Klecka prison regularly, A described 'BF' as a military police officer.<sup>183</sup>

175. On this point, also BZ recalled 'BF', but only as a member of the 121<sup>st</sup> Brigade, and BZ did not know further about the duties of 'BF'.<sup>184</sup>

176. The Trial Panel observes that Anonymous Witness H gave evidence that, when H and his brother were taken by KLA members on 27 February 1999, at a certain point, H and his brother were kneeling down. A person, dressed in civilian clothes and armed with a machine gun, fired a shot right near H's head. Anonymous Witness H did not know if that was by accident or on purpose, but another person in civilian clothes said: 'B what are you doing?' After the group spoke among themselves they ordered H and his brother to move another 10 meters up the hill and lay down. H thought they would be killed, but a person with a huge rifle told them not to be afraid as they were not going to kill them. Anonymous Witness H was informed that a commander would decide their fate. After around 10 minutes the commander arrived with a group of around four to six men, who all were wearing KLA uniforms with insignia. Further, Anonymous Witness H and his brother were put on the vehicle.<sup>185</sup>

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<sup>183</sup> Witness A, *supra* note 69.

<sup>184</sup> BZ, *supra* note 45, p.5.

<sup>185</sup> Anonymous Witness H, *supra* note 123.

177. It must be recalled that it was finding of the Trial Panel that Anonymous Witness H and his brother were taken to the Klecke/Klecka prison and subjected to cruel treatment (paras.101-104 above).

178. In this regard, the evidence of Anonymous Witness H suggests that 'B' participated in taking H and his brother into custody, but that he in turn awaited the direction of a superior commander. The evidence indicates that 'BF' was nickname of NK.

179. Besides Anonymous Witness H, also Anonymous Witness I pointed towards NK's conduct in the Klecke/Klecka prison. In particular Anonymous Witness I recalled that in April 1999, when four Serbian officers were brought to Klecke/Klecka, it was also NK ('BF') who took charge of the Serbian officers.<sup>186</sup> Anonymous Witness I also indicated that NK ('BF') was a 'zone police officer' and his duty was to conduct investigations and he could investigate anyone he wanted.<sup>187</sup>

180. With regard to evidence of Anonymous Witness H and Anonymous Witness I, the Trial Panel must distinguish when that evidence attests to NK's role in the Klecke/Klecka detention centre, and the separate factual allegations on NK's active participation in the alleged crimes. With regard to the latter, the evidence of each of the Anonymous Witnesses relates to separate allegations and as such trigger Article 157(3) KCCP.

181. With regard to NK's role in the Klecke/Klecka detention centre, the Trial Panel remarks that neither evidence of Anonymous Witness H nor evidence of Anonymous Witness I indicate that NK gave orders or instructions or exercised disciplinary powers in the Klecke/Klecka detention centre. While the evidence attests that NK was seen in the Klecke/Klecka detention centre, the evidence falls short of establishing that NK exercised command over the detention centre.

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<sup>186</sup> Exhibit P6, Anonymous Witness I, *supra* note 100, p.2.

<sup>187</sup> Anonymous Witness I, *supra* note 99, p.7.



182. In examining the superior responsibility of NK in the Klecke/Klecka detention centre, the Trial Panel notes that evidence suggests that NK was linked also to two KLA teams in two locations, in Bellanice/Belanica and in Shale/Sedlare (Lipjan/Lipljan). Therefore, NK does not appear exclusively linked to Klecke/Klecka and was rather split between, at least, three locations.

183. With regard to Bellanice/Belanica, the Trial Panel observes that AH, an administrator in the KLA military police, gave evidence that as of the end of 1998, he was based in Bellanice/Belanica, and his immediate supervisor was UG and higher in the chain of command was NK.<sup>188</sup> However, AH did not know the duties of NK.

184. On the evidence of IZ, a former 121<sup>st</sup> Brigade member, a team of seven to eight military police officers was based in Bellanice/Belanica and their leader was UG. IZ, however, did not know who was a military police commander for the whole area.<sup>189</sup>

185. BAZ gave evidence that in July/August 1998 he joined the military police and was stationed in Bellanice/Belanica, and his team leader was UG. On BAZ's account nobody knew who reported to whom. Later BAZ learned that UG reported to NKK. It was within duties of BAZ to follow soldiers' movements. As a squad they never arrested anyone. BAZ was never in Klecke/Klecka during the war.<sup>190</sup>

186. Whereas, in relation to Shale/Sedlare, it emerges from the evidence of SB, that as of mid-January 1999 he belonged to the military police and was stationed in Shale/Sedlare. His commander was AS and higher in command was NK. On the evidence of SB, their duties in Shale/Sedlare were to keep order in the market place, where there was a movement by population, which had been displaced by Serbs. They also helped the displaced population in

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<sup>188</sup> AH, 14.12.2010, EULEX Police interrogation statement of the witness, SPRK binder D; AH, *supra* note 67.

<sup>189</sup> IZ, *supra* note 60, p.4.

<sup>190</sup> BAZ, *supra* note 54.

re-settling themselves. Part of SB's duties was to investigate KLA soldiers for disciplinary violations, but SB did not remember such cases.<sup>191</sup>

## 2. NK's responsibility

187. In view of the foregoing, the evidence does not enable the Trial Panel to find beyond reasonable doubt that superior-subordinate relationship existed between NK and the individuals handling the prisoners in the Klecke/Klecka detention centre. The evidence does not enable the Trial Panel to conclude beyond reasonable doubt that NK knew or had reason to know that specific individuals, such as Anonymous Witness H, his brother or SA would be subjected to cruel treatment or had been subjected to cruel treatment; and that NK failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrator thereof.

188. Therefore, the Trial Panel rejects the Prosecution allegations in the Indictment on NK's superior responsibility.

189. Along with superior responsibility, the Indictment alleged NK's active participation in violation of bodily integrity and health of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka prison. It was finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment, but that out of the individuals listed in the Indictment Anonymous Witness H, his brother and A were subject to cruel treatment.

190. As considered in the Judgment above (paras.176-178, 180) evidence of Anonymous Witness H suggests that 'B' participated in taking H and his brother into custody. However, the Trial Panel is unable to make any findings based on that evidence by operation of Article 157(3)

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<sup>191</sup> SB, *supra* note 68.

KCCP. Furthermore, the Trial Panel notes that it emerges from the evidence of Witness A that A went to the Klecke/Klecka prison immediately after he came to know that Anonymous Witness H and his brother had been detained in Klecke/Klecka. It follows from A's statement that when he went to the prison he saw a prison 'director' and a certain woman there at the time. Witness A consulted BZ, head of the general headquarters, and they agreed that the prisoners be handed over to the OSCE, and thereafter A ordered their transfer.<sup>192</sup> The Trial Panel observes that Witness A saw Anonymous Witness H and his brother after they had been subjected to cruel treatment in the Klecke/Klecka prison, however, there is no suggestion in A's evidence associating NK to the crimes.

191. Therefore, the Trial Panel finds that it has not been proven beyond reasonable doubt that NK subjected Anonymous Witness H, or his brother or SA to cruel treatment.

192. Further, the Indictment alleges that NK, acting in co-perpetration, killed AA; participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison; violated the bodily integrity and health of a Serbian military prisoner detained in the Klecke/Klecka prison; and thereafter participated in the killing of the Serbian military prisoner; and participated in the killing of VM and ND.

193. The Trial Panel observes that for NK's guilt in perpetration of these crimes, the Prosecution in the Indictment exclusively refers to the evidence of Cooperative Witness AZ. Such reliance on the evidence of AZ is placed by the Prosecution with regard to the alleged NK's participation in the killing of AA;<sup>193</sup> participation in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison;<sup>194</sup> violation of the bodily integrity and health and killing of the Serbian military prisoner detained in the Klecke/Klecka prison;<sup>195</sup> and killing of VM and ND.<sup>196</sup>

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<sup>192</sup> *Ibid.*

<sup>193</sup> Indictment, pp.28, 29.

<sup>194</sup> Indictment, pp.32, 33.

<sup>195</sup> Indictment, pp.29, 30, 30, 31. It is noted that on pages 29, 30 of the Indictment the Prosecutor has qualified the crime against the Serbian military prisoner as torture. However, the charge with regard to NK does not include the

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194. With regard to these crimes there is no other evidence in the file attesting to NK's guilt. As considered in the Judgment previously, there is exhumation and post mortem evidence which attests to death of the specified individuals (para.108 above). However, that does not assist in drawing conclusions on the identity of the perpetrators. With regard to killing of AA, the Prosecution refers to Anonymous Witness C and Witness D, but also those witnesses do not give evidence on the identity of the perpetrators.

195. Even if evidence of AZ were not excluded, the Trial Panel would be precluded to make determination on NK's guilt based on that evidence, by operation of Article 157(4) KCCP, which prescribes that 'the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness'.

196. The Trial Panel finds that it has not been proved beyond reasonable doubt that NK committed the charged acts, pursuant to Article 390 3) KCCP.

### C. NXK

197. The Indictment alleges that NXK, as a KLA member, and in co-perpetration with other specified Accused, violated the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre. It was a finding of the Trial Panel that Anonymous Witness H and his brother were subjected to cruel treatment in the KLA detention centre in Klecke/Klecka, likely in February 1999, and SA, sometimes in March 1999 until 03 April 1999.

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crime of torture, but instead 'violation of the bodily integrity and health of a Serbian military prisoner' (see count 4 against NK in the Indictment, p.4).

<sup>196</sup> Indictment, pp.27, 28.

198. In allegations on violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, the Prosecution in the Indictment has referred to Anonymous Witnesses B, I, L and M, who saw NXK in the Klecke/Klecka detention centre.<sup>197</sup> In this regard, the Trial Panel found that conditions of detention *per se* did not amount to cruel treatment.

199. The Trial Panel observes that charges against NXK are brought by the Prosecution based on NXK's active participation in the alleged crimes and not based on superior responsibility. Therefore, the Trial Panel is to examine only NXK responsibility based on his alleged active participation.

200. It emerges from the evidence that around and during the relevant period of time NXK operated in various locations in Kosovo.

201. In particular, BAZ, who joined the military police in July/August 1998 and was based in Bellanice/Belanica, gave evidence that his squad leader was UG, who reported to NXK. BAZ saw UG and NXK coming and going. Later BAZ learned that NXK was based in 'Kosterc / Nishor', as head of the military police.<sup>198</sup>

202. It follows from the statement of NXK that from December 1998 he was transferred to the Pashtrik operational zone, in Kasterc/Kostrce (Suhareke/Suva Reka), as a commander of the military police, and the 123<sup>rd</sup> Brigade was responsible for that area.<sup>199</sup>

203. Witness A gave evidence that NXK was a military police officer operating in Pashtrik operational zone. Further, Witness A recalled contacting NXK when A went to Kervasari/Kravasarija prison.<sup>200</sup>

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<sup>197</sup> Indictment, p.26.

<sup>198</sup> BAZ, *supra* note 54.

<sup>199</sup> NXK, *supra* note 63, p.3.

<sup>200</sup> Witness A, *supra* note 69, p.7.

204. On the evidence of BZ, NXK was a member of the 121<sup>st</sup> Brigade, and as of December 1998 or January 1999 he was a commander of the military police battalion, under direct command of the military police directorate headed by FL. Military police battalion was spread in various locations, Divjake/Divljaka, Berishe/Berisa and Lladroc/Ladrovac. As far as BZ knew, NXK was moving between these locations according to needs.<sup>201</sup>

205. Further, the evidence suggests that around and during the relevant period of time NXK was seen also in the Klecke/Klecka detention centre.

206. On the account of Anonymous Witnesses L, M, I and B NXK carried out certain functions in the Klecke/Klecka detention centre, including, in the context of proceedings against KLA members. However, none of the witnesses linked NXK precisely to cruel treatment of specific individuals, such as Anonymous Witness H or his brother, or SA.

207. In particular, Anonymous Witness L stated that he was a member of the KLA, and in 1999 decided to join another brigade, and was summoned to Javor. When L arrived in Javor, he was arrested by a young KLA soldier, a member of the KLA military police, and taken to Klecke/Klecka and detained there. The next day he was interviewed by a KLA soldier ON from Bellanice/Belanica. L was also told that he should not have joined the other brigade without a prior approval. L's interview was interrupted by 'NX', with a surname [redacted] or KR, who after the war was a police officer in Prizren. And, it was NX who released L from the Klecke/Klecka detention centre. Anonymous Witness L during his detention saw another imprisoned KLA soldier, who told L that he was beaten in front of his family when taken into custody. However, L did not see anyone beaten in the Klecke/Klecka detention centre. L also did not see any other prisoners in Klecke/Klecka.<sup>202</sup>

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<sup>201</sup> BZ, *supra* note 45, p.5.

<sup>202</sup> Anonymous Witness L, *supra* note 111.

208. Anonymous Witness I, a former KLA soldier, declared that between May 1999 and June 1999 he was stationed in Klecke/Klecka. He personally knew a prison guard AZ ('MZ'). Anonymous Witness I saw AZ in Klecke/Klecka on a regular basis. He often saw also NXK in the Klecke/Klecka detention centre, who was commanding nine brigades of the military police, from the 121<sup>st</sup> Brigade to the 129<sup>th</sup> Brigade. Witness I saw many other KLA soldiers and military police in Klecke/Klecka. He heard that many persons were taken to Klecke/Klecka but did not witness any crimes.<sup>203</sup> In another statement, Anonymous Witness I recalled that in April 1999, when four Serbian officers were brought to Klecke/Klecka, it was also NXK who took charge of the Serbian officers.<sup>204</sup>

209. Anonymous Witness M gave evidence that he was a civilian and was arrested in March or April 1999 and taken to Klecke/Klecka. The same day M was questioned, including by a person that M described as a judge. M was threatened with wooden sticks, but was not hit. One person was standing at the door in a mask and threatened M to beat him. In a later statement Anonymous Witness M declared that, after the judge finished his questioning, a person in a mask hit M on a back twice.<sup>205</sup> It follows from M's statement that at a certain point NXK came together with the judge, and asked why M and certain other persons were there, opened the door and released them. M stated that he heard individuals screaming on the upper floor during their questioning. After they came back, they looked beaten. However, M did not personally witness the beating. According to M, he did not know the organization and the hierarchical structure of the Klecke/Klecka prison. Everyone, except for the judge, was wearing masks. M later heard rumours that name of the judge was ON and he was from Bellanice/Belanica. M considered that Klecke/Klecka detention centre was under responsibility of FL, who was in charge of the 121<sup>st</sup> Brigade. It operated in that area and headquarters of the Brigade were in Klecke/Klecka. M did not know who was in charge of the prison.<sup>206</sup>

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<sup>203</sup> Anonymous Witness I, *supra* note 99.

<sup>204</sup> Exhibit P6, Anonymous Witness I, *supra* note 100.

<sup>205</sup> Anonymous Witness M, *supra* note 53.

<sup>206</sup> Anonymous Witness M, *supra* note 85.

210. The Trial Panel observes that evidence of Anonymous Witness M points towards NXK's presence in the Klecke/Klecka prison around the time when M heard certain individuals screaming on the upper floor and observed that individuals looked beaten. The statement of Anonymous Witness M contains considerable redactions in line with the measures to protect identity of the Witness. It is not clear from M's statement who were these individuals, and if they could be Anonymous Witness H, his brother, or SA. Evidence of M is not sufficient to draw particular inferences as to responsibility of NXK. Also, other evidence does not attest to conduct of NXK in subjecting specific individuals, such as Anonymous Witness H, his brother, or SA to cruel treatment. In any event, the Trial Panel must recall Article 157(3) KCCP which would restrict the Trial Panel to make determination on Accused's guilt based '... solely, or to a decisive extent, on the testimony given by a single witness whose identity is anonymous to the defence counsel and the accused'.

211. According to Anonymous Witness B, a former KLA member it is likely that in May 1999, he was detained in Klecke/Klecka. When B entered the yard of the house in Klecke/Klecka, he saw NXK, who B knew as head of the military police. NXK asked B why he was there and who gave him permission to go on the mountain top (para.66 above). Further B was told that he needed to stay in prison for as long as his case was investigated. Anonymous Witness B recalled that the supervisor of the prison was AM. After five or six days B was brought upstairs, where B saw NXK again and another person. B once again explained that, upon being taken by Serbs, B had to tell Serbs KLA locations and names of the KLA soldiers that B knew. Anonymous Witness B was released from Klecke/Klecka after 21 days, due to a risk of Serb offensive. During his imprisonment in Klecke/Klecka, B did not witness any crimes.<sup>207</sup> With regard to Anonymous Witness B, the Trial Panel observes that Witness A was presented a ruling, dated 17 May 1999, from the KLA military court, ordering Anonymous Witness B into detention from 14 May 1999 until 14 June 1999.<sup>208</sup> Witness A recognized that it was his signature, however he did not recall the particular case involving Anonymous Witness B. Witness A declared that such a type of document he would give to a responsible person of the prison, without any doubt. However, A

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<sup>207</sup> Anonymous Witness B, *supra* note 81.

<sup>208</sup> Witness A, *supra* note 69, attachment to the statement 0096-09-EWC2/025



did not remember name of the person in charge of the Klecke/Klecka prison.<sup>209</sup> In this regard, the Trial Panel notes that A appeared to know FL, NXK, NK, 'BF' and 'FT'.<sup>210</sup>

212. The Trial Panel observes that, while Witness A indicated that he regularly went to the Klecke/Klecka prison, he recalled NXK merely as a military police officer in Pashtrik operational zone. Whereas, the evidence of Anonymous Witnesses L, I, M and B above suggests that NXK exercised certain authority in the Klecke/Klecka prison. Also, NB, a former KLA member, was told that AJK, AO, AGO and DR were detained in the Klecke/Klecka prison. All four, except AO, belonged to the KLA military police. It was mentioned that NXK and 'BF' informed them that they were under arrest and asked to surrender their weapons. Furthermore, NXK was issuing orders to prisoners and soldiers in the Klecke/Klecka prison and was in charge of the prison.<sup>211</sup>

213. Irrespective of the indication in the evidence that NXK exercised certain authority in the Klecke/Klecka prison, the Trial Panel is not permitted to engage into further examination and, moreover, may not draw any inferences in this regard. The Indictment alleges solely active participation of NXK in the crimes, and the Trial Panel may not exceed that scope. The Indictment, despite evidence that may support an allegation of superior responsibility, does not make such an accusation against NXK. As to NXK's responsibility, the Trial Panel assesses that, while NXK had links to the Klecke/Klecka prison and was seen there, that does not link NXK to the specific alleged crimes, such as cruel treatment of Anonymous Witness H, his brother or SA.

214. The Indictment further alleges that NXK, acting in co-perpetration, killed AA; tortured; and participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison; violated the bodily integrity and health of a Serbian military prisoner detained in the Klecke/Klecka prison; and thereafter participated in the killing of the Serbian military prisoner; and participated in the killing of VM and ND.

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<sup>209</sup> Witness A, *supra* note 69, pp.8, 3.

<sup>210</sup> Witness A, *supra* note 69, pp.4, 6, 7.

<sup>211</sup> Exhibit P 17, NB, SPRK record of the witness hearing in an investigation, 12.09.2011, Prosecution exhibit binder P 1 - P 31.

215. The Trial Panel observes that Prosecution has based guilt of NXK in all these crimes upon the account of Cooperative Witness AZ. There is no further evidence in the file which attests to conduct of NXK in commission of these alleged crimes. As considered in the Judgment above, there is exhumation and post mortem evidence on the factual allegations, however, that evidence does not make any suggestion as to identity of the perpetrators. As a result, even if evidence of AZ were not excluded, the Trial Panel would be limited to make determination on guilt based upon evidence of a single witness, furthermore, restricted by Article 157 (4) KCCP.

216. The Trial Panel finds that it has not been proved beyond reasonable doubt that NZK committed the charged acts, pursuant to Article 390 3) KCCP.

#### **D. FL**

217. The Indictment alleges that FL, in his capacity as a KLA member and commander, and as a person exercising overall control over the Klecke/Klecka detention centre, in co-perpetration with other specified Accused, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre. It must be recalled that it was finding of the Trial Panel that conditions of detention *per se* did not amount to cruel treatment, but that Anonymous Witness H, his brother and SA were subjected to cruel treatment.

218. Further, the Indictment puts forward that FL, in his capacity as a KLA member and commander, tortured a Serbian military prisoner, detained in the Klecke/Klecka detention centre; and participated in the killing of VM and ND, two Serbian police officers detained in the Klecke/Klecka detention centre.

1. FL's role in the Klecke/Klecka prison

219. With regard to FL's role in the Klecke/Klecka detention centre, the Indictment alleges that FL exercised overall command and control over the detention centre. FL was head of the KLA military police in the area, and ordered where prisoners be detained. The Indictment states that FL exercised the powers to order release and execution of certain prisoners.<sup>212</sup>

220. It is assessment of the Trial Panel that the evidence indicates that during the relevant period of time FL served as head of the KLA military police, within the KLA general headquarters in Divjake/Divljaka. Prior to his appointment to this office, he was a commander of the 121<sup>st</sup> Brigade. FL's deputy was HS ('TI'), who after FL's appointment to the KLA general headquarters became commander of the 121<sup>st</sup> Brigade.

221. These findings the Trial Panel draws from the statements of various witnesses. NM in the end of 1998 was appointed to the KLA headquarters in Divjake/Divljaka (para.63 above). NM gave evidence that initially FL was commander of the 121<sup>st</sup> Brigade. When restructuring of the general headquarters took place, FL was appointed as head of the KLA military police, and FL's deputy HS replaced him as a commander of the 121<sup>st</sup> Brigade.<sup>213</sup>

222. This is corroborated by the evidence of BZ (paras.61, 63 above), who served as chief of staff of the KLA general headquarters in Divjake/Divljaka from January 1999 until mid-April 1999. On BZ's account, FL was commander of the 121<sup>st</sup> Brigade and his deputy was HS. From January 1999 until April 1999 FL was appointed as head of the KLA military police, after restructuring of the KLA in November/December 1998. HS became commander of the 121<sup>st</sup> Brigade.<sup>214</sup>

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<sup>212</sup> Indictment, p.26.

<sup>213</sup> NM, *supra* note 66.

<sup>214</sup> BZ, *supra* note 45, pp.2, 3, 4; also BAZ, *supra* note 54, p.3.

223. Also other witnesses, AQ,<sup>215</sup> AO,<sup>216</sup> NB,<sup>217</sup> Witness G,<sup>218</sup> IZ,<sup>219</sup> RI (former member of the 121<sup>st</sup> Brigade),<sup>220</sup> FK (former member of the KLA military police),<sup>221</sup> indicated that during or around the relevant period of time HS was commander of the 121<sup>st</sup> Brigade. It was BZ's evidence that 'BF' as a member of the 121<sup>st</sup> Brigade was initially under command of FL and then HS.<sup>222</sup>

224. In addition to the evidence considered previously, further evidence corroborates that also KLA military police operated in the KLA base in Klecke/Klecka. According to Anonymous Witness I, the KLA military police stayed on the upper floor of the KLA base in Klecke/Klecka.<sup>223</sup> On the evidence of Witness A, the KLA military police exercised physical control over the Klecke/Klecka prison.<sup>224</sup> As considered in the Judgment above (para.76) Witness D, a former soldier in the Serbian army, in March 1999 was detained also in the Klecke/Klecka prison for 10 days. In Klecke/Klecka D saw many KLA soldiers. D personally saw a KLA female soldier beating 'SH' (para.76 above). The said female soldier was wearing a camouflage uniform but had a badge on her arm, on which it was written 'military police' in the Albanian Language. According to D, she was a sort of military police officer.<sup>225</sup> It was recollection of Anonymous Witness B that, when he was detained in the Klecke/Klecka prison, a military police officer 'FE' guarded the detained individuals.<sup>226</sup>

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<sup>215</sup> AQ, *supra* note 45, pp.3, 4, 5.

<sup>216</sup> AO, *supra* note 45, p.3.

<sup>217</sup> Exhibit P 17, NB, *supra* note 189, p.2.

<sup>218</sup> Witness G, *supra* note 45, p.3.

<sup>219</sup> IZ, *supra* note 60, p.3.

<sup>220</sup> RI, 24.05.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder D.

<sup>221</sup> FK, *supra* note 56, pp.4, 5.

<sup>222</sup> BZ, *supra* note 45, p.5.

<sup>223</sup> Anonymous Witness I, *supra* note 99, p.5.

<sup>224</sup> Witness A, *supra* note 69.

<sup>225</sup> Witness D, 24.12.2010, EULEX Police interrogation statement of the witness, pp.5, 6, SPRK binder C.

<sup>226</sup> Anonymous Witness B, *supra* note 81, p.5.

225. On the evidence of FK, who was assigned to the military police in the beginning of 1999, he never guarded any prisoners, but it was possible that any of the members of the military police guarded the prisoners in the KLA base in Klecke/Klecka.<sup>227</sup>

226. The evidence also indicates that KLA military police may have been in charge of conducting investigations. Witness A recalled the case of SA. It was said for SA that he was a prison director in Vushtrri/Vucitrn or Mitrovice/Mitrovica and had tortured many political prisoners. According to Witness A, the case of SA never reached A, and only investigators, meaning, KLA military police, worked on the case.<sup>228</sup>

227. As considered previously, it also emerged from the evidence that NXX, as a member of the KLA military police, was in the KLA base in Klecke/Klecka.

228. Further, the evidence suggests that members of the KLA military police transported detainees to and from Klecke/Klecka. Witness A gave evidence that KLA military police had taken to the Klecke/Klecka prison KR brothers, who were accused of collaborating with Serbs. Also, Witness A recalled that it was likely that he asked the KLA military police to bring BKU for additional questioning on the allegations of deserting.<sup>229</sup> AH, who belonged to the KLA military police, recalled that on one occasion he escorted an arrested soldier to Witness A.<sup>230</sup> Witness V, a former KLA member, who also served in the 121<sup>st</sup> Brigade, gave evidence that it was KLA military police that was in charge of transfer of the prisoners from the temporary prison in Shale/Sedlare to the prison in Klecke/Klecka.<sup>231</sup> A similar method of operation can be seen also for other locations. In particular, on the evidence of BZ the disciplinary centre in Lladroc/Ladrovac was under the responsibility of the KLA military court, but KLA military police guarded the prison and the prisoners.<sup>232</sup>

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<sup>227</sup> FK, *supra* note 56, pp.4, 5.

<sup>228</sup> Witness A, *supra* note 69.

<sup>229</sup> Witness A, *supra* note 69.

<sup>230</sup> AH, *supra* note 67, p.3.

<sup>231</sup> Witness V, *supra* note 79.

<sup>232</sup> BZ, *supra* note 45.

229. As to the degree of command exercised by FL with regard to the Klecke/Klecka detention centre, the Trial Panel notes that Anonymous Witness I declared that he saw FL several times in Klecke/Klecka in 1999, and FL was based in the building where the kitchen was.<sup>233</sup> At the same time evidence points towards various members of the KLA who on different occasions were identified as being in charge of the prison in Klecke/Klecka or giving orders to detain, release or execute certain individuals. On many occasions witnesses gave evidence that they were either asked to report to Klecke/Klecka or were taken into custody into Klecke/Klecka, however, witnesses did not give evidence that would enable the Trial Panel to determine that it was under superior responsibility of FL.

230. In particular, Witness A was head of the legal department in the KLA general headquarters in Divjake/Divljaka and also held military trials as a judge. On the evidence of Witness A, BKU, a former commander of the KLA brigade, was arrested and brought to Witness A. BKU told A that his entire brigade deserted, and he left to Albania. In view of seriousness of the case, A sentenced BKU to death by firing squad. However, the NATO intervention begun and A took responsibility not to execute his sentence and decided that BKU deserved another chance. BKU was released and he fought bravely afterwards.<sup>234</sup> No reference is made to any role played by FL in this process.

231. It was the recollection of Witness E, who worked together with Witness A, that A told him the story of BKU and that BKU was imprisoned. Witness A was very worried about BKU's situation, and also asked E what they should do about BKU.<sup>235</sup>

232. Also BZ recalled the case of BKU. According to BZ a decision was made to arrest BKU and bring him before the military court in knowing how seriously BKU allegedly violated the military

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<sup>233</sup> Anonymous Witness I, *supra* note 99, p.6.

<sup>234</sup> Witness A, *supra* note 69, p.5.

<sup>235</sup> Witness E, *supra* note 45, p.4.

rules.<sup>236</sup> BZ was not sure where BKU was detained. Following the NATO intervention, the Serbian offensive started. As Serbian forces were breaking the front line, Witness A asked BZ with regard to the soldiers who were at the time in detention, including BKU. BZ advised that they should be released and their cases reviewed after the war. Witness A shared that opinion.<sup>237</sup>

233. Further, after A learned of the imprisonment of two Serbian soldiers in the Klecke/Klecka prison, A went to the Klecke/Klecka detention centre to visit them. It was finding of the Trial Panel that the two prisoners were Anonymous Witness H and his brother. In releasing H and his brother, A stated that he consulted BZ, and ordered that both prisoners be handed over to the OSCE.<sup>238</sup> The Trial Panel notes that according to Anonymous Witness H, the person who visited H and his brother after beating, told H that he did not know that they had been taken by KLA. Anonymous Witness H thought that in this way the person implied that he could have done something if he knew that H and his brother had been taken by KLA.<sup>239</sup>

234. As for the KLA detention centre in Klecke/Klecka, it was evidence of AQ, a former KLA member, that it appeared that HS was in charge of the house in Klecke/Klecka.<sup>240</sup> Even though Witness A in his statement referred to the director of the Klecke/Klecka prison, A did not give evidence on identity of the director. With regard to HS, A said that A did not know anyone by name HS, but A recalled 'TI', who was commander at the time. Witness A saw 'TI' in Klecke/Klecka.<sup>241</sup>

235. Witness V gave evidence that he was detained in the Klecke/Klecka prison for 56 days and stayed together with BKU. According to Witness V, the commander and head of the prison was

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<sup>236</sup> BZ, *supra* note 45, p.4.

<sup>237</sup> BZ, *supra* note 45, p.5.

<sup>238</sup> Witness A, *supra* note 69, p.5.

<sup>239</sup> Anonymous Witness H, *supra* note 123, p.9.

<sup>240</sup> AQ, *supra* note 45, p.5.

<sup>241</sup> Witness A, *supra* note 69.

'MZ', with name AM,<sup>242</sup> and HS and 'MZ' checked who came in and out of the prison. In this regard, the Trial Panel notes that Witness A recalled 'MZ' as a simple soldier and A knew the name of AZ but could not match the name to a face.<sup>243</sup> Whereas, according to Anonymous Witness I, who was stationed in Klecke/Klecka around May 1999, June 1999, AZ ('MZ') was a guard of the Klecke/Klecka prison. AZ was dressed in a black uniform with military police patches on the left arm. Another guard of the prison was AK.<sup>244</sup> Further, on the evidence of Anonymous Witness C, he was released from the Klecke/Klecka prison by 'MZ' [name redacted]. C thought that 'MZ' was a director of the prison. Also, on the account of C, the prisoners were taken from the basement upstairs for interrogation by a person that C heard someone calling 'commander H'.<sup>245</sup> Anonymous Witness B declared that supervisor of the prison was AM.<sup>246</sup>

236. During his detention, V was interrogated twice by FL, HS, Witness A and 'MZ'. Witness A acted as a judge, FL and HS were accusers. V was defended by a lawyer from Peje/Pec. The proceedings were conducted in Novoselle/Novo Selo, in a private building. After proceedings, V went straight home.<sup>247</sup>

237. On the evidence of V, BKU was interrogated by Witness A, FL, but most of the time by HS ('TI'). One day BKU received a letter, which V thought was a letter on death sentence. According to V, the only person with the authority to write the letter was Witness A. V also recalled beating of a young man, around 17 years of age, who had stolen some things. Witness could hear the young man being beaten. The young man indicated that he was beaten by BH, who also guarded the prisoners.<sup>248</sup>

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<sup>242</sup> Witness V, *supra* note 79, pp.6, 10.

<sup>243</sup> Witness A, *supra* note 69, p.8.

<sup>244</sup> Anonymous Witness I, *supra* note 99, pp.5, 6.

<sup>245</sup> Anonymous Witness C, *supra* note 84, p.5.

<sup>246</sup> Anonymous Witness B, *supra* note 81, p.5.

<sup>247</sup> Witness V, *supra* note 79.

<sup>248</sup> Witness V, *supra* note 79.



238. It was recollection of Witness G, a former member of the 121<sup>st</sup> Brigade, that he was called for interview to Klecke/Klecka because of an argument or fight he had with other certain persons. In Klecke/Klecka commander HS ('TI') had them shake their hands, and told that they were not supposed to fight with each other.<sup>249</sup>

239. In light of the foregoing evidence, it is assessment of the Trial Panel that various individuals were active in the Klecke/Klecka prison.

240. With regard to FL, Witness A gave evidence that he heard that KR brothers were released from the Klecke/Klecka prison by FL and only FL had such powers as he was head of the military police.<sup>250</sup> Also, Witness T declared that he was told by one of the detained brothers NXK (para.99 above) that he was released by FL.<sup>251</sup> The Trial Panel notes that said evidence is based on hearsay. A similar assertion was provided by Anonymous Witness M, whose opinion was that FL was in charge of different functions in the Klecke/Klecka detention facility. At the same time, Anonymous Witness M declared that he did not know who was in charge of the prison and if that could be called a prison, as it was merely a house.<sup>252</sup>

241. With regard to statements of Witness A, Witness T and Anonymous Witness M, the Trial Panel observes that witnesses did not provide evidence that they witnessed FL in fact giving any instructions or orders or exercising disciplinary powers in Klecke/Klecka.

242. Furthermore, the Trial Panel observes that on the evidence of Anonymous Witness I, when in April 1999 four KLA soldiers brought to Klecke/Klecka four Serbian officers, and military police took charge of them, also FL was present that day in Klecke/Klecka. According to Anonymous Witness I, he saw FL in the kitchen, however, he did not know if FL dealt with these prisoners at all.<sup>253</sup>

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<sup>249</sup> Witness G, *supra* note 45, p.3.

<sup>250</sup> Witness A, *supra* note 69, p.4.

<sup>251</sup> Witness T, *supra* note 122, p.5.

<sup>252</sup> Anonymous Witness M, *supra* note 85, p.5.

<sup>253</sup> Exhibit P6, Anonymous Witness I, *supra* note 100.

243. In view of the foregoing, the evidence does not establish beyond reasonable doubt that FL knew or had reason to know that specific individuals, such as Anonymous Witness H, his brother or SA, would be subjected to cruel treatment or had been subjected to cruel treatment; and that FL failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrator thereof.

244. The Indictment also refers to FL's position as head of the KLA military police in the area.<sup>254</sup> However, that is not in itself sufficient. Superior responsibility is based upon the **actual power** of the superior to control the acts of his subordinates, and having the **material ability** to prevent and punish criminal conduct.<sup>255</sup> In the particular case, the evidence adduced by the Prosecution does not establish that FL exercised command over operation of the Klecke/Klecka detention centre so as to make him responsible with regard to cruel treatment of specific individuals.

245. It is noted by the Trial Panel that very often it remained unclear upon whose directions individuals were arrested and detained in the Klecke/Klecka prison.

246. Witness A did not know who arrested BKU and where BKU was detained until he was brought to Witness A.<sup>256</sup> The same was declared by Witness E.<sup>257</sup>

247. BEK recalled that in spring 1999 KLA forces were made to withdraw by the Serbian forces, and KLA arrived to BEK's village. KLA soldiers settled in a house in the neighbourhood. After BEK realized that the house was overcrowded, he proposed that a group of KLA soldiers go to his house. KLA soldiers entered his house by breaking the door, and BEK had a fight with a KLA soldier who broke the door. After a few days the KLA military police came to BEK and asked him

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<sup>254</sup> Indictment, p.26.

<sup>255</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Trial Judgment, 16.11.1998, para.377.

<sup>256</sup> Witness A, *supra* note 69, p.5.

<sup>257</sup> Witness E, *supra* note 45, p.4.

to go to Klecke/Klecka and give a statement. BEK arrived in the KLA base in Klecke/Klecka and contacted one of the soldiers there, who tried to slap him, but other soldiers told not to. Thereafter, BEK was told by another KLA soldier that he should report to the base every three hours.<sup>258</sup>

248. Witness N gave evidence that after NATO intervention, possibly, in May 1999, he was taken into custody by KLA and taken to a house in Klecke/Klecka or Berishe/Berisa. There Witness N was put in the basement. After three days N was taken upstairs for interview. N did not know who was commander of the KLA base.

249. AO, a former KLA member, declared that around 45 days after the NATO intervention started he was asked by KLA soldiers to go to Klecke/Klecka and to report to 'TI' on accusations of injuring a civilian. While in the KLA base in Klecke/Klecka, AO did not see 'TI'. AO was questioned by three to four KLA soldiers. AO insisted to be provided with a decision in writing as to accusations against him. AO, however, was not provided any such formal decision, and he was released the next day.<sup>259</sup>

250. Witness F gave evidence that in March 1999 he was arrested by KLA members, in black uniforms, and driven to the KLA base in Klecke/Klecka. The people who arrested F did not introduce themselves. In Klecke/Klecka was detained on the rumours that he was against KLA. In Klecke/Klecka F was questioned by four to five persons and it was concluded that F's detention had occurred by misunderstanding. Witness F did not know any of the persons who arrested him, nor the guards, nor the persons who questioned him.<sup>260</sup>

251. Also, Anonymous Witness B gave evidence that he did not know who were the KLA military police officers who came to B and asked B to report to Klecke/Klecka.<sup>261</sup>

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<sup>258</sup> BEK, *supra* note 45.

<sup>259</sup> AO, *supra* note 45, pp.3, 4, 5.

<sup>260</sup> Witness F, *supra* note 80, p.3.

<sup>261</sup> Anonymous Witness B, *supra* note 81, p.4.

## 2. FL's responsibility

252. In light of the foregoing, the Trial Panel finds that evidence adduced by the Prosecution does not prove beyond reasonable doubt that FL held superior responsibility over the Klecke/Klecka detention centre so as to make him liable in cruel treatment of specific individuals, such as Anonymous Witness H, his brother, or SA. The evidence also does not attest to FL's active participation in cruel treatment of specific individuals, including Anonymous Witness H, his brother, or SA.

253. Further, there is no evidence, apart from the evidence of Cooperative Witness AZ, to link FL to the alleged torture of a Serbian military prisoner; and killing of VM and ND.

254. The Trial Panel remarks that on FL's active participation in torture of a Serbian military prisoner; and killing of VM and ND, the Indictment exclusively relies on the evidence of Cooperative Witness AZ.<sup>262</sup>

255. As considered previously there is *post mortem* evidence which attests to death of specified individuals (para.108 above). However, there is no further evidence on the identity of perpetrators. As such, even with evidence of Cooperative Witness AZ in the file, the Trial Panel would not be able to make a determination on guilt, particularly, in view of Article 157 (4) KCCP.

256. The Trial Panel finds that it has not been proved beyond reasonable doubt that FL committed the charged acts, pursuant to Article 390 3) KCCP.

## E. NS

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<sup>262</sup> Indictment, pp.27, 29, 30.

257. The Indictment alleges that NS, in his capacity as KLA member holding a position of responsibility within the Klecke/Klecka detention centre, in co-perpetration with the specified Accused violated the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre. It was finding of the Trial Panel that conditions of detention *per se* did not amount to cruel treatment, and that from the individuals named in the Indictment Anonymous Witness H, his brother and SA were subjected to cruel treatment in the prison in Klece/Klecka.

258. Further, the Indictment claims that NS in co-perpetration with other specified Accused, tortured four Serbian military prisoners; participated in the killing of four Serbian military prisoners, detained in the Klecke/Klecka detention centre; killed a Serbian military prisoner, detained in the Klecke/Klecka detention centre; participated in the killing of AA; and participated in the killing of VM and ND.

1. NS's role in the Klecke/Klecka prison

259. With regard to NS's role in the Klecke/Klecka detention centre, the Indictment alleges that NS was among those responsible for the management of the prison, including the admission and registration of prisoners. Certain prisoners were handed over to NS's responsibility upon their arrival to the prison.<sup>263</sup>

260. Several witnesses recalled NS ('FT'). QK knew NS as member of the KLA.<sup>264</sup> Witness A knew the nickname 'FT', but did not know his real name. Witness A saw 'FT' in Klecke/Klecka very often.<sup>265</sup> BZ recalled 'FT', who was an officer within command of the 121<sup>st</sup> Brigade.<sup>266</sup>

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<sup>263</sup> Indictment, p.25.

<sup>264</sup> QK, *supra* note 47, p.4.

<sup>265</sup> Witness A, *supra* note 69, p.7.

<sup>266</sup> BZ, *supra* note 45, p.5.

Anonymous Witness I saw 'FT', with first name NN, on a couple of occasions in Divjake/Divljaka. According to Anonymous Witness I, 'FT' stayed in the barracks but was also allowed to enter the general headquarters.<sup>267</sup>

261. In another statement, Anonymous Witness I recalled that in April 1999, when four Serbian officers were brought to Klecke/Klecka, it was also military police officer NS ('FT') who took charge of the Serbian officers.<sup>268</sup>

262. There is no further evidence, besides evidence of Cooperative Witness AZ, on NS's association with Klecke/Klecka detention centre.

## 2. NS's responsibility

263. In view of the foregoing the Trial Panel finds that evidence falls short of establishing beyond reasonable doubt that NS held a position of responsibility with the Klecke/Klecka detention centre as alleged in the Indictment. The evidence adduced by the Prosecution does not prove beyond reasonable doubt that NS held superior responsibility over the Klecke/Klecka detention centre so as to make him liable in cruel treatment of specific individuals, such as Anonymous Witness H, his brother, or SA. The evidence also does not establish NS's active participation in cruel treatment of specific individuals, including Anonymous Witness H, his brother, or SA.

264. In the allegations that NS participated in torture of four Serbian military prisoners; participated in the killing of four Serbian military prisoners, detained in the Klecke/Klecka detention centre; killed a Serbian military prisoner, detained in the Klecke/Klecka detention centre; participated in the killing of AA; and participated in the killing of VM and ND the

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<sup>267</sup> Anonymous Witness I, *supra* note 99, p.6.

<sup>268</sup> Exhibit P6, Anonymous Witness I, *supra* note 100, p.2.

Indictment makes reliance on the evidence of Cooperative Witness AZ.<sup>269</sup> There is no further evidence to attest to conduct of NS in commission of those crimes.

265. As considered previously there is *post mortem* evidence which attests to death of specified individuals (para.108 above). However, there is no further evidence on the identity of perpetrators. As such, even with evidence of Cooperative Witness AZ in the file, the Trial Panel would not be able to make a determination on guilt, particularly, in view of Article 157 (4) KCCP.

266. The Trial Panel finds that it has not been proved beyond reasonable doubt that NS committed the charged acts, pursuant to Article 390 3) KCCP.

267. In light of the foregoing, the evidence adduced by the Prosecution falls short to establish the guilt of the Accused beyond reasonable doubt. Therefore, the Accused are found not guilty of all the charges against them.

## **VII. COSTS OF CRIMINAL PROCEEDINGS AND PROPERTY CLAIM**

268. As the Accused are found not guilty, the costs of criminal proceedings under Article 99 (2) 1) to 5) KCCP, the necessary expenses of the defendants and the remuneration and necessary expenditures of defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources as per applicable rates, pursuant to Article 103 (1) KCCP.

269. No property claim has been filed. Therefore, no decision is rendered pursuant to Article 396 (4) KCCP.

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<sup>269</sup> Indictment, pp.28, 29, 30, 31, 32, 33.

**Presiding Judge:**

Recording Officer:

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EULEX Judge Jonathan Welford-Carroll

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EULEX Legal Officer

Zane Ratniece

**Panel Members:**

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Judge Shqipe Qerimi

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EULEX Judge Dean Pineles

**LEGAL REMEDY:** Authorized persons may file an appeal in writing against this Judgment to the Supreme Court of Kosovo through the District Court of Prishtine/Pristina within fifteen (15) days from the date the copy of the Judgment has been received, pursuant to Article 398 (1) KCCP.

**ANNEX I**

**EVIDENCE SUBMITTED BY THE PROSECUTION**

**(SPRK binder B)**

- 1) **Witness Y**, 20.4.2012, SPRK record of the witness hearing, SPRK binder B.
- 2) **Anonymous Witness C**, 21.09.2010, SPRK record of the witness hearing in an investigation with attachment, SPRK binder B.



- 3) **Anonymous Witness I**, 22.11.2010, report – interrogation statement of the witness, SPRK binder B.
- 4) **Witness A**, 23.09.2010, SPRK record of the witness hearing in an investigation with attachments, SPRK binder B.
- 5) **Witness F**, 02.01.2011, report – interrogation statement of the witness with attachments, SPRK binder B.
- 6) **BKU**, 04.10.2010 and 15.10.2010, SPRK record of the witness hearing in an investigation with attachment, SPRK binder B.
- 7) **Witness E**, 28.10.2010, SPRK record of the witness hearing in an investigation, SPRK binder B.
- 8) **Anonymous Witness B**, 04.12.2010, report – interrogation statement of the witness with attachments, SPRK binder B.
- 9) **Witness G**, 11.01.2011, report – interrogation statement of the witness with attachments, SPRK binder B.
- 10) **Anonymous Witness H**, 24.08.2010, report – interrogation statement of the witness with attachments, SPRK binder B.

**(SPRK binder C)**

- 11) **QK**, 14.06.2011, report – interrogation statement of the witness, SPRK binder C.
- 12) **AQ**, 07.06.2011, report – interrogation statement of the witness with attachment, SPRK binder C.
- 13) **Witness T**, 03.05.2011, report – interrogation statement of the witness, SPRK binder C.
- 14) **Witness D**, 24.12.2010, report – interrogation statement of the witness; 18.01.2011, SPRK record of the witness hearing in an investigation, SPRK binder C.
- 15) **Witness V**, 18.04.2011, interview in the capacity of a witness with attachment, SPRK binder C.

- 16) **HAB**, 08.04.2011, SPRK record of the witness hearing in an investigation, SPRK binder C.
- 17) **IA**, 07.04.2011, report – interrogation statement of the witness, SPRK binder C.
- 18) **NAM**, 06.04.2011, report – interrogation statement of the witness with attachment, SPRK binder C.
- 19) **NM**, 05.04.2011, SPRK record of the witness hearing in an investigation with attachments, SPRK binder C.
- 20) **BZ**, 05.04.2011, SPRK record of the witness hearing in an investigation with attachments, SPRK binder C.
- 21) **DD**, 04.04.2011, report – interrogation statement of the witness, SPRK binder C.
- 22) **ZK**, 01.04.2011, SPRK record of the witness hearing in an investigation, SPRK binder C.
- 23) **BEK**, 08.01.2011, report – interrogation statement of the witness with attachments, SPRK binder C.
- 24) **Witness N**, 04.01.2011, report – interrogation statement of the witness with attachments, SPRK binder C.
- 25) **Witness O**, 24.12.2010, report – interrogation statement of the witness; 15.01.2011, SPRK record of the witness hearing in an investigation, both SPRK binder C.
- 26) **Witness R**, 22.12.2010, report – interrogation statement of the witness with attachments, SPRK binder C.
- 27) **NH**, 02.12.2010, report – interrogation statement of the witness, SPRK binder C.
- 28) **AO**, 30.11.2010, report – interrogation statement of the witness with attachments, SPRK binder C.
- 29) **HK**, 20.10.2010, SPRK record of the witness hearing in an investigation with attachments, SPRK binder C.
- 30) **BT**, 08.10.2010, report – interrogation statement of the witness with attachments, SPRK binder C.
- 31) **JU**, 24.08.2010, report – interrogation statement of the witness with attachment, SPRK binder C.
- 32) **GB**, 24.08.2010, report – interrogation statement of the witness, SPRK binder C.

**(SPRK binder D)**

- 33) **Anonymous Witness L**, 12.04.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.
- 34) **Anonymous Witness M**, 30.03.2011, report-interrogation statement of the witness; 20.05.2011, SPRK record of the witness hearing in an investigation, both SPRK binder D.
- 35) **AH**, 14.12.2010, report-interrogation statement of the witness; 27.05.2011, SPRK record of the witness hearing in an investigation, both SPRK binder D.
- 36) **SB**, 27.05.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.
- 37) **Witness U**, 25.06.2011, report-interrogation statement of the witness, SPRK binder D.
- 38) **Witness W**, 16.06.2011, report-interrogation statement of the witness, SPRK binder D.
- 39) **IZ**, 19.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 40) **BAZ**, 23.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 41) **ST**, 25.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 42) **RI**, 24.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 43) **FK**, 31.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 44) **ZS**, 18.05.2011, report-interrogation statement of the witness; 23.07.2011, SPRK record of the witness hearing, both SPRK binder D.
- 45) **VS**, 17.05.2011, report-interrogation statement of the witness; 23.07.2011, SPRK record of the witness hearing, both SPRK binder D.
- 46) **LS**, 18.05.2011, report-interrogation statement of the witness; 23.07.2011 SPRK record of the witness hearing, both SPRK binder D.
- 47) **Witness O**, 24.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 48) **Witness Q**, 26.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 49) **Witness P**, 25.05.2011, report-interrogation statement of the witness, SPRK binder D.
- 50) **BET**, 05.04.2011, report-interrogation statement of the witness, SPRK binder D.

**(SPRK binder F)**

- 51) Discharge list, document marked as 0096-09-EWC2/019, SPRK binder F.
- 52) Certification, document marked as 0096-09-EWC2/020, SPRK binder F.
- 53) Certificate for service in KLA, document marked as 0096-09-EWC2/021, SPRK binder F.
- 54) Manual on procedure implementation towards the detainees, document marked as 0096-09-EWC2/022, SPRK binder F.
- 55) Note to military prison, document marked as 0096-09-EWC2/023, SPRK binder F.
- 56) Duty report, document marked as 0096-09-EWC2/024, SPRK binder F.
- 57) Judgment, document marked as 0096-09-EWC2/025, SPRK binder F.
- 58) Judgment, document marked as 0096-09-EWC2/026, SPRK binder F.
- 59) Duty report, document marked as 0096-09-EWC2/027, SPRK binder F.
- 60) Duty report, document marked as 0096-09-EWC2/028, SPRK binder F.
- 61) Duty report, document marked as 0096-09-EWC2/029, SPRK binder F.
- 62) Decision, document marked as 0096-09-EWC2/030, SPRK binder F.
- 63) Request, document marked as 0096-09-EWC2/031, SPRK binder F.
- 64) Request, document marked as 0096-09-EWC2/032, SPRK binder F.
- 65) Decision, document marked as 0096-09-EWC2/033, SPRK binder F.
- 66) Ordinance, document marked as 0096-09-EWC2/034, SPRK binder F.
- 67) Appeal, document marked as 0096-09-EWC2/035, SPRK binder F.
- 68) Notification, document marked as 0096-09-EWC2/036, SPRK binder F.

**(SPRK binder H)**

- 69) EULEX Police WCIU report with investigation diary, EWC number 0068-09-EWC4, SPRK binder H (pp. H2-H5).
- 70) Exhumation Police report, dt.30.09.2009, SPRK binder H (pp.H6-H20).
- 71) Summary of information, SPRK binder H (pp.H21-H25).
- 72) Assessment Police report with attachments, dt.24-26.08.2009, SPRK binder H (pp.H30-H40).

- 73) Order for exhumation, post mortem inspection, autopsy and identification, PPP no.685/09, dt.08.09.2009, SPRK binder H (p.H41).
- 74) Communication from WCIU to EULEX PP, dt.27.09.2009, SPRK binder H (pp.H45-H46).
- 75) Chain of custody statements, SPRK binder H (pp.H47-H48).
- 76) ICMP printed statements on missing persons, SPRK binder H (pp.H49-H53).
- 77) UNMIK autopsy reports dt.29.10.2009, SPRK binder H (pp.H54-H59).
- 78) Chain of custody statement, SPRK binder H (p.H60).
- 79) Handover forms of exhumated bodies, dt.23.,25.09.2009, SPRK binder H (pp.H61-H66).
- 80) Death certificate of BC, dt.12.12.2009 (pp.H67-H68).
- 81) Victim identification information, SPRK binder H (pp.H69-H91).
- 82) Death certificate of DV, dt.12.12.2009 (pp.H92-H93).
- 83) Victim identification form no.1999-010047, SPRK binder H (pp.H94-H111).
- 84) Photo sheet KER overview, SPRK binder H (pp.H112-H134).
- 85) CD on exhumation grave site KER, SPRK binder H.

**(SPRK binder I)**

- 86) CD containing electronic versions of evidence, SPRK binder I.
- 87) Autopsy reports with annexes on two bodies found in grave site KEQ, SPRK binder I (pp.1-198).

**(SPRK binder L)**

- 88) CD containing electronic version of autopsy and ante mortem reports, SPRK binder L.
- 89) **MG**, 20.01.2010, record of expert witness hearing in investigation, SPRK binder L.
- 90) **TE**, 20.01.2010, record of expert witness hearing in investigation, SPRK binder L.
- 91) Picture case grave site KER, SPRK binder L (pp.L7-L9).
- 92) Autopsy report and ante mortem report for body KER01/001B, SPRK binder L (pp.L10-L96).

- 93) Autopsy report and ante mortem report for body KER01/004B, SPRK binder L (pp.L97-L237).
- 94) Autopsy report and ante mortem report for body KER01/005B, SPRK binder L (pp.L238-L335).
- 95) Autopsy report and ante mortem report for body KER01/006B, SPRK binder L (pp.L336-L412).
- 96) Autopsy report and ante mortem report for body KER01/004B, SPRK binder L (pp.L413-L516).

**(SPRK binder M)**

- 97) Police report on search of premises of NS (file no.1-3), 18.03.2011, SPRK binder M.
- 98) Search order GJPP 25/10 (PPS 07/10), dt.17.03.2011, SPRK binder M.
- 99) Application for police employment of NXK, dt.23.04.2002, SPRK binder M.
- 100) Police report on search conducted at UU, dt.02.02.2011, with attachments, SPRK binder M.
- 101) Search order GJPP 25/10 (PPS 07/10), dt.19.11.2010, SPRK binder M.
- 102) Photographs seized at NS's residence, SPRK binder M.

**(Court trial binder 1)**

- 103) **AC**, 03.08.2011, SPRK record of the witness hearing in an investigation, Court trial binder 1.
- 104) **BZ**, 29.07.2011, SPRK record of the witness hearing in an investigation, Court trial binder 1.
- 105) Autopsy reports, dt.29.10.2009, Court trial binder 1.

**(Prosecution exhibits binder I)**

- 106) Exhibit **P2**, EULEX WCIU officer's report 10.11.2011 regarding significant locations regarding Klecka case with attached photographs, Prosecution exhibits binder I.
- 107) Exhibit **P3**, response of Department of Forensic Medicine EULEX Kosovo regarding missing person AA, Prosecution exhibits binder I.
- 108) Exhibit **P4**, AZ's death certificate, Prosecution exhibits binder I.
- 109) Exhibit **P6**, **Anonymous Witness I**, 02.11.2011, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 110) Exhibit **P7**, **MB**, 08.11.2011, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 111) Exhibit **P8**, **BEC**, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 112) Exhibit **P9**, **JS**, 02.11.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.
- 113) Exhibit **P10**, **FZ**, 27.10.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.
- 114) Exhibit **P11**, **SZ**, 26.10.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.
- 115) Exhibit **P12**, **FLZ**, 26.10.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.
- 116) Exhibit **P13**, **NZ**, 24.10.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.
- 117) Exhibit **P14**, **IDZ**, 24.10.2011, SPRK record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 118) Exhibit **P15**, **BEH**, 23.11.2011, SPRK record of the witness hearing, Prosecution exhibits binder I.
- 119) Exhibit **P16**, **BT**, 24.11.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.

- 120) Exhibit **P17**, **NB**, 12.09.2011, report-interrogation statement of the witness, Prosecution exhibits binder I.
- 121) Exhibits **P21a**, **P21b**, **P21c**, **P21d**, **P21f**, decision of the EULEX Special Prosecutor Maurizio Salustro to acquire part of the case file no.2003/224/PEJ, statement of **TM** to the investigative authorities of the Republic of Serbia, dt.27.1.2005 and 11.04.2004 and annex (2), Prosecution exhibits binder I.
- 122) Exhibit **P22**, **AFZ**, 23.11.2011, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 123) Exhibit **P23**, **IDZ**, 23.11.2011, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 124) Exhibit **P24**, **CC**, 06.12.2011, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 125) Exhibit **P25**, **GK**, 07.12.2011, record of the witness hearing in an investigation, Prosecution exhibits binder I.
- 126) Exhibit **P26**, **SD**, 08.12.2011, record of the witness hearing, Prosecution exhibits binder I.
- 127) Exhibit **P27**, **MZS**, 12.12.2011, record of witness hearing, Prosecution exhibits binder I.
- 128) Exhibits **P28a**, **P28b-P28f**, letter from forensic archaeologist to the EULEX Special Prosecutor Maurizio Salustro, dt.8.12.2011, and comparison tables (5), Prosecution exhibits binder I.
- 129) Exhibits **P29a** and **P29b**, Department of Forensic Medicine report DFM KEQ 01, dt.10.,11.8.2010, and Department of Forensic Medicine report DFM KEQ 02, dt.10.,11.8.2010, Prosecution exhibits binder I.
- 130) Exhibits **P30a-P30e**, letter from WCIU Investigator to the EULEX Special Prosecutor Maurizio Salustro, dt.15.09.2011, regarding exhumation reports, exhumation Police report, dt.24.9.2009, additional exhumation Police report, dt.17.8.2010, photo sheet KEQ overview Klecka, Prosecution exhibits binder I.
- 131) Exhibit **P31**, **HYS**, 24.01.2012, record of the witness hearing, Prosecution exhibits binder I.
- 132) Exhibit **P33**, **BKO**, 07.02.2012, record of the witness hearing, Prosecution exhibits binder II.



- 133) Exhibit **P34**, PPS 07/10 photo board – attachment to **Witness V** 18.04.2011 hearing, Prosecution exhibits binder II.
- 134) Exhibit **P35**, **GA**, 08.02.2012, SPRK record of the witness hearing, Prosecution exhibits binder II.
- 135) Exhibit **P36**, Police file from the Police Headquarters Duisberg concerning the death of AZ, dt.28.09.2011, Prosecution exhibits binder II (excluding the so-called 'German Diary', declared inadmissible evidence by Ruling 21.03.2012).
- 136) Exhibit **P37**, single document containing official note from Chief Inspector of the Criminal Police, dt.29.09.201, reply of the General Practitioner, dt.29.09.2011, autopsy note, Prosecution exhibits binder II.

## **ANNEX II**

### **EVIDENCE SUBMITTED BY THE DEFENCE<sup>270</sup>**

- 1) Defence Exhibit **D (NeK) 1**, Bundle of 32 pgs. Document submitted by Defence Counsel Mahmut Halimi on 06 March 2012, contained in the Defence exhibits binder I.

The bundle contains:

- 'Informacije o saobračajnim prekršajima na Kosovu', PZ A No. 033264 (in the Serbian Language);
- Two separate UNMIK 'Formular Deklarate', AZ and BHO (in the Albanian Language);
- Kosovo Police Service, 'Initial / Incident Report', case No. 2005-GR-5628, dt.07.11.2005 (in the English Language);
- Order of the District Court of Prizren, Pndr. Nr. 1/2008, dt.03.01.2008 (in the Albanian Language);
- Kosovo Police Service, Prizren Police Station, 'Raporti i policit', dt.09.01.2008 (in the Albanian Language);
- Kosovo Police Service, 'Initial / Incident Report', case No. 2008-GI-4, dt.04.01.2008 (in the English Language);
- Kosovo Police Service, 'Formulari per ekzaminim i laboratorit te kriminalistikes se SHPK-se', case No. 2007-GA-3880 (in the Albanian Language);
- Passport copy of FAK and 2 pgs. of the text in the Albanian Language;
- Judgment of the District Court of Prizren, P nr. 63/2008, dt.30.04.2008 (in the Albanian Language);
- Kosovo Police Service, 'Initial / Incident Report', case No. 2005-XP5-12, dt.09.06.2005 (in the English Language);

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<sup>270</sup> The list of the evidence submitted by the Defence does not contain the purported parts of AZ's diary. In particular, Defence Exhibit **D (FL) 1, 2, 2a**, purported to be parts of AZ's Diary, contained in the Defence exhibits binder I, and Defence Exhibit **D (FL) 5c** purported to be AZ's diary, contained in the Defence exhibits binder I. The said evidence has been excluded from the list, in view of the Trial Panel's Ruling, dated 21.03.2012, declaring AZ's evidence inadmissible.

- UNMIK 'Initial / Incident Report', report No. 2001-JA-4083, dt.16.11.2001 (in the English Language);
  - Kosovo Police Service, 'Initial / Incident Report', case No. 2005-XP5-22, dt.11.09.2005 (in the English Language).
- 2) Defence Exhibit **D (RM) 1**, Letter to EULEX, dt.14.11.2011, submitted by Defence Counsel Naim Qelaj, contained in the Defence exhibits binder I.
  - 3) Defence Exhibit **D (RM) 2**, Letter of Complaint to the SPRK, dt.29.11.2011, submitted by Defence Counsel Naim Qelaj, contained in the Defence exhibits binder I.
  - 4) Defence Exhibit **D (FL) 3**, Graphic expertise of manuscripts, dt.02.02.2012, HYK and CV of HYK, contained in the Defence exhibits binder I.
  - 5) Defence Exhibit **D (FL) 4a**, EULEX OCIU Seized property schedule, dt.28.04.2010 (in XX), contained in the Defence Exhibits Binder I.
  - 6) Defence Exhibit **D (FL) 4b**, EULEX OCIU Seized property schedule, dt.28.04.2010, 29.04.2010 (in ZZ apartment; in LL; in XX), contained in the Defence exhibits binder I.
  - 7) Defence Exhibit **D (FL) 4c**, Statement, dt.05.03.2012, DL, contained in the Defence exhibits binder I.
  - 8) Defence Exhibit **D (FL) 4d**, Pre-trial judge's search order, dt.28.04.2010, PPS 425/09, GjPP 91/10, contained in the Defence Exhibits Binder I.
  - 9) Defence Exhibit **D (FL) 5a**, Koha Ditore article, dt.14.10.2011, ARA ('Exclusive: AZ has left as testament the publication of the letter where he tells about the treatment by the Mission which actually should have protected him'), contained in the Defence exhibits binder I.
  - 10) Defence Exhibit **D (FL) 5b**, Request to Koha Ditore, dt.08.02.2012, ENS, contained in the Defence exhibits binder I.
  - 11) Defence Exhibit **D (FL) 5d**, Kosova Sot interview with GZ ('GZ: EULEX led my husband to death'), dt.31.10.2011, contained in the Defence exhibits binder I.
  - 12) Defence Exhibit **D (FL) 5e**, Request to Kosova Sot, dt.08.11.2011, ENS; Kosova Sot response, dt.15.11.2011, n/n, contained in the Defence exhibits binder I.

- 13) Defence Exhibit **D (FL) 5f**, Transcript ('Documentary shown in Klan Kosova TV on witness X and his death'), contained in the Defence exhibits binder I.
- 14) Defence Exhibit **D (FL) 5g**, Request to Klan Kosova, dt.08.02.2012, ENS; Klan Kosovo response, dt.08.02.2012, BHA, contained in the Defence exhibits binder I.
- 15) Defence Exhibit **D (FL) 6**, Notification to AZ, dt.24.08.2009, Kosovo Ministry of Internal Affairs, Investigation Department, VHO, contained in the Defence exhibits binder I.
- 16) Defence Exhibit **D (FL) 7**, Letter of K.Khan QC to Chief EULEX Prosecutor, dt.31.01.12 (with two annexes: Letter of K.Khan QC to EULEX Special Prosecutor Maurizio Salustro, dt.10.01.12; Penal representation of GZ, dt.29.11.11), Letter of K.Khan QC to EULEX Special Prosecutor Maurizio Salustro, dt.10.01.12, contained in the Defence Exhibits Binder I.

## **ANNEX III**

### **EVIDENCE EXCLUDED WITH THE JUDGMENT**

**(SPRK binder G)**

**(FL's residence)**

- 1) Police report, dt.07.06.2010, SPRK binder G (p.**G1**).
- 2) List of items seized by OCIU on 29.04.2010 in the residence of FL, SPRK binder G (pp.**G2-G4**).
- 3) Photocopy of Police file, containing 169 documents, SPRK binder G (pp.**G5-G244**).

**(SPRK binder M)**

**(NK's property)**

- 1) Police reports, dt.18.07.2011, 14.07.2011, SPRK binder M (pp.**M138-M142**).
- 2) Police report on expertise examination of items seized in the house of NK, dt.20.06.2011, SPRK binder M (pp.**M145-M180**).
- 3) PED-OCIU IT Forensics Unit, evidence examination report, dt.06.05.2011, SPRK binder M (pp.**M207-M211**) and the attached DVD, marked **0096-09-EWC2**. The contents of the report and DVD are excluded only as far as it originates from the search of NK's property.
- 4) Police report on expertise examination of items seized in the residence of NK, dt.06.06.2011, and Police reports, dt.16.03.2011, SPRK binder M (pp.**M215-M226**). The contents of the PED -OCIU IT Forensics Unit, evidence examination report, dt.06.05.2011, is excluded as far as related to the search of NK's property (pp.**M227-M235**).