COURT OF APPEALS

Case number: **PAKR Nr 455/15**

Date: **15 September 2016**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Roman Raab as Presiding and Reporting Judge, EULEX Judge Jorge Martins Ribeiro and Kosovo Court of Appeals Judge Hava Haliti as Panel Members, with the participation of Adam Viplak, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

J.D., [father's name, born on];

S.G., [father's name, born on];

I.H., [father's name, born on];

S.J., [father's name, born on];

S.L., [father's name, born on];

S.S., [father's name, born on];

A.Z., [father's name, born on];

charged under the Indictment no PPS 88/11 dated 6 November 2013, filed by the EULEX Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) on 8 November 2013;

adjudicated in first instance by the *Basic Court of Mitrovica with the Judgment P. Nr. 938/13*, dated 27 May 2015;

deciding upon the following appeals, filed against the Judgment of the Basic Court of Mitrovica P. Nr. 938/13 dated 27 May 2015:

- **appeal of the Special Prosecutor, filed on 7 August 2015;**
- **appeal of defence counsel A.K. on behalf of the defendant S.L., filed on 6 August 2015 and**
- **appeal of defence counsel G.G-S. on behalf of the defendant S.S., filed on 10 August 2015,**

having reviewed the motion of the Appellate State Prosecutor filed on 12 November 2015;

after having held sessions on 11, 12, 13 May 2016;

having deliberated and voted on 21,26 July and 15 September 2016;

pursuant to Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (hereinafter "CPC");

renders the following

JUDGMENT

I. The appeal of defence counsel A.K. on behalf of defendant S.L., filed on 6 August 2015, is granted.

Pursuant to Article 398, paragraph 1 subparagraph 1.4, of the CPC the impugned judgment is modified in Count I as follows:

The defendant S.L. pursuant to Article 364, paragraph 1 subparagraph 1.3, of the CPC is acquitted of the following act:

"Acting in his capacity of a member of the KLA killed an unknown Albanian civilian prisoner by shooting him 3 (three) times in the head with a TT pistol, qualified as war crime against the civilian population according to the indictment",

as it has not been proven that the accused has committed the act which he has been charged with.

II. Based on the appeal of the defence counsel G.G-S. on behalf of defendant S.S., filed on 10 August 2015, pursuant to Article 394, paragraph 1 subparagraph 1.4, CPC in conjunction with Article 363, paragraph 1 subparagraph 1.2, and Article 81, paragraph 1 of the CCRK, *ex vi* Article 3(2) CCRK, the charge against the defendant S.S. as described in Count II of the impugned judgment is rejected as it is a material, factual part of a criminal offence in continuation for which the defendant was previously convicted and, accordingly, the appeal is partially granted.

The remainder of the appeal of the defence counsel G.G-S. is rejected as unfounded

III. The appeal of the SPRK Prosecutor, filed on 7 August 2015, is partially granted pursuant to Article 398, paragraph 1 subparagraph 1.4, of the CPC and accordingly the impugned judgment is modified in Count IV as follows:

Defendants J.D. and S.S. are found guilty of the following criminal acts:

"During the internal armed conflict in Kosovo on one occasion, between the beginning of August and the end of September 1998, acting as members of KLA and in co-perpetration with each other, as per Article 31 CCRK, intentionally violated the bodily integrity and the health of an unidentified Albanian male from the Shipol area in Mitrovica, detained in the detention facility in Likoc/Likovac by repeatedly beating him up, hereby classified as a war crime under Article 152, paragraph 1 and paragraph 2 subparagraphs 2.1 and 2.2, of the CCRK and in violation of Article 4 paragraph 2 (a) of the Additional Protocol II to the Geneva Conventions - in conjunction with Article 33, paragraph 2, of the Constitution of the Republic of Kosovo".

Pursuant to Article 3(2) CCRK and Article 31 and Article 152 paragraph 1 and Article 45 paragraph 1 of the CCRK they are hereby sentenced:

S.S. to 5 (five) years and 3 (three) months of imprisonment.

J.D. to 5 (five) years of imprisonment.

IV. Based on the appeal of the SPRK Prosecutor, concerning only the defendants S.S., S.L. and S.J., pursuant to Article 398, paragraph 1 subparagraph 1.4, of the CPC the impugned judgment is modified in Count IX as follows:

Defendants S.S. and S.L. are found guilty while defendant S.J. is acquitted of the following criminal act:

"In their capacity as KLA members and persons exercising control over the Likoc/Likovac detention centre, in co-perpetration with each other, as per Article 31 CCRK, they violated the bodily integrity and the health of an unidentified number of Albanian civilians detained in such detention centre by keeping them in inappropriate premises with lack of sanitation, inadequate nutrition, suffering frequent beatings, at least during August and September 1998, hereby classified as a war crime under Article 152, paragraph 1 and paragraph 2 subparagraphs 2.1 and 2.2, of the CCRK and, in case of defendant S.L., in conjunction with Article 161, paragraph 1 subparagraph 1.1, of the CCRK, both read together with Article 4, paragraph 2 (a), of the Additional Protocol II to the Geneva Conventions - in conjunction with Article 33, paragraph 2, of the Constitution of the Republic of Kosovo".

Pursuant to Article 31 and Article 152, paragraph 1, and Article 45, paragraph 1, of the CCRK, Article 3(2) CCRK, they are hereby sentenced as follows:

S.S. to 8 (eight) years of imprisonment.

S.L. to 7 (seven) years of imprisonment.

The remainder of the appeal of the SPRK Prosecutor is rejected as unfounded.

V. Following the stated above and pursuant to Article 80, paragraph 1 and paragraph 2 subparagraph 2.2, and Article 82, paragraph 1, of the CCRK, taking into consideration the punishment previously imposed in the judgment of the Court of Appeals case number PAKR 456/2015, dated 14 September 2016, the defendant S.S. is imposed the aggregate punishment of 10 (ten) years of imprisonment.

Following the stated above and pursuant to Article 80, paragraph 1 and paragraph 2 subparagraph 2.2, and Article 82, paragraph 1, of the CCRK, taking into consideration the punishment previously imposed in the judgment of the Court of Appeals case number PAKR 456/2015, dated 14 September 2016 the defendant J.D. is imposed the aggregate punishment of 7 (seven) years of imprisonment.

VI. The wording of the verdict in Counts III and V of the impugned judgment are modified as follows:

The words "it is established" and "however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 as it was classified in the indictment and for this reason it did not constitute a criminal offence at the time of perpetration" are withdrawn from the text.

Article 364, paragraph 1 subparagraph 1.1, is replaced with Article 364, paragraph 1 subparagraph 1.3, CCRK.

VII. The verdict of the impugned judgment in Item XVII concerning the calculation of detention period is amended as follows:

Pursuant to Article 83, paragraph 1, of the CCRK the period of deprivation of liberty of S.S. from 23 May 2013 until 31 May 2013 while in house detention, from 31 May 2013 until 19 December 2014 while in detention on remand and from 27 May 2015 until the delivery of the written Court of Appeals judgment, while in detention on remand, shall be credited for the punishment of imprisonment imposed on him.

Pursuant to Article 83 paragraph 1 of the CCRK the period of deprivation of liberty of J.D. from 24 May 2013 until 31 May 2013, while in house detention, from 31 May 2013 until 19 December 2014 while in detention on remand and from 27 May 2015, until the delivery of the written Court of Appeals judgment, while in detention on remand shall be credited for the punishment of imprisonment imposed on him.

Pursuant to Article 83 paragraph 1 of the CCRK the period of deprivation of liberty of S.L. from 23 May 2013 until 31 May 2013, while in house detention, from 31 May 2013 until 19 December 2014 while in detention on remand and from 27 May 2015, until the delivery of the written Court of Appeals judgment, while in detention on remand shall be credited for the punishment of imprisonment imposed on him.

VIII. The remaining parts of the judgment are affirmed.

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

A. The Indictment

On 08 November 2013 the EULEX Prosecutor of the SPRK filed the Indictment no PPS 88/11, dated 6 November 2013; two counts concerning defendants A.D., B.D., D.D., S.D., F.D., J.D.,

N.D., Z.D., S.S. and I.T. were severed and were subject of a separate judgment. In the remaining part of the indictment, concerning the defendants S.L., S.G., S.J., J.D., S.S., I.H. and A.Z. were charged with acts committed during the internal armed conflict in Kosovo in 1998, acting in their capacity of members of the KLA.

The charges consisted of violation of bodily integrity and health of civilian prisoners that were allegedly kept in KLA's detention centre in Likoc. The defendants were charged with the following acts:

S.S. was accused of:

"violation of the bodily integrity and the health of Witness A, by beating him on an undetermined number of occasions, not fewer than three, with punches and slaps inside the cell where he was detained, on several undetermined dates in August 1998" (count 13(2) of the indictment and count II of the judgment of the basic court);

"violation of the bodily integrity and the health of an unidentified person from Gllanasella village, by beating him up while he was cleaning the floor of the prison, in co-perpetration with another so far unidentified KLA member, on an undetermined date in September 1998" (count 13 (5)of the indictment and count V of the judgment of the basic court);

S.J. was accused that:

"he repeatedly violated the bodily integrity and the health of Witness E, over a period of approximately one week, including by flogging him with car chains, on undetermined dates in early 1999" (count 11 (6) of the indictment and count XII of the judgment of the basic court);

"in co-perpetration with other so far unidentified soldiers violated the bodily integrity and the health of two so far unidentified civilians, a father and a daughter, detained in an annex building of the Likoc/Likovac detention centre, who were severely beaten up, on undetermined dates in early 1999" (count 11 (7) of the indictment and count XIII of the judgment of the basic court);

S.J. and S.S. were accused that "in co-perpetration with each other they violated the bodily integrity and the health of Witness I, by repeatedly beating him, on an undetermined date in late spring/early summer of 1998" (counts 11 (8), and 13 (7) of the indictment and count XIV of the judgment of the basic court);

J.D. and S.S. were accused that "in co-perpetration with each other they violated the bodily integrity and the health of an unidentified Albanian male from the Shipol area in Mitrovica, on an undetermined date between beginning of August and end of September 1998" (counts 6 (3), and 13 (6) of the indictment and count IV of the judgment of the basic court);

S.G. and S.J. were accused that "in co-perpetration with each other, they violated the bodily integrity and the health of Witness C, by repeatedly striking him with a baseball bat while S.J.

kicked and punched him, on an undetermined date around the beginning of June 1998" (counts 9 (2), and 11 (2) of the indictment and count VII of the judgment of the basic court);

S.J., S.L. and A.Z. were accused that "in their capacity of members of the KLA, "in co-perpetration with each other and with Xh.Ll. (now deceased), and three so far unidentified soldiers, they violated the bodily integrity and the health of Witness F, by repeatedly kicking him, on an undetermined date in early June 1998. More precisely, S.L. and A.Z. participated in the crime by keeping the victim at the direct disposal of the other perpetrators, who beat Witness F and by reinforcing their criminal intent with his presence" (counts 11 (5), 12 (2), and 15 (2) of the indictment and count XI of the judgment of the basic court);

S.G. was accused of "violation of the bodily integrity and the health of Witness B, by repeatedly beating him with a baton around 22 August 1998" (count 9 (3) of the indictment and count III of the judgment of the basic court);

A.Z. was accused that "in co-perpetration with two so far unidentified soldiers he violated the bodily integrity and the health of Witness F, who was beaten with sticks; more precisely, the defendant participated in the crime by keeping the victim at the direct disposal of the two so far unidentified soldiers, who beat Witness F and by reinforcing their criminal intent with his presence on an undetermined date in June 1998" (count 15 (3) of the indictment and count XV of the judgment of the basic court);

"he violated the bodily integrity and the health of Witness F and an unknown prisoner from Prizren by repeatedly beating them, on an undetermined date in June/July 1998" (count 15 (4) of the indictment and count XVI of the judgment of the basic court).

The indictment contained two charges related to violation of bodily integrity of civilians that allegedly took place in other location rather than the detention centre in Likoc/Likovac.

I.H. was accused that "he violated the bodily integrity and the health of Witness F, a civilian, by firing a pistol round in his leg and then hitting him on his forehead with the pistol butt, in an undetermined location near Vaganice village (Mitrovicë/Mitrovica municipality) on an undetermined date in late May/early June 1998" (count 10 (1) of the indictment and count VIII of the judgment of the basic court);

S.J. was accused that "in co-perpetration with an undetermined number of other persons, he repeatedly violated the bodily integrity and the health of I.B., a Serbian Police officer held captive at the hands of the KLA; more precisely, the defendant participated in the crime by taking on several occasions I.B. to the market square in Likoc/Likovac, by announcing publicly that whoever wanted to beat I.B. could do so, and by keeping the victim at the disposal of an undetermined number of persons who slapped and hit him, in Likoc/Likovac (Skenderaj/Srbica municipality), on several undetermined dates in early June 1998" (count 11 (3) of the indictment and count X of the judgment of the basic court).

Besides charges that consisted of violation of bodily integrity and health of civilians, S.J., S.L., S.S. and A.Z. and were also accused that as persons exercising control over the Likoc/Likovac detention centre (conditions, regulations, and the persons to be detained and/or released), "in co-perpetration with each other, violated the bodily integrity and the health (e.g. prisoners chained, premises inappropriate, excessive heat, lack of sanitation, inadequate nutrition, frequent beatings) of an from spring 1998 until the first months of 1999" (counts 11 (1), 12 (1), 13 (1) and 15 (1) of the indictment and count IX of the judgment of the basic court).

S.G. and S.J. were accused that "in co-perpetration with each other and other so far unidentified KLA soldiers, they killed I.B., a Serbian Police officer by beheading him with a chain saw, in Likoc/Likovac (Skenderaj/Srbica municipality), on an undetermined date around mid-June 1998" (counts 9 (1), and 11 (4) of the indictment and count VI of the judgment of the basic court);

S.L. was accused of "killing an unknown Albanian civilian prisoner, by shooting him three times in the head with a TT pistol, in an undetermined location between the villages of Galica and Dubovc, on an undetermined date in September 1998" (count 12 (3) of the indictment and count I of the judgment of the basic court).

All these acts were classified in the indictment as War crimes against the civilian population provided for and punished by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of Common Article 3 to the four Geneva Conventions of 1949 and of Article 4 of Additional Protocol II to these Conventions, whereas all the above quoted rules of international law were indicated by the prosecutor as effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present indictment. The legal classification of the acts that were allegedly committed in co-perpetration consisted also of Article 22 of CCSFRY.

On 08 November 2013 the EULEX Prosecutor of the Special Prosecutor of the Republic of Kosovo filed the Indictment SPRK nr. PPS 88/11, dated 6 November 2013.

The main trial commenced on 22 May 2014 and was concluded on 25 May 2015. It was heard on 46 hearing days. The enacting clause of the Judgment was announced on 27 May 2015. The written Judgment was drawn up on 27 May 2015.

B. The Judgment

The case was adjudicated in first instance by the *Basic Court of Mitrovica with the Judgment P. Nr. 938/13*, dated 27 May 2015 as follows:

I. **Defendant S.L.** was found guilty of the following criminal act: that acting in a brutal manner he intentionally took the life of an unidentified Albanian speaking male around forty years old in such a way that he put a TT-type pistol to the male's head while the male had his hands tied and was guarded by two unidentified KLA soldiers, and then fired three shots in the male's head and thereby caused his death, in an undetermined location between the villages of Galica and Dubovc, on an undetermined date in September 1998 and this action was hereby classified as a murder qualified under Article 30 Paragraph 2 Subparagraph 1 of the Criminal Law of the Socialist Autonomous Province of Kosovo of 28 June 1977 (CLSAPK), and for this crime, pursuant to Article 30 Paragraph 2 Subparagraph 1 of the CLSAPK and Article 38 Paragraph 1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY). He was sentenced to 12 (twelve) years of imprisonment;

II. **Defendant S.S.** was found guilty of the following criminal act: that, during the internal armed conflict in Kosovo, on several occasions, in August and September 1998, acting as a member of the Kosovo Liberation Army (KLA), he seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949, because he intentionally perpetrated violence, cruel treatment, and torture against Witness A, a Kosovo Albanian civilian detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality), who took no active part in hostilities, by beating him with punches and slaps, inside the detention cell, and this action, pursuant to Article 33 Paragraph 1 of the Constitution of the Republic of Kosovo was classified as a war crime in continuation under Article 152 Paragraph 1, Paragraph 2 Subparagraph 2.1, and Article 81 Paragraph 1 of the Criminal Code of the Republic of Kosovo that entered into force on 1 January 2013 (CCRK), in violation of Article 4 Paragraph 2 (a) of the Additional Protocol II to the said Conventions, and for this crime, pursuant to Article 152 Paragraph 1 and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and by Article 38 Paragraph 1 of the CCSFRY he was sentenced to 6 (six) years of imprisonment;

III. **Defendant S.G.** was acquitted of the criminal offence of war crime against the civilian population provided for and punished by Articles 22 and 142 of the CCSFRY. Although it was established that during the internal armed conflict in Kosovo, on one occasion around 22 August 1998, S.G. acting as a member of the KLA intentionally violated the bodily integrity and the health of Witness B, an Albanian civilian detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality), by beating him repeatedly with a baton; however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949, as it had been classified in the indictment, and for this reason it did not constitute a criminal offence at the time of perpetration.

IV. **Defendant J.D. and defendant S.S.** were acquitted of the criminal offence of war crime against the civilian population provided for and punished by Articles 22 and 142 of the CCSFRY. It was established that during the internal armed conflict in Kosovo, on one occasion between beginning of August and end of September 1998 J.D. and S.S. acting as members of the

KLA and in co-perpetration with each other, intentionally violated the bodily integrity and the health of an unidentified Albanian male from the Shipol area in Mitrovica, detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality), by repeatedly beating him up, in Likoc/Likovac (Skenderaj/Srbica municipality); however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 as it was classified in the indictment and for this reason it did not constitute a criminal offence at the time of perpetration.

V. **Defendant S.S.** was acquitted of the criminal offence of war crime against the civilian population provided for and punished by Articles 22 and 142 of the CCSFRY. It was established that during the internal conflict in Kosovo, on one occasion in September 1998 S.S. acting as a member of the KLA, in co-perpetration with another so far unidentified KLA member, he intentionally violated the bodily integrity and the health of an unidentified Kosovo Albanian male from Gllanasella village detained in the KLA's detention facility by beating him up while he was cleaning the floor of the prison, in Likoc/Likovac (Skenderaj/Srbica municipality); however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 as it was classified in the indictment and for this reason it did not constitute a criminal offence at the time of perpetration.

VI. **Defendant S.G. and defendant S.J.** were acquitted of the criminal offence of war crime against the civilian population provided for and punished by Articles 22 and 142 of the CCSFRY;

VII. **Defendant S.G. and defendant S.J.** were acquitted of the criminal offence of war crime against the civilian population, provided for and punished by Articles 22 and 142 of CCSFRY;

VIII. **Defendant I.H.** was acquitted of the criminal offence of war crime against the civilian population under Article 142 of the CCSFRY;

IX. **Defendant S.J., defendant S.L., defendant A.Z. and defendant S.S.** were acquitted of the criminal offence of war crime against the civilian population under Article 142 of the CCSFRY. It was established that in their capacity as KLA members and persons exercising control over the Likoc/Likovac detention centre (conditions, regulations, and the persons to be detained and/or released), in co-perpetration with each other, they violated the bodily integrity and the health (e.g. prisoners chained, premises inappropriate, excessive heat, lack of sanitation, inadequate nutrition, frequent beatings) of an undefined number of Albanian civilians, detained in such detention centre, in Likoc/Likovac (Skenderaj/Srbica municipality), from spring 1998 until the first months of 1999, due to it was not proven that they committed the said action.

X. **Defendant S.J.** acquitted of the criminal offence of war crime against the civilian population, provided for and punished by Articles 22 and 142 of CCSFRY;

XI. **Defendant S.J., defendant S.L., defendant A.Z.** acquitted of the criminal offence of war crime against the civilian population under Articles 22 and 142 of the CCSFRY;

XII. **Defendant S.J.** acquitted of the criminal offence of war crime against the civilian population under Article 142 of the CCSFRY;

XIII. **Defendant S.J.** acquitted of the criminal offence of war crime against the civilian population under Article 142 of the CCSFRY;

XIV. **Defendant S.J. and defendant S.S.** acquitted of the criminal offence of war crime against the civilian population under Article 142 of the CCSFRY;

XV. **Defendant A.Z.** acquitted of the criminal offence of war crime against the civilian population under Articles 22 and 142 of the CCSFRY;

XVI. **Defendant A.Z.** acquitted of the criminal offence of war crime against the civilian population under Articles 22 and 142 of the CCSFRY;

C. The Appeals

On 7 August 2015 the Special Prosecutor appealed against Judgment.

On 6 August 2015 defence counsel A.K. on behalf of the defendant S.L. filed an appeal. On 10 August 2015 defence counsel G.G-S. on behalf of the defendant S.S. appealed against the judgment.

On 19 August 2015, defence counsel M.S. on behalf of J.D., on 21 August 2015 defence counsel H.M. on behalf of S.G. and defence counsel G.G-S. on behalf of S.S. respectively filed responses to the appeal of the Special Prosecutor.

On 27 August 2015 the EULEX Special Prosecutor filed the response to the appeal of the defendant S.L. Furthermore, on 31 August 2015 he also filed the response against the appeal of the defendant S.S.

The case was transferred to the Court of Appeals for a decision on the appeals on 25 September 2015.

On 12 November 2015 the Appellate Prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 11, 12 and 13 May 2016.

The Appellate Panel deliberated and voted on 21, 26 July and 15 September 2016.

II. SUBMISSIONS OF THE PARTIES

A. The appeal of the SPRK Prosecutor

The **Special Prosecutor** on 7 August 2015 appealed against the Judgment.

The appeal of the SPRK **with regard the decision on count I** over S.L.: The prosecution opposes the requalification by the first instance trial panel of the criminal act attributed to S.L. from war crime against the civilian population, as charged in the Indictment, to murder, because the underlying premises and reasoning for this legal operation are, in this particular case, unjustified in fact and in law.

The prosecutor is of the opinion that the trial panel could not make a distinction between a war crime and a purely domestic offence in count I and could not recognize the nexus between the imputed acts and the armed conflict.

The factual situation, as it was established by the court, contains an abundance of evidence which confirms the existence of such a nexus also in relation to the murder allegedly perpetrated by S.L.

The appellant submits that the legal re-qualification made by the first instance gives rise to a potential miscarriage of justice.

The appellant states that the re-qualification of the offence charged against the defendant S.L. was based on erroneous and incomplete determination of the factual situation.

He requests the Court of Appeals to modify the impugned judgment of the basic court by properly determining and assessing the material facts and the legal qualification of the offence. Furthermore he requests to modify the impugned judgment of the basic court by adequately increasing the sentence against the defendant S.L.

The appeal of the SPRK **with regard the decision on count II** over S.S.: The SPRK prosecutor submits that the sentence against defendant S.S. is disproportionate to the seriousness of the offence and requests to modify the impugned judgment of the basic court by adequately increasing the sentence against the defendant.

The appeal of the SPRK **with regard counts III, IV and V** of the impugned judgment and the acquittal of defendants S.G., J.D. and S.S.: the Prosecutor is of the opinion that the criminal acts of the above mentioned defendants – beyond any doubt – must be qualified as serious violation in the meaning of the legal provision of paragraph 2 of the Article 152 CCRK.

The SPRK prosecutor requests the Court of Appeals to rescind the acquittal of the defendants S.G., J.D. and S.S. for the criminal offences referred to in this section and to modify the

impugned judgment of the basic court by finding the defendants guilty and imposing an adequate imprisonment sentence on them.

The appeal of the SPRK **with regard count IX** of the impugned judgment and the acquittal of defendants S.S., S.L. and S.J.: the prosecutor is of the opinion that the criminal acts of the above mentioned defendants – beyond any doubt – must be qualified as serious violations in the meaning of the legal provision of paragraph 2 of the Article 152 CCRK.

SPRK Prosecutor submits that there is a plenitude of evidence that the defendants S.S., S.L. and S.J. knew, or at least had the reason and means to become aware of, the fact that civilian detainees were maltreated while being detained in inhumane conditions in the Likoc/Likovac KLA facility, at the hands of soldiers, under their control and command.

He emphasizes that the responsibility of the superiors for the actions of their subordinates, with the limitations provided for by the ICTY statute as well as by the substantial criminal law in general, is based on a veritable legal presumption of liability.

The SPRK prosecutor requests the Court of Appeals to rescind the acquittal of the defendants S.L., S.J. and S.S. of the criminal offences referred to in this count and to modify the impugned judgment of the basic court by finding the defendants guilty and imposing on them an adequate imprisonment sentence.

The appeal of the SPRK **regarding the rejection of two motions** to supplement evidentiary proceedings:

The first instance trial panel rejected two written motions of the Prosecution seeking supplementation of the evidentiary materials, namely the reading in the court of the pre-trial statements of unavailable witnesses M and G; furthermore, requesting new evidence to be presented.

The SPRK prosecutor requests the Court of Appeals to hold a hearing and take the new evidence as proposed by the Prosecution with the two motions in question rejected by the first instance court, to properly determine the material facts and, as result, to consider the decision of guilt against the defendants based on the new merits of the case.

B. <u>The appeal of Defence counsel A.K. on behalf of defendant S.L.</u>

Defence counsel A.K. on 6 August 2015 filed an appeal with the Basic Court on behalf of the **defendant S.L.** He notes that the Basic Court violated the procedural provisions such as the principle of *in dubio pro reo* and assessed erroneously the evidence. More particularly, he states that the testimony of Witness D should not be considered reliable. Testimony of Witness D is not supported by any other evidence. He points that the case law knows no case where a person is

convicted of murder on the basis of the statement of only one witness, especially when the person who allegedly has been killed is not identified, it is not known whether he has existed and no corpse (*corpus delicti*) was found. The evidence of the protected witness, who claims that the murder had taken place, has not been confirmed by any other witness; furthermore, the testimony of the protected witness cannot be confirmed by any other material evidence. He emphasizes that there is other evidence that directly opposes the testimony of Witness D, namely the statements of witnesses J.L., K.H. and N.F.

Witness D's testimony contains contradictions, as elaborated in the appeal.

The defence counsel A.K. finds that the Court of Appeals shall dismiss the case and overrule the decision of the Basic Court, because in the rendering of the judgment against S.L. the First Instance Court has awarded its trust only to the testimony of the Witness D, but not to the testimony of three other witnesses, two of whom have been court summoned witnesses. He notes that the trial panel has inferred that alleged murder of S.L. occurred after the passing away of A.L. and the exact dates of the alleged crime by S.L. should be approximations which have taken place several years after the events. According to his point of view in this case the first instance trial panel failed to clarify the date in which it is alleged that this crime has taken place.

The defence counsel contends that the Basic Court failed to evaluate properly the evidence and to prove that the crime having been actually committed or not.

As a conclusion, the defence counsel A.K. requests the Court of Appeals to announce a judgment of acquittal of the defendant S.L. or to rescind the appealed judgment and to send the case back to the basic court for retrial and re-adjudication.

In a later Supplement to the Appeal the Defence counsel raised the issue of the legal qualification change applied by the First Instance Court in a way that did not give the defendant an opportunity to prepare relevant defence.

C. <u>The Appeal of defence counsel G.G-S. on behalf of defendant S.S.:</u>

Defence counsel G.G-S. on 10 August 2015 filed an appeal with the Basic Court on behalf of the **defendant S.S.**. Defendant S.S. was convicted of one count of intentionally perpetrated violence, cruel treatment and torture on Witness A, a Kosovo Albanian civilian, by beating him with punches and slaps inside a detention cell.

The Appellant states that the first instance trial panel engaged in numerous errors both substantive and procedural all of which denied defendant S.S. a fair trial and resulted in an unlawful, unreliable verdict.

Namely he mentions refusal to provide the parties with a verbatim record of the proceedings; presumptions of the panel, especially presumed civilian status of certain victims; improper assessment of contradictions in witness statements given simultaneously in 'Drenica I' and 'Drenica II' cases, in connection with the composition of the Trial Panels in both cases; inconsistency in written judgment and oral reasoning by Presiding Judge on the fact of existence of a detention centre in Likoc; improper application of aggravating and fail to apply mitigating circumstances.

The defence in his appeal explained his point of view in relation with the assessment of witness and expert witness statements.

He is of the opinion the evidence was insufficient to identify defendant S.S. as a perpetrator of any of the charged crimes.

The Appellant challenges the credibility of the Witness A. He points out the Witness A's statement which is internally contradictory and contradicted by other statements namely Witnesses B and L, expert witness Dr. B., witnesses F.B. and B.G. Further he emphasizes that Witness A has suffered from a [diagnosis] and stresses his filing of the application for the KLA veteran status. He opines that the conflicting testimony of Witness A and B was insufficiently reliable to form the basis for any convictions. None of these testimonies was corroborated by other witness. He concludes the evidence obtained during the trial is insufficient to establish commission of a war crime, as the "random abuse", Witness A claimed he endured, was not closely related to the armed conflict in Kosovo.

The defence counsel challenges the double conviction of the defendant S.S. for the same act, both in Drenica I and Drenica II cases.

The appellant raises the issue of the burden of proof and the admissibility of the statements of Witness M and Witness G.

The appellant is of the opinion that the court used highly subjective standards for assessing the reliability of evidence. The first instance panel used inconsistent standards for assessing the reliability of the same kind of evidence. The defence counsel found to be extraordinary that the basic court panel has omitted from the reasoning critical material evidence. The trial panel has also made statements that are not supported by the record which is extremely misleading. In addition, the trial panel completely ignored the standard of *in dubio pro reo*.

The appellant notes that in case there are other reasonable inferences possible from the same evidence and which are inconsistent with guilt, those inferences must be drawn, and the accused must be acquitted. The appellant states that specifically in this case the trial panel essentially made the finding that Witness A was credible and then assessed the credibility or reliability of all the other witnesses in comparison to Witness A: no matter how credible, disinterested or reliable the testimony was, if it disagreed or contradicted A, it was rejected. All the witness testimonies

were rejected, exception made for Witness K and Witness D. The court rejected Dr. B., Dr. G., Dr. H. the psychiatrist and 90 percent of the testimony of Dr. B. Those were undisputed psychiatric testimonies, undisputed medical testimonies. The appellant states that it is not a standard of proof, that is subjective and arbitrary and against the law. The basic court trial panel found, in describing the injuries to Witness A, that he had bruises, two broken ribs, and a wound to his scrotum. In paragraph 119, it found that "none of the facts presented by Witness A, was denied by the expert opinion of Doctor B.".

The appellant is of the opinion that the testimony of Dr. B. directly contradicts Witness A. The appellant mentioned that in contrast to the testimony of Dr. B., Witness A stated he was beaten so badly that his ear was damaged and he lost his hearing, the same as to one eye. Beaten about the head and injured in his head. Feet beaten, broken left arm, six broken ribs, three on one side and three on the other side, and wounds to his genital so grievous, they were open, according to him, at the time of trial. That testimony was on 24 June 2014, on pages 18 and 29. Dr. B.'s examination revealed that Witness A at some point had two broken ribs that were well healed, a small scar near his left elbow, a small entirely healed scar to his scrotum. She testified that broken bones leave scars and you will know if a bone has been broken before.

Contrary to the opinion of the trial panel, the defence counsel states that Witness A's injuries were not proven as a result of the beatings as he attested because Dr. B. testified there was no way to know how those injuries happened. There could had been an active cause or a passive cause. There was no way to know how old the injuries were.

The appellant points out that the testimony of Witness A and Witness K was unreliable. The fact that the first instance trial panel found that the injuries might be consistent with the testimony of Witness A is in violation of the law: Witness A and Witness K, who is the wife of Witness A, testified these injuries and, despite Dr. B.'s testimony, the trial panel found that they did not make a deliberately false statement when they claimed all these injuries.

The appellant is of the opinion that witness M, the wife of Witness B, [had a diagnosis] at the time she gave her statement. Her statement was taken in the presence of Witness B, which is contrary to Law, Witness B kept trying to correct her statement, which render her statements unreliable.

The defence stresses that Witness G, at the time he gave his statement, was in a bad physical and mental condition which affected his ability to give a reliable statement and in this regards he cannot be a credible witness.

The defence counsel states that the statements of Witness G and witness M shall not be admitted in any court of law, they are not reliable.

In the amendment to his appeal the defence raised objections against the way of getting evidence during the Pre-trial phase by prosecutor Salustro and his deputy. The appellant is challenging the reliability of evidence obtained during the pre-trial stage.

As a conclusion, the defence counsel G.G-S. requests the conviction of defendant S. to be reversed and all charges dismissed.

D. Responses to the appeals

On 19 August 2015, **defence counsel M.S.** on behalf of **J.D.**, on 21 August 2015 **defence counsel H.M.** on behalf of **S.G.** and **defence counsel G.G-S.** on behalf of **S.S.**, respectively filed responses against the appeal of the Special Prosecutor. All contend that the Special Prosecutor fails to substantiate his claims concerning the alleged violations of criminal procedure, of the criminal law and an erroneous or incomplete determination of the factual situation.

In his response to the appeal of the SPRK´s Prosecutor, **defence counsel G.G-S.** on behalf of **defendant S.S.** requests to reject the appeal of the SPRK in its entirety.

In his response he submits that the first instance panel did not err when it found that the charges related to the unidentified man from Gllanasella and the unidentified man from Shipol were not war crimes. The pieces of evidence in this count were insufficient to prove the allegations against defendant S.S.

He repeats that the testimony of Witness A was not credible or reliable and was affirmatively contradicted by other reliable evidence. He also states that there was no proof the KLA HQ in Likovc was a detention centre and that there was no proof that defendant S. could be held liable pursuant the “command responsibility” theory.

The defence concurs with the basic court that the motions brought by the Prosecution during the trial were properly denied.

In his response to the appeal of the SPRK´s Prosecutor, **defence counsel H.M.** on behalf of **defendant S.G.** requests to reject the appeal of the SPRK Prosecutor, as ungrounded, and to confirm in entirety the judgment of the basic court regarding defendant S.G.

In his response the appellant is of the opinion that SPRK should have recognised the conflict between the testimony of Witness B and the health condition of the defendant at the time of the alleged criminal offence, namely that the defendant could not even walk at the mentioned period of time - according to the opinion of the expert witnesses.

He states that none of the evidence given by Witness B, at the main trial, clearly proved that defendant S.G. committed the criminal offence which he was charged with.

In his response to the appeal of the SPRK´s Prosecutor, **defence counsel M.S.** on behalf of **defendant J.D.** requests to reject the appeal as such, whereas the first instance court judgment should be confirmed.

He states that the appeal against defendant J.D. is ungrounded entirely. He states that the basic court has provided enough and persuasive reasoning concerning the perpetration of the criminal acts specified in the indictment, but not demonstrating characteristics of a serious violation of Article 3 common to the Geneva conventions and thus did not consubstantiate criminal offenses at the time of their commission.

In his response to the appeal of the SPRK´s Prosecutor, **defence counsel T.R.** on behalf of **defendant S.J.** requests to reject the appeal of the SPRK as unfounded and affirm the judgment of the basic court, the part of acquittal, with regard to defendant S.J., due to the inexistence of the grounds on which the appeal is filed against the judgment and also asserts there has been no violation of the law, pursuant to Article 394, paragraph 1, of the CPC.

The defence mentions that the appeal of the special prosecutor in relation to defendant S.J. did not meet the standard required by the provisions of Article 382, paragraph 1, subparagraph 1.2, of the CPC, because the appeal of the prosecutor does not mention defendant J. specifically in any context, does not refer to any single evidence that would prove the prosecutor's allegation that defendant J. committed the criminal offenses which he had been charged with, and therefore the appeal did not give grounds whereupon to challenge the judgment under Article 383 of the CPC.

In his response to the appeal of defendant S.S. the **SPRK Prosecutor** proposes that the Appeal of this defendant is rejected as ungrounded and partly inadmissible. He states the Basic Court carried out a complete and thorough analysis of all evidence presented at the trial, evaluated its credibility and reliability and drew a conclusion beyond reasonable doubt, which effectively supported the guilty verdict.

He emphasizes that all minor contradictions were overvalued by the defence to support its theory.

He is of the opinion that Witness A remained credible and his statement is incontrovertible.

In his response to the appeal of defendant S.L. the SPRK Prosecutor considers the assessment of the Basic Court as accurate and complete in relation to the credibility, reliability and conclusiveness of the evidence of witness D. He is of the opinion the defence was not able to put forth sufficient arguments that this evidence was incorrectly or incompletely determined.

The SPRK prosecutor requests the Court of Appeals to reject the appeal of the defendant S.L. as unfounded and to affirm the judgment of the basic court with the limitations resulting from the appeal of the Prosecutor.

E. Motion of the Appellate Prosecutor

The Appellate Prosecutor of Kosovo in his motion moves the Court of Appeals:

- to reject defendant S.L.'s appeal, in its entirety;

- to reject defendant S.S.'s appeal, in its entirety;

- to grant the appeal of the SPRK Prosecutor insofar as it is requested to hold a hearing to admit the documents relevant to Counts IX and XI of the indictment;

- to pronounce on the issue of the admission of the pre-trial statements as evidence;

- to conditionally grant the appeal of the SPRK Prosecutor insofar as it is requested to hold a hearing to admit the documents relating to the credibility of S.G.'s claim that he was to commit crimes in August-September 1998;

- to grant the remainder of the appeal of the SPRK Prosecutor.

The Appellate Prosecutor in his motion rebuts the argumentation of the Defence and upholds the SPRK Prosecutor's appeal. He fully concurs with the Trial Panel assessment of the Witnesses A, D and K as being credible.

In concern with Counts I and II of the impugned judgment he concurs with the factual findings of the Trial Panel; however, he challenges the legal qualification concerning Count I as a murder, instead of as a war crime, as per the Indictment.

The allegations of the Defence concerning the procedural issues are to be found ungrounded and irrelevant. In general he does not oppose the way of sentencing by the Trial Panel; however, he supports SPRK Prosecutor's call for a harsher sentence for the Defendants S.L. and S.S.

The Appelate Prosecutor challenges the acquittal of S.G. for beating Witness B, J.D. and S.S. for beating an unidentified man from Shipol and S.S. for beating an unidentified man from Gllanasella (Counts III, IV, V). He points out that the evidence obtained in the case at hand is sufficient for the conclusion that beatings occurred, were serious enough and were committed in connection with the armed conflict going on in Kosovo. Further, he presents legal grounds for convicting the defendants of those counts.

Finally, the Appelate prosecutor brings reasons supporting the conviction of S.S., S.L. and S.J. for their commander responsibility in running the detention centre in Likoc (count IX). In the context of Count IX he proposes the application of the Joint Criminal Enterprise mode of liability stating that all its elements were properly pleaded in the indictment.

He refers to the SPRK Prosecutor's request to reopen the procedure for presentation of the new evidence relevant for Counts 9 and 11 of the indictment. He brings his opinion that although SPRK appeal only seems to seek a legal remedy against the ruling rejecting the evidential proposals, the wording of the requested remedy leaves no doubt it is seeking remedy against the acquittals under the mentioned counts.

III. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel

Pursuant to Article 472(1) CPC the Panel has reviewed its competence. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of two EULEX judges and one Kosovo judge.

B. Admissibility of the appeals

The impugned Judgment was announced on 27 May 2015. All three appeals were filed within the 15-day deadline pursuant to Article 380 (1) CPC. The appeals were filed by the authorised persons and contain all other information pursuant to Article 376 *et seq* CPC. They are therefore admissible.

With regard to the appeals filed, some allegations were raised by the parties and several uncertainties arose. The Panel deems it proper to address them at this point.

The Panel refers in this context to a principle *tantum devolutum quantum appellatum*, which means that the appellate judge may decide only on those parts of the appealed decision which have been contested by either party. The *appealed part of the decision* must be determined by an act committed by a particular defendant, which means each count and each defendant must be explicitly mentioned in the appeal in order to open it for the appellate review of the appellate judge.

The SPRK Prosecutor has filed the appeal concerning counts I, II, III, IV, V and IX of the impugned judgment. No irregularities were observed with regards counts I – V. Charges of count IX were brought against the defendants S.S., S.L., S.J. and A.Z. in the indictment. In the heading of the appeal filed, only the names of S.S., S.L. and S.J. were mentioned. In the reasoning of the appeal the name of defendant S.J. was not mentioned any more, instead the name of defendant

J.D. was used in the text. It is to be pointed out that no charge in count IX was brought against J.D.

The Appellate Prosecutor explained at the appellate session, the entire count IX was appealed, not specific names or specific defendants. The name of the defendant J.D. was used by mistake instead of the correct name S.J.[1]

The Defence Counsel of S.J. presented the stance that the appeal does not concern his client, as no arguments regarding S.J. were brought in the Appeal. Consequently he did not file any response on behalf of Mr. J. In case the panel finds the appeal against his client filed, he requested the right to present his response in front of the Panel. This request was opposed by the Appellate Prosecutor as belated, stating only the written submissions are to be presented by the parties in the appellate proceedings.

Pursuant to Article 376 paragraph 1 of the CPC

As a general rule, objections or requests for legal remedy must contain:

1.1. the file number of the case;

1.2. the name of the defendant;

1.3. a description of the legal status of the case, including whether the objection or request was filed within the period of time allowed;

1.4. a description of the relevant facts contained in the record;

1.5. a description of the legal basis for the objection or request;

1.6. a description of the remedy being requested;

1.7. a description of the legal basis for the remedy;

1.8. if the objection or request is on behalf of the defendant, a statement that the defendant consents to the request.

Following the cited provision of the CPC, namely the subparagraph 1.2, the Panel opines that the appeal cannot be related to a count of the judgment without a clear list of all the defendants affected. The name of A.Z. was not mentioned in the appeal; hence this defendant cannot be affected.

The case of S.J. is different, as his name was correctly introduced in the heading of the appeal. Reading the reasons of the appeal it makes clear it was the decision concerning Mr. J. that was appealed. Moreover, J.D., whose name was used, was not charged with the act included into

[1] See the Record of the Appellate Session on 11 May 2016, page 8 of the English version.

count IX, thus the Appellate Prosecutor's explanation - the names were mistakenly commuted - suffices.

The Panel subsequently opines the defendant S.J. has grounds to request the right to present his stance. The Panel is fully aware of the provision of Article 390 paragraph 3 of the CPC that reads:

[…] The parties and the defence counsel […] may provide the necessary explanations of their positions as contained in the appeal or in the reply to the appeal, without repeating the contents of the report.

as well as of Article 378 paragraph 5 of the CPC, reading:

The reply to the request must be filed within five (5) days of a request which is being adjudicated by the court of appeals.

However bearing in mind the fundamental principles of the criminal proceedings, as constituted in Articles 5 (Right to Fair Trial) and 11 (Adequacy of Defence), such as Article 30, paragraph 3, and Article 31, paragraph 2, of the Constitution of the Republic of Kosovo, and considering that the uncertainty in the legal consequences of the Prosecution's appeal was caused due to an ambiguity in its reasoning, the Panel concludes that the right to fair trial requires the that the defence is given the opportunity to present its stance.

In reference to above cited Article 376, paragraph 1, of the CPC the Panel opines that no other count - besides these mentioned - was appealed by the Prosecution. The appeal with regards the ruling rejecting motions to supplement evidentiary proceedings, cannot replace the appeal challenging the decision on the merits of the judgment. The Appellate Prosecutor's stance that "the wording of the requested remedy leaves no doubt that the SPRK Prosecutor is seeking remedy against the acquittals" in the judgment is in contradiction to the provision of Article 376, paragraph 1, of the CPC as cited above. Because of this, the Appeal filed by the SPRK prosecutor cannot affect any other of the Counts of the impugned judgment except Counts I-V and IX, explicitly listed in the appeal.

Moreover, the Panel deems the Prosecution's submission is unclear: it refers to counts 9 and 11 of the indictment, which is beating of the man from Shipol and wounding of witness F, whereas from the argumentation of the appellant one can infer that the challenged decision is the one with regards the counts related to the acts concerning I.B.

C. Findings on the procedure

The Appellate Panel will first examine the procedural legal issues of the Judgment. Subsequenly, the Panel will turn to discuss the challenges raised in the appeals concerning the substantive legal issues of the Judgment.

1. Applicable Procedural Law

The indictment was filed with the Basic Court of Mitrovica on 8 November 2013. At this time the Criminal Procedure Code No. 04/L-123 (CPC) was in force, pursuant to its Article 540:

For any criminal proceedings initiated prior to the entry into force of the present Code, but without the indictment filed, the provisions of the present code shall be applied mutatis mutandis.

The investigation was initiated on 19 January 2012, before the CPC entered into force; the indictment was filed on 8 November 2013 when the CPC was in force, so the above cited provision is to be applied.

2. The Trial Panel Composition

The assignment of three EULEX judges to the panel was objected in reference to Law No. 03/L-053. The Trial Panel has explained the situation in a detailed way in points 15 and 16 of the impugned judgment. The Appellate Panel fully concurs with this reasoning and does not see the need of elaborating further.

3. Witnesses in remote location

The appellants object to the witnesses testifying in a remote location trough video link during the first instance procedure.

The Appellate Panel is of the opinion that the videoconference equipment with the two-way audio communication in real time worked properly and functioned properly during the procedure. All technical issues were solved promptly during the first instance procedure. The fact that the witness testifying took place in a remote location had no influence on the procedure. There were no complaints against the functionality of the system during the main trial. The Panel finds the objections in this regards ungrounded.

4. Recording of Main Trial

Another allegation challenged the way of recording the main trial. The defence states that the first instance presiding judge refused to provide the parties with a verbatim record of the proceedings. It was outlined that according to Article 315, paragraph 1 and 2, of the CPC, *a record of the proceedings of the main trial must be made in writing. The entire course of the main trial in its essentials must be entered into the record. In addition, the main trial shall be either audio- or video-recorded or recorded stenographically, unless there are reasonable grounds for not doing so.*

The Panel observes that pursuant to Article 315, paragraph 5, of the CPC, *the decision on how the main trial shall be recorded shall be taken by the single trial judge or presiding trial judge*.

Pursuant to Article 316, paragraph 1, of the CPC, *when the main trial is recorded only in writing, the single trial judge or presiding trial judge may order, upon a motion of a party or ex officio, that testimony which he or she considers particularly important be entered in the record verbatim.*

Having in mind the above cited provisions, the Panel is of the opinion that the first instance presiding trial judge made an appropriate decision on how the main trial should be recorded. The result is a verbatim – word to word – record of the Main Trial. The lack of an audio- or video-record was reasoned on grounds of protecting the witnesses. The Panel deems such reasoning in compliance with the requirements set in the law.

The use of court recorders who type the records directly in a Microsoft Word format instead of shorthand writing is a widely used and accepted method of recording court hearings in the Kosovo Judiciary. The screen in front of the presiding judge gave him the adequate opportunity to follow and correct the record during the main trial. Consequently, he did not draft it but was able to guarantee the statements were recorded exactly as spoken. Furthermore, all parties were able to request the record to be read immediately and also could have raised objections against the contents of the record (Art. 316 par. 2). The presiding trial judge during the first instance trial dealt with all the objections promptly and solved the arisen problems.

The Panel thus finds the challenge of the way the record was obtained ungrounded. It is to be noted that the objections concerning the record, raised in the appeals, were only general, not pointing out any particular part of any statement, recorded in an erroneous way.

5. Hostile witness concept

The defence has objected to the use of the hostile witness concept for interrogation of witnesses, as such concept is not included in the CPC. These objections were rejected by the first instance panel during the proceedings. The defence counsels repeated their objections in their appeals.

The Trial Panel allowed the prosecutor to declare the Witness B, proposed by the prosecution, as hostile. Consequently the Prosecutor was given the right to examine the witness without limitations that are usually applied during direct examination in relation to asking leading questions, to challenge the credibility and to the use of pre-trial statements. The parties were instructed that witnesses' pre-trial statements would, however, not be used as direct evidence.

There is an exhaustive explanation of the hostile witness concept, as applied by the trial panel, in the impugned judgment in its point 47.

This Panel has to admit that the hostile witness concept is unknown and unregulated in the CPC. However, Article 9 of the CPC mentions the equality of the parties as one of the principles of the criminal procedure. This legal provision clearly refers to the adversarial system of law. Article 7, paragraph 1, stipulates the General Duty to establish a full and accurate record, namely the truthful and complete establishment of the facts which are important to rendering a lawful decision.

The application of the hostile witness concept is a tool to ensure the establishment of the facts important to rendering a lawful decision. Comparing theoretical articles originated in the countries where the adversarial system is in force[2] and the jurisprudence of the ICTY[3], the Panel concludes, the hostile witness concept is an integral part of adversarial proceedings. Consequently, the Panel concurs with the first instance court's application of this concept and affirms the legal grounds of its use, as elaborated in point 43 of impugned judgment.

6. Pre-trial interrogations

The Defence challenges the admissibility and the evidential value of the pre-trial witness statements, referring to the interrogation method of Prosecutor Maurizio Salustro, who held the pre-trial interview sessions in the case at hand. It emphasizes the statements of multiple witnesses describing the inaccurate recording of their testimony in the pre-trial stage. This objection is backed up by the record of pre-trial testimony obtained by Prosecutor Salustro in another case, where only a part of the interview was recorded verbatim, while the rest of the conversation between Prosecutor Salustro and the Witness was out of record. In regards the

[2] Available at http://www.alrc.gov.au/publications/5.%20Examination%20and%20Cross-Examination%20of%20Witnesses%20/cross-examination-witnesses or further at http://www.duhaime.org/LegalDictionary/H/HostileWitness.aspx

[3] Check https://books.google.com/books?id=JaLlSni6OQwC&pg=PA897&lpg=PA897&dq=concept+of+hostile+witness+and+ECHR&source=bl&ots=rq4nteIl0h&sig=RDHGTka6izLDyaEpqHFN1aYqj14&hl=en&sa=X&ved=0ahUKEwjq1aDhz7bNAhWhJJoKHbXLA6oQ6AEIQzAF#v=onepage&q=concept%20of%20hostile%20witness%20and%20ECHR&f=false

circumstances of the pre-trial interviews the defence contests the general admissibility of the pre-trial statements.

Pursuant to Article 123, paragraph 1 and paragraph 2, of the current CPC, during the investigative stage the evidence from witnesses and expert witnesses may be taken in one of three kinds of sessions: pre-trial interviews, pre-trial testimony or special investigative opportunity.

The pre-trial interview is conducted by the state prosecutor. A record of the interview will be made and shall be placed in the file. Evidence obtained during the pre-trial interview may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand and indictments. Evidence obtained during the pre-trial interview may not be used as direct evidence during the main trial, but may be used during cross-examination to impeach witnesses if the witness has testified materially differently from the evidence given by the witness during the pre-trial interview.

The pre-trial testimony on the contrary shall be conducted by the state prosecutor in accordance with Articles 132-133 of this Code.

According to Article 131 (Pretrial Interview), paragraph 1, 2, 3, 4 and 5, of the CPC,

1. during the investigative stage, the state prosecutor may summon witnesses, victims, cooperative witnesses, protected witnesses and experts to provide information in a pre-trial interview relevant to the criminal proceedings.

2. The state prosecutor may permit the defence attorney, victim or victim advocate to participate in the pre-trial interview.

3. The state prosecutor may ask the person being interviewed about documentary or physical evidence during the interview. The documentary or physical evidence shall be identified clearly in any recording, transcript or report of the interview.

4. The pre-trial interview may be audio-or audio-video recorded, transcribed verbatim or summarized into a report. The recording, transcript or report shall comply with Chapter XI and shall be included in the case file.

5. A person being interviewed under this Article may later testify in pre-trial testimony or in a Special Investigative Opportunity.

Pursuant to Article 132, paragraph 6, of the CPC, *The state prosecutor shall give 5 (five) days written notice to the defendant, defence counsel, injured party and victim advocate of the date, time and location of the pre-trial testimony. A copy of the notice shall be placed into the files.*

Bearing in mind the provisions of the CPC as cited above, the Panel gets to the conclusion, the interrogation of the witnesses in the pre-trial stage in the case at hand was carried out as pre-trial

interview, as nor the defence counsels neither the defendants were notified. The same form was used in the case presented by the defence in the appeals. Article 131, paragraph 4, of the CPC allows summarizing pre-trial interview statements into a report. Thus the summary report presented by the appellant does not prove any violation of the procedural law, indeed does not disqualify the pre-trial witness statements in the case at hand. However, the use of the pre-trial interview as evidence is strictly governed by Article 123 paragraph 2 of the CPC. The panel observes that the Trial Panel in its evidence assessment did not exceed the limitations stipulated in Article 123 of the CPC.

7. Rejected Evidentiary Motion

The SPRK Prosecutor objected the first instance panel's decision to reject two motions seeking supplementary evidence. One of them aimed at having read in court the pre-trial testimony of witnesses M and G, not available for the trial because of attested medical reasons. The other requested new evidence to be presented.

The Panel emphasizes that, as explained above, no more Counts but those already mentioned were appealed. The new evidence proposed had no links to the appealed counts. The Panel observes it is indirect evidence regarding counts related to I.B. It is to be stated the proposed witness M.B. described merely the moment of capture of her husband, but did not give any statement concerning his fate afterwards. The proposed witness S.P. gave a description of a general situation in Drenica region at the beginning of the conflict. Also the proposed evidentiary evidence relating to the Humanitarian Law Centre and International Committee of the Red Cross does have no evidential value with regards the particular acts of particular individuals, including the defendants, related to the death of I.B.

Article 258 paragraph 2 subparagraph 2.2 of the CPC reads:

The court may prevent evidence from being taken if:

2.2. the fact to be proven is irrelevant to the decision or has already been proven

On this legal basis the Panel is of the opinion that the evidence proposed was in the context of the charges and the recent evidential situation is irrelevant to the decision, thus the rejection of the motion was grounded.

Regarding the request to read the pre-trial accounts of witnesses M and G, the Panel considers worth mentioning they were rejected on the basis of the new code provisions that allow the use of pre-trial statements only in case they could have been challenged by the defendants/defence. In the case at hand the witness statements were obtained without notification of the defendants.

The same provision applies regarding the motion to read the records of Witnesses A and B from the case files P.58/14. The Panel is of the opinion that the proposed reading of the records would not result in any change of the final decision in the case at hand.

According to Article 237 paragraph 1 and 4 of the Provisional Criminal Procedure Code of Kosovo (PCPC) (UNMIK/REG/2003/26), which was in force during the investigation:

(1) Witnesses and expert witnesses shall be obliged to appear before the public prosecutor upon being summoned and to make statements or give opinions on the subject matter. Unless otherwise provided, the provisions of Chapters XX, XXI and XXII of the present Code concerning witnesses and expert witnesses shall apply mutatis mutandis. No oath shall be administered on the occasion of the examination of witnesses and expert witnesses before the public prosecutor.

(4) The public prosecutor may decide to invite the defendant, his or her defence counsel and the injured party to be present during the examination of the witness or expert witness.

According to the Article 123, paragraph 1, 2 and 3, of the present CPC which entered into force on 1 January 2013 – the regulations for Pretrial Interviews are the followings:

(1) During the investigation stage, the evidence from witnesses and expert witnesses may be taken in one of three kinds of sessions: pre-trial interviews, pre-trial testimony or special investigative opportunity.

(2) The pre-trial interview is conducted by the state prosecutor. A record of the interview will be made and shall be placed in the file. Evidence obtained during the pre-trial interview may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Evidence obtained during the pre-trial interview may not be used as direct evidence during the main trial, but may be used during cross-examination to impeach witnesses if the witness has testified materially differently from the evidence given by the witness during the pre-trial interview.

(3) The pre-trial testimony shall be conducted by the state prosecutor in accordance with Articles 132-133 of this Code. Evidence from the pre-trial testimony shall be audio-recorded, audio and video-recorded or transcribed verbatim. Evidence obtained during the pre-trial testimony may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Pre-trial testimony shall be admissible during the main trial for cross-examination of the same witness, and may be used as direct evidence during the main trial if the witness is unavailable due to death, illness, assertion of privilege or lack of presence within Kosovo, but may not be used as the sole or as a decisive inculpatory evidence for a conviction.

Article 132, paragraph 6, of the CPC stipulates:

The state prosecutor shall give five (5) days written notice to the defendant, defence counsel, injured party and victim advocate of the date, time and location of the pre-trial testimony. A copy of the notice shall be placed into the file.

Comparing the provisions cited above, it is clear that the new procedural code, in force after the pre-trial statements were obtained, changed the situation. It differentiates pre-trial interview and pre-trial testimony with important consequences for in their admissibility as evidence. Pursuant to the old PCPC there was no difference of this nature, however the prosecutor had the discretion to notify the defendant and defence counsel of pre-trial examination of the witness.

The Panel concurs with the first instance panel's stance that the pre-trial statements not announced to the defendants cannot be used as direct evidence, thus cannot be read in front of the court. With respect of the provision of Article 262 of the CPC the Panel concurs that there are inconsistencies in the entire system of the criminal proceedings, pursuant to the CPC. The stance of the first instance court is based upon a direct evaluation of the differences resulting from the procedural code amendments. It respects the rights of the defendants including the right to the fair trial; hence the Panel does not see any grounds to reverse the first instance decision.

D. Credibility of Witnesses

It was emphasized in the impugned judgment and in the appeals, and the Panel fully concurs, three witnesses are of the highest importance with regards the Counts appealed – Witness D in Count I, Witness A in Counts II, IV and V and Witness B in Count III. The testimony of these witnesses in regard of the mentioned counts is the principal or even sole evidence as a basis for the verdict of the courts. The mentioned witnesses were the only persons present to the acts of the defendants. Other witnesses are in an only limited way able to bring own observations of the events foregoing or following the acts charged.

The credibility of all of these witnesses was challenged by the appeals. Before presentation of own observations and conclusions the Panel has to emphasize that the legal standard for any appellate intervention into the evaluation of witness' credibility is rather limited. It has been well established in Kosovo jurisprudence, that

[…] it is for the trial court to hear, assess and weigh the evidence at trial […] Therefore the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the

evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous.[4]

Examining the first instance court's evaluation of the witnesses' credibility it is also to bear in mind there is no particular formula for such an evaluation. The procedure of assessment of all factors relevant for witness' credibility can be summarized as follows:

The issue of credibility is one for fact and cannot be determined by following a set of rules. A trial panel must inevitably weigh the evidence of a witness, consider its merits and demerits and, having done so, decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, it is satisfied that the truth has been told. In assessing credibility a number of factors must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavoring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness, his conduct and demeanor[5].

Aware of the limitations described above and of a wide range of factors to be considered when evaluating evidence, on the basis of the objections raised in the appeals, the Panel found grounds to review the conclusions of the first instance court.

1. Sole witness testimony as basis of guilt

The Panel paid its attention to the question whether the testimony of a sole witness can be the basis of conviction of a defendant. This issue is addressed in Article 262 of the CPC, which reads as follows:

Evidence as a basis of guilt

1. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.

2 The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the state prosecutor.

3. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.

[4] See Supreme Court of Kosovo Ap.-Kz. 477/05, 25 January 2007
[5] See Basic Court of Prishtina, Judgment P No. 766/2012, 17 September 2013

4. The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Panel notes that none of the situations mentioned in the above provision did occur. The evidence provided by Witnesses A, B and D was given in front the court in the trial hearings and the defendants/defence counsel had full opportunity to provide their questioning, to challenge the evidence being produced. The defendants themselves stayed silent so no conclusions were based on their statements. The identity of all three witnesses was known to the defendants and to their defence counsel and none of the said witnesses was a cooperative witness. The legal obstacles to base the guilt of the defendants solely on the testimony of any of mentioned witnesses therefore did not exist.

The Panel, however, is of the opinion that in case a single witness gives decisive evidence, the requirements for its credibility in general – and specifically with regard to its testimony – are higher and must be thoroughly examined and assessed.

2. Credibility of Witness A

The Trial Panel heard Witness A in multiple sessions, including cross-examination by the defence. After the final assessment of his testimony he was found credible and fully reliable (as from paragraph 109 onwards of the impugned judgment).

The Panel fully concurs with such an assessment. Bearing in mind a number of objections challenging Witness A's credibility, the Panel deems appropriate to present its own stance.

Firstly, the Panel reviewed the general integrity and credibility of Witness A, his personal reliability. There were several objections raised up in the appeals.

Two principal circumstances where pointed out in the appeals in order to disqualify and in general to challenge the credibility of Witness A., namely suffering from [diagnosis], as per a document of diagnosis presented during the trial, and his prior application to KLA veteran status.

Let us now address the said arguments. The [diagnosis] was determined in 2003, without any record of relapse. Witness Dr. G.H., who has certified such a diagnosis, stated he did not remember the medical examination of Witness A. He was not able to individualize specific symptoms suffered by Witness A. His description was thus merely general. The panel fully concurs with its assessment as not conclusive. The only medical proof of such a disease suffered by Witness A was dated 2003, without any successive treatment, medication or observation. Furthermore, the diagnosis was of **["A nature"]**, not of ["C nature] which corresponds to a lack of any relapse. Despite the repetitive and exhaustive interrogation of Witness A in front of the court, no symptoms of any [diagnosis] were noted. The Panel opines that the unique occurrence of [diagnosis] does not undermine general credibility of Witness A. As said, ["A nature"] in this

context means it was present in the past, at the moment it happened; nowhere it is stated the witness is [diagnosis] – no need at this point to elaborate on whether that would be significant to a priori grant no probative value to a statement.

This issue was in some extent the essence of the testimony of Witness L, Witness A's brother. The assessment of witness L done by the Panel will be addressed later.

The Panel reviewed the first instance court's conclusions related to the KLA veteran status application. It is a notorious fact that the KLA veteran status brings the holder some material benefits. There are different grounds for such a status being granted. It is not only direct participation in the fight, but also any kind of support to the fighters. Witness A's application was not based on participation in the military actions, but rather on supporting provided to the fighters who were or passing by his village. None of his activities described in the application, including the arms maintenance, do not demonstrate his involvement into the direct combat. On the other hand his support to the KLA members in his village was authentic. His application does not indicate his attempt to obtain unearned benefit, rather the endeavor to improve his material situation on the basis of undisputed help provided to the KLA in the wartime.

Based on above mentioned conclusions the Panel fully shares the Trial Panel's assessment of Witness A as a credible witness.

A special attention was paid to the reliability of the specific statements of Witness A with regards to each of the acts as described in his testimony.

It is to be noted that the interrogation of the witness took place after a significant period of time has elapsed since these extremely traumatic and rather long lasting events were experienced. It is clearly understandable that many details and particularities can be unclear, recalled without full accuracy and their reproduction can suffer from deficit of accuracy or even shortcomings. The Panel is of the opinion that all so called contradictions pointed out in the exhibit list presented as a supplement of the appeal, as well as inconsistencies concerning details and minor particularities in the Witness A' testimony, are of this nature. This panel is of the opinion, and contrary to the defence´s claims, that strange or suspicious (not to say "set up") would be a "perfect" or "absolutely flawless" statement about traumatic events occurred many years ago.

The overall account of the events that took place during his captivity is consistent despite numerous repetitive questions concerning many details asked along the entire proceedings. Witness A several times in front of the court repeated his description of the course of events that took place in Likoc. He was consistent in the number of people kept in the facility and their identity. He did not give full personal data of them, but he individualized each of them in a way they cannot be mistaken. He was also consistent in his description of the conditions in which the detainees in Likoc were kept. His statements were coherent; he did not amend his description in order to comply with the questions, but rather contested lack of details in his observations or lack of knowledge of fate of those people after he was separated from them.

3. **Corroboration of Witness A's testimony**

The Panel fully concurs with the conclusion presented in the impugned judgment, that Witness A's statement is corroborated by those of Witness K and expert witness Dr. C.B.

Witness K was able to provide consistent evidence about the moment her husband was captured, some circumstances of his detention in Likoc and the personal physical conditions of Witness A following his release. Witness K said her husband had a good physical status when he was taken by the KLA soldiers and he was in a terrible physical condition when he was released. In her statement she did not repeat the details of the statement of Witness A, rather described what she perceived herself. Her testimony corroborates the time and duration of her husband's captivity and his physical and mental conditions after his release. Witness K tried to visit Witness A in the Detention Centre of Likoc. She thus proved the existence of the detention centre there. She was not allowed to visit her husband in the Detention Centre, which proves the fact that Witness A did not stay there voluntarily, and also confirms the detainee's deprivation of contact with his family.

The expert witness Dr. C.B. has examined the health conditions of Witness A (apart from the wound in his genitals). It must be noted this examination took place 15 years after the injuries allegedly were sustained. She clearly stated that because such a long period of time had elapsed, the examination in the present could determine neither the exact time when the injuries had been inflicted, nor the inflicting mechanism. However she detected broken ribs and other bones. Dr. B. was also able to reproduce the report drawn by the medical doctor, Dr. G., who had examined the scrotum of Witness A.

The Panel concurs with the assessment of her testimony as presented in paragraphs 132 and 135 of the impugned judgment. Concerning paragraph 134 of the impugned judgment the Panel observes that the injuries of witness A cannot be in general attributed to the specific beating suffered in Likoc, but there are no doubts they are a result of the beating which took place during Witness A's captivity there.

Several appellate objections were focused on the particular injuries stated by Witness A. The Panel points out that Witness A did not undergo any medical examination during and immediately after his detention in Likoc. The reasons why there is no medical record concerning the injuries sustained in Likoc after his release from there are not relevant, what is clear is that such record does not exist. The overall description of his injuries was thus based only on his own feelings (and confirmed not only by his wife but also by the experts, as stated earlier). Such a statement cannot be deemed as forensic piece of evidence; however it can be the ground for the conclusions of the court, though aware of its evidentiary value. His statement is in accordance with the outcome of the expert examination. In particular the witness described broken ribs (three on each side of his body). This "diagnosis" was based merely on the pain he suffered. It is

a matter of common knowledge that broken ribs are a very painful injury, as ribs are in motion with each breathing movement and cannot be fixed in the same way as other broken bones. The number and location of broken ribs as set on the basis of pain cannot be anyhow specific, as the pain covers the entire torso. The expert detection of broken ribs in a forensic way thus upholds the statement of Witness A.

The same goes for the Witness A's description of "open wound" in the scrotum, objected by the appellants, is more understandable in context of the overall description of his injuries, mentioning a visible scar as "open", as it was used repetitively in Witness A's statements[6]. The description of a broken bone in the area of the elbow also corresponds to the conclusions of the medical expertise.[7] The same conclusion corroborating Witness A's statement was drawn by the expert witness´s examination.

4. **Credibility of witness L**

Witness L was pronounced non credible by the first instance panel. This conclusion was based on contradictions with the statements of Witness A (paragraph 189 of the impugned judgment), his intent to discredit Witness A on the grounds of his mental illness (paragraph 190), his complete switch in the statement with regards his meeting with S.S. in Likoc (paragraph 191), the visible hostility towards J.D. (paragraph 192) and his tendency to avoid providing straight answers (paragraph 193).

The Panel found this assessment of the first instance court to be appropriate. Witness L's statement is not fully in accordance with the statement of Witness A; however, it confirms that Witness A was captured at his house and he arrived back home after several weeks, being in a poor medical condition. He also confirms several attempts of visiting Witness A in Likoc, which never was permitted by the KLA members residing in Likoc. The part concerning the meeting with defendant S.S. is not relevant and has no evidentiary value for the case at hand. The event described by the witness should have taken place outside the Likoc KLA facility and gives no evidence on the behavior of the KLA member described as to the detainees. The presence of S.S. in Likoc in the relevant time was never contested by the defendant himself, thus no evidence of this fact is needed. The Panel, however, fully concurs with the Basic Court on the assessment, as unrealistic, of Witness L´s account on his erroneous recognition of the KLA member in Likoc (as explained in paragraph 191). Such an explanation raises serious doubts about the *honest endeavor to tell the truth* by Witness L. Those doubts are even deepened by the Witness L's clear hostility towards J.D., calling him a Serbian collaborator and a person with a bad biography, without giving any evidence supporting such statements.

[6] See the Main Trial record on 8 July 2017 page 4 of the English version
[7] Compare at the same place

Bearing in mind the above mentioned inconsistencies, together with his tendency to avoid straight answers, as observed by the court and not contested by the appellants; this Panel finds the statement of Witness L an insufficient ground to draw any conclusions. This applies also for his assertion on witness A's mental infirmity, which itself was already subject to the Panel's assessment, above.

5. **Credibility of Witness B**

Witness B is another main witness, who has been detained in Likoc and allegedly suffered beating (Count III). His testimony in front of the court was found partially reliable. In particular, the first instance court assessed as reliable only the part of Witness B's statement related to the beating by the defendant S.G. This part was found "sincere and adamant" (paragraph 151 of impugned judgment). The later change of the Witness B's stance was found "not convincing" (paragraph 152) on the grounds of the contradiction of the changed testimony with the statements of witnesses A and K. Finally the first instance court determined that Witness B was afraid to tell the truth due to his concerns about his personal security.

The Panel has evaluated the statements of Witness B as recorded at the trial and reached the conclusion that the first instance court's assessment is not reasonable.

It was noted that witness B during his testimony in front of the court significantly changed his stance. Even at the beginning of his testimony he announced that he stands by his pre-trial statement only 50:50[8], which he later changed to mere 10%[9]. His behaviour in front of the court cannot be assessed as "sincere and adamant". In the course of his interrogation he has demonstrated entire lack of will to cooperate with the court and no endeavour to tell the truth could have been observed at all. He denied in fact everything he has stated during the proceedings, including the denial of the fact he had been given instructions on his rights by the court[10], which had been duly recorded. The Panel did not find any part of his statement that could be considered reliable or adamant in his testimony. His description of the beating suffered from S.G. was not convincing at all. Without any details he merely stated "S.G. started torturing me, five minutes later R.S. came and withdrew S.G. from there"[11], not giving any description of particular slaps, punches or hits. It was noted that the alleged torturing took mere 5 minutes in the Witness B's account. Moreover, he repeatedly stated, he was released after one or two hours[12], not giving the details of any injuries caused by the "torture".

[8] See the Main Trial record on 14 October 2014 page 6 of the English version
[9] See the Main Trial record on 29 October 2014 page 3 of the English version
[10] See the Main Trial record on 29 October 2014 page 12 of the English version
[11] See the Main Trial record on 14 October2014 page 8 of the English version
[12] See the Main Trial record on 14 October 2014 page 13 of the English version

The Panel thus concludes there are no factual grounds on which any assessment of defendant S.G. as a torture perpetrator can be based. Moreover, the entire performance of Witness B at the trial cannot be considered credible and the first instance court erred in its assessment.

6. Credibility of witness D

The testimony of Witness D is the sole ground for the conclusions pertaining Count I of the impugned judgment. Besides this he was one of the witnesses describing the conditions of the Likoc facility and stating the detainees were kept there.

The trial panel found Witness D fully credible. His account is assessed as "spontaneous and consistent", based on his own observation of facts (paragraph 136, 137 of the impugned judgment). The disparities in his statements were explained by the "time passed since the events took place and natural capacity of human perception of the facts" (paragraph 140). The first instance court pointed out that no other credible evidence has contradicted Witness D's statement (paragraph 143) and considered the arguments raised by the defence in order to impeach witness' credibility were ungrounded.

The Panel has reviewed the first instance court's evaluation of the credibility of Witness D based on the records of his statements and after a thorough and careful assessment reached the conclusion the trial panel erred. Paragraphs 136-139 of the impugned judgment, dealing with the credibility of Witness D, are not only general and do not contain any weighing of the facts, but also do not address his contradictions and inconsistencies.

The stance of Witness D might be deemed consistent but only at the first glance. Reading it carefully it is remarkable that his account is too vague and unclear. Many contradictions, to say the least, are contained in his statements covering the principal points of an event that for an eyewitness must, and would have been traumatic and rather unique. It concerns the description of the victim who allegedly was of 160 – 180 cm in height[13], what covers a wide range of the human height, from a short one up to rather tall. The victim's position during the execution is unclear as well, as three shots into kneeling person are described[14] in contrary with later one shot into standing person[15], getting kneeled afterwards to receive two more shots. One, at a first attempt, might be unable to exactly describe the event in words, but after an effort of picturing what is kept in memory, because the eyes saw it, then it would be expectable that the individual might describe his visual memories, at least the essential in a consistent way. More inconsistencies cover the description of the location of the alleged murder scene, the distance of the perpetrator and the victim during the execution, the make of the vehicle used (which would be easy to recall for an engineer going through such a traumatic event, on the way to and back

[13] See the Main Trial record of 11 November 2014 page 47 of the English version
[14] See the Main Trial record of 12 November 2014 page 4 of the English version
[15] See the Main Trial record of 18 November 2014 page 6 of the English version

from a murder) for transportation to the crime scene[16], use of radio by the perpetrator, description of the events preceding the journey to the crime scene etc.[17], the location of the river in relation to the site[18], etc. Asked for the explanation about these inconsistences the witness gives evasive or avoiding answers referring to the time elapsed or mistakes of translation. Also, to an objective observer, it makes no much sense the course of the facts as told: that someone is brought from the woods to be murdered by the road and the corpse taken back to the woods when it would be much logical then just going to the woods and perpetrate the murder. This panel is fully aware that often criminal acts are not in accordance with any kind of rational logics, but this was just an example to be read together with the inconsistencies pointed above as sheer examples of why, as a whole, his testimony was considered not credible, at least not enough for the criterion necessary to establish facts: "beyond a reasonable doubt".

Neither his description of the conditions in the Likoc facility is convincing. He is not sure whether the doors of the rooms were locked or only closed, but recollects observing the detainees through the peep holes[19], number of detainees[20] etc.

At the end of his account he in a spontaneous way depicts his relation to the L. family, which illustrates his hostility to the defendant.[21] Very significant contradictions can be found in the witness' statement dated 18 November 2014, page 15[22]. After everything he had stated along his testimony, in which his membership in KLA was underlying, as he had even included names of the commanding structure, when he was asked later on the question " whether he had been a member of the KLA", his answer was simply "no".

Accordingly to these considerations on the witness´s credibility and statements, this Panel does not share the first instance court's opinion on "full credibility of Witness D"; on the contrary, this Panel finds that the first instance court erred in its assessment of Witness D's account.

[16] The witness who was an engineer described "the jeep, red in colour, jeep I use to describe any 4 wheels driven vehicle" as can be seen in the Main Trial record of 11 November 2014.
[17] The Main Trial records containing Witness D's account are to be compared
[18] Compare records of the Main Trial on 11 November 2014 page 43 and on 13 November 2014 page 36 of the English version
[19] See the Main Trial record of 11 November 2014 page 32 of the English version
[20] See the Main Trial record of 11 November 2014 page 27 of the English version
[21] See the Main Trial record of 18 November 2014 page 13 and following of the English version
[22] In comparison with the Main Trial record on 11 November 2014 page 9 of the English version

E. The findings of the facts

After the assessment of the evidence on the basis of the appeals the Panel reviewed the factual findings reached by the first instance court.

It should be highlighted that in 1998 the Albanian population of Kosovo rose up against the overwhelming oppression imposed upon them by the regime. The KLA, acting on behalf of the Albanian population of Kosovo, conducted a war aimed at securing freedom and independence for their own future. Many of the participants are justly proud of their activity in it.

It is to be noted that each of the defendants is charged with his own actions he is responsible for and the responsibility does not affect the structure he has served. It is also important to bear in mind that a conflict does not give freedom to the conflicting parties or a *carte blanche* to behave in an uncontrolled, unlawful and criminal manner – on the contrary, the way conflicts must be disputed is also in the core of the UN Charter and at the very heart of the International Humanitarian Law.

1. Count I

Pursuant to the Indictment the defendant S.L. was charged with a war crime. By the Trial Panel S.L. was found guilty of the alleged criminal act of murder and sentenced to 12 years of imprisonment.

The first instance court based its findings regarding Count I solely on the statements of Witness D, who was found fully credible. The facts that the body of the victim was never found and his identity was not known were assessed as not objecting the guilty verdict.

The Panel concurs with the latter conclusion of the first instance court. It is consistent with the jurisprudence, that although specified personal data of an alleged victim might be helpful in certain cases, it is not always necessary to specify the identity of the persons that may be the victims of acts criminalized under provisions on war crimes.[23]

It was concluded above that no legal provision prohibits the conviction of a defendant on the basis of a sole witness testimony. The limits for such a conclusion are comprised in Article 262 of the CPC. In the case at hand this provision shall not apply, as Witness D's testimony could have been challenged by the defendants and their counsel, his identity was known to the defendants and their counsel and he was not pronounced cooperative witness. However, in such case, the requirements or threshold for the credibility of the sole witness must be higher if compared with a case where the key testimony is corroborated by other evidence.

[23] See in the judgment of the Supreme Court of Kosovo Ap.-Kz. No. 89/2010 of 26 January 2011

As elaborated above, the Panel does not share the opinion of the first instance court to find Witness D fully credible. The Panel therefore concludes that bearing in mind the contradictions, attempts to avoid questions, unclarities etc. observed in Witness D's account, the facts cannot be established beyond reasonable doubt on the sole basis of his statements. This conclusion is upheld by the fact the body of the victim was never found and his identity remains unknown. In the situation of the sole testimony of the witness, who is not convincing, and without any corroborative evidence, the possible doubts about the guilt of the defendant remain. The Panel thus applies the principle *in dubio pro reo* and comes to the conclusion that the guilty verdict cannot be rendered.

2. Count II

By the Trial Panel defendant S.S. was found guilty of *war crime in continuation.* Defendant S.S. was sentenced to 6 years of imprisonment.

The first instance court has determined the factual situation regarding this count in paragraphs 68-79 of the impugned judgment. The factual findings were based mostly on the testimony of Witness A. The Appellate Panel approves the Basic Court assessment of Witness A as fully credible (as elaborated above). Also this Panel concurs with the first instance court regarding the reliability of Witness A and corroboration of his statements by other evidence. The Panel thus merely refers to the first instance panel assessment and conclusions presented in the mentioned part of the impugned judgment. The legal consequences will be drawn later.

3. Count III

Defendant S.G. was accused of violation of the bodily integrity and the health of Witness B. The Trial Panel found the facts to be established; however, it has acquitted the defendant stating the act did not constitute a serious violation of common Article 3 of the four Geneva Conventions of 1949 (paragraph 282 of the impugned judgment).

The Appellate Panel reassessed the available pieces of evidence in this count. The Panel, as it was explained before, does not find Witness B credible. Furthermore, there is no any other evidence which corroborates the testimony of Witness B and no other evidence related to this count.

Based on the own assessment of the credibility of the only witness related to this count, the Panel concludes that the factual findings referring solely to the testimony of Witness B cannot reach the standard *beyond reasonable doubt*. As stated before, not only Witness B is not credible himself, but also his description of the beating or torture he claims to have been victim of, allegedly performed by the defendant S.G., is vague, unclear and too general. In the situation no

other evidence regarding Count III was obtained, the Panel disagrees with the first instance court's conclusion that the facts of Count III were established. With no factual grounds there is no space to address the threshold of a "serious" violation common to Article 3.

4. Count IV

Defendant J.D. and defendant S.S. were accused that in co-perpetration with each other they violated the bodily integrity and the health of an unidentified Albanian male from the Shipol area in Mitrovica and with this criminal action they committed a war crime.

The Basic Court of Mitrovica has acquitted both defendants concluding that the act did not constitute a serious violation of Article 3 common to the four Geneva Conventions (paragraph 282 of the impugned judgment).

The decision of the basic court was based solely on the statement of Witness A. Regarding the facts, the Trial Panel assessed that Witness A is credible and his testimony gives a clear view that the defendants in co-perpetration with each other, intentionally violated the bodily integrity and the health of an unidentified Albanian male by repeatedly beating him up, in Likoc.

The Appellate Panel concurs with the first instance court's factual findings[24]. As it was explained above the Appellate Panel found Witness A credible. The Panel is convinced his account matches the high requirements of credibility and is fully eligible to be a sole ground for the guilty verdict.

The Panel admits the identity of the victim is not known. According to the practice of the International Tribunals, the characteristics of war crimes carry the opportunity that the victims of the crimes remain unknown, but it is possible to prove that criminal activity against unknown civilian took place, was committed. The criminal justice system aims to bring justice for the victims, regardless they are identified or not. Moreover, referring to the testimony of Witness A, the Panel observes the witness repeatedly described the beating of a man from Shipol, which is incomplete but it is the only reference to his identity. The circumstances of this beating also remained consistent and unchanged within the entire course of the proceedings.

The Appellate Panel states that the characteristics of this criminal action are not based merely on the threshold of the bodily harm of the victim but on the whole frame of his fate. The seriousness of the violation of the International Humanitarian Law must be assessed regarding all conditions of the victim, and the physical violence is only one of. It is proven that the victim was kept by the perpetrators in the Likoc detention centre without his consent, deprived of freedom, being beaten up and kept in bad conditions. He was beaten in front of other detainees (at least Witness A and his brothers) in a humiliating and degrading manner to serve as an intimidating example to

[24] Despite rather brief description in point 81 of the impugned judgment.

the other detainees. The reason for the beating was his alleged lack of respect to the KLA members. None of the detainees witnessing the beating he sustained was allowed and able to help him in his fate. All these circumstances increased significantly the gravity of the act perpetrated.

Witness A clearly identified the perpetrators of count IV.[25] Defendants J.D. and S.S. have direct criminal responsibility in this count. They were in co-perpetration with each other, intentionally violating the bodily integrity and the health of an unidentified Albanian male by repeatedly beating him up, in Likoc.

Regarding the "presumption" of the civilian status of the victim, objected in the appeals, the Panel points out it is not a relevant issue in the case at hand. Article 3 common to the Geneva Conventions of 1949 protects

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 […]

The conclusion that the man from Shipol was not taking active part in the hostilities when in Likoc and when suffering beating fully concurs with the statement of Witness A and all the evidence obtained in entire trial. The status of a protected person thus does not come from the court's presumption, rather from the facts based on the evidence.

The Panel concludes that with regards Count IV the facts of the beating of a man from Shipol by the defendants S. and D. were established corresponds with the serious violation of Article 3 common to the four Geneva conventions of 1949.

5. Count V

Defendant S.S. was accused that he violated the bodily integrity and the health of an unidentified Albanian male from Gllanasella and with this criminal act he committed a war crime.

The Basic Court of Mitrovica has acquitted the defendant concluding that although the facts were established, the act did not constitute a serious violation of Article 3 common to the four Geneva Conventions (paragraph 282 of the impugned judgment).

As in Counts II and IV the factual findings are based solely on the statements of Witness A. It was repeatedly established by the Panel as the account of Witness A was found fully credible and sufficient for the conclusions on the defendants' guilt. With regards of Count IV the Panel explained that the unknown identity of a war crime victim does not create a barrier to convict the perpetrator.

[25] See the Main Trial record of 25 June 2014 page 24

However, reviewing the account of Witness A in front of the court, the Panel found out, the facts leading to a guilty verdict of the defendant S.S. cannot be established in this count. Witness A gave his testimony regarding Count V on 25 June 2014. He described the beating of a man from Gllanasella. However, he never stated S.S. was the perpetrator. He said the "soldiers of S.S." have perpetrated the beatings. S.S. was just "around". The witness was only "told that the perpetrators were ordered by S.S.", but he did not hear the orders himself. When asked directly, whether it was S.S. who had beaten the man from Gllanasella he answered: "to tell the truth, I forgot".[26]

Taking this into consideration, the Panel is of the opinion that although Witness A was found credible, there is no evidence proving the participation of S.S. in the crime. Exception made to Witness A's testimony, no other piece of evidence was related to Count V. The defendant thus cannot be found guilty in this count. It is also to be noted that the defendant was charged in this case on the basis of direct liability. The Panel is convinced the charge cannot be extended to his possible responsibility as a commander.

6. Count IX

Defendants S.J., S.L., A.Z. and S.S. were acquitted regarding count IX due to the fact it was not proven that they committed the acts they were charged with. The SPRK Prosecutor appealed against count IX of the impugned judgment and the acquittal of defendants S.S., S.L. and S.J. As explained above, the appeal was filed only in relation to the three defendants mentioned. The Panel thus did not consider defendant A.Z.'s participation in the acts he was charged with.

The first instance court has reasoned the verdict of acquittal on the finding that apart from Witness A there were no other people maltreated in Likoc (paragraph 214) and no evidence had proven that any of the defendants was exercising control over the facility (paragraph 210). The explanation of this stance was made very briefly. Assessing Witness A as fully credible and the conclusion that beatings in counts II – V were established, is in contradiction with other findings of the first instance court.

The Panel first focused on the question whether the Likoc facility served as a detention centre, what should be understood as a point where an undetermined number of individuals was kept in a systematic way, in inappropriate conditions, exposed to violation of bodily integrity or other intimidation (thus deprived of their dignity – which is the basic right and value protected by the International Instruments on Human Rights).

It was explained above: the Panel has no doubts about the credibility of Witness A. He has clearly stated that at the time of his detention multiple individuals were kept in Likoc. He

[26] See the Main Trial record of 25 June 2014 pages 21, 22

described the conditions of his own captivity and it is clear that besides of the deprivation of liberty, on the basis of mere suspicions of being a collaborator he suffered from starving, lack of hygiene, lack of contact with his relatives, oral threatening with the fate of executed people, intimidation by being witness of fellow detainees' maltreatment and beatings. The intensity of beating can be seen as a tool to evaluate the gravity of suffering. However, taking into consideration the conditions of detention just mentioned the "*mere slaps and punches*"[27] are a genuine part of a cruel, humiliating and degrading treatment. Witness A has directly witnessed the fate of multiple detainees kept at least for a time in the same room. This fact proves that other detainees were kept in the same conditions and suffered from the same treatment as Witness A himself, regardless the exact intensity was not fully established and could have differed in relation to particular detainees.

The testimony of Witness A is corroborated by the account of Witness K, who described her several attempts to meet her husband in Likoc, which was never approved by the soldiers. The same was mentioned in the testimonies of Witnesses L and D, who were found not credible or reliable.

On the grounds of the consistent and credible testimony of Witness A, the Panel concludes it was proven that at least during the captivity of Witness A there were multiple individuals detained in Likoc in intimidating, humiliating and degrading conditions. The building in Likoc, where this took place, was a previous police station, which is described as not a big one, containing only several rooms. It is thus obvious that the placement of more than 10 detainees, as described by Witness A, involved the use of the whole building. It was impossible to hide this fact from the persons responsible for the KLA activities in the region.

The first instance court erred stating that "*there was no evidence that any other person apart from Witness A was a subject of maltreatment*" (paragraph 214). Witness A described the conditions of all detainees he got in touch with as similar to his own. The Panel concludes there was a detention centre established and run by KLA in Likoc at least during the time of captivity of Witness A.

Subsequently it was to establish whether any of the defendants should be found liable for these conditions.

As stated before, three defendants are facing the charges in this count, whereas the acquittal of A.Z. became final. The concept of commander responsibility covers the situation when *a military commander or a person effectively acting as such shall be criminally liable for the commission of war crimes under his effective command and control, even if he only should have known that*

[27] Pointed out in a scornful way by the defence

the forces were committing or planning them or in case he has failed to take all necessary and reasonable measures within his power to prevent or stop their commission.[28]

The responsibility of commanders includes two concepts of criminal responsibility. First, the commander can be held directly, by action, responsible for ordering his subordinates to carry out unlawful acts. In this context, subordinates who invoke the defence of superior orders may avoid liability depending on whether, in the circumstances, they should have obeyed or disobeyed the order of superiors. This is to be distinguished from the second concept, called command or superior responsibility, where the commander may be held liable for a subordinate's unlawful conduct. This concept of command responsibility is a form of responsibility based on the commander's failure to act, therefore based on commission by omission.

The position of all three defendants in the chain of command of KLA was superior. S.S. was a commander of the Operational Zone Drenica, S.L. was his deputy, later promoted into the position of a commander and S.J. was a head of military police of Drenica zone. The ability of each of them to command their units can be thus found. This fact, however, does not suffice to find any of them guilty for the conditions in the detention camp run in the zone of their command. It is to be examined whether each or any of them exercised effective power over the detention centre.

It was established that the detention centre was located in a building included in the KLA Drenica Zone Headquarters. The defendants S.S. and S.L. were in charge of commanding the zone. This fact is clearly stated by the witness B.G., found credible by the first instance court, whose credibility was not challenged in any appeal. In his account he stated that whenever he had an issue with KLA, he was willing to meet S.S. or S.L.[29]. It leads to a clear conclusion: both of them had the effective power to make decisions in the KLA Headquarters. It is thus obvious their position was sufficient to change the everyday conditions of the people detained in Likoc.

Regarding the knowledge of misbehavior it is necessary to highlight that, as established, S.S. was an active perpetrator of beating detainees: hence actively participated in their cruel, humiliating and degrading treatment. In the case of S.L. his direct participation was not proven. Considering his position in the command of Likoc Headquarter and his effective control over it, in the context of the limited size of the Headquarters, as described before, his knowledge of conditions of the detainees must be found.

In the case of S.J. there is no direct evidence depicting his relation to the Likoc facility. In the witnesses' statements the soldiers, not the members of military police, are mentioned as the perpetrators. No orders given by S.J. in Likoc are stated. No personal involvement of the defendant in any activities in Likoc was described. Hence, the sole reason to believe that S.J. was able to execute his power over Likoc facility can be found in his formal position of the Military

[28] See the judgment of the Supreme Court of Kosovo Ap.-Kz. No. 89/2010, point 111.
[29] See the Main Trial record of 4 December 2014 page 10, page 12

Police commander. The Panel is convinced it cannot be considered as sufficient ground to convict the defendant.

The prosecution brought up the proposal of application of the Joint Criminal Enterprise (JCE) concept to establish the criminal liability of all the defendants. The Panel assesses such proposal as without legal grounds and cannot be approved.

It is even strange that on one hand the Prosecution protests because the court used an institute not set in the law (hostile witness) and on the other hand wants the court to use a form of criminal liability not set in the criminal codes applicable in Kosovo (on modes of liability see Articles 31 to 36 CCRK) . The JCE concept is another form of criminal liability (besides, among others [30], direct liability and commander's liability). As such, it is a component of the charges. It was not applied in the indictment. Even if it were applicable, foreseen in the law, in Kosovo (and despite the fact that the concept of JCE itself has evolved since the first trials after WWII, and even in ICTY´s Case Law, from Tadic *et al* in 1999 to the Appeal Chamber´s Judgment in Gotovina *et al* in 2012) it had to be mentioned in the indictment as mode of liability, it could never be called upon only now as its requirements as less explicit or demanding than the ones necessary for the classic co-perpetration[31], this to say that it would be to the detriment of the defendants. Nevertheless, JCE is not a mode of liability foreseen in the criminal code of Kosovo, as said, it is not one of the modes of criminal liability set in any of the applicable codes.

F. Applicable Substantial Law

The first instance trial panel paid attention to this issue. The conclusions, however, are not clear, as in the enacting clause the criminal code in force from 1 January 2013 is used along with the Criminal Code of SFRY. This Panel thus assessed the applicable substantial law.

Article 3 of the CCRK, the code in force at the time of the proceedings, stipulates:

1. *The law in effect at the time a criminal offense was committed shall be applied to the perpetrator*
2. *In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.*

[30] It is worth pointing out, however, that the modes of liability and other subjects of criminal science or dogmatic (as forms of criminal offence, etc.) are mentioned sometimes interchangeably and even in different Statutes of International and Hybrid courts they do not exactly match.

[31] This assuming that the Prosecution was addressing the so called third form of Joint Criminal Enterprise, as the first corresponds to the classic co-perpetration - meaning, where all the co-perpetrators have the same intent in relation to the whole set of criminal offences actually perpetrated, when not only all of them take part in the *actus reus* (regardless if at different stages), but also share the *mens rea*.

In 1998 when the acts the defendants are charged with were committed, the Criminal Code of the SFRY of 1977 (CCSFRY) was in force, amended by the Constitution of the FRY of 1992, which abolished the use of the death penalty.

In the meantime the Provisional Criminal Code of Kosovo (PCCK) of 2004 was in force, effective from 6 April 2004.

The recent Criminal Code of Kosovo (CCRK) came into force on 1 January 2013.

The assessment of the most favorable law cannot be based on a mere comparison of the range of applicable punishments. The evaluation of the whole impact of the application of a particular code or another must be considered.

Pursuant to the Indictment the defendants are charged with the criminal offence of War crime against the civilian population, committed in complicity (in co-perpetration) pursuant to Articles 22 and 142 of the CCSFRY (currently criminalized under articles 31 and 152 of the CCRK).

Article 142 of the CCSFRY reads:

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, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health […] or who commits one of foregoing acts shall be punished by imprisonment for not less than five years or by the death penalty.

Article 38 of the CCSFRY reads:

1. *The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years*
2. *The court may impose a punishment of imprisonment of 20 years for criminal act eligible for the death penalty.*

The CCSFRY does not give any definition of *civilian population.* The Panel contests the Trial Panel's conclusion presented in paragraphs 252 – 256, that individual civilians were not covered by protection of Article 142 of the CCSFRY.

The commentaries to the Article 142 of the CCSFRY read as follows:

The civilian population is the victim of the criminal act. The criminal legal protection includes all the civilians in the occupied territory[…].[32]

[32] See Ljubisa Lazarevic; Commentary of the Criminal Code of the FRY; 1995; 5th Edition; Savremena Administracija, Belgrade; Article 142; item 3

The panel concludes that the wording *"all the civilians"* must be understood as "each of the civilians".

The Code, moreover, refers to the *rules of international law effective at the time of war.* This allows the legal recognition of any development in international law without necessity of change in the domestic legislation. Common Article 3 of the Geneva Conventions covers individual civilians and those who are *hors de combat*. Therefore, the Panel is of the opinion the perpetrators of the acts described by Witness A are criminally liable pursuant to Article 142 of the CCSFRY.

As mentioned above, the Constitution of 1992 abolished the use of the death penalty in Yugoslavia. This fact is to be considered when assessing the most favorable law. The abolition of the death penalty however does not affect Article 38 as cited above, as in its provisions *"eligibility to the death penalty"* only addresses the gravity of the criminal act.

The PCCK in Article 120, paragraph, 1 reads:

Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of at least five years or by long-term punishment.

Article 37, paragraph 2, of the PCCK reads:

The punishment of long-term imprisonment is imprisonment for a term of twenty-one to forty years.

The CCRK in Article 152, paragraph 1, reads:

Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five years or by life-long imprisonment.

Article 44 of the CCRK reads:

The law may provide for the punishment of life long imprisonment for the most serious criminal offences committed under especially aggravating circumstances or criminal offences that have caused severe consequences.

Article 44, paragraph 1, of the CCRK reads:

The punishment of imprisonment may not be shorter than thirty (30) days or more than twenty five (25) years.

Comparing the mere range of the punishments applicable, the most lenient punishments, most favorable for the defendants, are stipulated by the CCSFRY. As mentioned above, the

assessment of the most favorable law must take into consideration all legal consequences arising from its application.

The CCRK, unlike the other two codes, provides for in its Article 81 the concept of criminal offence in continuation. By definition there is a criminal offence in continuation when at least two of following conditions exist:

1. *The same victim of the criminal offence*
2. *The same object of the offence*
3. *The taking advantage of the same situation or the same relationship*
4. *The same place or space of commission of the criminal offence*
5. *The same intent of the perpetrator.*

The exception is defined in paragraph 2, reading:

Criminal offences perpetrated against personality may be considered as criminal offences in continuation only if they are committed against the same person.

The Panel is of the opinion that in the case at hand, although it deals with such a serious crime as a war crime, the conditions of application of Article 44 of the CCRK are not met. In the whole range of acts suitable to fulfill elements of the war crimes, the acts in case at hand cannot be considered as the most severe. The expectations of the punishments which can be imposed thus do not reach the high limit of the punishment as provided for in the law. On the contrary, the concept of criminal offence in continuation is applicable to the benefit of the defendants. Thus, this Panel finds the application of the recent CCRK as the most favorable.

It is also to be mentioned that the reference to the Geneva conventions with regards to the acts committed in 1998 is fully concordant with the law. Article 33, paragraph 1, of the Constitution of the Republic of Kosovo reads:

No one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

Article 22 of the Constitution of the Republic of Kosovo encompasses the direct applicability of International Agreements and Instruments, amongst others The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol (ECHR), and The International Covenant on Civil and Political Rights and its Protocol (ICCPR).

Both these instruments, namely on their Article 7, paragraph 2, of the ECHR and Article 15, paragraph 2, of the ICCPR read, respectively, as follows:

This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

On the legal grounds established above, namely with these arguments pertaining to what might appear to be a case of "*nulla crimen sine lege*", the Panel concludes the criminal liability for the war crimes committed in 1998 in Kosovo is in accordance with the law.

G. Legal consequences

The Panel has assessed the legal consequences of the facts established above. As an introductory remark, clearly resulting from the evaluation of the facts, the Panel points out that there are no legal consequences affecting the defendants in Counts I and V, as no facts enabling the court to convict the defendants were established.

1. Count II

As stated in the part dedicated to the factual findings, the Panel presented its agreement with the findings of the first instance panel, having found the defendant S.S. guilty of beating Witness A in Likoc detention centre.

However, an error in applying the law to the detriment of the defendant occurred by failing to apply the provision set in Article 81 of the CCRK. The charges covering the acts (at the time only "allegedly") committed by the defendant were brought by the Indictment No. PPS 88/11. The first instance court rendered the decision of severance, what led to the situation in which part of the charges against the defendant was adjudicated separately. The Panel, however, did not find any reason why this procedural severance of the charges should affect the defendant to his detriment. The Basic Court of Mitrovica solved the described situation by applying Article 81, paragraph 6, of the CCRK[33], reading:

A criminal offence that was not included in the criminal offence in continuation with the final judgment of the court, but was discovered later, is considered as a separate criminal offence.

The Panel states the cited provision does not apply, as the acts S.S. is charged with were not *discovered later*, but rather were part of same indictment. Therefore, they cannot be considered a separate criminal offence in the event the requirements to establish that the criminal offence was in continuation, as required by Article 81, paragraph 1, are met.

[33] See the Judgment of the Basic Court of Mitrovica case No. P.58/14, dated 27 May 2015, paragraph 242.

In this case, considering all the charges against S.S., including those adjudicated in a separate judgment P.58/14 dated 27 May 2015, read together with the appellate judgment PAKR 456/2016 dated 14 September 2016, the acts were committed against the same victim (Witness A), the offence had the same object, taking advantage of the same situation (captivity of Witness A in Likoc), at the same place (the detention centre of Likoc) and with the same intent of the perpetrator (to punish the alleged collaborator with Serbia). All the conditions for the criminal offence in continuation are met (two of them would suffice).

Consequently, the Panel faces the situation when part of the criminal offence in continuation has been adjudicated by a final judgment (case number P.58/14 dated 27 May 2015, in conjunction with appellate judgment PAKR 456/2016 dated 14 September 2016), whereas the other part of the same criminal offence in continuation is still not adjudicated in a final form.

The Panel applied the provision set in Article 363, paragraph 1 subparagraph 1.2, of the CPC, which reads:

The court shall render a judgment rejecting the charge, if:

[…]

The accused was previously convicted or acquitted of the same act under a final judgment […]

The concept of the criminal offence in continuation is built on the assumption that each part of the offence represents an entire criminal act was committed, in what could be a situation of concurrency of criminal offences[34]. Aware of this the Panel, rejected the charge of defendant S.S. in Count II, as the same defendant has been previously convicted under a final judgment for another part of the criminal offence at hand (in continuation, but the defendant cannot be punished twice for the same criminal offence).

2. Count IV

The factual findings with regards count IV were elaborated above. It is to be summarised that the Panel concurred with the factual findings of the first instance court. The beating of a man from Shipol by the defendants S.S. and J.D. was established.

The acquitting verdict of the first instance court was based on the conclusion that the act committed did not reach the necessary threshold of seriousness, as it was not proven that any of the actions caused grave consequences for the victim (paragraph 244.1. of the impugned judgment).

[34] Ideal or real, homogeneous or heterogeneous.

The Panel does not concur with such a conclusion. It is not only direct bodily harm caused to the victim or permanent damage to the "health"[35] that must be considered when evaluating *grave consequences* of the breach of international humanitarian law. In the case at hand, the entire conditions of the act must be assessed. It was established that the man from Shipol was beaten in a cruel manner by two perpetrators. The beating took place in the presence of other detainees, which along the overall situation of helplessness increased the range and scope of humiliation. The victim has been beaten to serve as an example, in a way to show his "brothers", present to the execution, the perpetrator's discontent with their previous behavior. The conditions of detention in Likoc were also described in a sufficient way by Witness A and it is clear, that the conditions of other victims of beating were in no way better than the ones of Witness A. The witness described it and both instances establish it as a fact.

As a conclusion, the Panel states that, although the precise description of the (physical) injuries suffered by the man from Shipol is not available, his beating in context of all the circumstances proven by the evidence, reaches the threshold of the *grave consequences* for the victim (bearing in mind the concept of "health" to be considered), especially at the time of beating itself.

It is not possible to apply the concept of criminal offence in continuation with regards the other acts the defendants were convicted with. Article 81, paragraph 2, reads:

Criminal offences perpetrated against personality may be considered as criminal offences in continuation only if they are committed against the same person.

In the case at hand, the beating in Count IV was committed solely against a man from Shipol, while the other criminal offences were committed against Witness A, who was not a victim in Count IV. Therefore, Count IV must be considered a separate criminal offence. Consequently, the defendants were found guilty as given in the enacting clause.

3. Count IX

The factual findings with regards Count IX can be summarized as follows: there was a detention centre in Likoc, a KLA facility, at least during the period of the detention of Witness A, the defendants S.S. and S.L. were in the commander's position there in the relevant period of time, S.S. was the commander of the Operational Zone Drenica and took active part in beating of the detainees, while S.L. was his deputy; later, during the relevant period of time, he was promoted

[35] This concept has to be interpreted as the World Health Organisation defines it, "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", see Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

to the position of commander. However, there is no proof that he directly participated in the maltreatment of the detainees.

The legal consequences of the defendants' acts are to be found from Article 152 paragraph 2 subparagraphs 2.1. and 2.2. that reads:

War crimes in serious violation of Article 3 common to the Geneva conventions

1. Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five (5) years or by life long imprisonment.

2. A serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against 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:

> *2.1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
>
> *2.2. committing outrages upon personal dignity, in particular humiliating and degrading treatment;*

The behavior of S.S. is to be qualified pursuant to the cited provision. He was responsible for the conditions of the detainees kept in Likoc. He participated in the beating of the detainees, so he was fully aware of the conditions they were being kept. He never used his power to terminate humiliating and degrading treatment of the detainees; on the contrary, he has actively aggravated their suffering by his own participation in threats, intimidation and in perpetrating also physical violence.

It was also established that the impact of the conditions in the detention centre on the detainees fulfills the characteristics of a *serious violation* as required in Article 152, paragraph 2, of the CCRK. The Panel repeatedly states that not only direct violence or bodily harm suffered are to be considered in this regard. In the case at hand, the overall conditions, as a whole, including deprivation of liberty based merely on suspicion, without any perspective of review of the grounds for detention, lack of proper food, hygiene, use of the toilet only once a day, necessity to urinate into a bottle, lack of contact with relatives, permanent intimidation and threatening, being witness of cruel treatment of fellow detainees and, of course, victims of beating, regardless its intensity, inflicted over a significant period of time, by multiple persons, all this put together must indeed be assessed as a serious violation of Article 3 common to Geneva Conventions of 12 August 1949.

In the case of defendant S.L. his active participation was not established. The court also considered the fact that for a decisive part of the relevant period of time he was superior to the staff of Likoc, but he was himself subordinate to S.S. His commander responsibility hence stems from Article 161, paragraph 1 subparagraph 1, of the CCRK as committed by omission.

And this is so, nevertheless the previous paragraph, given that it was also established he exercised control over Likoc centre. As an effective commander he was authorized to make decisions, as stated by witness B.G., he was in position to know, or at least should have known, about the treatment of the detainees and their conditions in the facility under his command. In spite of this, he failed to exercise his power in order to terminate the conditions seriously violating provisions of international humanitarian law. He did not act even after he was promoted to the position of superior commander over Drenica Operational Zone.

H. The Punishments

There are two counts where the defendants were found guilty, namely Count IV, with regards defendants S.S. and J.D., and Count IX with regards defendants S.S. and S.L. Moreover, the defendants S.S. and J.D. were imposed the imprisonment punishments in the case P.58/14 (so called Drenica II) which were not served yet.

The rules for imposing punishments in such circumstances can be found in the provisions of Articles 80 and 82 of the CCRK.

Article 80, in its paragraph 1 and paragraph 2 subparagraph 2.2, reads as follows:

1. *If a perpetrator, by one or more acts, commits several criminal offences for which he or she is tried at the same time, the court shall first pronounce the punishment for each act and then impose an aggregate punishment for all these acts*
2. *The court shall impose an aggregate punishment in accordance with these rules*
   […]
   2.2.If the court has imposed a punishment of imprisonment for each criminal offense, the aggregate punishment must be higher than each individual punishment but the aggregate punishment may not be as high as the sum of all prescribed punishments nor may exceed a period of twenty five (25) years.

   […]

Article 82, paragraph 1, of the CCRK reads:

If a convicted person is tried for a criminal offence he or she committed before serving a punishment imposed under an earlier conviction, […], the court shall impose an aggregate

punishment (Article 80 of this Code), taking into consideration the previously imposed punishment. The punishment or part of the punishment which the convicted person has already served shall be included in the aggregate punishment.

The first instance court explained its assessment of punishments rather briefly in points 298 – 302 of the impugned judgment. The mitigating and aggravating circumstances where reviewed by the Panel.

Regarding all three defendants the mitigating factor of "living a honest life" after the war can be granted as none of them has been convicted. The Panel cannot recognize the fight against the regime ruling Yugoslavia at the time of the offence as mitigating factor, as this fact had no mitigating effect on the crime committed. On the contrary, the armed conflict was in the case at hand misused as the scene and motive for the violence committed against people not involved in combat. The acts of the perpetrators as members of a party in an armed conflict is an element of the definition of war crime, so it cannot be considered to be a mitigating factor. The Panel also contests the important political positions or prestigious work as mitigating in this case. These positions did in no way affect the gravity of their criminal behavior during the war time.

With regards to aggravating circumstances, the Panel found a specific factor to be taken into consideration in relation to S.S. He was a commander of the operation zone, which brought him a significant "soft power" in the eyes of other KLA members. Being a model (or ought to be one) of behavior for the other KLA members, and acting as a direct perpetrator in Count IV, he clearly demonstrated his support to the violent behaviors against detainees. In relation to Count IX, he was of higher rank if compared with S.L., so he hold a bigger de facto power, but also he had a higher level of responsibility for the conditions in the facilities under his command. Moreover, in comparison with S.L., who was not described as perpetrator of violence by action, S.S. took an active part in all beatings being a subject of the case at hand.

In determining the punishments all the above mentioned circumstances were taken into consideration. The punishments imposed distinguish the involvement of particular defendants in the offences committed. The Panel is of the opinion that the commander's responsibility is not of a lower gravity if compared to the perpetrated violence by action, as it creates a framework in which the direct violence is performed – and tolerated if not accepted.

In imposing aggregated punishments to defendants S.S. and J.D., the Panel proceeded in accordance with the above cited provision of Article 82 of the CCRK and took into consideration the punishments imposed on them in the case P. 58/14, as modified by the appellate judgment PAKR 456/2016 (so called Drenica II). The aggregate punishments imposed in the case at hand thus annul the punishments as determined in Drenica II and replace them with the punishments determined in this judgment.

IV. CLOSING REMARKS

With regards to the impugned judgment of the Basic Court, the Court of Appeals for the reasons elaborated upon above:

Granted the appeal of defence counsel A.K. on behalf of defendant S.L.;

Modified the impugned judgment in Count I and acquited defendant S.L.;

Partially granted the appeal of defence counsel G.G-S. on behalf of defendant S.S. and rejected the charge against the defendant S.S. as described in Count II of the impugned judgment, as it is a material, factual part of a criminal offence in continuation for which the defendant was previously convicted;

Rejected the reminder of the appeal of defence counsel G.G-S. as unfounded;

Partially granted the appeal of the SPRK Prosecutor and accordingly modified the impugned judgment in Count IV;

Consequently found guilty and sentenced defendants J.D. and S.S. in Count IV;

Based on the appeal of the SPRK's Prosecutor, the Panel found guilty and sentenced defendants S.S. and S.L., whereas acquitted defendant S.J. in Count IX;

Rejected the remainder of the appeal of the SPRK's Prosecutor as unfounded;

The Panel imposed the aggregate punishments on defendants S.S. and J.D.;

The Panel modified the wording of the verdict in Counts III and V of the impugned judgment;

The Panel precisely credited the detention periods to the punishments;

The Panel affirmed the remaining parts of the judgment.

Done in English, an authorized language. Reasoned Judgment completed on 2 November 2016.

Presiding Judge

_____

Roman Raab
EULEX Judge

Panel member

_____

Jorge Martins Ribeiro
EULEX Judge

Panel member

_____

Hava Haliti
Kosovo Court of Appeals Judge

Recording Officer

_____

Adam Viplak
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
PAKR 455/15
15.09.2016