

IN THE BASIC COURT OF PRISHTINE/PRISTINA

Case Number: P 766/12

17 September 2013

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF PRISTINA in the Trial Panel composed of EULEX Judge Malcolm Simmons, presiding and Judge Shpresa Hasaj-Hyseni and EULEX Judge Mariola Pasnik, panel members and Nexhmije Mezini, as recording officer, in the criminal case against:

- I. **AK**, father's name X, mother's name X, born on X, in village of X, Municipality of X, Kosovo Albanian, residing in X, Municipality X, completed secondary school, X; charged in the Indictment of the EULEX Special Prosecutor PPS no. 07/10, dated and filed with the Registry of the District Court of Pristina on 25 July 2011 (hereinafter "Indictment") with the criminal offences:

Count 1:

War Crime against the Civilian Population and Prisoners of War, under Articles 142, 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter the "CCSFRY"), also foreseen in Articles 120, 121 of the Criminal Code of Kosovo (hereinafter the "CCK"), read in conjunction with Articles 22, 24, 26 of the CCSFRY and 23, 25, 26 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of Additional Protocol II to the four Geneva Conventions (hereinafter "APII"); the Accused, in his capacity as a KLA member, in co-perpetration with **FL, NK1, NK2, NS, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and**

the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in an improvised KLA detention centre in the village of Klecke/Klecka, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) APII; the Accused in his capacity of member of the KLA, in co-perpetration with **NK2, NS, RM, NK1** and cooperative witness X **participated in the killing of a Serbian military prisoner**, detained in the Klecke/Klecka detention centre, and whose remains were found in a mass grave near Klecke/Klecka containing five bodies; more precisely, the defendant participated in the crime by providing **NS**, the direct perpetrator of the killing, with a scythe, although he knew, because explicitly informed of **NS's** intentions, that the latter was going to kill the prisoner with that scythe; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 3:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA, in co-perpetration with **FL, NK2, NS, NK1, BL** and

cooperative witness X, **participated in the killing of ND and VM, two Serbian Police officers** detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by marching the two prisoners to the execution spot and by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew (because explicitly informed of **FL's** orders), or at least could easily foresee from the orders received (marching the two Serbian prisoners to a remote location in the woods) what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

- II. **NK1**, nickname 'X', father's name X, mother's name X, X, in X Village, X Municipality, Kosovo Albanian, residing in X Village, X Municipality, attended law faculty, inspector at X; charged in the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member and commander, and as a person holding a position of responsibility over Klecke/Klecka detention center, in co-perpetration with **FL, NK2, NS, AK, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent

beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against the Civilian Population, under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as member of the KLA, in co-perpetration with **NK2, NS** and **RM**, killed **AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre, by shooting at him with an AK-47 firearm; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 3:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as member of the KLA and in co-perpetration with **NK2, NS** and two unidentified KLA soldiers, **participated in the killing of four Serbian military prisoners** detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and identified through DNA as **BC, ZF** and **ZT**, who were executed with several rounds of AK-47 firearm by a group composed by **NK1, NK2, NS**, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 4:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused, in his capacity as member of the KLA, in co-perpetration with **NK2 violated the bodily integrity and health of a Serbian military prisoner**, detained in the Klecke/Klecka detention centre, by repeatedly beating him; the victim was subsequently killed and his remains were found in a mass grave near Klecke/Klecka containing five bodies; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 5:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused in his capacity of member of the KLA, in co-perpetration with **NK2, NS, RM, AK** and cooperative witness X **participated in the killing of a Serbian military prisoner**, mentioned under Count 4 above; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, **NS**, although he knew, because explicitly informed about **NS's** intention to kill the prisoner from the previous conversation between the latter and **FL**, that the prisoner would be executed, in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 6:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII; the Accused in his capacity as member of the KLA, in co-perpetration with **FL, NK2, NS, AK, BL** and cooperative witness X, **participated in the killing of ND and VM, two Serbian Police officers**, detained in the Klecke/Klecka detention center, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about **FL's** intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

- III. **NK2**, call sign during the war 'X', father's name X, mother's name X, born on X, in X Village, X Municipality, Kosovo Albanian, residing at X, attended law school, X; charged in the said Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member, in co-perpetration with **FL, NK1, NS, AK, BS, SS1**, cooperative witness X and **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including

prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA and in co-perpetration with cooperative witness X, **NS, SS1, BS, tortured four Serbian military prisoners**, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC, ZF and ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 3:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA and in co-perpetration with **NK1, NS** and two unidentified KLA soldiers, **participated in the killing of four Serbian military prisoners**, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka, three of whom identified through DNA as **BC, ZF and ZT**, who were executed with several rounds of AK-47 firearm by a group composed by **NK1, NK2, NS**, and two unidentified KLA soldiers; in Klecke/Klecka,

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

Count 4:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA, in co-perpetration with **NK1 violated the bodily integrity and health of a Serbian military prisoner**, detained in the Klecke/Klecka detention centre, by repeatedly beating him; the victim was subsequently killed and his remains were found in a mass grave near Klecke/Klecka containing five bodies; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 5:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity of member of the KLA, in co-perpetration with **NK1, NS, RM, AK** and cooperative witness X **participated in the killing of a Serbian military prisoner**, mentioned under Count 4 above; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, **NS**, although he knew, because explicitly informed about **NS's** intention to kill the prisoner from the previous conversation between the latter and **FL**, that the prisoner would be executed; in Klecke/Klecka,

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

Count 6:

War Crime against the Civilian Population, under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA, in co-perpetration with **NK1, NS** and **RM**, **killed AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre, by shooting at him with an AK-47 firearm; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 7:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA, in co-perpetration with **FL, NK1, NS, AK, BL** and cooperative witness X, **participated in the killing of ND and VM, two Serbian Police officers**, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gunshots fired with a pistol; more precisely, the defendant participated in the crime by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about **FL's** intention to kill the prisoners, what would happen to them; in a location

known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

- IV. **BL**, father's name X, mother's name X, born on X, in X Village, X Municipality, Kosovo Albanian, residing in X Village, X Municipality, completed elementary school, X; charged according to the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member, in co-perpetration with **FL, NK1, NK2, NS, AK, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA, in co-perpetration with **FL, NK2, NS, NK1, AK** and cooperative witness X, **participated in the killing of ND and VM, two Serbian Police**

officers, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by marching the two prisoners to the execution spot and by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew (because explicitly informed of **FL's** orders), or at least could easily foresee from the orders received (marching the two Serbian prisoners to a remote location in the woods) what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

- V. **FL**, nicknames 'X' and 'X', father's name X, mother's name X, born on X, in X Village, X Municipality, Kosovo Albanian, residing at X, attended faculty of law, X; charged according to the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member and commander, and as a person exercising overall control over the Klecke/Klecka detention centre, in co-perpetration with **NK1, NK2, NS, AK, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition,

frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member and commander, **tortured a Serbian military prisoner**, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave containing five bodies near Klecke/Klecka, by punching and kicking him during an interrogation; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 3:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member and commander, in co-perpetration with **NK2, NS, NK1, AK, BL** and cooperative witness X, **participated in the killing of ND and VM, two Serbian police officers**, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by ordering cooperative witness X to execute the prisoners; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

VI. **RM**, nickname 'X', father's name X, mother's name X, born on X, in X, Kosovo Albanian, residing in X, completed high school, X; charged according to the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population, under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA, in co-perpetration with **NK1**, **NK2** and **NS**, **killed AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre; more precisely, the defendant participated in the crime by keeping the victim at the disposal of the perpetrators and by pushing him into a hole in the ground where he was subsequently executed by **NK1** and **NK2** with AK-47 firearms; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity of member of the KLA, in co-perpetration with **NK1**, **NS**, **NK2**, **AK** and cooperative witness X **participated in the killing of a Serbian military prisoner**; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, **NS**, although he knew, because explicitly informed about **NS's** intention to kill the prisoner from the previous conversation between the latter and **FL**, that the

prisoner would be executed; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

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

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member holding a position of responsibility within the Klecke/Klecka detention centre, in co-perpetration with **FL, NK1, NK2, AK, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA and in co-perpetration with cooperative witness X,

NK2, SS1, BS, tortured four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC, ZF** and **ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 3:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA and in co-perpetration with **NK1, NK2** and two unidentified KLA soldiers, **participated in the killing of four Serbian military prisoners**, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka, three of whom identified through DNA as **BC, ZF** and **ZT**, who were executed with several rounds of AK-47 firearm by a group composed by **NK1, NK2, NS**, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 4:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity of member of the KLA, in co-perpetration with **NK1, NK2, RM, AK** and cooperative witness X **killed a Serbian military prisoner**, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near

Klecke/Klecka containing five bodies, by inflicting several blows to his body (and in particular to his neck) with a scythe; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

Count 5:

War Crime against the Civilian Population, under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA, in co-perpetration with **NK1, NK2** and **RM, participated in the killing of AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre; more precisely, the defendant participated in the crime by keeping the victim at the disposal of the perpetrators and by pushing him into a hole in the ground where he was subsequently executed by **NK1** and **NK2** with AK-47 firearms; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999;

Count 6:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused in his capacity as member of the KLA, in co-perpetration with **FL, NK1, NK2, AK, BL** and cooperative witness X, **participated in the killing of ND and VM, two Serbian police officers**, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed

about **FL**'s intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 04/05 April 1999;

VIII. **SS1**, nickname 'X', father's name X, mother's name X, X, in X Village, X Municipality, Kosovo Albanian, residing in X, X Municipality, completed elementary school, X; charged according to the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member, in co-perpetration with **FL, NK1, NK2, NS, AK, BL, BS**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA and in co-perpetration with cooperative witness X, **NK2, NS, BS, tortured four Serbian military prisoners**, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC, ZF and ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

- IX. **SS2**, father's name X, mother's name X, born on X, in X Village, X Municipality, Kosovo Albanian, residing in X Village, X Municipality, completed elementary school, X; charged according to the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member, in co-perpetration with **FL, NK1, NK2, NS, AK, BL, BS, SS1**, cooperative witness X, and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999;

- X. **BS**, father's name X, mother's name X, born on X, in X Village, X Municipality, Kosovo Albanian, residing in X, law graduate, X; charged according to the Indictment with the criminal offences:

Count 1:

War Crime against the Civilian Population and War Crime against Prisoners of War, under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as KLA member, in co-perpetration with **FL, NK1, NK2, NS, AK, BL, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, **violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners**, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipan Municipality, from early 1999 until mid-June 1999;

Count 2:

War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; the Accused, in his capacity as member of the KLA and in co-perpetration with **NK2, NS** and **SS1** **tortured four Serbian military prisoners**, detained in the Klecke/Klecka detention

centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC**, **ZF** and **ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999 but not before 11 April 1999;

AFTER having held the Main Trial sessions in open court on 18, 23, 24, 25 and 30 April, 14, 15, 21, 28 and 29 May; 5 June; 3, 16 and 18 July; 2, 4, 10, 11 and 17 September 2013, in the presence of the Accused **AK**, his Defence Counsel FGi-B; **NK1**, his defence counsels FV and XM; **NK2**, his defence counsels MH and BS; **BL**, his Defence Counsel MD; **FL**, his defence counsels KAAKQC, TR and TG; RM, his Defence Counsel HM; **NS**, his defence counsels BT and Dr. DE; **SS1**, his Defence Counsel MS; **SS2**, his Defence Counsel TH; BS, his Defence Counsel AQ, except for the sessions when Defence Counsel sent their substitutes; and in the presence of EULEX Special Prosecutor Maurizio Salustro of the Special Prosecution Office of Kosovo;

AFTER deliberation and voting held on 16 September 2013;

PURSUANT to Article 392 of the Kosovo Code of Criminal Procedure on this 17th day of September 2013, in open court and in the presence of all Accused, their Defence Counsel and the EULEX Special Prosecutor, renders the following

JUDGMENT

1. **AK**, with personal details above, in house detention from 11 December 2012 to 6 June 2013 and from 13 June to 4 July and from 13 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the Kosovo Code of Criminal Procedure (hereinafter the “KCCP”)

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 142, 144 of the CCSFRY, also foreseen in Articles 120, 121 of the CCK, read in conjunction with Articles 22, 24, 26 of the CCSFRY and 23, 25, 26 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of Serbian police officers **ND** and **VM**) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Further, pursuant to Article 389 (1) of the KCCP

Count 2: **REJECTED** War Crime against Prisoners of War (participation in the killing of a Serbian military prisoner)¹ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) APII because the prosecutor withdrew the charge during the main trial;

2. **NK1**, with personal details above, in detention on remand from 24 December 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June to 4 July and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against the Civilian Population (killing of **AA**) under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four

¹Count 2 was withdrawn by the EULEX Special Prosecutor pursuant to Partial Withdrawal of the Indictment, dated 9 November 2011, filed with the Court on 11 November 2011, as presented at the session on 11 November 2011. However, that count remained in the Indictment.

Geneva Conventions 1949, and Articles 4, 5(1) APII because it has not been proven that the accused committed the act with which he has been charged;

Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of four Serbian military prisoners) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 4: **NOT GUILTY** of War Crime against Prisoners of War (violation of the bodily integrity and health of a Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII because it has not been proven that the accused committed the act with which he has been charged;

Count 5: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of a Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII because it has not been proven that the accused committed the act with which he has been charged;

Count 6: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of Serbian police officers **ND** and **VM**) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in

violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII because it has not been proven that the accused committed the act with which he has been charged;

3. **NK2**, with personal details above, in detention on remand from 24 November 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June to 4 July and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of four Serbian military prisoners) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of four Serbian military prisoners) under Articles 22, 144 of the

CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 4: **NOT GUILTY** of War Crime against Prisoners of War (violation of the bodily integrity and health of a Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 5: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of a Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 6: **NOT GUILTY** of War Crime against the Civilian Population (killing of **AA**) under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 7: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of Serbian police officers **ND** and **VM**) under Articles 22, 144 of the

CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

4. **BL**, with personal details above, in detention on remand from 11 December 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June to 4 July and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of Serbian police officers **ND** and **VM**) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

5. **FL**, with personal details above, in detention on remand from 24 November 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June to 4 July and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoner of War (torture of Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of Serbian police officers **ND** and **VM**) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

6. **RM**, with personal details above, in detention on remand from 11 December 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June to 4 July and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population (killing of **AA**) under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of a Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

7. **NS**, with personal details above, in detention on remand from 24 November 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June 2013 to 4 July 2013 and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of four Serbian military prisoners) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 3: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of four Serbian military prisoners) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 4: **NOT GUILTY** of War Crime against Prisoners of War (killing of a Serbian military prisoner) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

because it has not been proven that the accused committed the act with which he has been charged;

Count 5: **NOT GUILTY** of War Crime against the Civilian Population (participation in the killing of **AA**) under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 6: **NOT GUILTY** of War Crime against Prisoners of War (participation in the killing of Serbian police officers **ND** and **VM**) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

8. **SS1**, with personal details above, in detention on remand from 11 December 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June 2013 to 4 July 2013 and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common

Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of four Serbian military prisoners) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

9. **SS2**, with personal details above, in house detention from 11 December 2012 to 6 June 2013 and from 13 June 2013 to 4 July 2013 and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

10. **BS**, with personal details above, in detention on remand from 11 December 2012 to 6 March 2013 and in house detention from 6 March to 6 June 2013 and from 13 June to 4 July and from 27 July to 2 September 2013 is found as follows:

Pursuant to Article 390 (3) of the KCCP

Count 1: **NOT GUILTY** of War Crime against the Civilian Population and War Crime against Prisoners of War (violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners) under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

Count 2: **NOT GUILTY** of War Crime against Prisoners of War (torture of four Serbian military prisoners) under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII because it has not been proven that the accused committed the act with which he has been charged;

COSTS OF CRIMINAL PROCEEDINGS AND PROPERTY CLAIM

The Accused having been found not guilty, the costs of criminal proceedings under Article 99 (2) 1) to 5) KCCP, the necessary expenses of the defendants and the remuneration and necessary

expenditures of defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources as per applicable rates, pursuant to Article 103 (1) KCCP.

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

REASONING

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The annexes hereto comprise an integral part of this Judgment.

A. INTRODUCTION

I. Procedural History

The Indictment of the EULEX Special Prosecutor PPS no. 07/10, dated 25 July 2011 charged the Accused **AK, NK1, NK2, BL, FL, RM, NS, SS1, SS2** and **BS**, with crimes allegedly committed by

them from early 1999 until mid-June 1999 against Serbian and Albanian civilians and Serbian military prisoners in and near the village of Klecke/Klecka in Kosovo.

The Indictment charged the Accused with 34 counts of war crimes against the civilian population and Serbian prisoners of war, in violation of Articles 142, 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, also foreseen in Articles 120 and 121 of the Criminal Code of Kosovo, read in conjunction with Articles 22, 24 and 26 of the CCSFRY and Articles 23, 25 and 26 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5 (1) of Protocol II Additional to the four Geneva Conventions, all rules of international law effective at the time of the armed conflict in Kosovo.

Count 2² against the Accused **AK** was withdrawn by the EULEX Special Prosecutor on 9 November 2011.³ The Indictment was not amended prior to the commencement of the re-trial. However, on 18 April 2013 at the commencement of the re-trial the prosecutor confirmed that count 2 against **AK** was withdrawn.

The Indictment alleged that an undefined number of Serbian and Albanian civilians and Serbian military prisoners were detained in an improvised KLA detention centre located in the village of Klecke/Klecka in the Municipality of Lipjan in inhumane conditions and routinely subjected to beatings. The Indictment named fourteen persons whom it was alleged were detained in the said detention centre.

The Indictment alleged that two of the named detainees were executed by gunshots in a location known as Livadhi i Canit near the village of Klecke/Klecka on or about 4th or 5th April 1999. One of the named detainees was allegedly tortured and later executed with a scythe blade in April 1999, not before 11 April 1999. Four of the named detainees were allegedly

² War Crime against Prisoners of War, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) APII

³ SPRK partial withdrawal of the Indictment, 9.11.2011, PPS 07/10, Court trial binder 4.

beaten for one full day and a few days later they too were executed by gunshots in Klecke/Klecka in April 1999, not before 11 April 1999.

The Indictment alleged that another named detainee, after his having been released, was allegedly executed by gun shots in Klecke/Klecka on or about 3 or 4 April 1999.

The Accused **AK, NK1, NK2, BL, FL, RM, NS, SS1, SS2** and **BS** were charged with individual criminal liability for allegedly committing and, to varying degrees, participating in the commission of the crimes.

In the Indictment the Accused **FL** is referred to as a commander and as a person exercising overall control over the Klecke/Klecka detention centre with regard to the violation of the bodily integrity and health of Serbian and Albanian civilians and Serbian military prisoners⁴, and as a commander⁵ with respect to the torture of a Serbian military prisoner and the killing of two Serbian military officers, detained in the Klecke/Klecka detention centre.

In the Indictment the Accused **NK1** is referred to as a commander and a person holding a position of responsibility over the Klecke/Klecka detention centre⁶ with regard to the violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners.

In the Indictment the Accused **NS** is referred to as a person in a position of responsibility within the Klecke/Klecka detention centre⁷.

On 30 March 2012 the Court severed the case against **NK1, NK2, FL** and **NS**.

⁴ Count 1 against **FL**

⁵ Counts 2 and 3 against **FL**

⁶ Count 1 against **NK1**

⁷ Count 1 against **NS**

On 2 May 2012 Judgment was issued in case P. nr. 425/11 in the criminal proceedings against **NK1, NK2, FL** and **NS**. All four defendants were acquitted pursuant to Article 390 (3) of the KCCP.

On 30 March 2012 Judgment was issued in case P. nr. 425/11 in the criminal proceedings against **AK, BL, RM, SS1, SS2** and **BS**. All six defendants were acquitted pursuant to Article 390 (3) of the KCCP.

On 20 November 2012⁸ and 11 December 2012⁹ the Supreme Court remitted the cases against all ten defendants for re-trial. The Supreme Court did not displace or adversely comment on the factual findings of the first trial panels.

The findings of the Supreme Court in both cases primarily concerned the admissibility of the evidence of **AZ**. One of the issues to be determined by this Trial Panel was what, if any, weight it could attach to the evidence of **AZ**.

Both cases having been remitted for re-trial on 11 February 2013 the Court issued a Ruling re-joining the cases.

The Accused pleaded not guilty to all counts against them in the Indictment.

II. JURISDICTION

According to Article 23 (1) of the KCCP, 'a District Court shall have jurisdiction to adjudicate at first-instance a criminal offence punishable by imprisonment of at least five years or by long-term imprisonment'. The Indictment of the EULEX Special Prosecutor charges the Accused with

⁸ Case number Ap-Kz. No. 453/2012 (**NK1, NK2, FL** and **NS**)

⁹ Case number Ap-Kz. No. 527/2012 (**AK, BL, RM, SS1, SS2** and **BS**)

War Crime against the Civilian Population and War Crime against Prisoners of War, which is punishable by imprisonment of at least five years. Therefore, the District Court has subject-matter jurisdiction over this case.

The Law on Courts that entered into force on 1 January 2013 re-classified District Courts as Basic Courts.

The alleged crimes were committed in or near the village of Klecke/Klecka, Lipjan/Lipljan Municipality. Lipjan/Lipljan Municipality falls within the jurisdiction of the Basic Court of Prishtine/Pristina. Accordingly, this Court has territorial jurisdiction over the case under Article 27 (1) KCCP.

Article 5.1 of the Law on the Special Prosecution Office of the Republic of Kosovo¹⁰ gives the SPRK exclusive competence to investigate and prosecute War Crimes.

Article 3.2 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo¹¹ provides that EULEX Judges shall have jurisdiction over cases prosecuted by the SPRK. Consequently, EULEX Judges have jurisdiction in this case.

B. POLITICAL AND SOCIAL CONTEXT

The Court takes judicial notice of the fact that the Constitution of the Socialist Federal Republic of Yugoslavia (“SFRY”) of 1974 designated Kosovo as an autonomous province within the Republic of Serbia and a constituent entity of the SFRY¹².

¹⁰ Number 03/L-052

¹¹ Number 03/L-053

¹² Articles 1, 2 and 4 of the 1974 Constitution

Further, on 28 March 1989 the Assembly of the Republic of Serbia amended the Constitution revoking the autonomous status of Kosovo.

Further, in 1990 the Assembly of Kosovo and the provincial government were abolished.

Further, in March 1990 the Assembly of the Republic of Serbia passed new laws that prohibited Kosovo Albanians from working in political and economic institutions. Kosovo Albanian students and professors were refused access to the universities.

A period of unrest followed during which various political parties were established. Almost inevitably, political and social tensions turned to armed resistance. Initially, these were somewhat sporadic and clandestine. However, in or about March 1993 the Kosovo Liberation Army (hereinafter "KLA") was born.

The KLA advocated an armed resistance to the official regime. The governing body of the KLA was the General Staff.

Between 1993 and 1997 the situation in Kosovo continued to deteriorate. By the end of 1997 and the early part of 1998 there was open conflict between the KLA and Serbian forces.

C. EXISTENCE AND QUALIFICATION OF ARMED CONFLICT

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

Pursuant to UNMIK Regulation 1999/24¹³, as amended by UNMIK Regulation 2000/59¹⁴, the substantive criminal law provisions applicable were the provisions of the Criminal Code of the Socialist Federal Republic of Yugoslavia, with the amendments as promulgated by the aforementioned UNMIK Regulations.¹⁵

Pursuant to Article 142 of the CCSFRY, the criminal offence of War Crime against the Civilian Population was committed by

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

Pursuant to Article 144 of the CCSFRY the criminal offence of War Crime against Prisoners of War was committed by

¹³ 12 December 1999

¹⁴ 27 October 2000

¹⁵ Capital punishment was abolished pursuant to Article 1.5. Pursuant to Article 1.6 of UNMIK Regulation 2000/59 for each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the death penalty is converted into a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years.

'whoever, in violation of the rules of international law, orders, murders, tortures or inhumane treatment of prisoners of war, including therein biological experiments, causing of great suffering or serious injury to the bodily integrity or health, compulsive enlistment into the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial, or who commits some of the foregoing acts'.

The Indictment alleges that the Accused acted in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 (hereinafter "Common Article 3 GC 1949") and Articles 4 and 5 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.

Common Article 3 of the Geneva Conventions 1949 provides:

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

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

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and

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

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

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

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

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

Article 4 of Additional Protocol II 1977 (inhumane treatment) provides

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

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d)

acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured; (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 5 (1) of Additional Protocol II 1977 (Persons whose liberty has been restricted) provides

In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained (a) the wounded and the sick shall be treated in accordance with Article 7; (b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) they shall be

allowed to receive individual or collective relief; (d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions; (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

In order to determine whether the alleged criminal offences constitute War Crimes, the Trial Panel must first determine whether, during the relevant period in 1999, the conflict in Kosovo amounted to an armed conflict. Only the existence of an armed conflict will trigger the application of Articles 142 and 144 of the CCSFRY.

Therefore, for the criminal offences to amount to War Crimes, a link with armed conflict must be established. Internal disturbances and tensions (such as riots, isolated and sporadic acts of violence, or other acts of a similar nature) do not amount to a non-international armed conflict.

Under the Geneva Conventions, *international armed conflict* is defined as

‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’.

‘Armed conflict’ as such is not defined in the Geneva Conventions.

The most widely utilized definition of *internal armed conflict* is the definition formulated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) in *Tadić*:

‘An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed

*groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*¹⁶

Common Article 3 GC 1949 refers to an armed conflict not of ‘an international character’ and provides that it must occur ‘in the territory of one of the High Contracting Parties’.

The threshold under Additional Protocol II is higher. Pursuant to Article 1.1, the Protocol only applies to conflicts between the armed forces of a High Contracting Party ‘*and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations*’. Like Common Article 3 GC 1949, this Article provides that the conflict must take place ‘*in the territory of a High Contracting Party*’.¹⁷

The available information and evidence concerning the KLA’s structure and activities in Kosovo in 1998 and 1999, as noted also by the ICTY Trial Chamber, starting from at least mid-1998, illustrates that the KLA was an ‘*organized armed group*’. While different aspects of the KLA’s organization and activities developed at different paces during that period, there was a gradual progression towards centralization of authority and coordination of efforts against the FRY/Serbian forces. During 1998 the KLA established a general staff and subordinated seven zone headquarters under it, established regulations governing troop structure and military discipline, carried out coordinated attacks on FRY/Serbian forces, established a financial

¹⁶ *Prosecutor v. Duško Tadić*, ICTY, Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 02.10.1995, para.70.

¹⁷ The Manual on the Law of Non-International Armed Conflict With Commentary, International Institute of Humanitarian Law, San Remo 2006, available at: <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf>

operation, smuggled and/or purchased significant weapons stocks, instituted the use of a distinctive KLA emblem, and implemented strategic policies to further their aims.¹⁸

The jurisprudence of the ICTY and the Supreme Court of Kosovo has established that there was an ongoing armed conflict in Kosovo at least since early spring 1998 onwards between the (governmental) Serbian armed forces and the KLA, continuing into 1999.¹⁹ The ICTY in *Milutinović* and *Đorđević* explicitly held that the armed conflict continued until June 1999.²⁰

With regard to the period covered by the Indictment in the present case, the existence of an armed conflict has been established also by the Supreme Court of Kosovo in the *Kolasinac* Decision of 5 August 2004 and in the *Latif Gashi* Decision of 21 July 2005.

The Trial Panel finds that an armed conflict did exist in Kosovo throughout the relevant period to which reference is made in the indictment and lasted until the terms of the international peace plan that was agreed between NATO and the FRY on 9 June 1999.

While the qualification of the armed conflict as an internal armed conflict prior to the NATO involvement is well-established, the question arises whether, following the commencement of NATO air strikes in March 1999, the conflict elevated to an *international* armed conflict. The ICTY Trial Chamber in *Đorđević* addressed this issue and answered in the affirmative. The ICTY Trial Chamber concluded:

¹⁸ *Prosecutor v. Milan Milutinović*, ICTY, Trial Judgment, 26 February 2009, paragraph 840

¹⁹ See e.g. *Prosecutor v. Milan Milutinović*, ICTY, Trial Judgment, 26 February 2009, paragraphs 840-841; *Prosecutor v. Vlastimir Đorđević*, ICTY, Trial Judgment, 23 February 2011 paragraph 1579 ff; *Prosecutor v. FL, Haradin Bala, Isak Musliu*, ICTY, Trial Judgment, 30 November 2005, paragraph 171 ff (the Trial Chamber was concerned with a period in 1998, but also remarked that the armed conflict continued long after July 1998); *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, ICTY, Trial Judgment, 3 April 2008, paragraph 100 (the Appeals Chamber on 21 July 2012 ordered a partial re-trial of the case that is currently ongoing).

²⁰ See the respective cases referenced *ibid*.

*'The Chamber is satisfied that as of the end of May 1998 an armed conflict existed in Kosovo between Serbian forces, in particular, forces of the VJ and the MUP, and the KLA. This armed conflict continued until at least June 1999. On 24 March 1999 NATO commenced its military operations in the FRY. On the same day the government of the FRY declared a state of war. On this basis the Chamber is satisfied that from 24 March 1999, until the end of hostilities in June 1999, an international armed conflict existed in Kosovo between Serbian forces and the forces of NATO.'*²¹

For the purpose of determining the applicable law in this case, the Trial Panel, however, does not need to make a determination as to the nature of the existing armed conflict. Even if the armed conflict following the involvement of NATO is to be qualified as an international armed conflict, the obligations enshrined in Common Article 3 GC 1949 and AP II 1977 would continue to apply. The value of Common Article 3, as routinely emphasized by commentators, is not limited to internal armed conflict. The latter represents the *minimum* which must be applied in the least determinate of conflicts. Therefore its terms must, *a fortiori*, be respected in the case of international conflicts proper, when all the provisions of the Geneva Conventions are applicable.²²

D. LAW

I. Applicable Criminal Law

The Indictment charges each of the accused with responsibility for War Crime against the civilian population and War Crime against prisoners of war in violation of Articles 142 and 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Articles 120 and 121 of

²¹ *Prosecutor v. Vlastimir Đorđević*, ICTY, Trial Judgment, 23.02.2011 paragraphs 1579 and 1580 (the appeal in the case is currently pending before the Appeals Chamber).

²² ICRC Commentary to Common Article 3, available at: <http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument>

the Criminal Code of Kosovo. The alleged underlying acts include: violation of the bodily integrity and health of civilians; murder of civilians; violation of the bodily integrity and health of military prisoners; torture and murder of military prisoners. It is further alleged that the conduct of the accused was in violation of Common Article 3 to the four Geneva Conventions of 12 August 1949 and Articles 4 and 5(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.

I. Law applicable in Kosovo at the time of the alleged commission of the offences

Pursuant to section 1.1 of UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59, the law applicable in Kosovo is:

- (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
- (b) The law in force in Kosovo on 22 March 1989.

The CCSFRY was in force in Kosovo on 22 March 1989 and is, thus, applicable to this case. In relation to the offence of War Crime against the civilian population, Article 142 of the CCSFRY, in the pertinent part, provides that:

“[w]hoever, in violation of the rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings [...] inhuman treatment, [...] or violation of bodily integrity or health [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.”

In relation to the offence of War Crime against prisoners of war, Article 144 of the CCSFRY, in the pertinent part, provides that:

“[w]hoever, in violation of the rules of international law, orders murders, tortures or inhuman treatment of prisoners of war, including therein [...]

causing of great sufferings or serious injury to the bodily integrity or health [...] or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.”

UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59, abolished the death penalty, stipulating that for each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty shall be replaced by a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty years.

Articles 142 and 144 of the CCSFRY require that the offence of War Crime, committed through one or more of the underlying acts listed therein, shall be *“in violation of the rules of international law”*. Consequently, the application of the two provisions is conditional upon the international law applicable in Kosovo in 1989. In this regard, Article 210 of the Constitution of the Socialist Federal Republic of Yugoslavia, which was promulgated in 1974 and was in effect in Kosovo on 22 March 1989, provided that:

“International treaties shall be applied as of the day they enter into force, unless otherwise specified by the instrument of ratification or by agreement of the competent bodies. International treaties which have been promulgated shall be directly applied by the courts.”

The four Geneva Conventions of 1949 were ratified by the Socialist Federal Republic of Yugoslavia in 1950 and Additional Protocols I and II were ratified in 1979. Consequently, these international instruments were in force in Kosovo on 22 March 1989, as required by UNMIK Regulation 1999/24 and UNMIK Regulation 2000/59.

Common Article 3 to the four Geneva Conventions of 1949 provides, in the pertinent part, as follows:

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

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

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [...]”

As a rule of customary international law, the substantive provisions of Common Article 3 are applicable to internal and international conflicts alike.²³

For a violation of Common Article 3 to the Geneva Conventions to occur, it is required that the victim was not taking active part in the hostilities at the time of the offence.²⁴ While neither treaty law nor customary law expressly define the notion of active participation in hostilities, it has been defined in the jurisprudence of the International Criminal Tribunal for the Former

²³ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 (“*Čelebići Appeal Judgment*”), para. 420. See also *ibid.*, paras 147-150. In the *Nicaragua* case, the International Court of Justice held that: “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22). In relation to the substantive provisions contained in paragraphs 1(a)-(d) of Common Article 3, the ICRC commentary states: “The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For “the greater obligation includes the lesser”, as one might say.” (International Committee of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, Pictet, (ed), 1958, p. 14).

²⁴ See Common Article 3 to the four Geneva Conventions. See also *Čelebići Appeal Judgment*, paras 420, 424.

Yugoslavia as participation in acts of war that aim by their nature or purpose to cause actual harm to the personnel or equipment of the armed forces of the opponent.²⁵ The protection of Common Article 3 extends to victims that are members of armed forces who have laid down their arms or are placed *hors de combat* by, for instance, sickness, wounds or detention.

Article 4 of Additional Protocol II which further develops the protections afforded by Common Article 3, provides, in the pertinent part, that:

“1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. [...]

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

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

Article 5 of Additional Protocol II provides, in pertinent part, as follows:

“1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:
[...]

²⁵*Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-bis-T, Public Judgment with Confidential Annex, 29 November 2012 (re-trial), para. 398, referring to *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 178.

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

The purpose of Article 5 of Additional Protocol II is to ensure the humane treatment of persons whose liberty has been restricted for reasons related to the conflict.²⁶ Such persons must be provided with essential minimum requirements: food, drinking water, hygiene and shelter.²⁷ Protection against the rigours of the climate includes the provision of clothes for the cold and shelter from the sun and any intemperate conditions.²⁸ While the obligation of the detaining authority in this regard remains an absolute one, its content varies, contingent on the living conditions prevailing in the area.²⁹

II. The nature of the armed conflict

The Indictment explicitly alleges that a state of internal armed conflict existed at the time of the commission of the offences which triggered the application of Common Article 3 to the four Geneva Conventions and Articles 4 and 5(1) of Additional Protocol II.

In determining the existence of an armed conflict, the ICTY Appeals Chamber has articulated the following test:

“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International

²⁶ International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986 (“ICRC Commentary on the Additional Protocols”), para. 4565.

²⁷ ICRC Commentary on the Additional Protocols, para. 4573.

²⁸ ICRC Commentary on the Additional Protocols, para. 4574.

²⁹ ICRC Commentary on the Additional Protocols, para. 4573.

*humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*³⁰

The criteria to be addressed under this test are: (i) the intensity of the conflict and (ii) the organisation of the parties to the conflict.³¹ The purpose is to distinguish an armed conflict “from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.³² Specifically in relation to armed conflicts of non-international character, the armed group must have “some degree of organisation”, and its leadership must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented.³³ The ICTY jurisprudence has considered the following factors when assessing the degree of organisation of an armed group: (i) the presence of a command structure (ii) the ability of the armed group to carry out operations in an organised manner (iii) the level of

³⁰*Prosecutor v. Duško Tadić aka “Dule”,* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. See also *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012 (“*Lubanga Dyilo* Trial Judgment”), para. 533.

³¹*Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87-T, Judgment, 23 February 2011 (“*Đorđević* Trial Judgment”), para. 1522, referring to *Prosecutor v. Duško Tadić aka “Dule”,* Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 (“*Tadić* Trial Judgment”), para. 562; *Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-T, Judgment, 16 November 1998 (“*Čelebići* Trial Judgment”), para. 184; *Prosecutor v. FL et al.*, Case No. IT-03-66-T, Judgment, 30 November 2005 (“*L* Trial Judgment”), para. 84; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1, Judgment, 27 September 2007 (“*Mrkšić* Trial Judgment”), para. 407. See also *Lubanga Dyilo* Trial Judgment, paras 535-536.

³²*Đorđević* Trial Judgment, para. 1522, referring to *Tadić* Trial Judgment, para. 562; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment, 8 July 2008 (“*Bošković and Tarčulovski* Trial Judgment”), para. 175; *L* Trial Judgment, para. 89. See also *Lubanga Dyilo* Trial Judgment, para. 538.

³³*Đorđević* Trial Judgment, para. 1525, referring to *Bošković and Tarčulovski* Trial Judgment, paras 196-198; *L* Trial Judgment, para 89; *Prosecutor v Naser Orić*, Case No. IT-03-68-T, Judgment, 30 June 2006, para. 254.

logistics (iv) the level of discipline and ability to implement the basic obligations of Common Article 3 and (v) the ability to “*speak with one voice*”.³⁴

Further, in the *Tadić* case, the ICTY Appeals Chamber has determined the circumstances in which an armed conflict, which is *prima facie* internal, could be rendered international:

*“[...] an internal armed conflict may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”*³⁵

In expounding on the degree of control which must be wielded by a foreign State over armed forces fighting on its behalf in order to render ‘international’ an armed conflict which is *prima facie* ‘internal’, the ICTY Appeals Chamber adopted the overall control test, pursuant to which:

“control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in

³⁴*Dorđević* Trial Judgment, para. 1526, referring to *L* Trial Judgment, paras 46, 94, 96-111; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84, Judgment, 3 April 2008, paras 60, 65-69, 76-86, 88; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras 23-24. See also *Lubanga Dyilo* Trial Judgment, para. 537.

³⁵*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (“*Tadić* Appeal Judgment”), para. 84. See also *Lubanga Dyilo* Trial Judgment, para. 540.

organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”³⁶

The Trial Panel finds the definitions adopted by the ICTY and endorsed by the International Criminal Court (“ICC”) persuasive and will bear them in mind in determining the nature of the armed conflict in the present case.

III. Elements of the underlying offences

In relation to the elements of the underlying offences charged in the Indictment, the Trial Panel opines that they should be defined in light of the rules of international law effective in Kosovo at the time of their alleged commission. This is confirmed by the explicit reference to the rules of international law contained in Articles 142 and 144 of the CCSFRY. Further, the Trial Panel notes that the elements of the offences will necessarily differ contingent on the nature of the armed conflict.

a. Violation of the bodily integrity and health

As recalled above, Common Article 3 and Article 4(2.a) of Additional Protocol II explicitly prohibit, *inter alia*, violence to the life and health of persons and, in particular, cruel treatment. The elements of the offence of cruel treatment, as defined in customary international law, have been articulated by the ICTY as follows: an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, and which is committed against a person taking no active part in hostilities.³⁷ The Elements of Crimes for the ICC define the offence of cruel treatment as follows: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; (iii) the perpetrator was aware of the factual

³⁶*Tadić* Appeal Judgment, para. 137. See also *Lubanga Dyilo* Trial Judgment, para. 541.

³⁷*Čelebići* Appeal Judgment, para. 424.

circumstances that established this status; (iv) the conduct took place in the context of and was associated with an armed conflict not of an international character; (v) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.³⁸ The Trial Panel finds this detailed definition persuasive.

The sole distinguishing element, in addition to the nature of the armed conflict, between the offence of cruel treatment, committed in a non-international armed conflict, and the offence of inhuman treatment, committed in an international armed conflict, is the requirement that the victim of inhuman treatment be a protected person.³⁹

In addition, human rights bodies have found violations of the prohibition of inhuman treatment in cases of active maltreatment of detainees, as well as in cases of solitary confinement, very poor conditions of detention, lack of adequate food, water or medical treatment for detained persons.⁴⁰

b. Torture

The definition of the crime of torture, as set out in the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) may be considered to reflect customary international law.⁴¹ Article 1 of the Torture Convention defines torture as:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third

³⁸ Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B (“Elements of Crimes”), Article 8 (2) (c) (i)-3.

³⁹ *Čelebići Appeal Judgment*, para. 426.

⁴⁰ See Customary International Humanitarian Law, Volume I: Rules, Jean-Marie Henckaerts, Louise Doswald-Beck, Cambridge University Press, 2009 (“Customary International Humanitarian Law”), pp 318-319.

⁴¹ *Prosecutor v. Dragoljub Kunarac et al*, Case no. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 (“*Kunarac Appeal Judgment*”), para. 146, referring, *inter alia*, to *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 111.

*person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*⁴²

The ICTY has developed extensive jurisprudence in relation to the crime of torture. In particular, in *Kunarac et al.* the ICTY Appeals Chamber endorsed the following aspects of the definition adopted by the Trial Chamber in that case: (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; (iii) the act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.⁴³ In relation to the requirement contained in the Torture Convention that a public official or any other person acting in a non-private capacity participate in the act of torture, the ICTY Appeals Chamber in *Kunarac et al.* held that the Torture Convention was sought to regulate the conduct of States, and it is only for that purpose and to that extent that it deals with the acts of individuals acting in an official capacity.⁴⁴ Hence the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.⁴⁵

In the same vein, the Elements of Crimes of the ICC do not contain a requirement that a public official or any other person acting in an official capacity participate in the act of torture. The elements of the crime of torture when committed in the context of an internal armed conflict are defined for the purpose of the Rome Statute as follows: (i) the perpetrator inflicted severe

⁴² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, I-24841, adopted by the General Assembly of the United Nations on 10 December 1984, Article 1.

⁴³ *Kunarac et al.* Appeal Judgment, paras 142, 144.

⁴⁴ *Kunarac et al.* Appeal Judgment, paras 146-147.

⁴⁵ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, para. 284, referring to *Kunarac et al.* Appeal Judgment, para. 148.

physical or mental pain or suffering upon one or more persons; (ii) the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; (iii) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities; (iv) the perpetrator was aware of the factual circumstances that established this status; (v) the conduct took place in the context of and was associated with an armed conflict not of an international character; (vi) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁴⁶

In relation to the *actus reus*, the sole distinguishing element between the offence of torture committed in a non-international armed conflict, and torture committed in an international armed conflict, is the requirement that the victim of the latter be a protected person.⁴⁷

Further, the difference between the offences of torture and cruel treatment lays in the requirement that for torture, the perpetrator must have acted with the purpose of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. No such purpose is required by the *actus reus* of the offence of cruel treatment.⁴⁸

c. Murder

The elements of the crime of murder include the deprivation of another person's life.⁴⁹ However, in order for a murder to be characterised as a serious violation of international humanitarian law, it must have been committed against a person taking no active part in the

⁴⁶ Elements of Crimes, Article 8 (2) (c) (i)-4. See also *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 ("*Mbarushimana* Confirmation Decision"), paras 168-169. For a discussion of the elements of the crime of torture see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, paras 289-296.

⁴⁷ *Čelebići* Appeal Judgment, para. 425.

⁴⁸ See Customary International Humanitarian Law, p. 318. See also *Mbarushimana* Confirmation Decision, para. 169.

⁴⁹ See Criminal Law of the Socialist Autonomous Province of Kosovo, PS No. 011-25/77, 28 June 1977, Article 30(1); Article 178 of the CCK.

armed conflict. It is the specific situation of the victim at the moment the crime was committed that must be taken into account in determining the victim's protection under Common Article 3. The status of the victim must be reflected in the *mens rea* of the perpetrator.⁵⁰

E. CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

I. Burden and standard of proof

Article 6 (2) of the European Convention on Human Rights (hereinafter the "ECHR"), the Constitution of Kosovo and Article 3 (1) of the KCCP enshrine the presumption of innocence to which Accused are entitled. This presumption places on the Prosecution the burden of establishing the guilt of the Accused, a burden which remains on the Prosecution throughout the trial.

Article 396 (7) of the KCCP stipulates that '*the court shall state clearly and exhaustively which facts it considers proven or not proven, as well as grounds for this*'. Accordingly, the Trial Panel must determine in respect of each of the counts charged against each of the Accused, whether it is satisfied on the basis of the whole of the evidence so that it is sure that every element of that crime has been established. Any doubt must be resolved in favour of the accused.

The Trial Panel pursuant to Article 7 (1), (2) KCCP '*... must truthfully and completely establish the facts which are important to rendering a lawful decision*' and '*... has a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in ... favour ...*'.

II. Corroboration

⁵⁰*Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, Judgment, 26 February 2009, vol. 1, para. 134.

Article 157 of the KCCP provides as follows:

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

Sub-paragraph (3) introduces the requirement of corroboration in the case of an anonymous witness and further provides that the court shall not find the accused guilty based to a decisive extent on the evidence of an anonymous witness.

Sub-paragraph (4) introduces the requirement of corroboration in the case of a cooperative witness.

Sub-paragraph (4) does not refer to 'decisive' evidence. The prosecution has submitted that any piece of evidence might corroborate the evidence of a cooperative witness.

It is trite law that evidence in corroboration must be *independent* evidence which implicates the accused in the commission of the offence. Corroboration in that sense is reliable, independent evidence which confirms, supports or adds weight to other evidence in the case.

The prosecution case rests substantially upon the evidence of **AZ**. The diary entries that were purportedly written by him do not corroborate his subsequent evidence because they are not independent. The corroboration must emanate from another, reliable source.

Some notes in the diary purportedly written by **AZ** are consistent with the evidence he gave before the prosecutor. For example, the diary contains the names of some prisoners who were detained in Klecka on or about the dates recorded therein. In some cases those diary entries are corroborated by other evidence, for example witness statements. While this might add weight to the credibility of **AZ** it does not corroborate his evidence regarding the identity of the persons by whom he says the offences charged were committed.

A lie purportedly told by an accused does not provide corroboration. An accused may lie for any number of reasons. Occasionally an innocent accused might lie in order to bolster what he perceives to be a weak defence. In and of itself a lie cannot prove guilt.

III. Credibility

The issue of credibility is one of 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 endeavouring 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 demeanour.

AZ committed suicide in September 2011. By reason thereof he was unavailable to give evidence before this court. The Trial Panel had available to it his prior evidence and had an opportunity of watching DVD recordings of a part of his evidence. The court also had an

opportunity to consider the evidence of other witnesses who were able to describe his general behavior and character. The Court also had available to it various psychiatric reports and records.

However, the Trial Panel has been denied the opportunity of putting additional questions to **AZ** in order to test his evidence; to challenge apparent inconsistencies in his evidence; to assess his demeanor while testifying⁵¹; to assess the manner in which he testified⁵²; to assess the full extent of his capacity to perceive, to recollect or to communicate those events about which he gave evidence; to assess his character for honesty or veracity or to test the existence or nonexistence of a bias, interest, or other motivation behind the evidence he gave.

These were important factors that, had **AZ** been available to the Court, would have assisted the Trial Panel in assessing his credibility.

F. CREDIBILITY OF AZ

Because **AZ** was not available to give evidence before the Trial Panel, in assessing his credibility the Trial Panel must have regard to the admissible evidence that might assist the court in making that assessment.

I. The evidence of AZ⁵³

The prosecution case rests substantially upon the evidence of **AZ**. The credibility of **AZ** is a pivotal issue in this case. Indeed, the Indictment expressly averred that *'in the instant case, the well-grounded suspicion against all the defendants arises mainly from the declarations of Cooperative Witness X, formerly a suspect within the same investigation'*.

⁵¹ Other than reviewing the DVD evidence of a part of his prior evidence

⁵² *ibid*

⁵³ Trial Panel Order on Disclosure, 20 January 2012, Court trial binder 5. The Order revoked the protected status of **AZ**. The Order *inter alia* noted that the identity of Cooperative Witness X had become widely known as a result of his death and press reporting of his diaries and other documents.

The statements and diaries of **AZ** fall into the following categories: (1) Statements given as a witness to EULEX police on 20 and 30 November 2009 and continued on 3 December 2009; (2) Statements given as a suspect/defendant to the SPRK prosecutor on 4 February 2010, 9 February 2010, 11 February 2010, 16 February 2010 and 17 February 2010; 10 March 2010, 16 March 2010, and 25 March 2010; 6 June 2010 and 20 August 2010; (3) Statements given as a cooperative witness to the SPRK prosecutor on 5 and 7 October 2010; (4) Statements given during the questioning by defense counsel on 5, 6, 7 and 9 July 2011; (5) Diaries completed during the conflict in Kosovo in 1999⁵⁴; (6) Diaries completed after the conflict in Kosovo⁵⁵ and (7) Diaries completed in Germany (2011)⁵⁶

AZ was declared a Cooperative Witness on 25 August 2010. **AZ** died on 28 September 2011 and was therefore unavailable for the main trial or re-trial of this case.

Counsel for the defendants had an opportunity to cross-examine **AZ** and did so on 5, 6, 7 and 9 July 2011. However, defence counsel did not have available to them at the time of cross-examination statements made by **AZ** on 20 and 30 November 2009 and continued on 3 December 2009. In addition, defence counsel did not have available to them witness statements and forensic evidence that were in the possession of the prosecution prior to cross-examination⁵⁷.

54 Evidence comprising the so-called 'war diaries', marked as: 0096-09-EWC2/008, 0096-09-EWC2/009, 0096-09-EWC2/010, 0096-09-EWC2/011, 0096-09-EWC2/012, 0096-09-EWC2/013, 0096-09-EWC2/014, 0096-09-EWC2/015, 0096-09-EWC2/016

55 Evidence comprising the so-called 'post-war diaries', marked as: 0096-09-EWC2/001, 0096-09-EWC2/002, 0096-09-EWC2/003, 0096-09-EWC2/004, 0096-09-EWC2/005, 0096-09-EWC2/006, 0096-09-EWC2/017, 0096-09-EWC2/018

56 Evidence comprising the so-called 'German Diary', filed by the SPRK in trial session on 11 November 2011, marked by the Court as Exhibit P1(b)

⁵⁷ Referred to in the Ruling on Admissibility dated 21 March 2012

The evidence of **AZ** poses many unanswered questions. By reason of the failure on the part of the prosecution to disclose other evidence in its possession prior to 5 July 2011 defence counsels were denied the opportunity to cross-examine **AZ** on matters that were clearly crucial to the Trial Panels' determination of the facts in issue. While certain documentary evidence was made available to defence counsels prior to 5 July 2011, the fact that **AZ** was unavailable for trial created amuch greater prejudice for the defendants in meeting the allegations.

At the first trial the Defence challenged the admissibility of **AZ**'s statements and diaries. The first Trial Panel ruled the evidence of **AZ** inadmissible⁵⁸.

The Supreme Court of Kosovo subsequently reversed that Ruling and declared⁵⁹ admissible the statements and diaries of **AZ**.

While the admissibility of the the evidence of **AZ** is no longer in issue, the weight to be attached to his evidence is. So too is the extent to which the Trial Panel can rely on his evidence in its determination of the matters in issue.

Article 157 (4) of the KCCP, provides that '*the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness*'.

The finding of mortal remains in or near the village of Klecke/Klecka might support the Prosecution case that crimes were committed. In the absence of other evidence, the finding of remains does NOT prove *by whom* those crimes were committed or, indeed, when or where those crimes were committed. The finding of mortal remains does not corroborate the evidence of **AZ** regarding the identity of the perpetrators of those crimes.

⁵⁸ Ruling of 21 March 2012

⁵⁹ Rulings dated 20 November and 11 December 2012

Further, even if the prosecution were to overcome the obstacles presented by Article 157 (4) the court must, nevertheless, be satisfied regarding the credibility of **AZ**. The Trial Panels assessment of the credibility of **AZ** is central to its determination of the charges against each of the Accused.

Therefore, the credibility of **AZ** is a preliminary issue that must be addressed by the Trial Panel.

AZ gave his occupation as ‘crane driver’. He had no formal qualifications.

According to military records, **AZ** was a member of the KLA from 16 May 1998 until 19 September 1999⁶⁰. It appears he was known by the nickname ‘X’. He was attached to the 121st Brigade of the KLA. This Brigade became known as the “Kumanova” Brigade. His function was described as “Military Police Officer”. However, on several documents **AZ** described himself or was described as “Prison Warden”⁶¹.

AZ gave evidence⁶² that he was in Klecka from February 1999 until the end of the war. That is consistent with other documentary⁶³ evidence.

AZ provided investigators with documentation⁶⁴ that is consistent with other evidence⁶⁵ confirming the identity of persons detained in the detention centre in the village of Klecke/Klecka.

⁶⁰ 0096-09-EWC2/021 binder F

⁶¹ 0096-09-EWC2/024, binder F, 0096-09-EWC2/027, binder F, 0096-09-EWC2/030, binder F, 0096-09-EWC2/031, binder F, 0096-09-EWC2/032, binder F

⁶² Page 12 (English) of record of examination of 7 July 2011

⁶³

⁶⁴ Document number 0096-09-EWC2/024; Court decision dated 17 May 1999 (0096-09-EWC2/025) signed by X; Order dated 14 February 1999 to bring a prisoner to court. The prisoners name appears on the list of persons dated 6 May 1999 detained [at Klecka]. The list records the prisoner was admitted on 4 February 1999 and released on 20 March 1999.

⁶⁵ Statements of: Anonymous Witness C dated 21 September 2010; X dated 4 October 2010; Witness F dated 2 January 2011; Witness V dated 18 April 2011; Witness W dated 16 June 2011; Witness D dated 24 December 2010 and 18 January 2011.

The evidence **AZ** was present at the detention centre in the village of Klecke/Klecka is consistent with other evidence. **SD**⁶⁶ gave evidence⁶⁷ that he was stationed in the KLA headquarters in the village of Divjake during the period December 1998 to 4 April 1999. He said he visited the detention centre in the village of Klecke/Klecka on a regular basis. It was his evidence that during one such visit he distributed a manual on the treatment of detainees. In his evidence⁶⁸ **AZ** said he had received a copy of the manual⁶⁹ from **SD**.

In his evidence **SD** referred to the case of **BK**. **AZ** compiled a list of prisoners dated 6 May 1999. That list included the name **BK**.

Anonymous Witness C gave evidence⁷⁰ that he was detained in the village of Klecke/Klecka during the period 20 March – 3rd/4th April 1999. He said **AZ** released him.

UK⁷¹ gave evidence⁷² that he saw **AZ** at the detention centre in the village of Klecke/Klecka in or about May/June 1999.

Anonymous Witness B gave evidence⁷³ that he met **AZ** at the detention centre in the village of Klecke/Klecka. Witness V also gave evidence that he saw **AZ** at the detention centre in the village of Klecke/Klecka. Interestingly, both witnesses thought **AZ** held a position of responsibility within the detention centre.

⁶⁶ Also known as Witness A

⁶⁷ Statement dated 23 September 2010

⁶⁸ Statement of 9 February 2010

⁶⁹ 0096-09-EWC2/022, binder F

⁷⁰ Statement of 21 September 2010

⁷¹ Previously known as Anonymous Witness I

⁷² Statement of 22 November 2010

⁷³ Statement of 8 December 2010

In various statements to the EULEX Special Prosecutor and to the Police, **AZ** gave an account of events in Klecke/Klecka that he said he had witnessed and/or participated in. It was his evidence that throughout the period of his KLA service he kept a diary. The diary in question was not a single, bound book in the traditional sense of a diary but comprised a collection of papers and notebooks. The entries in that diary were said to have been made broadly contemporaneously with the events described. The format of the diary raised an obvious concern from defence counsel who questioned the authenticity, reliability and contemporaneity of the events described therein and the weight the court should attach to it.

AZ asserted that he had preserved and hidden his diaries from the end of the conflict until he handed them over to the Police. **GZ** gave evidence **AZ** gave her the diaries and told her to hand them over to the authorities if anything were to happen to him⁷⁴

AZ gave evidence⁷⁵ that he killed **ND** and **VM**. Both were Serbian police officers⁷⁶. He said he killed them on or about 4th or 5th April 1999 on the orders of **FL**. Their names and their village were recorded by **AZ** in a notebook.

AZ took investigators to the place where he said the bodies of the two policemen were buried. Bodies were exhumed from two sites. At one site⁷⁷ investigators recovered five bodies. At a second site⁷⁸ investigators recovered two bodies.

AZ described his having a close relationship with **FL**. It would appear that during the war **FL**'s close family was for a time resident at the home of **AZ**⁷⁹.

⁷⁴ Statement of 20 April 2010

⁷⁵ Statement of 11 February 2010, page 12 pf 20 (A82)

⁷⁶ Ante Mortem Reports attached to Post Mortem Reports dated 19 April 2001; statement of Witness U dated 26 June 2011.

⁷⁷ KER01

⁷⁸ KEQ

⁷⁹ Evidence of Witness Y, statement 20 April 2010

FL referred to the period during the war when his family had resided at the home of **AZ** but denied there was any special relationship between his family and that of **AZ**. He described his family being displaced and seeking shelter.

On the evidence of **GZ**⁸⁰ it appears the relationship between **AZ** and **FL** became strained following the commencement of an ICTY investigation against **FL** and others.

It was the prosecution case that following the arrest of **FL** in 2003 associates of **FL**, including **NS**, **SS1** and **BS** took **AZ** to Albania with the intention that he did not return. He did return but subsequently went into hiding. **GZ** gave evidence of threats she said **AZ** had received warning him against giving evidence about wartime events⁸¹.

In 2007 **AZ** discovered a hand grenade under his car⁸². In June 2009 he was shot and wounded while at home in X. He believed **FL** was behind each of these apparent attempts on his life.

On 24 November 2005 **AZ** was driving his motor vehicle in Shtime when he was in collision with another vehicle driven by **SF**. Police attended the scene. The police report appears to hold the third party driver responsible for the accident.

On 28 October 2006 **AZ** was driving his motor vehicle in X when he was in collision with another vehicle. Police attended the scene. The police report appears to hold **AZ** responsible for the accident.

On 3 October 2007 **AZ** was driving his motor vehicle in Komorane when he was in collision with another vehicle driven by **BS**. Police attended the scene. The police report appears to hold the third party driver responsible for the accident.

⁸⁰ Also known as Witness Y

⁸¹ Evidence of Witness Y, statement 20 April 2010

⁸² Incident Report dated 16 July 2007

AZ gave evidence that each of these road traffic accidents was engineered for the sole purpose of silencing him. He said that **FL** had orchestrated these accidents.

AZ was twice admitted to psychiatric hospitals in 2005 and 2006.

i. Findings

(a) Diaries

The so-called 'diary' purportedly written by **AZ** is a central part of the prosecution case.

It was the prosecution case the diary entries were written in the hand of **AZ**. **AZ** gave evidence *"I was taking notes but they were my personal notes. No one knew I was writing in my diaries."*⁸³ He said *"I wrote these diaries in Klecka prison during the time I worked there as a guard. When for example someone was brought in I wrote his name on a piece of paper secretly and then copied it to my diary when I felt safe to do so."*⁸⁴ **AZ** gave evidence that no one had access to his diaries. He said *"I have kept them in secret, hidden places and I am 100% sure that nobody has had access to the diaries"*⁸⁵. It was suggested by the defence that the diary entries were written by different authors.

In assessing this evidence the court refers to the reports of **Professor AB** dated 30 December 2012⁸⁶ and 2 July 2013⁸⁷, an expert instructed by the prosecution and the reports of **Dr. HK**

⁸³ Statement on 9 February 2010 at binder A, page A36

⁸⁴ Statement on 9 February 2010 at binder A, page A37

⁸⁵ Statement on 9 February 2010 at binder A, page A37

⁸⁶ Exhibit P50

⁸⁷ Exhibit P51

dated 2 February 2012⁸⁸, 26 February 2012⁸⁹ and 30 May 2013⁹⁰, an expert instructed by the defence.

Having carefully reviewed the reports submitted by the respective handwriting experts the court finds that the signature at the end of the documents exhibited as 0096-09-EWC2/023, 0096-09-EWC2/013, record dated 16.02.2010, record dated 17.02.2010, record dated 10.03.2010, record dated 16.03.2010, record dated 16.03.2010, record dated 25.03.2010, record dated 09.06.2010 and the record dated 20.08.2010 and the documents exhibited as 0096-09-EWC2-038, 0096-09-EWC2/039, 0096-09-EWC2/040, 0096-09-EWC2/041 and the attachment to the record of 16.03.2010 (photograph) is that of **AZ**.

The Trial Panel finds that the document exhibited as 0096 – 09 – EWC2 -003 (page 7) are attributable to one author.

The Trial Panel finds that documents exhibited as 0096-09-EWC2 -001; 0096-09-EWC2 -001 – page 7 (date 30.07.2007); 0096-09-EWC2 -001 – page 9 (date 22.09.2007); 0096-09-EWC2 -001 – page 11 (date 26.11.2007); 0096-09-EWC2 -001 – page 13 (date 14.02.2008); 0096-09-EWC2 -001 – page 19 (date 04.03.2008); 0096-09-EWC2 -001 – page 23 (date 01.06.2008); 0096-09-EWC2 -001 – page 31 (date 12.12.2008); 0096-09-EWC2 -001 – page 41 (date 07.07.2009); 0096-09-EWC2 -001 – page 43 (date 4 to 5.08.2009); 0096-09-EWC2 -002 – page 14 (date 28.05.2006); 0096-09-EWC2 -002 – page 15 (date 29.05.2006); 0096-09-EWC2 -002 – page 16 (date 30.05.2006); 0096-09-EWC2 -002 – page 18 (date 02.09.2006); 0096-09-EWC2 -002 – page 42 (date 07.05.2007); 0096-09-EWC2 -003 – page 1 (date 21.01.2009); 0096-09-EWC2 -003 – page 5 (date 23.12.2005); 0096-09-EWC2 -003 – page 7 (Ankes); 0096-09-EWC2 -003 – page 9 (date 26.06.2004); 0096-09-EWC2 -003 – page 36 (date 06.08.2004); 0096-09-EWC2 -005 – page 1 (date 04.01.2008); 0096-09-EWC2 -006 – page 11 (date 19.09.2006, with the title “Oje Familja L”); 0096-09-EWC2 -008 – pages 1, 2, 3, 4 and 5; 0096-09-EWC2 -010; 0096-09-EWC2 -011; 0096-09-EWC2 -011 – pages 2 – 15 inclusive; 0096-09-EWC2 -012 – cover; 0096-09-

⁸⁸ Exhibit D (FL) 9

⁸⁹ Exhibit D (FL) 10

⁹⁰ Exhibit D (FL) 11

EWC2 -012 – pages 1 – 6 inclusive; 0096-09-EWC2 -013 – page 17; 0096-09-EWC2 -014 – pages 1 – 5 inclusive; 0096-09-EWC2 -016; 0096-09-EWC2 -018 – page 1 (date 18.02.2010) and the document composed of 32 pages (the first page contains the text “Lineatur 51”) are attributable to a second author, with the exception of the extensions in longhand inserted in the writing marked as 0096 – 09 – EWC2 – 011 – pg. 4 which are attributable to another author. Further, the Trial Panel finds that, save for the longhand annotations, these documents were written by **AZ**.

Dr. HK is of the opinion the document exhibited as 0096 – 09 –EWC2 – 003 – page 7 can be attributed to one author; the documents exhibited as 0096 – 09 – EWC2 – 003 – page 5, 0096 – 09 – EWC2 – 003 – page 9, 0096 – 09 – EWC2 – 003 – page 36 can be attributed to a second author. The Trial Panel accepts the evidence of Professor **AB** that the apparent difference in handwriting on each of these documents could be attributed to natural variations that are the product of the same author.

Referring to exhibit 0096 – 09 - EWC2 – 013, pages 1, 3, 5, 6, 12, 16, 16a and 18, Dr. Kotri opined these documents were written by three different authors.

It is most surprising that, given the findings of Dr. Kotri in his report dated 30 May 2013, **Professor AB** did not address these findings in his subsequent report dated 2 July 2013. Instead, he simply referred to the methodology adopted by Dr. Kotri when evaluating other documents. This omission is even more surprising because the findings of Dr. Kotri substantially undermine the prosecution case that **AZ** alone wrote the diary.

Having carefully reviewed each of the documents to which Dr. Kotri refers, the Trial Panel finds that 0096-09-EWC2 -013 – pages 1, 12, 16 and 16a in the so-called war diaries were clearly not written in the same hand as the majority of the documents attributed to **AZ**. Further, the court finds that the annotations in 0096 – 09 – EWC2 – 011 – at page 4 were not written by **AZ**.

Even without the benefit of Dr. Kotri’s expert opinion, it is obvious the documents exhibited as 0096-09-EWC2 -013 – pages 1, 12, 16 and 16a were not written in the same hand as the

majority of the documents comprising the war diary. The Trial Panel finds that these documents were not written by **AZ**. Further, the Trial Panel finds that these entries were made by three different authors.

When he was interviewed by police 3 December 2009 **AZ** was asked why he had kept the diaries. In reply he said *“Just to have them to help my memory if I would need some information later on.”*⁹¹ However, the Trial Panel has found that some entries in the diary were not written by **AZ**. If entries were made by other persons then clearly this was not a personal diary that **AZ** kept *“to help [his] memory”*.

If **AZ**'s war diary contains pages written by other persons, several questions follow as a matter of simple logic. The most obvious question is what was the nature and purpose of the so-called war 'diary'? Clearly it was not a personal diary kept by **AZ**. Instead, the Trial Panel finds that it contains contributions made by other authors. The Trial Panel finds that the so-called war diary was a collection of records to which other persons had contributed.

While the Trial Panel finds that most of the entries in the war diary were made by **AZ**, the fact that some entries were made by other persons raises the question whether the entries made by **AZ** were matters within his personal knowledge.

Further, the fact entries were made by other persons contradicts his account that this was a personal diary in which he secretly recorded information. That was simply a lie. Instead, this was more likely a record of events at the detention centre to which others persons contributed and which **AZ** kept after the war and simply 'adopted' as his own.

Another question that arises is the contemporaneity of entries in the diary. There can be no certainty about the actual date diary entries were made. The only evidence in that regard is the evidence of **AZ**, by reference to some events to which reference is made therein and the evidence of other witnesses.

⁹¹ Statement of 30 November 2009, continued on 3 December 2009

Some parts of the 'diary' comprised a collection of loose papers that could have been added to at any time or changed. Other entries appear to be later additions. For example, the diary entries for 15, 18 21 and 26 December 2006 are written on a single sheet of paper that has been attached using sticky tape to the first page of a bound book containing other diary entries.⁹² On the reverse of the page that has been stuck into the bound book is a significant entry that refers to payments that **AZ** alleged he had received from **FL**. That entry was inserted later and was an obvious and crude attempt by **AZ** to fit an event into the chronology of later diary entries.

Further, the page that has been inserted in the diary refers to the period 15 – 26 December 2006. The next entry in that diary is 27 December 2006. During that period **AZ** was a patient at the psychiatric hospital in Pristina and, it appears, keeping a separate diary. For example, in the diary exhibited at 0096 – 09 – EWC2/006 there is an entry that refers to 26 January 2007.⁹³ That diary entry states “until today 26.1.2007” but is the continuation of a page dated “1.12.2006”.⁹⁴ However, diary entries for the intervening period were written in other notes books.

It was averred by counsel for **FL** that one diary entry had been altered. Counsel referred to two pages that the Trial Panel finds were written by **AZ**. Those documents were analysed by Dr. Kotri and are the subject of his report dated 26 February 2012⁹⁵.

One of the documents is dated 29 December 2010 and contains two columns of dates. The second document was clearly written later because it refers to a telephone conversation with the prosecutor on 6 July 2011. The Trial Panel finds that the second, later document is a partial transcription of the first document – save for one important omission. Both documents contain a list of dates when **AZ** was interviewed by the prosecutor. The earlier version of the document contains the sentence “*I signed without knowing what is on it, it was not translated to me*”. While the substance of the earlier document has been transposed into the later document, that

⁹² Exhibit 0096 – 09 – EWC2/001

⁹³ Exhibit 0096 – 09 – EWC2/006

⁹⁴ Exhibit 0096 – 09 – EWC2/006, pages 25 and 26

⁹⁵ Referred to in the report of **Dr. HK** dated 26 February 2012 as exhibits D (FL) 1 and D (FL) 2

crucial sentence is omitted. That raised an obvious concern on the part of defence counsel that an entry in the diary had been altered. The panel finds this document was re-written but the trial panel makes no further finding in this regard except to note this was but one of a number of issues that could and should have been investigated by the prosecutor in the pre-trial stage of the proceedings.

(b) Psychiatric History of AZ

The psychiatric history of **AZ** was important in assessing his overall credibility. Various psychiatric records were obtained by the parties. The Trial Panel appointed, *ex officio*, **Dr. RL**. The Prosecution put in evidence a report from its' own expert, **Dr. FR**. Further, the Trial Panel had the benefit of receiving the reports and records of the psychiatrists who treated **AZ**.

AZ was first admitted to the psychiatric hospital in X from 15 December 2005 until 4 January 2006. No diagnosis was recorded following his admission but previous diagnoses of post-traumatic stress disorder (hereinafter "PTSD") and "cephalea post traumatica" were noted.

The clinical records note that he was admitted due to headaches and other disorders that had been ongoing for three weeks following a road traffic accident.

It is recorded that "*when admitted he had a light confuse condition, lazily replied, reserved, he admitted to sleep disorders etc. His clothing and personal hygiene normal*". It was also noted "*conscious, anxious, fearful, hypobulic, reduced lascivious vital dynamisms, no signs of disordered thinking, memory or perceptions*".

Blood tests were normal. There was a reference to "myalagia intercodstalis".

He was "*released with improved condition*" and prescribed Fluoxetine⁹⁶

⁹⁶ Assumed fluoxetine, an antidepressant medication, Report dated 12 August 2012 Dr. L.

AZ was admitted for treatment on a second occasion between 30 November 2006 and 19 January 2007 in X. On this occasion his diagnosis was recorded as *“acute psychotic disturbance-episodes F23.8”*⁹⁷

He was treated with haldol (antipsychotic), lorazepam (hypnotic) and largactil (also known as chlorpromazine – another antipsychotic).

He was described as being brought to hospital by family members because of *“insomnia, disorganized behavior, pursuing ideas that started before one month”*. He was described as *“conscience conserved, disoriented, external view he looks confused, anxious, verbal contact with difficulties, gives inadequate answers within the context of the question, inadequate affective report, he does not know how to describe his mood, gives perception of audition hallucination’s, thinking disorganized with presenting of illusive ideas and pursuing and persecution, homicide ideas, judging and memory affected, unaware of his condition.”* He was described as improving with treatment and spending some weekends at home.

There is evidence of him being admitted to a psychiatric intensive care unit on 1 December 2006 because of *“worsening of his illness which manifest through prominent psychomotor agitation”* He was described as *“agitated, dysphoric and verbal communication established with difficulties”*. It was noted *“During his stay patient started to improve and he stated. “I suffered with insomnia even before being hospitalized for the first time at psychiatric department in X due to a traffic accident motivated intentionally for my liquidation”. In this department he is quiet, communicative, unhappy, with open affect, he informs that he is threatened continuously from many person, “they threat me by phone and say that they will blow on the air me and my family, I see some persons requesting me to kill this one or that one in exchange for a lot of money; I sent letters to many politicians to provide me with security as I fought for two years”*.

⁹⁷ F23.8 corresponds to the ICD-10 diagnosis *other acute and transient psychotic disorder*, Report dated 12 August 2012 Dr. RL

It is also noted, *“This is first hospitalization in psychiatric department in Prishtina as his illness started to deteriorate a month ago before being hospitalized, as he started to suffer with strange thoughts” that he was threatened through phone, that he and his family would be wiped out, and they would not let me alone, would not let him work”, then suffers with insomnia, self-talking, much taking, and is angry. After using therapy agitation, dysphoria decreased and delusive ideas faded away”.*

Other records include the following, which are not dated: *“He comes together with this wife due to a condition after a traffic accident suffered before 3 weeks. He looks afraid, worried, insomnia, time to time confused. Very stressed condition (states that I am going to kill myself) and talks about who is going to take care of the children...”*⁹⁸ *“affirms that he was involved with the case of FL regarding Hague statement. Feels scared...”* *“He had an accident in 2005 after that he does not feel well. Mental state:, external view corresponds with age, care and hygiene maintained, speaks slowly and quietly, with non-adequate effects (disturbance, fear, confusion, lowered mood, flow of opinions is slow, without answers in adequate manner, denied disturbance in perceptive area...partially aware in respect of his mental condition.”* *“Psychiatric condition: orientated (sometimes confused). Legally consciousness, when asked he answers after a pause, speaks slowly, upset, often with financial situation, without sporadic elements”.* *“Accident on 24.11 in X.....Asserts that he is involved with FL case in regard to the suspicions in X.....Feels fixated, offended, afraid that he is being pursued and it is possible that the accident was not by chance!?”* A brain scan was reported as normal.

AZ was admitted to psychiatric hospitals on two separate occasions. On each occasion a different diagnosis was made.

The first admission to hospital in December 2005 referred to a *previous* diagnosis of PTSD. In his report **Dr. RL** refers to PTSD usually occurring after a life-threatening or catastrophic traumatic experience. It is unclear which clinician made this diagnosis.

⁹⁸ Dr. Latham presumed this was a reference to his first admission.

AZ was described as having anxiety symptoms but there is no description of avoidant or reliving symptoms. There is a recorded absence of psychotic symptoms at the time of this admission. No additional diagnosis was applied at that time.

The second admission from November 2006 resulted in a likely diagnosis of *other acute and transient psychotic disorders*.

In his report **Dr. RL** observes that in more straightforward terms this is a person who is found to have some symptoms that would be classified as psychotic but that would not fulfill criteria for schizophrenia and indeed do not even resemble those symptoms seen in schizophrenia. There appears to have been some disturbed behaviour at the time of this diagnosis but there is little detail in the description of symptoms that he apparently had. This makes any post-hoc estimation of severity difficult.

In terms of the manifestation of symptoms, **Dr. RL** observed that the records indicate that in 2005 **AZ** predominantly experienced anxiety symptoms, including fearfulness, difficulty sleeping as well as a suggestion that he had expressed some suicidal thoughts. In 2006 there is reference to more symptoms including symptoms that would be classified as psychotic (auditory hallucinations, persecutory delusions and thought disorder). Auditory hallucinations (hearing voices or noises) seem to have been suspected from his behaviour but there is no description of them and so in his view there should be some reservation in accepting that these were present. **Dr. RL** thought that it would be usual to record whether someone heard voices or noises, the nature, the frequency and the content of voices. It would also be usual to record whether voices were heard in external space. None of this detail is apparent in the medical records. Persecutory delusions (fixed false beliefs held despite evidence to the contrary and not understandable within a person's culture) are only substantiated by **AZ's** beliefs that he was being followed, attempts had been made on his life and that he had been the subject of threats.

Dr. RL observes that the difficulty in any confident assertion now that these were delusions is that the substance of the beliefs appears to be disputed factually. In other words if **AZ** was

being threatened, followed and attempts had been made on his life then they were reasonable beliefs and not symptoms of a psychiatric disorder.

However, they were identified as delusions at the time by those clinicians treating him. Thought disorder is suggested by the reference to disorganized thoughts but again there is no further description of this. Other symptoms of abnormal mood state and behavioural disturbance are also noted.

Dr. RL is of the opinion that there is little clear evidence in the medical documents of a state of psychosis and without reliance on his beliefs about being pursued this diagnosis could not have been made – the symptoms have been listed but the details or evidence for these symptoms is missing.

No diagnosis of schizophrenia was made and **Dr. RL** is of the opinion there is no evidence to suggest that a diagnosis of schizophrenia would be justified at the time of any hospital admissions or subsequently. He did observe that isolated psychotic symptoms are known to be a risk factor for later development of schizophrenia although he did not think it is likely from more recent evidence, including his observation of his mental state during interviews in 2011 that were recorded on DVD and the evidence from family members that this occurred. **Dr. RL** concludes by stating that while his mental state might have evolved into schizophrenia this does not appear to have occurred.

Dr. RL referred in his report to the prescription of Haldol, largactil and lorazepam and was of the opinion this was appropriate for the immediate disturbance that **AZ** presented with – observing that these are commonly used for ‘rapid tranquilisation’ when someone is highly agitated or aggressive.

Dr. RL thought the two antipsychotic medications might have been intended to be prescribed for longer-term prevention of recurrence of symptoms. In his opinion, the prescription of these drugs suggests that the degree of behavioural disturbance was severe but not necessarily that the psychosis was. I cannot comment on what usual prescribing practices are in Kosovo.

Dr. RL thought it unlikely the condition was of longstanding. In 2005 the absence of psychotic symptoms was noted albeit he did have anxiety symptoms. These two episodes are unlikely to represent evidence of a longstanding disorder. There is no evidence from subsequent information that he had any mental illness in subsequent years.

Dr. RL observed that PTSD is by definition precipitated by a traumatic event and episodes of psychosis are commonly associated with some kind of traumatic trigger. In his opinion the second episode could be entirely explained by a traumatic event. In other words, if he had been threatened and attempts had been made on his life then he did not have delusions and his other disturbed behaviour could be related to the acute stress of this situation. This would then not be described as acute psychosis. This is impossible to be certain about because of the relative paucity of clear clinical descriptions of his mental state in medical records.

Dr. RL was of the opinion that both mental disorders that were applied could have had an effect on his understanding and perception of a particular incident but in his view this is only likely to have been an issue during the acute episodes when psychosis was present.

The general state during his second hospitalisation was that he felt persecuted, anxious and agitated. This was assumed to be a feature of mental disorder. **Dr. RL** observed that this state can lead to misinterpretation of people's actions, applying a persecutory or paranoid slant to any behaviour or action. In this way, understanding or perception of an incident can be altered. The car accident that **AZ** was involved in might be seen as either an accident with no deliberate malice or an organized or deliberate attempt by someone to harm him. This could be fact or a result of **AZ** experiencing persecutory delusions so that he might have mistaken an accident for a more deliberate or malicious act. He could have applied a delusional interpretation of events.

In his report **Dr. RL** states that **AZ** was not apparently mentally ill at the time of any evidence that he gave and there is no suggestion of him being psychotic prior to 2006. There is no evidence that he was mentally ill at the time of any incidents about which he has given evidence. It is also notable that the diagnosis of psychosis was made as an "acute and

transient” disorder. It seems unlikely that there would have been any significant influence of any mental illness on his interpretation of events.

Dr. RL stated that, in his opinion, it is even less likely that **AZ** would recall historical events inaccurately. He observed that some people with psychosis have symptoms known as delusional memories (where false beliefs about the past are formed) but this seems very unlikely from the evidence he has seen and is usually associated with a more severe psychotic state such as schizophrenia. **Dr. RL** did not believe that **AZ’s** account of events from 1998 or 1999 could be delusional and he did not believe that psychiatric evidence has any role in assessing the reliability of statements he made about events at that time in 2009 and 2010.

Dr. RL observed that if **AZ** was in the state described in hospital records in 2006 then he might have struggled with accurately recalling events because he was highly agitated, anxious and sedated with medication. However, there is no evidence to suggest he gave evidence during any such episode.

Dr. RL observed that long-term mental conditions are associated with cognitive decline that might include memory problems. However, in the case of **AZ** he found no evidence of a long-term condition but even if this were the case it would be more likely that he would simply be unable to recall events rather than recalling false events or events that never occurred. In 2005 an absence of memory problems was noted.

Dr. RL stated that there is no other evidence from any of the psychiatric evidence that he had any significant and long lasting memory problems albeit in the admission in 2006 there is reference to some memory problem but no elaboration on the nature of any problem.

Dr. RL was of the opinion **AZ** did not need further treatment for what was a brief and transient state. He might have been followed up to confirm that there was no further deterioration. If his mental condition had evolved into schizophrenia then treatment would have been indicated but there is no evidence for this having occurred. If he continued to suffer with PTSD then

treatment for this would have helped but again this seems unlikely because even in 2005 there were few symptoms described.

Dr. RL opines that the evidence for a severe psychiatric disorder that might have affected his reliability as a witness is weak. He thought it unlikely that there is a direct relationship between any mental disorder and his evidence: in other words it is not likely to have been delusional beliefs that formed the basis of his evidence.

Dr. RL observes that **AZ** was obviously suspicious about other people's behaviour and fearful. He could not say whether this was a symptom of mental disorder. Whether or not his beliefs about being persecuted, followed etc were delusions can only be determined by a legal position on the facts. In his opinion, if **AZ** was delusional and remained delusional at the time of his evidence then he would suggest the following:

1. His evidence about events in 1998 and 1999 should not be viewed as unreliable because of mental disorder.
2. The weight of his evidence about subsequent threats and attempts on his life should be adjusted according to the facts that are determined about these incidents.

In conclusion, **Dr. RL** is of the opinion there should be no special significance applied to **AZ's** mental disorder when assessing the reliability or credibility of his evidence. He does not have any mental disorder that can be said to impact on his honesty. Other factors will undoubtedly be considered but these are factors that are not the subject of psychiatric expert evidence, for example his honesty or whether he was capable of lying.

The Prosecution relied upon the evidence of an expert psychiatrist, **Dr. FR**. It was his opinion that there was no evidence of mental health disease in general and, in particular, no evidence of a condition that could produce any significant impairment in the recollection of past events.

Dr. FR thought it unlikely the symptoms diagnosed could have gone unnoticed especially to family members. In his opinion, the symptoms described in the hospital records were the result

of **AZ's** "intentional simulation". In his opinion **AZ** "acted in a situation in which was easy to simulate, also for a not expert in mental health."

Dr. RL and **Dr. FR** disagree there is no evidence to support a finding of psychiatric disorder. Indeed, **AZ** was hospitalized on two occasions in 2005 and 2006 and was under the care of three psychiatric doctors.

Further, the diary entries of **AZ** depict a man suffering mental illness.

His diary entry of 18 December 2006 reads:

"RETURN TO HOSPITAL, 18.12.2006

*That day was day of sorrow for me and my family. They said- happy journey dad, and my wife with tears in her eyes said- happy journey, oh my dear spouse, hope you get better soon and then you'll come to your family. Damn ...X together with the driver **SRF** that destroyed our love between you and me, oh my husband. **Do not worry about children because I gave you my word that I will take care; only you come home. I only want you to get better as soon as possible. Bye. You go now, children should not understand that you are sick. She said these words on my ear.**"*

If **AZ** kept his post-war diary without any expectation that it would be read by other persons, this diary entry gives a candid insight into his mental health. If **AZ** kept his diary with the expectation – or anticipation – it might be read by other persons and this diary entry was designed to deceive, then it demonstrates his ability to manipulate circumstances to fit a pre-conceived plan.

In preparing his expertise **Dr. RL** has relied upon the opinions of the doctors who originally treated **AZ**.

Dr. RL agreed that the symptoms described in the various psychiatric reports could have been fabricated by **AZ**. Indeed, that was the evidence of **AZ**. **IZ**⁹⁹ and **AZ**¹⁰⁰ also gave evidence that **AZ** was not genuinely ill.

Dr. RL and **Dr. FR** agreed that they could not exclude the possibility **AZ** simply lied when he gave evidence.

The Court finds that it is possible that **AZ** was not mentally ill in 2005 and 2006 but that he merely pretended to have the symptoms of a psychiatric illness. Indeed, that is the Prosecution case.

If the Prosecution case is correct, **AZ** was a manipulative liar. He was admitted to the psychiatric hospital in X from 15 December 2005 until 4 January 2006. He was treated with various drugs including anti-depressants. He was admitted to the psychiatric hospital in X from 30 November 2006 until 19 January 2007. On 1 December 2006 he was transferred to the Psychiatric Intensive Care Unit of the Hospital due to a worsening state of his mental health. He remained in the Intensive Care Unit until his discharge on 19 January 2007. The diagnosis that was made at that time was “psychotic disturbance”.

AZ persuaded three psychiatrists that he was mentally ill when he was not.

Whether or not he was mentally ill in 2005 and 2006, when **AZ** gave evidence he said he merely pretended to have the symptoms of a psychiatric illness in order to (a) inflate a damages claim following a road traffic accident¹⁰¹, (b) provide himself with a partial defence to the killing of **FL**¹⁰² and/or (c) to discredit a statement that he said he had given to **KFOR**¹⁰³.

In the first case he lied with the intention of defrauding an insurance company. In the second case he lied in order to construct a partial defence to murder. In the third case he lied in order

⁹⁹ Statement of 23 November 2011, Prosecution Evidence binder I, page P23

¹⁰⁰ Statement of 23 November 2011, Prosecution Evidence binder I, page P22

¹⁰¹ Record of cross-examination by defence counsel on 7 July 2011 at point 470

¹⁰² Record of cross-examination by defence counsel on 7 July 2011 at point 298

¹⁰³ Statement to Kosovo Police of 16 July 2007

to discredit a statement that, in fact, he had never made. Each of these reasons undermines the credibility of **AZ**.

The Trial Panel finds that whether or not **AZ** had a mental illness in 2005 and 2006, when he gave evidence in 2009 and 2010 he did not have a recognised psychiatric disorder that might have affected his ability to give accurate evidence about events in 1999. Further, the Trial Panel finds no evidence of his suffering any psychiatric illness prior to 2005.

Ultimately, the Trial Panel reached the conclusion the psychiatric history of **AZ** was not a decisive issue in this case. Even if the physicians who treated **AZ** and the experts who reviewed their reports had agreed he was suffering from psychosis which could potentially have affected his ability to accurately recall earlier events this would not necessarily mean his testimony was not accurate. Of far greater concern to the Trial Panel were (a) the fact **AZ** may have feigned any illness and even greater (b) the numerous factual inconsistencies in his evidence to which detailed reference is made beneath. Of course a significant factor which compounded these concerns was the fact **AZ** died prior to the trial and was therefore not available to testify before the Trial Panel and potentially explain these inconsistencies.

(c) Statements

AZ gave statements in the capacity of a witness to EULEX police on 20 and 30 November 2009 and continued on 3 December 2009. He gave statements in the capacity of a suspect/defendant to the SPRK prosecutor on 4 February 2010, 9 February 2010, 11 February 2010, 16 February 2010 and 17 February 2010; 10 March 2010, 16 March 2010, and 25 March 2010; 6 June 2010 and 20 August 2010. He gave statements in the capacity of a cooperative witness to the SPRK prosecutor on 5 and 7 October 2010. He was cross-examined by defense counsel on 5, 6, 7 and 9 July 2011.

i. Grave sites

In August 2009 **AZ** identified four grave sites.

Referring to one site¹⁰⁴ he told investigators 9 bodies had been buried there.

He also identified two other sites¹⁰⁵ which, he said, each contained two bodies. Investigators identified those sites as KEQ01 and KEQ02.

Referring to the fourth site he had identified, **AZ** stated this site contained the bodies of 10 persons. However, he thought the bodies had been removed from this site in 2002.

From photographs¹⁰⁶ he identified burial sites he said were at Livadhi I Canit.

He identified other photographs¹⁰⁷ depicting the village of Klecka.

ii. Killing of Four Serbian Soldiers

AZ gave evidence that **AA** was killed one day after his release. A diary entry records his date of release as 2 April 1999¹⁰⁸.

AZ gave evidence¹⁰⁹ that approximately 20 days before the killing of **AA** he had witnessed the killing of four Serbian prisoners. He gave that evidence on two separate occasions¹¹⁰.

¹⁰⁴ KER, see binder M, page M72, M123

¹⁰⁵ KEQ, see binder M, M72, M121, M122

¹⁰⁶ Photographs 9 and 10

¹⁰⁷ Photographs 11 – 16 inclusive

¹⁰⁸ Exhibit 0096 – 09 – EWC2/012

¹⁰⁹ Police interview on 30 November 2009, continued on 3 December 2009

¹¹⁰ 30 November 2009, continued on 3 December 2009 and on 11 February 2010

Describing the killing of the four Serbian prisoners, he said he was approximately 40 – 50 meters away when they were killed. He said the prisoners were dressed in regular Serbian army uniform¹¹¹. He said two of the prisoners had their hands tied behind their backs. The other two were tied together. He said wire had been used to tie them.

He said “**NK1, NK2, NK1** and two others whose names I cannot recall had taken the Serbs from Klecka...” He said “**X**”¹¹² was also present but that he did not take part in the killings. He said “*The prisoners were taken down the meadow to the hole and then I heard the shots fired by Kalashnikovs. There were some trees between myself and the execution place, therefore I could not see exactly who was shooting but I heard the sound of several Kalashnikovs, not only one*”.

Referring to the burial site he said **AA** was buried in the “*location where 9 got buried*”¹¹³.

The remains of **DT, BC, ZF, ZT** and **DV** were found at site KER01. This was the site **AZ** had identified to investigators as the grave containing the bodies of the Serbian soldiers whose killing he said he had witnessed 20 days before the killing of **AA**. He gave the same evidence on different occasions¹¹⁴. However, **DT, BC, ZF, ZT** and **DV** were not captured by the KLA until 11 April 1999¹¹⁵.

In 2009 **AZ** was asked¹¹⁶ about a diary entry that said “*D TA N, 16.10.1946, brought in on 11.04.1999, released 18.04.1999; T S Z, 13.07.1951; S, B S, 05.09.1972 and F P Z, 12.03.1962*”. He said “*After they arrived they were taken to FL and after that some persons belonging to F’s ‘gang’ brought them to me*”. He said they were released on 18 April 1999.

He said that later that night he had *heard* that those prisoners had been killed. He then stated “*I am not sure about it but these four might be those Serbs that I have mentioned earlier and that I believe worked for some electricity company*”. He said they were civilians. The four

¹¹¹ Statement of 3 December 2009

¹¹² **RM**

¹¹³ Statement of 3 December 2009 (continuation of statement commenced on 30 November 2009)

¹¹⁴ Interviews on 3 December 2009 and 11 February 2010

¹¹⁵ Statement of **TM** dated 27 January 2005, SPRK binder I, at P21B and P21C

¹¹⁶ Police interview on 30 November 2009, continued on 3 December 2009

Serbian prisoners whose killing he said he had witnessed and whose bodies he said he had helped bury in the grave he had identified to investigators were not civilians. They were killed wearing their military uniforms.

Further, when he was interviewed in 2009 he told police that he had only heard about the killing of the four Serbian prisoners who had been released on 18 April 1999¹¹⁷. When he was examined on 11 February 2010 he said *"I am pretty sure that two different groups of four Serbs were brought to Klecka."*

He gave a very graphic account of the killing of the four Serbian prisoners and even took investigators to the place where their bodies were found.

His account of one of the victims being killed with a scythe blade is consistent with the forensic evidence. Indeed, a scythe blade was found in the grave. The finding of the scythe blade in the grave appears to support his account of having witnessed the killings. However, his evidence regarding the chronology of events and the identity of the victims is contradicted by his diary entry and by other evidence.

In his closing comment¹¹⁸ the prosecutor said that, given the passage of time, it was not wholly surprising there were some errors in **AZ's** recollection. However, the date **AZ** says the four Serbian prisoners were released is recorded in his diary, as is the date he says **AA** was released.

The evidence **AZ** gave regarding the killing of the four Serbian prisoners is inconsistent and contradictory and is contradicted by other evidence including forensic evidence to which reference is made below.

iii. Killing of a fifth Serbian Soldier

¹¹⁷ Statement on 3 December 2009 (continuation of statement of 30 November 2009)

¹¹⁸ Minutes of 11 September 2013

AZ gave evidence¹¹⁹ that 10 days after the killing of the four Serbian prisoners **NS** asked him to find a scythe. Referring to the fifth Serbian prisoner **NS** told him “*I will slash this pig*”. He said the prisoner had arrived in the prison “*...the same day, only a few days earlier.*” **AZ** gave evidence the fifth Serbian prisoner was killed “the same day he arrived”.¹²⁰

AZ gave evidence that “**FL** was also interviewing the Serb with the others...” **AZ** described the Serb prisoner as 45 – 50 years old. He said he was not wearing a uniform but a short sleeve shirt and black trousers. He said someone had described the prisoner as “*high ranking*”. He also described this prisoner as “*in some sort of high position*”¹²¹.

DT was one of five Serbian soldiers taken by the KLA on 11 April 1999. He was taken together with **BC**, **ZF**, **ZT** and **DV**.

DT was a Captain in the Reserve Army. He was born on 16 October 1946. In early 1999 he would have been 52 years of age.

AZ said **FL** “asked him questions first and *punched him and kicked him*”¹²² He said they were in the yard. Also present were **NS**, **NK2**, **NK1**, **BL**, **SS1**, **BS** and **ST**.

AZ said that when **FL** had finished questioning the prisoner he said “*take away this pig*”. **AZ** said he understood this to mean ‘kill the prisoner’.¹²³ He said **NS** said to **FL** “*I will kill this pig*”. **FL** then left. The prisoner was further beaten by **NK2** and **NS**.

AZ gave evidence that after the prisoner had been beaten **NS** “shouted ‘Find me a scythe and I will slaughter him’. He addressed me directly”.

AZ gave evidence he found a scythe blade in a burned-out house. He said the wooden handle had been burned. He said he gave the blade to **AK** who gave it to **NS**. He said **NS** tied some cloth around the end of the blade.

¹¹⁹ Statement of 11 February 2010, binder A at page A76

¹²⁰ Statement of 11 February 2010, binder A at page A75

¹²¹ Statement on 11 February 2010, binder A at page A76

¹²² Statement on 11 February 2010

¹²³ Statement on 11 February 2010

He said **NS**, **NK1**, **NK2** and “VD”¹²⁴ took the Serbian prisoner to the field. He said the Serbian prisoner was sitting down whereupon **NS** began slashing him with the scythe. He said he hit him in the neck, to the back and to the legs. He said that when he died he was pushed into the hole. He said he assumed the scythe blade had been left at the scene.

He said **NK1** and **NK2** ordered him and **AK** to bury the body. He said he did not think he saw the scythe blade in the grave at that time.

His account of a fifth Serbian prisoner being killed with a scythe blade is consistent with the forensic evidence. The bodies of five Serbian soldiers were recovered from the grave. Two of the bodies displayed signs of their having been killed by a sharp instrument. Indeed, a scythe blade was found in the grave.

The finding of the scythe blade in the grave appears to support his account of having witnessed the killings. However, his evidence regarding the chronology of events and the identity of the victims is contradicted by his diary entry and by other evidence to which reference is made below.

AZ said that less than a week after the Serbian prisoner had been killed with the scythe he heard gunshots. He said **NK1**, **NK2**, **SS1** and **NS** went to him and told him to find someone to cover the bodies. He said he went with **AK** to the hole where he saw the bodies of three Albanian men. He said all three were dressed in civilian clothes. He did not recognize them.

When he was examined on 11 February 2010 **AZ** was asked about three Albanian prisoners who had been shot. He was asked “Is this the same hole where the four Serbs and the other Serb were killed and dumped?” In reply he said “yes”.

He was also asked: “Are you sure about the sequence of the killings: first **AA**, then the four Serbs, then the Serb killed with the scythe, then the three Albanians?” In reply he said “Yes”.

¹²⁴ **RM**

That answer contradicted his prior evidence that he had confirmed at the start of the examination. Previously he said the four Serbian prisoners were killed 20 days *before AA*.

When he was examined on 16 March 2010 he said “I have to warn you however that according to the information that I have the bodies were removed from this site”.

iv. ***Killing of VM and ND***

When he was examined on 16 March 2010 **AZ** identified the place¹²⁵ where he said the bodies of **VM** and **ND** were located.

When he was interviewed on 11 February 2010, referring to **ND** and **VM** he said they were “civilians”. They were not. They were both policemen. They were taken by the KLA on 9 February 1999.

When he was interviewed on 30 November 2009, referring to **ND** and **VM** he said they were released on 5 April 1999. He said “*Half an hour after G [sic] and M were released I heard some shots being fired from two Kalashnikovs from the direction of Shala village. AS had left somewhere with AK with shovels before the prisoners were taken out from the prison by NK2, NS and BL. Sometime later AS came and said ‘We finished and we covered them’.*”

Twice **AZ** refers to “**AS**”. **AS** is not a defendant in these proceedings.

However, when **AZ** was examined on 11 February 2010 he said that he had killed **ND** and **VM**.

AZ gave evidence on 11 February 2010 that he, **AK** and **BL** took **VM** and **ND** to Livadhi I Canit. There they met **FL**, **NK1**, **NS** and **NK2**. He said that when they arrived **FL** said “*Everyone put his weapon away. I want now A to kill them because I never saw or heard of A killing anyone*”. He said **VM** and **ND** were facing him when he shot them. He said “*I shot them from a two meter*

¹²⁵ Record of examination of 16 March 2010, photograph 9 at binder A, page A175

distance with my 9mm Walter (sic) pistol. I shot a whole magazine. They were facing me. I just shot at them. I don't remember where I hit them because I was shocked."

He said that after the killings **FL** hugged him.

He said **AK** and **SS2** used shovels to cover the bodies with soil.

v. Killing of AA

When he was interviewed on 16 March 2010 **AZ** identified the site¹²⁶ of **AA**'s grave and stated "*The location I showed you from a distance is the one where nine people were buried*".

AZ gave evidence that **AA** was released on 2 April 1999¹²⁷. He said that "*one day after his release he was again arrested and killed near Klecka village (location where 9 got buried)*". He said that he had witnessed the killing of **AA** from a distance of approximately 50 meters. He said **AA** had been shot by **NK1** and **NK2** who had used AK47's. He said **NS** was also present but that he did not see if he was shooting. He said "*VD*" was also present.

When he was examined on 11 February 2010 **AZ** was asked about the killing of **AA**. Specifically, he was asked: "Are you sure about the sequence of the killings: first **AA**, then the four Serbs, then the Serb killed with the scythe, then the three Albanians?" In reply he said "Yes".

vi. Killing of SA and YG

When he was interviewed by police on 30 November 2009 **AZ** stated **IG** and **SA** were taken from the prison by **AK**, **NK1** and **NK2** and that less than thirty minutes later he heard gunshots.

¹²⁶ Record of examination of 16 March 2010, photograph 12 at binder A, page A178

¹²⁷ Police interview on 30 November 2009, continued on 3 December 2009

He said that was on 3 April 1999. He said that the following day he saw what he thought was a fresh grave.

Later in the same statement, referring to **ND** and **VM** he said they were released on 5 April 1999. He said they were released on the same day as **SA** and **IG**.

When he was interviewed on 9 February 2010 **AZ** said **IG** and **SA** were taken from the prison by **NK1**, **NK2** and **NS** and that shortly thereafter he had heard gunshots. He said he was not sure if **AK** was in the group that took the two prisoners away. That contradicted what he stated when interviewed by police on 30 November 2009. On that occasion he seemed sure **AK** was amongst the group that took the two prisoners away.

AZ said **NK1**, **NK2** and **NS** later told him that they had killed **IG** and **SA** at a place called Livadhi I Canit.

He said he went to the area and found what appeared to be a fresh grave.

When he was examined on 11 February 2010 he said **NS**, **NK2** and **NK1** took **SA** and **IG** in a car and went towards the mountains. He did not say he heard gunshots. He said he later saw **NS**, **NK2** and **NK1** and they said they had killed **SA** and **IG**.

(d) Forensic Evidence

i. Forensic Archaeologist

AZ identified four possible grave sites in which he said bodies had been interred. Those sites were, geographically, close to each other. Bodies were recovered at two sites. At site KER01 investigators recovered five bodies. At site KEQ01 investigators recovered two bodies.

At the site **AZ** said contained 9 bodies five bodies were recovered¹²⁸.

¹²⁸ KER01

Referring to site KER01, the Forensic Archaeologist **CC** gave evidence that when this grave was exhumed the bodies had been deposited in the following order: the first body deposited in the grave was body 007B¹²⁹. That body was found at the bottom of the grave. The second body deposited into the grave was 006B¹³⁰. The third body deposited into the grave was 005B¹³¹. The fourth body deposited in the grave was 001B¹³². The last body deposited in the grave was 004B¹³³.

The legs of body 001B were under the body of 004B, suggesting that 001B was the penultimate victim put into the grave, that 004B was the last body to go into the grave on top of the legs of 001B and that the body of 001B was then pulled back so that he lay on top of 004B.

A scythe blade was recovered from the grave. This was found parallel to the leg of body 001B and under the legs of body 004B.

Three ligatures were found in the grave and these were associated by the forensic archaeologist with bodies 001B, 004B and 005B. Bodies 004B and 005B were noted to have had their hands tied behind their backs¹³⁴.

What appeared to be remnants of military uniform were also recovered from the grave¹³⁵.

The bodies recovered from site KER01 were later identified as **DT**, **BC**, **ZF**, **ZT** and **DV**.

At the time of exhumation, there was no indication that either the burial pit, the soils within it, the carefully deposited bodies or the artifacts remaining, had been disturbed. There were no differences in the soil layering that showed any disturbance of the original soil layers at the time of deposition.

¹²⁹ later identified as **DT**

¹³⁰ later identified as **DV**

¹³¹ later identified as **BC**

¹³² later identified as **ZF**

¹³³ later identified as **ZT**

¹³⁴ SPRK binder L, page L432

¹³⁵ SPRK binder I, at P28a; SPRK binder L, pages L432 and L433

CC gave evidence that there was no soil between the bodies that were lying on top of each other.

CC stated she found no evidence the burial site had been disturbed, stating *“The position of the bodies did not indicate to me that they had been disturbed.”*

It was her evidence that it is not possible to determine if bodies had been removed very shortly after the initial burial. She said that if time had passed, maybe 6 months or more, then there would have been some decomposition and it is possible that small bones might have been left behind from bodies that may have been moved.

It was her evidence that in 2001, the bodies would have been in an advanced stage of decomposition. If the bodies had been moved in or after 2001 she would have been able to discern the fact the bodies had been moved. There followed an exchange between the forensic archaeologist and the prosecutor:

Prosecutor: *“Imagine that a certain number of bodies in a place similar to that one, imagine that some bodies are removed from there before being covered with soil would your investigation be able to give any information about that?”*

CC: *“Do you mean before the bodies were completely covered with soil the first time?”*

Prosecutor: *“Before being covered at all yes.”*

CC: *“If bodies were removed before they were covered it would be very difficult to say if there were more bodies there.”*

However, that was not the prosecution case. **AZ** gave evidence that after each victim or group of victims was killed the bodies were buried.

The evidence **AZ** gave regarding burial sites and the removal of bodies is interesting.

The Assessment Police Report compiled on 26 – 28 August 2009, referring to **AZ**, states *“...he mentioned a fourth location that up to this location about 300mtrs away 10 bodies were*

*removed and sent to unknown direction in 2002...he is 100 percent sure that victims were buried mentioned places and later on they were removed to unknown direction. When bodies were removed from both sites he was cutting trees on the other side of mountain and he saw everything.”*¹³⁶

After the war **AZ** resided in X with his family¹³⁷. The Trial Panel takes notice of the fact that at the relevant time the travelling time by road between X and Klecka was approximately 45 minutes – 1 hour. It is improbable that, had **AZ** wished to cut wood, he would have driven from X to Klecka. It is even more improbable that, given the fact he resided quite some distance from Klecka, he would happen to be cutting wood at precisely the time he says bodies were removed. It is unclear on his evidence at what time he says he saw the bodies being removed. It seems unlikely that, if it were done at all, it would be done during the daylight hours.

In any event, his comments to investigators in 2009 regarding the removal of bodies is contradicted by the evidence he gave in 2010. When he was examined on 11 February 2010 **AZ** gave evidence that after the war and before **FL**'S arrest by the ICTY, possibly sometime in 2001 or 2002, he had received a telephone call from **FL** ordering him to “*remove the bodies*” and to “*clear the area*”. **AZ** said he went “there” with **SS1** and **NS**. When they arrived at the scene **SS1** stated “*let’s not touch anything and just go away*”. It appears they then left. **AZ** further stated “*After a while, within one year after the first time, I went back to the location and I could see that nothing had been touched. I repeated the checking a few times while on my way to my father’s house. I think the last time I went there it was sometime in 2009.*”¹³⁸

There was no evidence suggesting any attempt or intention to disturb the graves prior to 2001. Referring to site KER01, **CC** gave evidence that, had the grave been disturbed in 2001 or even 6 or more months after the initial burial, she would have seen evidence the bodies had been disturbed. She found no such evidence.

¹³⁶ Binder M, pages M71, M72

¹³⁷ Statement of **GZ** dated 20 April 2010

¹³⁸ Statement of 11 February 2010, binder A at page A83

At none of the other locations identified by **AZ** did investigators find any evidence the ground had been disturbed. There was no evidence the grave sites had been disturbed in 2002 as averred by **AZ**.

ii. Forensic Pathologist

The mortal remains of five bodies were recovered at site KER01. Through DNA analysis these have been identified as **DT**, **DV**, **BC**, **ZF** and **ZT**.

The autopsy reports on **BC**, **ZF** and **ZT** give the cause of death as gunshot wounds to the head.

The autopsy report on **BC** records one gunshot wound to the rear of the skull¹³⁹.

The autopsy report on **ZF** records two gunshot wounds to the rear of the skull¹⁴⁰.

The autopsy report on **ZT** records two gunshot wounds to the rear of the skull¹⁴¹.

The autopsy report of **Dr. MK** dated 18 November 2009¹⁴² following his examination of the mortal remains of **DV** gives the cause of death as “cut of the neck by sharp instrument” and describes the following injuries to the body: “*on anterior aspect of cervical vertebrae number 3 (three) sharp incision oriented transversely. Incision on corpus vertebrae up to a few mm (a few millimeters) deep*”

The autopsy report of **Dr. MK** dated 19 November 2009¹⁴³ following his examination of the mortal remains of **DT** gives the cause of death as “*cut of the neck by sharp instrument. Blunt*

¹³⁹ Binder L, pages L238 – L335

¹⁴⁰ Binder L, pages L10 – L96

¹⁴¹ Binder L, pages L97 – L237

¹⁴² Autopsy performed on 29 October 2009

¹⁴³ Autopsy performed on 29 October 2009

force trauma to the chest and to the right forearm” and describes the following injuries to the body: “on anterior aspect of cervical vertebrae number 3 (three) sharp incision oriented transversely. Incision on corpus vertebrae up to a few mm (millimeters) deep. Incisions on corpus vertebrae elongated to processus costarius dexter on third cervical vertebrae. “

The pathologist also noted blunt force trauma to rib number 4 on the left side. It is two fracture of corpus located at +/- 20cm from caput costae and the second fracture located at +/- 26cm from caput costae and fracture to the right arm.

Further, the exhumation reports from site KER01 in the village of Klecke/Klecka record a scythe having been recovered from between the human remains.¹⁴⁴

The mortal remains of five bodies were recovered at site KEQ01. Through DNA analysis these have been identified as the bodies of **VM** and **ND**.¹⁴⁵

The autopsy report for **VM** gives the cause of death as gunshot to the head and trunk.¹⁴⁶

The autopsy report for **ND** gives the cause of death as gunshots to the head.¹⁴⁷ The same Report refers to three gunshots to the head. One of the gunshot wounds was to the back of the head.

e. Conclusions

1. Substantive allegations

¹⁴⁴ Exhumation Police report, *supra* note 122.

¹⁴⁵ EULEX Office on Missing Persons and Forensics, confirmation of identity, 10.12.2010, case no. KEQ01-002B, MPU 1999-000043 (Veljko Marković), SPRK binder I; EULEX Office on Missing Persons and Forensics, confirmation of identity, 10.12.2010, case no. KEQ01-001B, MPU 2001-000001 (**ND**), SPRK binder I.

¹⁴⁶ Ministry of Justice of Kosovo, Office on Missing Persons and Forensics, autopsy report, Malisheva grave site, 14.09.2010, case no. KEQ01/002B, SPRK binder I.

¹⁴⁷ Ministry of Justice of Kosovo, Office on Missing Persons and Forensics, autopsy report, Malisheva grave site, 14.09.2010, case no. KEQ01/001B, SPRK binder I.

AZ described the killing of the four Serbian soldiers as having taken place 20 days before the killing of **AA**. He was sure about that. In fact, he gave the same evidence on two occasions.¹⁴⁸

His diary records **AA** as having been released on 2 April 1999. He said **AA** was killed the following day. He said that one week after the killing of the four Serbian soldiers he had witnessed the killing of a fifth Serbian soldier. He took investigators to the location of the grave. The bodies exhumed from that grave were later identified as **DT**, **DV**, **BC**, **ZF** and **ZT**. If the four Serbian soldiers were killed 20 days before **AA** they were killed in the first half of March 1999. The Trial Panel is sure about the date **AA** was released from Klecka because evidence was given by other witnesses who were released at the same time.

However, **DT**, **DV**, **BC**, **ZF** and **ZT** were not taken by the KLA until 11 April 1999¹⁴⁹.

Indeed, a diary entry records *“D TA N, 16.10.1946, brought in on 11.04.1999, released 18.04.1999; T S Z, 13.07.1951; S, B S, 05.09.1972 and F P Z, 12.03.1962”*

Referring to this diary entry, **AZ** said the Serbian prisoners were civilians who arrived at the prison on 11 April 1999. **AZ** thought they might have worked at the electricity company. They were not civilians. They were members of the Serbian Army and were in uniform when they were taken by the KLA on 11 April 1999. Uniforms were recovered when their remains were exhumed. **AZ** said they were kept in the basement of the burned-out houses and ‘released’ on 18 April 1999¹⁵⁰.

AZ gave evidence that **AK** helped him bury the four Serbian prisoners. However, if the four Serbian Soldiers were killed on 18 April 1999 **AK** could not have been present. The prosecutor conceded that **AK** had been wounded on 18 April 1999. Indeed, counsel for **AK** adduced

¹⁴⁸ 3 December 2009 and 11 February 2010

¹⁴⁹ *Supra*, statement of **TM**

¹⁵⁰ Examination on 11 February 2010

medical evidence and photographs that the Trial Panel find supports the defence case that **AK** had been seriously wounded on 18 April 1999 and that by reason thereof he could not have been present on 18 April 1999 as alleged by **AZ**.

AZ gave evidence that **NK1** and **NK2** ordered him and **AK** to bury the body. The Trial Panel finds that **AK** was not present and therefore could not have done this.

AZ gave evidence about a fifth Serbian prisoner who was killed ten days after the four Serbian prisoners. **AZ** described him as “high-ranking”.¹⁵¹ He said he was wearing “civilian clothes”.¹⁵²

Referring to the fifth Serbian prisoner, **AZ** gave evidence that **FL** “asked him questions first and punched him and kicked him”¹⁵³ He said they were in the yard. He said **NS**, **NK2**, **NK1**, **BL**, **SS1**, **BS** and **ST** were also present. When he was interviewed by police on 3 December 2009, referring to this incident, **AZ** stated “**FL** was also interviewing the Serb with the others, but I did not hear what they were asking him about.”¹⁵⁴ In 2009 **AZ** made no allegations that **FL** had punched and kicked the prisoner as he later alleged.

AZ said that when **FL** had finished questioning the prisoner he said “take away this pig”. **AZ** said he understood this to mean kill the prisoner.¹⁵⁵ Again, **AZ** did not mention this when he was interviewed in 2009¹⁵⁶.

AZ said **NS** said to **FL** “I will kill this pig”. He said **FL** was present when **NS** stated that. He said the prisoner was further beaten by **NK2** and **NS**.

AZ gave evidence in 2010 that after the prisoner had been beaten **NS** “shouted ‘Find me a scythe and I will slaughter him’. He addressed me directly”.

¹⁵¹ Statement of 3 December 2009

¹⁵² Statement of 11 February 2010

¹⁵³ Statement on 11 February 2010

¹⁵⁴ Statement on 3 December 2009, binder M, page M22

¹⁵⁵ Statement on 11 February 2010

¹⁵⁶ *ibid*

When he gave evidence in 2009 **AZ** stated “...one week later **NS** came to the prison house in Klecka and asked me to find a scythe for him, stating that ‘I will slash this pig’...**FL** was present when **S** mentioned this.”¹⁵⁷ If the beating of the Serbian prisoner occurred in the yard and in the presence of **AZ**, as he alleged in 2010, why, in 2009, did **AZ** give evidence that **NS** “came to the prison house in Klecka and asked me to find a scythe”¹⁵⁸

Further, **AZ** said that he had found the scythe blade and given it to **AK** who had given it to **NS**. If the fifth Serbian prisoner had been killed 10 days after the four Serbian prisoners were killed on 18 April 1999 then **AK** could not have been present.

The fact a scythe blade was found in the grave appears to add weight to **AZ**’s account.

The use of a scythe blade is interesting. Why would **NS** request a scythe blade? It seems an odd weapon of choice. The evidence of **AZ** is that, having been instructed by **NS** to find a scythe, he went searching and conveniently found a scythe blade in a burned-out building. **AZ** gave this evidence for the first time more than eight weeks *after* the grave had been exhumed and the scythe blade recovered. The Trial Panel cannot exclude the possibility **AZ** became aware of this evidence for the first time after the grave was exhumed.

AZ said that the fifth Serbian prisoner whom he said **NS** had killed using the scythe blade was, to the best of his knowledge, the only prisoner killed using a scythe¹⁵⁹. He described this prisoner as “high-ranking”. **AZ** thought he was between 45 and 50 years of age.

The diary entry records the names “*D TA N, 16.10.1946, brought in on 11.04.1999, released 18.04.1999; T S Z, 13.07.1951; S, B S, 05.09.1972 and F P Z, 12.03.1962*”.

¹⁵⁷ *ibid*

¹⁵⁸ *Ibid*, binder M, page M22

¹⁵⁹ Examination on 11 February 2010

Reference to these prisoners having been “brought in on 11.04.1999” confirms that these were among the five Serbian soldiers taken by the KLA on 11 April 1999.

Reference in the diary to “D TA N, 16.10.1946” is clearly reference to **DT**. The first name is correct. The reference to “TA N” appears to be error in recording the last name. **DT** was born on 16 October 1946¹⁶⁰.

DV was one of the five Serbian soldiers taken by the KLA on 11 April 1999. Interestingly, his name is not among those recorded in this diary entry.

AZ variously described the fifth Serbian prisoner as not wearing a uniform but “civilian clothes”¹⁶¹ and a short sleeve shirt and black trousers.¹⁶² However, when the remains of **DT** were recovered he was wearing a “thick jacket”¹⁶³. The DFM records confirm “Army clothing” and a “multicoloured jumper” were found with his remains¹⁶⁴.

The other prisoner who the Trial Panel finds was killed with a scythe was **DV**. He was not the “high-ranking” officer whom **AZ** said he had seen killed with the scythe blade. Firstly, **DV** was not “high-ranking”. He was an ordinary soldier. Further, at the time of his death **DV** was 31 years of age. **AZ** said the man he had seen killed with the scythe blade was between 45 and 50 years of age. Further, “military clothing” and “military shoes” were found with the remains later identified as **DV**.¹⁶⁵

The Trial Panel finds that the fifth Serbian prisoner whom **AZ** described having been killed by a scythe blade was **DT**. He was a Captain in the Reserve and the direct subordinate of the X

¹⁶⁰ SPRK binder L, page L416

¹⁶¹ Statement on 11 February 2010

¹⁶² Statement on 3 December 2009

¹⁶³ SPRK binder L, page 433

¹⁶⁴ Prosecution Evidence binder I, page P28b

¹⁶⁵ Prosecution binder I, page P28d

commander of the Serbian Army. He was the only member of the group taken by the KLA on 11 April 1999 who could have been described as “high ranking”. He was 52 years of age at the time of his death.

If, as the Trial Panel has found, the fifth prisoner whom **AZ** described having been killed by the scythe blade was **DT**, the evidence of **AZ** is contradicted by a diary entry. **AZ** gave evidence that **DT** was not killed on 18 April 1999 but 10 days later. However, a diary entry records “*D TA N, 16.10.1946, brought in on 11.04.1999, released 18.04.1999*”. That diary entry suggests **DT** was one of the four Serbian prisoners who were shot 10 days before the fifth Serbian prisoner was killed by **NS** using the scythe blade.

AZ described in detail the killing of the four Serbian prisoners. Indeed, he said that he had helped bury the bodies. However, when he took investigators to the site he seemed unsure at which of two locations the bodies were buried.

The bodies of **DT**, **DV**, **BC**, **ZF** and **ZT** were found at site KER01.

The Forensic Archaeologist gave evidence that when the grave was exhumed the bodies had been deposited in the following order: the first body deposited in the grave was **DT**. His body was at the bottom of the grave. The second body deposited into the grave was **DV**. The third body deposited into the grave was **BC**. The fourth body deposited in the grave was **ZF**. The last body deposited in the grave was **ZT**.

A scythe blade was recovered from the grave. This was found parallel to the leg of **ZF** and under the legs of **ZT**.

AZ said two of the prisoners had their hands tied behind their backs. The other two were tied together. He said wire was used to tie them. Wire ligatures were found in grave site KER01. These had been used to tie the hands of some of the prisoners. **AZ** mentioned “rope or metallic

wire”¹⁶⁶ for the first time during his interview on 3 December 2009. Wire ligatures were found when Site KER01 was excavated on 23 – 25 September 2009 – approximately two months before he gave that statement. The Trial Panel cannot exclude the possibility **AZ** became aware of this evidence for the first time after the grave was exhumed.

AZ gave evidence the four Serbian prisoners whose killing he had witnessed were shot using AK47’s. It was his evidence that ten days after the killing and burial of the four Serbian soldiers he had found the scythe blade that **NS** had used to kill the fifth Serbian prisoner. **AZ** gave evidence “the Serb was the only prisoner who was killed with a scythe to the best of my knowledge.”¹⁶⁷

However, the autopsy reports show that two of the bodies recovered from the grave - **DV** and **DT** - displayed evidence of injuries caused by a sharp instrument. The injuries noted on the bodies of both victims are recorded as having been sustained ante mortem.

The forensic pathologist **MG** gave two statements regarding the injuries he noted on the remains of **DV** and **DT**. In his statement given on 20 January 2010¹⁶⁸ **Dr. MG** was asked by the prosecutor “*Could the injuries you have found on the vertebrae have been caused by using a sickle or scythe?*” In reply **Dr. MG** states “*It is possible. The injuries are compatible with the use of such an instrument*”. In response to a question posed by the Trial Panel, in a report dated 13 July 2013 **Dr. MG** said he could not “*exclude*” the possibility the injuries had been caused by the same instrument.

The court finds the injuries sustained ante mortem by **DT** are consistent with the ante mortem injuries sustained by **DV**. Further, the Trial Panel finds that the injuries sustained by both victims are consistent with their having been killed by a scythe blade.

The forensic evidence contradicts the evidence of **AZ**.

¹⁶⁶ Statement of 3 December 2009, binder M, page M23

¹⁶⁷ Examination on 11 February 2010

¹⁶⁸ SPRK binder L, pages L1 – L3

AZ said he only found the scythe blade ten days after four Serbian prisoners had been shot. Five bodies were recovered from site KER01. Three had been shot and two killed by a sharp instrument that the Trial Panel finds was a scythe blade.

His evidence is further contradicted by the diary entry that refers to **DT** being one of the four who were 'released' on 18 April 1999 when on **AZ's** evidence, as found by the Trial Panel, **DT** was not killed until ten days later.

Further, in his statement of 20 January 2010, referring to the injuries noted on the remains of **DT** and **DV**, **Dr. MG** describes injuries to the third cervical vertebrae. He went on to say "*...the third cervical vertebra is very high, so to uncover it and to inflict a blow that cuts it from the front one should lift the head of the victim with the chin up...in a normal situation it would be almost impossible for one single person to pull the head of the victim backwards and hit at the same time with a force strong enough to cut all the tissues and reach the vertebra*". In his evidence **AZ** refers only to **NS** 'slashing' the victim. He said "*...NS started to slash him several times with the scythe. He hit him to the neck, to the back and to the legs...*"¹⁶⁹ He makes no reference to anyone else participating in the attack. On **AZ's** evidence the attack was perpetrated by **NS** alone.

AZ failed to mention the participation of another person in, not one but two, of the killings.

AZ gave evidence that the body of **DT** was the last of the Serbian prisoners to be deposited in the grave. However, the forensic evidence revealed that the body of **DT** was found at the bottom of the grave – suggesting his was, in fact, the first body to go into the grave. Even if the Trial Panel are wrong about the identity of the fifth Serbian prisoner killed 10 days later, the fact remains the body of **DV** was on top of that of **T**. The bodies of the other three Serbian soldiers – all of whom had died as a result of gunshot wounds were on top of them. That evidence contradicts the evidence of **AZ**.

¹⁶⁹ Statement of 11 February 2010 at A76 confirming prior statement to police

AZ gave evidence that less than a week after the Serbian prisoner had been killed with the scythe blade he heard gunshots. He said **NK1**, **NK2**, **SS1** and **NS** went to him and told him to find someone to cover the bodies. He said he went with **AK** to the hole where he saw the bodies of three Albanian men. He said all three were dressed in civilian clothes. He did not recognize them. The Trial Panel finds that **AK** could not have been present for the reasons stated herein.

No evidence was put before the court of any intention to disturb the grave prior to 2001. The Forensic Archaeologist gave evidence that in 2001 the bodies would have been in an advanced stage of decomposition.

At the time of exhumation, there was no indication that either the burial pit, the soils within it, the carefully deposited bodies or the artifacts remaining, had been disturbed. There were no differences in the soil layering that showed any disturbance of the original soil layers at the time of deposition. The Forensic Archaeologist gave evidence that *“The position of the bodies did not indicate to me that they had been disturbed.”*

The prosecutor put it to **Ms. C**: *“Imagine that a certain number of bodies in a place similar to that one, imagine that some bodies are removed from there before being covered with soil would your investigation be able to give any information about that?”* The Forensic Archaeologist replied by stating: *“If bodies were removed before they were covered it would be very difficult to say if there were more bodies there.”*

However, that was not the prosecution case. **AZ** gave evidence that after each victim or group of victims was killed the bodies were buried. This was a fanciful submission by the prosecution, unsupported by any evidence.

The Forensic Archaeologist gave evidence that there was no soil between the bodies and that they were very tightly packed together. That too contradicted the evidence of **AZ** who said that after the killing of the four Serbian soldiers he and **AK** had buried the bodies. If the bodies of the four Serbian prisoners had been covered with soil it would have been necessary to remove

the top layer of soil in order to bury the fifth Serbian prisoner. Not only was there no soil between the bodies but the two bodies that displayed signs of the victims having been killed by a sharp instrument were at the bottom of the grave.

In any event, even if the five bodies in the grave had been disturbed that does not explain how two of the bodies (**DV** and **DT**) displayed ante mortem injuries consistent with the victim having been killed by a sharp instrument when, on the evidence of **AZ**, he did not find the scythe blade until 10 days after four of the five prisoners had been killed by gun shots.

AZ gave evidence the body of **AA** had been interred in the same grave as the five Serbian prisoners.

If **AA** had been killed 20 days after the four Serbian prisoners then his body would have been on top of the five Serbian victims (the fifth Serbian prisoner having, on **AZ**'s evidence, been killed 10 days after the group of four). If **AA** was killed on 3 April 1999 then he was killed approximately two weeks before the four Serbian prisoners.

The Trial Panel finds that the five Serbian prisoners could not have been killed before 11 April 1999.

If **AA** was killed on 3 April 1999 and the five Serbian prisoners killed after 11 April 1999 then **AA**'s body would have been at the bottom of the grave. When the grave was exhumed on 23 – 25 September 2009 **AA**'s body was not found. Further, the forensic Archaeologist gave evidence there was no sign the grave had been disturbed.

When he was examined on 11 February 2010 **AZ** was asked about three Albanian prisoners who had been shot. He was asked "Is this the same hole where the four Serbs and the other Serb were killed and dumped?" In reply he said "yes".

He was further asked: "Are you sure about the sequence of the killings: first **AA**, then the four Serbs, then the Serb killed with the scythe, then the three Albanians?" In reply he said "Yes".

AZ gave evidence that **IG** and **SA** were taken from the prison by **AK**, **NK1** and **NK2** and that less than thirty minutes later he heard gunshots. He said that was on 3 April 1999. He said that the following day he saw what he thought was a fresh grave.

When he was interviewed on 9 February 2010 **AZ** said **IG** and **SA** were taken from the prison by **NK1**, **NK2** and **NS** and that shortly thereafter he heard gunshots. He said he was not sure if **AK** was in the group that took the two prisoners away. That contradicts what he stated when interviewed by police on 30 November 2009 when he seemed sure **AK** had been present.

In 2009 **AZ** told investigators that some bodies having been removed in 2002.¹⁷⁰ However, that contradicts the evidence he gave in 2010. When he was examined on 11 February 2010 he gave evidence that after the war and before **FL**'S arrest by the ICTY, possibly sometime in 2001 or 2002, he had received a telephone call from **FL** ordering him to "*remove the bodies*" and to "*clear the area*". **AZ** said he went "there" with **SS1** and **NS**. When they arrived at the scene **SS1** stated "*let's not touch anything and just go away*". It appears they then left. **AZ** further stated "*After a while, within one year after the first time, I went back to the location and I could see that nothing had been touched. I repeated the checking a few times while on my way to my father's house. I think the last time I went there it was sometime in 2009.*"¹⁷¹

It was the evidence of **Ms. C** that, had the grave been disturbed 6 or more months after the initial burial, she would have seen signs the bodies had been disturbed. She found no such evidence. There was no evidence suggesting any intention to disturb the graves prior to 2001. Indeed, in 2010 it was **AZ**'s evidence in 2010 that from 2001 or 2002 until 2009 he had repeatedly checked the "location" and the graves had not been disturbed.

AZ identified several possible grave sites within a relatively small geographical location. Bodies were exhumed at KER01 and KEQ01. At none of the other sites identified by **AZ** did investigators find remains or, indeed, evidence of the burial or covering of human remains. They found no evidence that might suggest the disinterment of graves.

¹⁷⁰ Binder M, pages M71, M72

¹⁷¹ Statement of 11 February 2010, binder A at page A83

The evidence **AZ** gave regarding the grave sites, the victims interred therein and removal of bodies was contradictory and contradicted by other evidence, including the forensic evidence. The Trial Panel finds that **AZ** was not present when the four Serbian prisoners were killed but, as he stated in 2009, he only heard later that they had been killed. His evidence regarding his finding the scythe blade and his having witnessed the killing of the fifth Serbian prisoner is also so unreliable that the Trial Panel finds that he was not present.

When he was interviewed by police on 3 December 2009 **AZ** said **ND** and **VM** were released on 5 April 1999.

He said *“Half an hour after **G** [sic] and **M** were released I heard some shots being fired from two Kalashnikovs from the direction of Shala village. **AS** had left somewhere with **AK** with shovels before the prisoners were taken out from the prison by **NK2**, **NS** and **BL**. Sometime later **AS** came and said ‘We finished and we covered them’”*.

It is unclear to whom **AZ** is referring when he says *“AS”*.

In December 2009 he said he only “heard” shots. He made no mention of **FL** having been present. Indeed, at that stage he made no mention of his own involvement.

He later¹⁷² said that he had lied about this and that, in fact, he had killed both men on the instructions of **FL**. Of course, when he was interviewed in December 2009, he might not have wanted to mention his own part in their killing but also he did not mention **FL** at all in relation to that event. That is odd given the fact that, during the same interview, he had implicated **FL** in the killing of other prisoners.

When he was interviewed on 3 December 2009 he told investigators that **ND** and **VM** had been taken from the prison by **NK2**, **NS** and **BL**. He said that *“sometime later **AS** came and said ‘We finished and we covered them’”*. When he gave evidence on that occasion he promised to tell the truth. He lied.

¹⁷² 11 February 2010

When he was examined by counsel for **FL** on 7 July 2011 **AZ** was asked when he had decided to tell the truth. In reply he stated *“From the moment I removed the idea to kill **FL** I handed over my gun, I was unarmed, and after that I always thought of reaching an end through an agreement.”* He said that from that moment he was committed to telling the truth.

AZ surrendered his firearm to KFOR on 24 November 2006¹⁷³. However, on 30 November 2009 and 11 February 2010 he gave two contradictory accounts of the killing of **ND** and **VM**. In 2009 he told investigators he had *“Half an hour after **G** [sic] and **M** were released I heard some shots being fired from two Kalashnikovs from the direction of Shala village.”* In 2010 he said he had killed both prisoners on the instructions of **FL**. When this inconsistency was put to him on 7 July 2011 he said both versions of his evidence were true. He said *“Initially they were released and then they were killed, because there is a plus sign next to their names”*. This failed to explain the obvious contradiction in his evidence. This was but one example of inconsistencies in the evidence of **AZ** that the trial panel was unable to resolve because he was unavailable.

AZ gave evidence that he shot **VM** and **ND**. He said both men were *facing him* when he shot them.

The autopsy examinations of both victims were performed on 14 September 2010. The autopsy report on **VM**¹⁷⁴ records two gunshot wounds to the right side of the head and one gunshot wound to the rear of the head. The autopsy report on **ND**¹⁷⁵ records a gunshot wound to the head and a gunshot wound to the trunk.

AZ never mentioned the fact **VM** had been shot once in the back of the head. It is possible that this occurred as the victim lay on the ground. If he were as “shocked” as he would have the Trial Panel believe it is surprising that he would, apparently, clinically shoot one of the victims in the back of the head. If he did not fire that shot it is surprising that he omitted to mention who did. On his account he was solely responsible for shooting both prisoners.

¹⁷³ Letter from KFOR dated 3 September 2013

¹⁷⁴ Binder I

¹⁷⁵ Binder I

Had **AZ** not killed **VM** and **ND** it is surprising that he would say that he had killed them. Indeed, he made that assertion before he had been declared a cooperative witness. That might appear to add weight to his evidence. However, his assertion that he had killed both men was clearly designed to add weight to his veracity and to his claim that he had killed both men on the instructions of **FL**.

It is interesting that when he was examined on 11 February 2010 he was not asked where he had shot **VM** and **ND**. However, spontaneously he offered: *“I don’t remember where I hit them because I was shocked.”*

When he gave his statement on 11 February 2010 the bodies of **VM** and **ND** had not been exhumed. There had been no forensic examination of the remains of **VM** and **ND** and no conclusion made regarding the gunshot wounds sustained.

The forensic evidence appears to contradict his account of the position of the prisoners when, he says, he shot them.

However, even if he had executed **VM** and **ND** that does not support his evidence that it was done on the orders of **FL**.

2. Other matters relevant to Credibility

a. SD

AZ described **SD** as *“like a father to me”*.¹⁷⁶ When he gave evidence **SD** was asked about a person with the nickname *“X”*, a name used by **AZ**. He said *“Yes, I remember him very well. He was a simple soldier. I also spoke with him when I was going around. I saw him occasionally in Divjake at the main HQ and in Berisha”*¹⁷⁷. He was asked if he knew the name **AZ**. In reply he

¹⁷⁶ Record of examination of 9 February 2010, SPRK binder A, page A27

¹⁷⁷ SPRK binder B, page B96

stated *“I definitely know the name, although I cannot match the name with a face”*¹⁷⁸. The description given by **AZ** of his relationship with **SD** seems rather hollow.

When he was examined on 7 July 2011 **AZ** was asked about **PU**, to whom he had referred in his statement of 5 October 2010. He described **PU** as approximately 30 – 35 years of age, *“sort of average, not slim”*. He said he met him 2 – 3 times. **SD** gave evidence that **PU** was the name he used in order to conceal his true identity. **SD** and **PU** were one and the same person.

AZ referred in his evidence to the case of **BK**, a former commander who had been sentenced to death. When he was interviewed on 9 February 2010 **AZ** said **FL** *“personally arrested him and personally took him to the prison in Klecka.”* He said **FL** told him *“If you release this one I will kill you. This one has to be executed.”*

He said a few days later he received an order from **SD** to bring **BK** to him. He said he refused, endorsing the back of the order that he could not execute the order. He said that a few days later he went to see **SD** and told him he was not willing to *“take a bullet”* for **BK**.

In fact, **BK** had been tried and convicted by the Military Court presided over by **SD** who had sentenced him to death. This was a lawful, judicial decision – not an arbitrary decision of **FL**.

Given the fact **BK** was detained based upon a lawful judicial decision issued by **SD**, it is odd that **AZ** would refuse an order to take **BK** before that very court.

When **SD** was interviewed in September 2010 he was asked if the Director of the prison had complained to him that **FL** appeared determined to have **BK** executed, as an example to others. In reply he said *“I do not remember such a story. Nobody complained to me. What I can say is that not everybody within the KLA was happy with my decision not to execute **K”***¹⁷⁹.

¹⁷⁸ SPRK binder B, page B96

¹⁷⁹ Statement of 23 September 2010 paragraph 23

When he gave evidence before this court **SD** said *“Nobody objected to it. I can confirm that they never interfered in legal matters...”*¹⁸⁰ He said **K** appeared before him *“several times. At least twice”*¹⁸¹

Referring to the occasion when he had refused to take **BK** to **SD**, **AZ** gave evidence that **SD** had subsequently sent four military police officers to collect **BK**.

SD said he could not recall who transported **BK** between the prison and the court. When he was interviewed in September 2010 he was asked if he had ever sent military police to the prison in Klecka to get **BK**. In reply he said *“Most likely as that was part of the regular procedure”*¹⁸².

On the prosecution case, the military police charged with escorting **BK** to **SD** were under the command of **FL**. This is an obvious logical inconsistency in the evidence of **AZ**. **AZ** refused to comply with the order to take **BK** before the military court because he was afraid of the reaction of **FL** whereupon **SD** sent the military police to collect him.

When he gave evidence before the court **SD** was asked if the prison coordinator had ever refused to transfer **BK** from the prison in Klecka to the court. In reply he said he could not recall.

He was asked if the coordinator had expressed any concerns about the case of **BK**. He said *“There was an act through which he did express his concern and, based on this, I went to him and explained that there was nothing for him to be worried about because ‘I stand right behind you’”*¹⁸³.

SD was asked if **AZ** had ever stated that he would not “take a bullet” for **K**. In reply he said *“No. Never.”*¹⁸⁴

¹⁸⁰ Testimony on 23 April 2013

¹⁸¹ Testimony on 23 April 2013

¹⁸² Statement of 23 September 2010 paragraph 24

¹⁸³ Testimony of 24 April 2013

¹⁸⁴ Testimony of 24 April 2013

b. KFOR statement

In the Indictment it is averred that *“After receiving subsequent additional threats and pressure, in 2006 cooperative witness X decided to go to KFOR in X, surrender his gun to them and give a full statement regarding the war time...When L and his associates came to know of this, and fearing a subsequent judicial reaction, they forced cooperative witness X to be admitted to the Pristina Psychiatric hospital for some time to discredit his credibility.”*

AZ was admitted to a psychiatric hospital on two occasions. On 15 December 2005 he was admitted to the psychiatric hospital in X. He was discharged on 4 January 2006. On 30 November 2006 he was admitted to the psychiatric hospital in Pristina. He was discharged on 19 January 2007.

When he was interviewed on 16 March 2010 he said he had been admitted to the psychiatric hospital on the second occasion after he had surrendered his weapon to KFOR and, he said, told them *“the full story”*.

When he was interviewed by police on 16 and 17 July 2007 he referred repeatedly to the statement that he said he had given to KFOR, it appears in 2006. He referred to his KFOR statement on other occasions including 16 March 2010 and 7 July 2011. On each occasion he promised to tell the truth.

In his statement to police on 16 July 2007 he said FL had asked him how much money he wanted in order to *“withdraw the statement in KFOR”*. He said that, in reply, he had stated *“how to withdraw it, now I can not”*.

During the interview on 16 March 2010 he said he told FL that that he *“wanted”* to go to KFOR in order to *“report them”*. He said FL insisted they meet to discuss *“the issue”*. He said that during that meeting FL told him that he had to go to the psychiatric hospital, stating that was the only way to ‘discredit’ the story he told KFOR. He said he was *“supposed”* to go to the hospital the day after that meeting.

GZ gave evidence that **AZ** was admitted to the psychiatric hospital in order to “discredit” a statement that, he said, he had given to KFOR.¹⁸⁵

It does seem odd that if **FL** was able to persuade **AZ** to go to the psychiatric hospital in order to ‘discredit’ his story, why was he not able to persuade **AZ** not to make a statement to KFOR in the first place or go back to KFOR to either alter it or else retract it altogether?

When he was interviewed on 5 October 2010 he was asked about the Discharge List from the Psychiatric Clinic at the University Clinical Centre that describes, amongst other things, the symptoms he presented with upon arrival at the clinic. These include “...*insomnia, disordered behavior, haunt and suspicion ideas.*” In response he said “*I actually pretended to have the symptoms that are listed here. The doctors just described how I behaved and the symptoms that they diagnosed. But I acted that way upon instructions given to me by FL*”.

However, upon his arrival at the psychiatric hospital in November 2006 and thereafter he told staff that he had been threatened. Indeed, the records of the time from December 2006 when he was transferred to the psychiatric hospital intensive care unit record him stating “*they threat me by phone and say that they will blow on the air me and my family, I see some persons requesting me to kill this one or that one in exchange for a lot of money; I sent letters to many politicians to provide me with security as I fought for two years*”.

It is simply illogical that **AZ** would cooperate in his being admitted to the psychiatric hospital and pretend to have the recorded symptoms, allegedly on the instructions of **FL**, in order to “discredit” a statement that, he said, he had given to KFOR but then inform hospital staff of the threats that, he said, he had received.

The prosecution did not put in evidence the statement **AZ** said he had given to KFOR. The Court therefore contacted KFOR in order to determine whether **AZ** had given a statement to KFOR. This was clearly relevant to his credibility. If he had not given a statement to KFOR that significantly undermined his credibility regarding his account of threats that he said he had

¹⁸⁵ Statement of Ganimete Zogaj dated 20 April 2010

received from or on behalf of **FL**. It also raised questions about the real reason or motivation for his being admitted to the psychiatric hospital in 2006. Several times in his diary he refers to the statement he says he gave to KFOR.

AZ surrendered his firearm to KFOR on 24 November 2006. It was the prosecution case he gave KFOR *"a full statement regarding the war time"*. It was the prosecution case that he was admitted to the psychiatric hospital on 30 November 2006 in order to discredit that statement. Therefore, if **AZ** had given a statement to KFOR it would have been given during the period 24 – 30 November 2006. In fact, **AZ** never gave a statement to KFOR during that period.¹⁸⁶ The prosecution variously postulated that **AZ** might have been confused between KFOR and UNMIK or he might have given a verbal statement. The Trial Panel found those explanations implausible. Indeed, in his statements **AZ** differentiates between KFOR, UNMIK and the ICTY.

KFOR confirmed¹⁸⁷ that on 24 November 2006 **AZ** had surrendered a firearm and informed them he was in possession of a hand grenade. The Situation Report, to which reference was made in that letter, stated **AZ** had been *"handed over to war crime unit Pristine"*.

A diary entry made by **AZ** on 24 November 2006¹⁸⁸ refers to his having gone to KFOR and subsequently his having gone to the "UN" where, it appears, he remained from 1am until 10am the following morning. Crucially, the diary entry further states *"Pa desh-*", a literal translation of which is *"without testimony/evidence"*. The only logical interpretation of that sentence is that he did not give a statement – written or verbal. Clearly, therefore, his own diary entry contradicts his later evidence that he had told *"the full story"* and this being the reason for his subsequent hospital admission.

¹⁸⁶ Letter from KFOR dated 27 August 2013 in Volume 17 at tab 5

¹⁸⁷ Letter of 3 September 2013

¹⁸⁸ Exhibit 0096-09-EWC2/006, page 30

Nevertheless, the Court contacted UNMIK and ICTY and requested information whether, during the period 24 – 30 November 2006, **AZ** had given a statement. UNMIK¹⁸⁹ and the ICTY¹⁹⁰ both confirmed that no statement had been given by **AZ** during that period.

Had **AZ** given a verbal statement it is improbable he would have admitted himself to a psychiatric hospital in order to “discredit” it. He would have simply denied it. Further, had he spoken with war crimes investigators regarding alleged war crimes it seems inconceivable they would not have taken a statement from him or made some record of their having spoken with him. No such record was put in evidence. In any event, it appears on the face of his own diary entry, to which reference is made above, that **AZ** never gave a statement to UNMIK.

The Trial Panel finds that **AZ** did not give a written or verbal statement to any war crimes investigator during the period 24 – 30 November 2006. This significantly undermines his evidence regarding the reason he said he was admitted to the psychiatric hospital on 30 November 2006. That was a lie and further undermines his credibility.

Further, **AZ** gave evidence¹⁹¹ that KFOR had offered him “protection”. If he had never given a statement to KFOR it seems unlikely they would have had any reason to offer him protection. That too was a lie.

¹⁸⁹ Exhibit C17, letter dated 9 September 2013 from UNMIK Head of the Rule of Law Liaison Office

¹⁹⁰ Exhibit C18, email dated 11 September 2013 from the Office of the Prosecutor, Mechanism for International Criminal Tribunals, The Hague

¹⁹¹ Cross-examination on 7 July 2011

c. ICTY statements

AZ referred on various occasions during his evidence to his having received threats from **DL**, brother of **FL**.

When he was examined on 9 February 2010 he said **DL** told him not to say anything to UNMIK and that if he were summonsed to the Hague *“they would tell me what to say”*.

When he was examined on 17 February 2010 he said **DL** told him that if he were called to give evidence in the Hague she should consult with **FL** before making any statement. During that same examination **AZ** referred to a further meeting with **DL** during which he said **DL** gave him copies of the statements given to the ICTY by **FL**, **HB** and **IM**. Referring to **DL**, **AZ** said *“He brought along a copy of the statements that F, B and M had given the ICTY. He told me to read them and to prepare my version of the facts in case I get arrested”*.

When he was examined by counsel for **FL** on 7 July 2011 **AZ** was asked about that alleged meeting with **DL** at the home of his uncle. Referring to the statements of **FL**, **HB** and **IM** he said *“I read them”*. Later, when asked *“did you read the statements?”* he replied *“I read part of it...”* He then said *“I only read B’s all the others were there”*. He was asked if the statements had been left with him. In reply he said *“They took them”*.

In fact, having made enquiries of the ICTY the Court established that **FL** and **IM** never gave statements to the ICTY¹⁹². Therefore **DL** could not have shown **AZ** ICTY statements of **FL** and **IM**. That too was a lie.

d. Alleged payments made by FL

¹⁹² Letters from ICTY dated 31 July and 13 August 2013 respectively

AZ gave evidence that he received various payments from **FL**. Those payments were, in essence, an attempt to ‘buy his silence’.

A diary entry for 29 November 2006¹⁹³ reads “**F** offered me a monthly salary from 500 Euro. On 1 May he gave to my friend 5000 Euro to give to me in order to help **F**...When I went to the hospital **NK1** offered me another 2000 Euros. In total 7000 Euro.”

AZ was in Hospital from 30 November 2006 to 19 January 2007.

Further, there is no diary entry for 1 May referring to any payment of 5000 Euros. Given the obvious significance of that allegation it is a surprising omission.

AZ gave evidence that while he was in the psychiatric hospital in Pristina **NK1** gave him 2,000 Euros. He said that “during the same period” **BT** had given 5000 Euros to his wife on behalf of **FL**.¹⁹⁴

An entry in the diary¹⁹⁵ refers to **AZ** having been given 2000 Euros and 5000 Euros having been given to his wife. That diary entry reads: “Today **N** came and he brought to me 2000 euro, **F** has sent this and 5000 euro they gave to your /brother’s wife/ to be given to our wife”. That diary entry is undated but is written on the back of the page containing entries dated 15, 18, 21 and 26 December 2006. The next diary entry is dated 27 December 2006. It appears this was a later addition to the diary. Indeed, the page on which this entry is made was not the first page in the bound book but a separate page that has been stuck into the front of that book using sticky tape.¹⁹⁶

It was alleged this sum was given during the period **AZ** was hospitalized in order to discredit the statement he had given to, he said, **KFOR**.

¹⁹³ 0096 – 09 – EWC2/006, page 25

¹⁹⁴ Statements of 10 and 16 March 2010

¹⁹⁵ 0096-09-EWC2/001, page 2a

¹⁹⁶ Exhibit 0096 – 09 – EWC2/001

When he was interviewed on 16 March 2010 he said that it was **NK1** who had given his wife 5000 Euros. **GZ** said the meeting took place in the oda of her cousin **GT** in Lapushnik. She said that meeting took place while **AZ** was in hospital. She said G's son **B** was also present¹⁹⁷.

However, when **BT** was examined by the prosecutor he said he knew nothing about 5000 Euros having been given to **GZ**¹⁹⁸.

The diary entry of 29 November 2006 refers to a sum of 5000 Euros having been given to a friend of **AZ** in order to "help **F**". The entry says that sum was given on "1 May". That entry refers to "another" sum of 2000 Euros being "offered" by **NK1** to **AZ** while the latter was in hospital. The diary entry states "in total 7000 Euros".

However, the diary entry after 21 January 2007 states "today N visited me and gave me 2000 Euro..." That same entry refers to the sum of 5000 Euros being given to **GZ**.

AZ and **GZ** both gave evidence that **GZ** received the sum of 5000 Euros while **AZ** was in hospital. **AZ** gave evidence that he received the sum of 2,000 Euros from **NK1**. The diary entries are contradictory about what payments were made and when.

When **GZ** gave evidence before this Court on 14 May 2013 she claimed not to recall anything about a payment of 5000 Euros¹⁹⁹.

When he was interviewed by police on 17 July 2007²⁰⁰ **AZ** referred to his having gone to KFOR and his having given a statement. He said he agreed to be hospitalized, the purpose of which was apparently to discredit that statement. He was asked "Did you accept to be hospitalized?" In reply he said "As I was threatened and I was afraid, and as they promised me to take care of my family and they will give me 500 E per month, *then* I accepted this proposal."

¹⁹⁷ Statement of 20 April 2010

¹⁹⁸ Statement of **BT** dated 5 April 2011

¹⁹⁹ Minutes of 14 May 2013, page 16 (English version)

²⁰⁰ Continuation of statement on 16 July 2007

Later in that statement **AZ** was asked “According to your opinion does **FL** owes you?” In reply **AZ** stated “Yes, he owes me, according to our agreement that every month he gives me 500 E until he finds me a job *but from December 2006 till today he owes me for each month by 500 E and he didn’t fulfill the agreement.*” However, on his evidence he was “offered” 2000 Euros by **NK1** on 29 November 2006 and was “given” 2000 Euros by “**N**” on 21 January 2007. Further, he averred **GZ** received 5000 Euros on 21 January 2007. There is also reference to a payment of 5000 Euros having been paid on “1 May”.

The accounts given by **AZ** regarding the monies he said he received from **FL** is inconsistent and so full of contradictions that the Trial Panel is unable to make any findings on this issue.

e. Alleged Assassination Attempts

AZ made various allegations about threats he said he had received from persons acting on behalf of **FL**.

On 16 July 2007 **AZ** told police that he had seen two men tampering with his vehicle. A hand grenade was subsequently found attached to his vehicle. At the time, **AZ** told police²⁰¹ **FL** was somehow involved. There was no evidence to connect **FL** with this incident. Indeed, when **AZ** was cross-examined on 7 July 2011 he was asked by counsel for **FL** “...isnt it true that you did not know who these people were at all?” In reply he stated “I don’t know but I have my doubts.”

On 21 June 2009 **AZ** sustained gunshot wounds to his left hand and right thigh. That incident was recorded in his diary under the date 21 June 2009 with the words “*assassination attempt*”.

When he was interviewed on 17 February 2010 he was asked “*Were there other incidents you were involved in?*” In reply he referred to the incident involving the hand grenade. Surprisingly, he did not mention having been shot in the right thigh and left hand.

²⁰¹ Interview with Kosovo police on 16 July 2007

The Trial Panel finds that on 16 July 2007 **AZ** made a report to police that he had seen men tampering with his vehicle and that a hand grenade was found by police. Further, the Trial Panel finds that **AZ** sustained gunshot wounds to his left hand and right thigh during an incident on 21 June 2009.

There was no independent evidence to support **AZ**'s assertion that **FL** or, indeed, any of the defendants was behind either incident.

In her statement of 20 April 2010 Mrs. **GZ** said that she had overheard a telephone conversation between her husband and **DL** during which, she alleged, **DL** had said "I will send you up in the air, you and your family!" She said **AZ** told her that **FL** was afraid that **AZ** "would speak about what had happened during the war."²⁰²

There was no evidence **FL** was behind any of the alleged attempts on the life of **AZ**. The only evidence of the alleged telephone call between **AZ** and **DL** is the evidence of **AZ** and **GZ**.

f. Road Traffic Accidents

AZ gave evidence about road traffic accidents that he averred were orchestrated by **FL** in order to silence him.

²⁰² Statement of 20 April 2010

When he was cross-examined on 7 July 2011 **AZ** was asked about a car accident in 2005 involving his daughter when she was 18. He said he believed it was deliberate. He conceded that following that accident and because he thought it had been done deliberately he moved out of his house²⁰³. He thought his daughter had been deliberately targeted. He thought **FL** was behind the accident. He alleged **NK2** had forgiven the driver of the vehicle and that **FL** was behind attempts to see an amicable resolution with the driver of the vehicle.

He said he believed **FL** was behind attempts that were subsequently made to encourage him to 'make peace' with the driver of the vehicle that hit his daughter.

On 24 November 2005 **AZ** was driving his motor vehicle in Shtime when he was in collision with another vehicle driven by **SF**. Police attended the scene. The police report appears to hold the third party driver responsible for the accident. On 28 October 2006 **AZ** was driving his motor vehicle in X when he was in collision with another vehicle. Police attended the scene. The police report appears to hold **AZ** responsible for the accident. On 3 October 2007 **AZ** was driving his motor vehicle in Komorane when he was in collision with another vehicle driven by **BS**. Police attended the scene. The police report appears to hold the third party driver responsible for the accident.

He was then asked about a second accident when his vehicle was hit by a lorry. He said he thought this accident was also deliberate.

Referring to the two occasions in which the third-party drivers were held responsible, he conceded that on both occasions the drivers of the vehicles had waited for police, that police had attended the scene and had spoken with the drivers of the other vehicles and that their personal details had been recorded by police.

There was no evidence **FL** or, indeed, any of the defendants were somehow behind these road traffic accidents.

²⁰³ Page 18 (English) of record of examination of 7 July 2011

g. ZK

AZ blamed **FL** for the fact his uncle, **ZK**, was charged with a double murder. He said “...around three years ago my uncle was beaten up by three – four people in front of my uncles car workshop in pristina, not far away from the railway tracks close to the traffic light. He went home, took his Kalashnikov, found the guys in a coffee bar, killed two of them and injured a third one. Later on I found that **HS** was inside the coffee bar. I thought that this entire story was somehow linked to my own problems. My uncle is currently serving his sentence in Dubrava.”²⁰⁴

In fact, that account was not true. **ZK** was convicted by the Basic Court of Pristina on 19 March 2013 for, inter alia, the offence of Aggravated Murder under Article 147 (9) and (11) of the CCK. It appears on the face of the Judgment that this was a dispute concerning the use of property. There was no evidence to implicate **FL** or, indeed, any of the defendants in the events in issue in those proceedings.

h. Illegal Wood cutting

When he was cross-examined on 7 July 2011 **AZ** was asked about an occasion when he had been reported by police for illegally cutting firewood. He said it was his cousin who had taken the wood. He said he believed **FL** was behind his being reported by the police.

lii. Findings regarding the Credibility of AZ

The Trial Panel does not propose reciting here all of the inconsistencies and contradictions in the evidence of **AZ** to which it has referred above.

²⁰⁴ Statement dated 17 February 2010

AZ gave evidence that he had written the diaries. He described his doing so secretively. He was afraid of what might happen if it was discovered that he was keeping a written record of events in the prison in Klecka. That was a lie. The Trial Panel has found that some entries in the diary were written by other persons. Some diary entries appear to be later additions, inserted to fit the chronology.

AZ gave statements to EULEX police on 20 and 30 November 2009 and continued on 3 December 2009²⁰⁵; on 4 February 2010, 9 February 2010, 11 February 2010, 16 February 2010 and 17 February 2010; 10 March 2010, 16 March 2010, and 25 March 2010; 6 June 2010 and 20 August 2010²⁰⁶ and on 5 and 7 October 2010²⁰⁷. He was cross-examined by defense counsel on 5, 6, 7 and 9 July 2011.

The first statement he gave to investigators was on 20 November 2009 – almost 8 weeks after the first grave had been exhumed and the bodies of the five Serbian victims recovered.

His evidence regarding the killing of the five Serbian prisoners is inconsistent, contradictory and is contradicted by other evidence, including forensic evidence.

He said **AK** had helped him bury the bodies of the five Serbian prisoners. He graphically described how he had given the scythe blade to **AK** who had given it to **NS**. That was a lie. **AK** could not have been present on the occasions described by **AZ** because he had been seriously wounded and was lying in a hospital bed and this was accepted by the prosecution.

If he was not lying about **AK** but merely mistaken the end result is the same – his evidence is unreliable.

AZ was asked when he had decided to tell the truth. In reply he stated *“From the moment I removed the idea to kill FL I handed over my gun, I was unarmed, and after that I always*

²⁰⁵ Statements given in the capacity of a witness

²⁰⁶ Statements given in the capacity of a suspect/defendant

²⁰⁷ Statements given in the capacity of a Cooperative Witness

thought of reaching an end through an agreement.” He said that from that moment he was committed to telling the truth.

AZ surrendered his firearm to KFOR on 24 November 2006²⁰⁸. However, on 30 November 2009 and 11 February 2010 he gave two contradictory accounts of the killing of **VM** and **ND**. In 2009 he told investigators *“Half an hour after G [sic] and M were released I heard some shots being fired from two Kalashnikovs from the direction of Shala village. ”* In 2010 he said he had killed both prisoners on the instructions of **FL**. When this inconsistency was put to him on 7 July 2011 he said both versions of his evidence were true. He said *“Initially they were released and then they were killed, because there is a plus sign next to their names”*. That was an absurd assertion. In 2009 he said he had “heard” shots fired. In 2010 he said that *he* had killed both prisoners. Even when confronted with an obvious inconsistency he obfuscated.

It is, of course, possible that he did kill **VM** and **ND**. However, the forensic evidence appears to contradict his account of the shooting. In any event, assuming he did kill **ND** and **VM** that does not in and of itself corroborate his evidence that he shot them on the orders of **FL**.

AZ gave various explanations for his admission to a psychiatric hospital in 2005. It was put to **AZ** by counsel for **FL** that *“the 1st admittance to the hospital was to prepare your defence for the murder of FL not to manufacture an insurance claim...”* In reply he said *“Both are true”*²⁰⁹. He again refuses to acknowledge inconsistencies in his evidence.

GZ said **AZ** told her that he would admit himself into a psychiatric hospital *“to get more money from the insurance company.”*²¹⁰

In fact, **AZ** gave various reasons for his being admitted to psychiatric hospitals in 2005 and 2006. He told investigators he wanted to inflate an insurance claim following a road traffic accident. He told investigators he wanted a defence were he to kill **FL**. He told investigators he was admitted in order to discredit a statement he had given to KFOR. In the first case he lied

²⁰⁸ Letter from KFOR dated 3 September 2013

²⁰⁹ Page 35 (English) of record of examination of 7 July 2011

²¹⁰ Statement of GZ dated 20 April 2010

with the intention of defrauding an insurance company. In the second case he lied in order to construct a partial defence to murder. In the third case he lied in order to discredit a statement that he said he had given to KFOR.

When he was interviewed on 16 March 2010 he said he had been admitted to the psychiatric hospital on the second occasion after he had surrendered his weapon to KFOR and, he said, told them *“the full story”*. That was a lie.

When he was interviewed by police on 16 and 17 July 2007 he referred repeatedly to the statement that he said he had given to KFOR, it appears in 2006. He referred to his KFOR statement on other occasions including 16 March 2010 and 7 July 2011. On each occasion he promised to tell the truth. He lied. He had never given a statement to KFOR.

AZ admitted that he had lied to ICTY investigators in 2004²¹¹.

When he was examined on 17 February 2010 **AZ** referred to a further meeting with **DL** during which he said **DL** gave him copies of the statements given to the ICTY by **FL**, **HB** and **IM**. He said *“He brought along a copy of the statements that F, B and M had given the ICTY. He told me to read them and to prepare my version of the facts in case I get arrested”*. That was a lie.

When he was examined by counsel for **FL** on 7 July 2011 **AZ** was asked about that alleged meeting with **DL** at the home of his uncle. Referring to the statements of **FL**, **HB** and **IM** he said *“I read them”*. Later, when asked *“did you read the statements?”* he replied *“I read part of it...”* He then said *“I only read B’s all the others were there”*. That was a lie. **FL** and **IM** never gave statements to the ICTY.

He denied that he hated **FL**. That was a lie. He admitted that he had had himself admitted to a psychiatric hospital in 2005 in order to have a defence to the murder of **FL**.²¹²

²¹¹ Cross-examination on 7 July 2011

²¹² *ibid*

When he was examined on 10 March 2010 reference was made to a diary entry in which **AZ** had stated *"I also tried several times to go and kill F"*²¹³. When he was asked about this by counsel for **FL** on 7 July 2011 he stated *"I thought about it...I never attempted to kill him."* This was yet another inconsistency affecting the credibility of **AZ**.

AZ was asked by counsel for **FL** if he believed that everything bad in his life had to do with **FL**. In response he said *"from 2003 onwards"*²¹⁴.

AZ conceded that, following the conviction of **ZK**, he had said to **NK1** *"I want to get rid of all of them"*²¹⁵.

There are substantial inconsistencies and contradictions in the evidence of **AZ**. His evidence is also contradicted by other evidence. His evidence was full of lies. On his own admission he has lied to investigators in the past.

On the prosecution case, **AZ** fabricated symptoms over a period of time that persuaded three psychiatrists that he was genuinely mentally ill. If that is correct, **AZ** was a convincing, manipulative liar.

In his evidence he demonstrated hostility towards **FL**. He blamed **FL** for everything that went wrong in his life after 2003. His diary contains page after page of invective against **FL** and his family. He admitted to having thought about killing **FL**. Whether this was the product of threats that, he said, he had received from **FL** does not detract from his overall animus towards **FL**. Indeed, there was no evidence to prove that **FL** was behind any of the threats that, he said, he had received. Some of the evidence he gave around purported threats was simply concocted.

The Prosecution case rests substantially upon the evidence of **AZ**.

Inconsistencies, discrepancies and contradictions will, almost inevitably, arise in any case of this nature, involving numerous witnesses who observed different events at different times or the

²¹³ Exhibit 0096-09-EWC2/006, page 30

²¹⁴ Page 21 (English) of record of examination of 7 July 2011

²¹⁵ Page 31 (English) of record of examination of 7 July 2011

same event at the same time. The evidence of a witness is often coloured by factors including their proximity to the event or their perception, understanding and recollection of an event. Such errors are not necessarily fatal to a case.

However, in numerous material respects, to which reference is made herein, the evidence **AZ** gave is not only inconsistent but is substantially contradicted by other evidence. The inconsistencies and contradictions found by the court are not discrepancies that might be the product of an honest but imperfect recollection, observation or reconstruction of the events about which he gave evidence.

The Trial Panel finds that many of the events to which **AZ** refers in the war diary are correct. For example, evidence given by witnesses about the dates they say they were detained at the prison in Klecka is consistent with entries in the diary, including information regarding the identity of other persons detained during the same period. However, none of that evidence corroborates the evidence of **AZ** regarding *who*, he says, committed the offences charged in the indictment.

Any finding of this Trial Panel regarding the identity of the perpetrators of the crimes charged in this indictment rests substantially upon the evidence of **AZ**. His credibility is therefore central to the prosecution case. Having considered all of the evidence in this case, the Court finds that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence.

Even if the Trial Panel had found **AZ** to be a credible witness, that would not, in and of itself, provide the corroboration required by law. The finding of mortal remains might support the Prosecution case that crimes were committed. Assuming the victims were unlawfully killed, in the absence of other evidence, the finding of remains does not corroborate the evidence given by **AZ** regarding the identity of the persons by whom, he says, the crimes were committed. It is simply absurd to suggest that because mortal remains are found where a witness says they will find that corroborates the evidence the witness gives about the identity of the perpetrators.

Corroboration in this regard can only be provided by independent, reliable evidence. That is the fundamental flaw in the prosecution case.

G. ASSESSMENT OF THE EVIDENCE

Before addressing the Trial Panels assessment of the material evidence it is pertinent to say something about witness intimidation.

In any case such as this, questions of real or perceived intimidation of witnesses regrettably but inevitably arise.

In this case, no evidence of actual witness intimidation was put before the Court.

This was a sensitive case. It raised issues that some sections of the community are unwilling to address. The struggle for an independent Kosovo produced political, social and ethnic tensions that continue to this day. It was against that background that witnesses were expected to testify. There was a perception amongst some that those who gave evidence for the prosecution were traitors. Those witnesses might have been afraid of the reaction from within their own communities were their identities to become known. Others might have feared physical retribution. It is not entirely surprising that some witnesses chose to retract their previous evidence.

Anonymous Witness I was an obvious example. He had given statements to police on 22 November 2010 and to the prosecutor on 2 November 2011. When he appeared before the court by video link on 29 May 2013 he suddenly announced he no longer wished to remain anonymous. He informed the court of his name and subsequently appeared before the court to give evidence. His status changed and he was no longer an 'anonymous' witness.

He told the court that he had been “blackmailed” by the prosecutor and was subjected to various forms of pressure. However, when asked by the court to describe the actions of the prosecutor about which he complained, the court found that the alleged conduct of the prosecutor as recounted by the witness fell far below what might be characterized as undue pressure or influence. In the circumstances, the court did not accept his evidence in that regard. The court found that the evidence he gave in November 2010 and November 2011 he gave voluntarily and without any unlawful pressure having been exerted. Indeed, having given a statement in November 2010 he contacted the prosecutor prior to giving a further statement in 2011. Those are not the actions of a witness who was pressured into giving evidence. Having considered the totality of his evidence the Trial Panel chose to admit into evidence his prior statements.

Another example was Anonymous Witness M. He gave a statement to the police on 30 March 2011 and to the prosecutor on 20 May 2011. He gave evidence before this court on 21 May 2013.

The evidence he gave to the police and before the prosecutor was in all material respects, consistent.

When Anonymous Witness M testified before this court he confirmed that both statements had been read to him in Albanian prior to his having signed them. However, he said that he was “in fear” from Eulex when he signed them. Referring to the statement of 30 March 2011, his fear appears to have manifested as a result of his having been put in a Eulex vehicle and driven approximately 15 km from his home. He did not assert that he had been threatened or intimidated by the Eulex police officers or, indeed, subsequently by the prosecution. When he was interviewed on 20 May 2011, referring to his statement of 30 March 2011, he said “I confirm everything”.

On both occasions the Anonymous Witness M was warned of the consequences of giving false testimony. At the conclusion of his examination before the prosecutor the witness signed a declaration that stated, inter alia, "I sign it without coercion".

In his first statement he said he did not wish to testify in court.

In some important material respects his testimony before the court contradicted what he had previously stated.

The evidence Anonymous Witness M gave before this court was selective. He appeared to have a good recollection of certain events. However, his testimony before this court contradicted his previous evidence on several important matters in issue. Indeed, his evidence before this court was, on occasion, inconsistent. Having considered the totality of his evidence, the Court chose to accept as the more reliable the evidence he gave to the police on 30 March 2011 and before the prosecutor on 20 May 2011.

A further example was Anonymous Witness C. He gave a statement to the prosecutor on 21 September 2010. He gave evidence before this court on 30 April 2013.

When Anonymous Witness C testified before this court he consistently stated that he was unable to recall certain significant events about which he had given evidence before the prosecutor in September 2010.

The evidence Anonymous Witness C gave before this court was selective. He appeared to have a good recollection of certain events. However, his testimony before this court contradicted his previous evidence on important matters in issue. Indeed, his evidence before this court was, on occasion, inconsistent. Having considered the totality of his evidence, the Court chose to accept as the more reliable the evidence he gave before the prosecutor in September 2010.

Yet a further example was Anonymous Witness B. He gave a statement to the police on 4 December 2010. He testified before this Court on 28 May 2013.

The testimony Anonymous Witness B gave before this court contradicted his previous evidence on important matters in issue. Having considered the totality of his evidence, including the witness demeanour in court, the Trial Panel chose to accept as the more reliable the evidence he had given in his statement to the police in December 2010.

A further example was **GZ**. She was examined by the prosecutor on 20 April 2010. She gave evidence before this Court on 14 and 15 May 2013.

When she gave evidence before this court she consistently stated that she was unable to recall certain significant events about which she had given evidence before the prosecutor in April 2010. Indeed, her recollection of events could be, at best, described as ‘selective’. In part this appeared to be due to her obvious animosity towards the prosecutor whom she blamed for the death of her husband.

Referring to the statement that she gave in April 2010 she stated **AZ** instructed her regarding what to say. She said “**A** suggested everything. I knew nothing about this”²¹⁶.

In respect of each of the witnesses whose testimony before this Trial Panel was contradicted by their previous evidence the Trial Panel chose to admit into evidence the previous statements.

i. Structure of the KLA in 1999

BZ gave evidence that from June 1998 he was in charge of the development of the professional capacity of the KLA in the framework of the directorate. From April until November 1998 he was the operational director and from November 1998 to April 1999 he was head of the General KLA HQ. Between January and April 1999 the KLA General KLA Headquarters was in the village of Divjake.

²¹⁶ Minutes of 14 May 2013

It was his evidence that the KLA General Headquarters in Divjake comprised three houses. The first house was occupied by **JK** who was one of two Deputy Commanders. He was in charge of political activities. The other Deputy Commander, **SB**, was in charge of operational matters. He occasionally visited the KLA General Headquarters in Divjake. That building also housed three directorates: Administration and Personnel; military and civilian relations and the political directorate. **SD** also had an office in that building. It was his evidence that he would report directly to **AS** who was at that time the KLA Commander.

The second house was occupied by **BZ**, and other staff forming part of the operations department. In addition, that building contained the directorate for communications.

The third house was occupied by the Military Police. They were responsible for security of the General Headquarters.

It was his evidence that from January until April 1999 the Director of the Military Police Directorate was **FL**. In his statement he said **FL** was *"head of the entire KLA military police."*²¹⁷ In his evidence before this court, referring to that statement, he said *"When I made my statement on this date I explained that he was in charge of the professional part."*

He said the duties of the director of the military police were to *"train the police, to issue regulations and to inspect work."*

It was his evidence the Director of the Military Police Directorate did not have an executive function.

In this regard he was asked by the prosecutor whether the Director could give orders to the military police. In reply he said *"only in relation to the professional part of the battalion of the HQ in relation to security issues."* He elaborated this by stating *"When I say security issues of the general HQ, it is to secure the HQ of the premises and to escort the member from the central command to different locations."*

²¹⁷ Statement of 5 April 2011

Referring to the “professional part” the prosecutor asked him “*what other parts existed?*” In reply he stated “*Like the military police and HQ there were other military police in operational area.*” He further stated “*When I refer to professional matters as mentioned before, they issued regulations and training and inspections...The inspection of the military police he could do in the area where he could go.*”

Counsel for **FL** put a series of questions to him regarding the structure of the KLA at that time:

KK: *Do you agree that one of the aims of all armies is to have clear lines of command?*

BZ: *Yes.*

KK: *Every army wishes to avoid duplicate command?*

BZ: *Yes.*

KK: *In organising KLA, various zones were set out correctly?*

BZ: *Yes.*

KK: *And these zones were at different times?*

BZ: *Yes.*

KK: *Drenica zone was the first one to organise itself?*

BZ: *Yes.*

KK: *Under your proposals and directions the aim was as the KLA matured and organised they would be a structure of each zone?*

BZ: *Yes.*

KK: *I will not go in to organisational levels but let me ask you questions regarding Brigade level and I will go upwards. The Brigade commander was subordinate to the zone commander?*

BZ: Yes.

KK: So for example when we are talking about 121 Brigade, **HS** was subordinated to the zone commander of the Pashtrik zone right?

BZ: Yes.

KK: And every Brigade including the 121 Brigade had a tog dealing with military police?

BZ: Yes.

KK: The commander of the military police at Brigade level was subordinated to the brigade commander?

BZ: Yes. Directly.

KK: Therefore Brigade commander of military police was direct subordinate to the Brigade Zone commander and the witness said yes. Is that right?

BZ: Yes. It is true.

KK: At the zone level, in the same way as the HQ has staff, there were zone level staff officers?

BZ: Yes.

KK: Those zone level staff officers their role is to provide support and administration and logistics to the zone commander?

BZ: Yes.

...

KK: Zone level officers did not have operational control in their own capacity they cannot give orders, they work directly with the zone commander?

BZ: Yes. The zone commander is the main responsible person and the organisation of the system was the same as general HQ.

...

KK: Casting your mind back to that period of early 1999 can you recall that **FL** was discharging his responsibilities as a staff officer of the military police directorate in Ladrovc, do you remember?

BZ: Yes. Based in Ladrovc.

...

KK: ...there is no doubt am I right that only the Brigade commander can give order to the commander of the military police?

BZ: All the units that were reported to the command.

KK: So staff officer could not give orders to a Brigade level?

BZ: Yes. That is true without the permission of the commander he cannot.

KK: **FL**'s job as the head of the directorate of the military police was to help reorganise the military police of the KLA?

BZ: Yes.

KK: By issuance of regulations for example?

BZ: Yes.

KK: That were approved by the general staff?

BZ: Yes.

KK: The approval of the general staff transmitted the same way?

BZ: Yes.

KK: One concern was a uniformity of uniforms?

BZ: This was regulated by policies as to how they were to look like.

KK: One task was the identity badges?

BZ: These are all regulated by regulations; ID cards, uniforms; it is all regulated.

KK: In the regulations these are samples of the types of duties of staff officer **FL** in the military police directorate is that right?

BZ: Regulations were written within the military police itself in relation to their conduct and this was all written down.

KK: **FL** could not bypass the chain of command as staff officer?

BZ: No he could not.

KK: He could not give an order to a Brigade military Police officer could he?

BZ: He could have inspected but not order without permission of the commander.

It was his evidence that in November or December 1998 there was a restructuring of the KLA Headquarters. He said that prior to that **FL** was the commander of the 121st Brigade. His deputy at that time was **HS**. During the restructuring, **FL** was appointed Director of the Military Police Directorate.

ii. Existence of a KLA prison in the village of Klecke/Klecka

The acts charged in the Indictment were alleged to have occurred at or in relation to a KLA prison, also described as a detention centre, established in the village of Klecke/Klecka, where Albanian civilians suspected of collaboration with the Serbian regime, Serbian civilians and

Serbian police and militaries were detained. The Klecke/Klecka prison also served as a detention centre for KLA soldiers investigated or sentenced for disciplinary offences.

The command of the 121st Brigade, also known as 'Kumanova' Brigade,²¹⁸ was located in Klecke/Klecka. The Accused **BL** stated that he was a soldier in the 121st Brigade from the beginning until the end of the conflict, and was a soldier in the Village of Panorc/Ponorac. It was his evidence that the command of the 121st Brigade was located in Klecke/Klecka.²¹⁹

The Accused **SS1** gave evidence that his house in Klecke/Klecka was used by the KLA in 1998. However, during 1998 Klecke/Klecka was destroyed by Serbian forces.

From January 1999 until June 1999 **SS1** was assigned to the 121st Brigade in Luzhnice/Luznica. However, it was his evidence that in April 1999 the Commander of the 121st Brigade was based in Klecke/Klecka.²²⁰

The Accused **BS** gave evidence that he too was a member of the 121st Brigade. He gave evidence that the headquarters of the 121st Brigade was based in Klecke/Klecka.²²¹

The Accused **AK** gave evidence that in 1999, until he was injured on 18 April 1999, he occasionally went to Klecke/Klecka when requested by the headquarters or by the command of the 121st Brigade. From the statement of the Accused **AK** it is not entirely clear if the general headquarters of the KLA were also based in Klecke/Klecka or only the headquarters of the 121st Brigade.²²²

²¹⁸ QK, 14.06.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; **IA**, *supra*, p.3; **NH**, 02.12.2010, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; Witness G, *supra*

²¹⁹ **BL**, 11.05.2011, SPRK record of the suspect hearing in an investigation, p.3, SPRK binder O.

²²⁰ **SS1**, 11.05.2011, SPRK record of the suspect hearing in an investigation, pp.3, 4, SPRK binder O.

²²¹ **BS**, 12.05.2011, SPRK record of the suspect hearing in an investigation, p.4, SPRK binder O.

²²² **AK**, 14.04.2011, record of the hearing on detention on remand, Court trial binder GJPP binder 3.

Other witnesses, including Anonymous Witness M,²²³ **BZ**,²²⁴ **ST**,²²⁵ **FK**,²²⁶ **AQ**,²²⁷ **AO**,²²⁸ testified that either the headquarters of the 121st Brigade or the 121st Brigade was based in Klecke/Klecka.

BK testified that in 1999 he was in the KLA base in Klecke/Klecka.²²⁹

Former KLA member **IZ** stated that he had not been to Klecke/Klecka but had heard that a KLA base was located there.²³⁰

BZ gave evidence that the headquarters of the 121st Brigade would occasionally move to Berishe/Berisa.²³¹

Several witnesses indicated that the KLA general headquarters were located in the Village of Divjake/Divljaka,²³² near Klecke/Klecka. According to **BZ**, from January 1999 until mid-April 1999 he was the chief of staff of the KLA general headquarters. It was his evidence the headquarters were in the Village of Divjake/Divljaka until April 1999 and thereafter moved to Devetak, near Shtime/Stimlje.

NM gave evidence that at the end of 1998 he was appointed to the KLA headquarters in Divjake/Divljaka. It was his evidence **BZ** was the chief of staff of the KLA general headquarters.

²²³ Anonymous Witness M, 20.05.2011, SPRK record of the witness hearing in an investigation, p.3, SPRK binder D.

²²⁴ **BZ**, 23.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

²²⁵ **ST**, 25.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

²²⁶ **FK**, 31.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

²²⁷ **AQ**, *supra*

²²⁸ **AO**, *supra*

²²⁹ **BK**, *supra*

²³⁰ **IZ**, 19.05.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

²³¹ **BZ**, *supra*

²³² It is noted that KLA general headquarters could be spread also in other locations. Witness W described ill-treatment in another location, where he said were KLA headquarters: Witness W, 16.06.2011, EULEX Police interrogation statement of the witness, SPRK binder D. **BZ** testified that until April 1999 the general headquarters were in Divjake/Divljaka and then moved to Devetak, near Shtime/Stimlje: Bislim Zyrap, *supra* note 42, p.2.

The legal department was based in Divjake/Divljaka. He recalled that **SD** and Witness E worked there.²³³

Asman Hoxha, who joined the KLA military police in the end of December 1998 or beginning of January 1999 recalled that **SD** was a judge of the military court, and on one occasion he escorted an arrested soldier to **SD**.²³⁴

SB knew **SD** as a judge, who gave him some forms or templates at a meeting which took place either in Klecke/Klecka or Divjake/Divljaka.²³⁵

SD stated that in the end of 1998 he assumed the duties of Head of the legal department in the KLA, in the Village of Divjake/Divljaka. He served as the only judge in the Divjake/Divljaka area until April 1999. Military trials were held, also with the participation of a military prosecutor **HK**, and an *ex officio* defence counsel, Witness E.²³⁶ The statement of Witness E confirms that he worked with **SD** in Divjake/Divljaka, near Klecke/Klecka for a certain period of time. He assisted **SD** in drafting legal documents, and, as developed by practice, acted in defence for the accused KLA soldiers.²³⁷ The statement of **HK** confirms that he was with **SD** from December 1998 until March/April 1999 in Divjake/Divljaka, near Klecke/Klecka, but they did not do any work.²³⁸

SD confirmed there was a prison in Klecka. He said Commander Murrizi was responsible for the day-to-day supervision of the prison.

From the statement of **HK** it follows that close to Klecke/Klecka there was a prison where he saw people being detained.²³⁹

²³³ NM, 05.04.2011, SPRK record of the witness hearing in an investigation, SPRK binder C.

²³⁴ AH, 27.05.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.

²³⁵ SB, 27.05.2011, SPRK record of the witness hearing in an investigation, SPRK binder D.

²³⁶ Witness A, 23.09.2010, SPRK record of the witness hearing in an investigation, SPRK binder B.

²³⁷ Witness E, *supra*

²³⁸ **HK**, 20.10.2010, SPRK record of the witness hearing in an investigation, SPRK binder C.

²³⁹ *Ibid.*

Surprisingly, **BZ** who, from November 1998 to April 1999 was head of the General KLA HQ, apparently did not know there was a KLA prison in Klecka²⁴⁰. In his testimony he referred to **BK** and two Serbian prisoners²⁴¹, one of whom had died. He thought they had been detained in Lladrovc.

Several witnesses in their prior statements gave evidence that they were not aware of the existence of a prison in Klecke/Klecka or did not see any prisoners there.²⁴²

Some of the Accused gave evidence that they stayed in other locations and were not aware of a prison in Klecke/Klecka. Some of the Accused went to Klecke/Klecka on certain occasions but did not see any prisoners there.

Further, **SD** stated that he often visited the Klecke/Klecka prison, just outside Divjake/Divljaka. According to **SD**, not many prisoners were in the Klecke/Klecka prison. Improvised prisons had been established in other parts of the Pashtrik/Pastrik operational zone, Lladroc/Ladrovac and Kervasari/Kravasarija.²⁴³

SD recalled the case of **BK**, a commander of the brigade, who had been sentenced to death having been convicted of desertion. In fact, **SD** gave evidence that he sentenced **BK** to death. **BK** was sent to the Klecke/Klecka prison pending enforcement of the sentence.²⁴⁴

²⁴⁰ Minutes of examination on 5 June 2013

²⁴¹ Anonymous witness H and his brother

²⁴² Witness E, 28.10.2010, SPRK record of the witness hearing in an investigation, pp.3, 4; Witness G, 11.01.2011, EULEX Police interrogation statement of the witness, pp.3, 4, SPRK binder B; AQ, 07.06.2011, EULEX Police interrogation statement of the witness, pp.3, 5, SPRK binder C; IA, 07.04.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; BZ, 05.04.2011, SPRK record of the witness hearing in an investigation, p.4, SPRK binder C; DD, 04.04.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder C; Bk, 08.01.2011, EULEX Police interrogation statement of the witness, p.4, SPRK binder C; AO, 30.11.2010, EULEX Police interrogation statement of the witness, p.5, SPRK binder C.

²⁴³ SD, *supra*

²⁴⁴ *Ibid*, pp.1, 5, 6.

HK,²⁴⁵ Witness E²⁴⁶ knew to varying degrees about the case of **BK**. While **BZ** knew the case of **BK**, as far as he knew, **BK** was held in Lladroc/Ladrovac.²⁴⁷ **BK** confirmed that he was commander of the 123rd Brigade, and later, on 15 or 16 January 1999 was arrested and detained until 23 March 1999. **BK**, however, refused to specify the location where he was detained.²⁴⁸ However, in his evidence Witness V testified that he had been a KLA member and later had been accused of being a spy. It was his evidence that he had been detained at a prison in Klecke/Klecka. Witness V gave evidence that while detained at Klecke/Klecka he saw imprisoned **BK** along with other prisoners.²⁴⁹

Witness F also testified that in March 1999 he was arrested by KLA soldiers and taken to a house in Klecke/Klecka where he was kept in a room that he described as looking like a basement. He said he was detained there together with five or six other detainees²⁵⁰.

Anonymous Witness B gave evidence that in the end of April or beginning of May 1999 he was detained in the basement of a two storey house in Klecke/Klecka. After five or six days Anonymous Witness B was brought upstairs and questioned. A few days later Anonymous Witness B was given a court decision wherein a period of 30 days detention was imposed.²⁵¹

When he was examined by the EULEX Special Prosecutor Anonymous Witness B was presented a document, dated 17 May 1999 entitled 'Decision on Detention', issued by the KLA military court. The said Decision bears the name of the investigative judge as **PU**.²⁵² **SD** gave evidence that he used the name '**PU**' rather than his real name, in order to conceal his identity and

²⁴⁵ **HK**, *supra*

²⁴⁶ Witness E, *supra*

²⁴⁷ **BZ**, *supra*

²⁴⁸ **BK**, 04.10.2010, SPRK record of the witness hearing in an investigation, p.2, SPRK binder B.

²⁴⁹ Witness V, 18.04.2011, interview to Swiss Deputy Federal Prosecutor, SPRK binder C.

²⁵⁰ Witness F, 02.01.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder B.

²⁵¹ Anonymous Witness B, 04.12.2010, EULEX Police interrogation statement of the witness, pp.4, 5, SPRK binder B. Judgment 0096-09-EWC2/025 binder F

²⁵² *Ibid*, p.5.

protect himself from possible future retaliation. Further, **SD** also confirmed that it was his signature on the said decision of the KLA military court.²⁵³

Anonymous Witness C gave evidence that in March 1999, in the KLA headquarters in Llapushnik/Lapusnik he was told that his son was being held in Klecke/Klecka. Anonymous Witness C walked to Klecke/Klecka and from there was driven to Terpeze/Trpeza Village where he was detained. After six days Anonymous Witness C was taken back to Klecke/Klecka and put in a basement. Anonymous Witness C gave evidence that he spent about seven days there before being released on 3 April 1999.²⁵⁴

Anonymous Witness M gave evidence that he was arrested in March or April 1999 and taken to Klecke/Klecka. While in Klecke/Klecka Anonymous Witness M was questioned by KLA members and also by a judge before being released.²⁵⁵

Witness O gave evidence that in 1998 or 1999, together with Witness P, Witness Q and SS, all of whom were civilians, he was detained by KLA soldiers. It was his evidence they were initially taken to Likoc/Likovac where they were held for two days before being taken to Klecke/Klecka and put in a room with several other men including **BK**. Witness O gave evidence that he was kept in Klecke/Klecka for one month.²⁵⁶

Witness Q could not recall the precise date he was arrested but thought that it was in the winter of 1999. He said there was still snow on the ground. Witness Q gave evidence that he was taken to Likoc/Likovac where he was held for two days before being taken to

²⁵³ Witness A, *supra*

²⁵⁴ Anonymous Witness C, 21.09.2010, SPRK record of the witness hearing in an investigation, pp.2, 3, 4, SPRK binder B.

²⁵⁵ Anonymous Witness M, 30.03.2011, EULEX Police interrogation statement of the witness, SPRK binder D.

²⁵⁶ Witness O, 24.05.2011, EULEX Police interrogation statement of the witness, pp.2, 3, 4, SPRK binder D.

Klecke/Klecka. Witness Q stated gave evidence that while in Klecke/Klecka he was detained in a room with several other men including **BK**.²⁵⁷

Witness P gave evidence that, having been arrested, he was taken together with Witness O, Witness Q and **SS** first to Likoc/Likovac and then to Klecke/Klecka.

Witness P gave evidence that during that time his eyesight was poor, but he recalled that in Klecke/Klecka they were put in a room with other prisoners, who could have been two.²⁵⁸ Witness O, Witness P and Witness Q declared that they were released at the same time and **SS** was released later.

The Trial Panel finds that in 1999 a prison/detention centre was operated by the KLA in the village of Klecke/Klecka.

The Trial Panel finds that the prison/detention centre was a residential building built on two floors. The ground floor was, it appears, partially subterranean with two rooms, where individuals were detained. A toilet was located in the yard. The first floor was used by KLA members to interrogate detainees.

The Trial Panel finds that members of the KLA were responsible for guarding the prison.

Further, the Trial Panel finds that other buildings in or about the village of Klecke/Klecka were used for the detention of prisoners.

²⁵⁷ Witness Q, 26.05.2011, EULEX Police interrogation statement of the witness, pp.2, 3, 4, SPRK binder D.

²⁵⁸ Witness P, 25.05.2011, EULEX Police interrogation statement of the witness, pp.2, 3, 4, SPRK binder D.

iii. **Responsibility for supervision of the KLA prison in the village of Klecke/Klecka**

BZ gave evidence that from November 1998 to April 1999 he was in charge of the General HQ of the KLA in the village of Divjake. He said **FL** was the Director of the Military Police Inspectorate²⁵⁹.

BZ said it was the function of the Police Inspectorate to train police, inspect police and to issue regulations relating to the police. It was his evidence the Director of the Inspectorate did not have an executive function. He said the head of the Military Police could only give orders to military police in relation to security of the HQ and escorting members of the HQ. However, he did concede that the military police might have provided security at the prison:

***XM:** Those who physically provided security for the prison premises, you say military police, this is a broad notion. Was prison security part of the battalion responsibility?*

***BZ:** I don't know who those persons are. **SD** was responsible and head of the legal department.*

***XM:** If I tell you that **SD** stated that they belong to the battalion, do you agree with that statement?*

***BZ:** If he has stated so, he was in charge and knows better than anyone else.*

BZ gave evidence that in 1998 the KLA was re-structuring itself into a professional military along NATO lines. He described a formalized command structure with Brigade Commanders subordinate to Zone Commanders. He said the Military Police brigade commander was subordinate to the Zone Commander. At Zone level there were various staff officers. It appears the ranking structure at Zone level mirrored that at HQ level²⁶⁰. Staff officers at Zone level provided logistical and organizational support to the Zone commander. Operational command was the responsibility of Zone commanders. Zone commanders reported to the General HQ.

²⁵⁹ Testimony of BZ given on 5 June 2013

²⁶⁰ Testimony of BZ given on 5 June 2013

BZ gave evidence that **HS** was the commander of the 121st Brigade. He was subordinate to the commander of the Pashtrik Zone. He said only Brigade commanders could give orders to the Military Police. He said staff officers could not give orders to military police at Brigade level.

When he gave evidence before this Court **SD** said the prison in Klecke/Klecka was under the overall control of the Legal Services department of the KLA. He said the prison coordinator was responsible for the day-to-day supervision of the prison.

It was his evidence that *"...no one could interfere in prison matters. This was the exclusive competence of the Legal Services, namely the court..."*²⁶¹

However, when he was examined by the prosecutor in September 2010, referring to his visiting the prison, he said *"Of course, this did not mean that I could control what the police were doing there. Since I was basically alone there was only so much that I could do. I would issue regulations, visit the prison, but then the prisoners were under the physical control of the KLA Military Police"*.

When he was interviewed by the prosecutor in September 2010 he said he would "regularly" visit the prison in Klecke/Klecka. Sometimes he would visit the prison twice a week²⁶². Sometimes he would visit only once a month. When he gave evidence before this court he said he would go to the prison in Klecke/Klecka *"When I saw it necessary to enquire or inspect..."*²⁶³ He further described "regular" inspections. He said he moved about the prison without any restrictions²⁶⁴.

He said he could not recall having ever seen **FL** at the prison in Klecke/Klecka²⁶⁵.

He said all prisoners were under the jurisdiction of the court.

²⁶¹ Testimony of 23 April 2013

²⁶² Statement of 23 September 2010

²⁶³ Testimony on 23 April 2013

²⁶⁴ Testimony on 24 April 2013

²⁶⁵ Testimony on 24 April 2013

However, when he was interviewed by the prosecutor in 2010 he said that some civilians were held at the prison in Klecke/Klecka. He said they were “under the jurisdiction of the police”²⁶⁶.

It was his evidence before this court that **AZ** supervised the prison. He said **AZ** reported to him everything related to the prison. He said he had “close” cooperation with **AZ**. He said that when he visited the prison “only the coordinator gave me information”.

He gave evidence before this court that “**FL** did not have the competence to release them”. He went on to say “However, it is possible that the coordinator told me that upon consultations with **FL** he released them”.²⁶⁷

However, when he was examined in September 2010, referring to the release of the **K** brothers, he said “**L** was the only one who had such power, as he was the head of the Military Police”. He said this was a misunderstanding and that he was referring to persons who were in detention rather than prisoners who were under the jurisdiction of the court.

He said that in “exceptional” circumstances the coordinator might release prisoners. In other circumstances only the judge or prosecutor could release a prisoner.

SD gave evidence about the release of two Serbian prisoners²⁶⁸. He said he consulted **BZ** and not **FL**.

He said **FL** had never given him an order to release a prisoner.

On 3 April 1999, Anonymous Witness C was released by ‘**X**’ /**AZ**, who Anonymous Witness C thought was a director of the prison.²⁶⁹

Witness V gave evidence that the commander and head of the prison was ‘Murrizi’, with name **A**,²⁷⁰ and **HS** and ‘**X**’ checked who came in and out of the prison.

²⁶⁶ Statement of 23 September 2010 paragraph 15

²⁶⁷ Testimony on 23 April 2013

²⁶⁸ Anonymous Witness H and his brother

²⁶⁹ Anonymous Witness C

Anonymous Witness B gave evidence²⁷¹ that he met **AZ** at the detention centre in the village of Klecke/Klecka. He thought **AZ** held a position of responsibility within the detention centre.

SD said that he had never heard allegations that **FL** had mistreated prisoners²⁷².

SD said no one had ever complained to him of having been mistreated²⁷³. Of course, that does not mean prisoners were not mistreated.

iv. Treatment of persons detained by the KLA in the village of Klecka/Klecka

It was alleged by the Prosecution the Accused **AK, NK1, NK2, BL, FL, NS, SS1, SS2, BS**, as KLA members, in co-perpetration with **AZ** and other unidentified KLA soldiers, kept an undefined number of Serbian and Albanian civilians and Serbian military prisoners in inhumane conditions, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition and prisoners chained and/or subject to frequent beatings.

a. Conditions of detention

It was averred by the prosecution that, in addition to the prison/detention centre to which reference is made herein, other buildings in the village of Klecke/Klecka were used by the KLA to detain prisoners. It was the Prosecution case those facilities lacked the most fundamental basic living requirements, and in which prisoners were sometimes kept chained.²⁷⁴

Referring to the main prison in Klecke/Klecka, **AZ** gave evidence it was a residential house on two floors. He said the building was new. There was plaster on the walls. The house was

²⁷⁰ Witness V, *supra*

²⁷¹ Statement of 8 December 2010

²⁷² Testimony on 24 April 2013

²⁷³ Testimony on 24 April 2013

²⁷⁴ Indictment, p.23.

heated by two stoves. He said “*heating was good in the cells as well*”. The ground floor was partially subterranean. Access to the ground floor was at the front of the building. The ground floor comprised two rooms. He said 4 or 5 prisoners would be kept in one room and 4 in the other room. He said foam mattresses were supplied. He said there were never more than 10 prisoners at any one time. He said the prisoners were not chained. There was an outside toilet. Prisoners were allowed outside 2 or 3 times a day. Sometimes prisoners were even permitted to go home at night and return in the morning. There was a well outside the house that could be used by prisoners. Prisoners received the same food as the guards²⁷⁵.

Referring to conditions in the burned-out houses, **AZ** said conditions were not as good. He said there was a stove for heating. The floor was earth – not concrete. There was no running water. Bottled water was given to the prisoners. They were given the same food as prisoners in the main detention centre. There were no mattresses but there were blankets. He said prisoners were not chained – save for two. He said that the chains of those prisoners were approximately two meters long. He could not recall the identity of those prisoners. He said prisoners were allowed outside²⁷⁶.

UK, who said he had been a KLA soldier, gave evidence that he was in Klecke/Klecka in May/June 1999. On one occasion he had passed the detention centre and looked through the window. He described having seen approximately 30 prisoners inside. They were all in the basement. He said that from outside it looked like a ground floor but actually it was a basement. The military police used to stay on the top floor. **AZ** gave evidence that no more than 10 prisoners were detained in the main prison at any one time.

Anonymous Witness B gave evidence that in May 1999 he was detained in Klecke/Klecka, in a two storey house. The upper floor appeared to be used by the KLA military police. B was put in one of the two rooms in the basement. B was able to go out in the yard, where he met other

²⁷⁵ Record of examination on 9 February 2010

²⁷⁶ Record of examination on 9 February 2010

two detained KLA soldiers and was able to talk to them. B later moved into the cell with the other two detainees. B described conditions as good. They had three metal beds, they were able to eat some food and shave and wash regularly. The door to the cell was kept open during the day and they were able to stay outside in the yard. During the night the door was kept locked.²⁷⁷

Anonymous Witness M, a civilian, gave evidence that in March or April 1999 he was arrested by the KLA and taken to a two storey house in Klecke/Klecka. He said he was detained in one of two rooms in the basement of the house. The basement was dark, there was no floor, only the soil, and water and mud on the ground.

Witness F, Witness O, Witness P and Witness Q, who gave evidence they were detained in the prison in the Village of Klecke/Klecka, said they were given sponge mattresses to sleep on and also blankets.²⁷⁸ None of those witnesses gave evidence he had been deprived of food.

Anonymous Witness C gave evidence they were given very little food. He said they were fed approximately every 24 hours.²⁷⁹ Witness D, Witness F, and Anonymous Witness B said that food was given more often.²⁸⁰ Witness D said they were fed twice a day.

Witness D, Witness O, Witness P, Witness Q and Witness F gave evidence the only toilet was in the yard of the house where they were detained. None of the witnesses said they had been prevented from using a toilet or limited in their use of a toilet²⁸¹. Other witnesses gave the same evidence.

²⁷⁷ Anonymous Witness B, *supra*

²⁷⁸ Witness F, *supra*; Witness O, *supra* note 80; Witness P, *supra*; Witness Q, *supra*. Anonymous Witness B testified that metal beds were provided for sleeping.

²⁷⁹ Anonymous Witness C, *supra*

²⁸⁰ Witness D, 18.01.2011, SPRK record of the witness hearing in an investigation, SPRK binder C and 24.12.2010, EULEX Police interrogation statement of the witness, SPRK binder C; Witness F, *supra*; Anonymous Witness B, *supra*.

²⁸¹ Witness D, *ibid*. Witness O, *supra*; Witness P, *supra*; Witness Q, *supra*; Witness F, *supra*

Witness F gave evidence they were kept in the room with the door closed but not locked during the day. It was locked during the night. When detainees needed to go to the bathroom, they knocked on the door and would be let to the toilet outside the house.²⁸² Witness Q described the toilet as a hole in the ground, with pieces of timber on the sides and overhead.

Witness D gave evidence that in the morning a bucket of water would be provided so that prisoners could wash themselves. He said they could also burn some wood inside the room.²⁸³

Anonymous Witness C said that during his detention in Klecke/Klecka that lasted approximately seven days he was never permitted to leave his cell. He described the cell looking like a stable, with running water inside the cell.²⁸⁴ However, when he was examined by the Pre-Trial judge in February 2011 he was asked if there was running water in the cell. In reply he said “Maybe that was in Terpeza but in Klecka, there was no running water, no way²⁸⁵”

Witness P and Witness Q gave evidence the floor of the room where they were detained was covered with wooden planks.²⁸⁶

Witness P gave evidence the room smelled of manure.²⁸⁷ No other witness mentioned the smell. Witness F said there were no windows in the room where he was detained. Witness O, Witness Q, Witness P, Witness V, and UK referred in their evidence to one or more windows.²⁸⁸

²⁸² Witness F, *supra*

²⁸³ *Ibid.*

²⁸⁴ Anonymous Witness C, *supra*

²⁸⁵ Record of examination 22 February 2011

²⁸⁶ Witness P, *supra*; Witness Q, *supra*

²⁸⁷ Witness P, *supra*

²⁸⁸ Witness O, *supra*; Witness Q, *supra*; Witness P, *supra*; Witness V, *supra*; Anonymous Witness I, 22.11.2010, EULEX Police interrogation statement of the witness, SPRK binder B.

Witness V gave evidence that he was permitted a visit by his father while in detention in Klecke/Klecka.²⁸⁹

NR was a journalist with the Tanjung agency. He was arrested by KLA soldiers in October 1998. He thought he was eventually taken to Klecke/Klecka. He was detained until the end of November 1998. He said he heard the other persons in the vehicle in which he was travelling refer to Klecke/Klecka²⁹⁰.

Referring to the journalists, **GK** stated they were taken to Shala. He said he placed each of them in separate rooms where they remained for two months. It appeared to be his evidence that, throughout their detention, they remained in Shala²⁹¹.

On the assumption **NR** was detained in Klecke/Klecka, he described conditions at that time. He said it was very cold and there was no heating in the room. He said he was not allowed outside the room to go to the toilet and used a bucket in the room. He said he received food three times a day²⁹².

None of the witnesses gave evidence that they had been chained while in detention or that they had seen other prisoners chained.

The panel found contradictions in the evidence of some witnesses regarding the condition of the building in which they were detained and the conditions in which they were kept. However, these apparent contradictions are most likely explained by the fact some of the witnesses were detained in different buildings within the village of Klecke/Klecka.

b. Treatment of prisoners during their detention

²⁸⁹ Witness V, *ibid*, p.7.

²⁹⁰ NR, 12 January 2012

²⁹¹ GK, 9 May 2012

²⁹² NRc, 12 January 2012

Witness P, Witness Q and Witness O described how, as they were being driven to Klecke/Klecka, they were taken from the vehicle in which they were being carried and lined-up. KLA soldiers who were masked and carrying guns also got out of the vehicle. Witness O said that it was since then that he had been in fear of being killed.²⁹³

Witness D gave evidence that the prisoner known as 'S' was subjected to beating in front of the other prisoners. The Trial Panel finds that 'S' was SA. It was his evidence that 'S' would be taken upstairs and Witness D would subsequently hear him screaming. Other prisoners were not ill-treated in D's presence. Witness D gave evidence that he was not personally ill-treated.

SD who visited the prison in Klecke/Klecka regularly gave evidence that prisoners did not complain of the treatment in the prison, except for one prisoner who was tired of staying inside his cell all day and asked A to be allowed to perform some work.²⁹⁴

Witness F said that they were treated well and were not beaten.

Witness O, Witness P and Witness Q gave evidence they were detained in a room with SS. Witness O and Witness Q said other prisoners were detained in the same room including BK.

Witness O, Witness P and Witness Q testified that none of the prisoners was mistreated.

Witness V gave contradictory evidence about his treatment while detained in Klecke/Klecka. He said that during that period MS threatened to kill him. Witness V gave evidence: 'He dragged me out of the cell with a sack over my head and he threatened my life. When I was in prison, MS, together with his cousin and three other persons came three times in my cell. On

²⁹³ Witness O, *supra*; Witness Q, *supra*; Witness P, *supra*.

²⁹⁴ Witness A, *supra*

one occasion they threatened me and on another occasion they kicked me.’²⁹⁵ In the same statement V gave evidence: ‘Personally I was never physically maltreated in Klecke/Klecka. I only received two kicks with the knee in my stomach.

Witness V gave evidence **BK** was interrogated several times on the upper floor of the house where he was detained. Witness V never saw **B** being maltreated. Witness V did describe having seen marks on **BK**’s hands and shoulders, but said **BK** had stated that he had hurt himself.

Witness V gave evidence about a young man of 17 years of age, from the Village of X with whom he had been detained for two days. Witness V gave evidence that KLA soldiers, including **BH**, had beaten the young man.

Anonymous Witness M testified that during his detention a person with a mask hit him with a stick on the back twice.²⁹⁶

Anonymous Witness M gave evidence that he heard detainees screaming as they were questioned on the first floor. He said that when the detainees were returned to the cell he could see they had been beaten.

Anonymous Witness L gave evidence that during his detention at Klecke/Klecka he saw an imprisoned KLA soldier in his cell whom he said had been badly beaten. **UK** gave evidence he had not witnessed any crimes in Klecke/Klecka.²⁹⁷

Witness N gave evidence that in or about May 1999 he was taken by KLA soldiers either to Klecke/Klecka or Berishe/Berisa where he was detained for three days in a one storey house

²⁹⁵ Witness V, *ibid*, p.4.

²⁹⁶ Anonymous Witness M, *supra*

²⁹⁷ Anonymous Witness I, *supra*

with a basement. N was put in a room in the basement. He gave evidence that, having been interviewed, he was released.²⁹⁸

NR was arrested in October 1998. He was detained until the end of November 1998. He said that during his captivity he thought he was detained in Klecke/Klecka. He said two Serbian prisoners were detained in the room next to his. He described how he heard screams as they were beaten²⁹⁹.

The Trial Panel finds that while certain detainees were subjected to mistreatment there is no evidence of the systematic mistreatment of detainees on an arbitrary basis. The witnesses' statements are not sufficient to infer that by reason of being detained in Klecke/Klecka they would be under a constant fear of being subjected to physical abuse or death. In light of the foregoing evidence, the Trial Panel finds that conditions of detention *per se* did not amount to cruel treatment.

Save for the case of Anonymous Witness H and his brother, **SD** gave evidence that none of the detainees complained to him of any mistreatment.³⁰⁰

BZ stated *"No complaints from the legal office that SD was in charge or any other complaints by anyone...I had not received any complaints."*³⁰¹

Whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis.³⁰² In this regard, the Indictment names individuals subjected to inhumane treatment, the former prison director **SA**, the former police officer **YG**, the three brothers **B**, **E** and **NK2**, the civilians Anonymous Witness H and his brother, the five Serbian

²⁹⁸ Witness N, 04.01.2011, EULEX Police interrogation statement of the witness, SPRK binder C

²⁹⁹ **NR**, 12 January 2012

³⁰⁰ Page 14 of the Minutes of 23 April 2013

³⁰¹ Minutes of 5 June 2013

³⁰² *Prosecutor v. FL, Haradin Bala, Isak Musliu*, ICTY, Trial Judgment, 30.11.2005, para.232.

militaries **DT**, **D**³⁰³ **V**, **BC**, **ZF**, **ZT**, **VM** and **ND**. The evidence submitted by the Prosecutor indicates that certain other individuals possibly were subjected to cruel treatment.

i. SA and YG

Anonymous Witness C gave evidence that having been detained that in Terpeze/Trpeza, on 26 March 1999 he was transferred to Klecke/Klecka. The cell was in the basement.

Anonymous Witness C gave evidence he was detained for approximately seven days. He said there were four other prisoners in his cell including **SA** another detainee from X called **I** or **Y**.

Anonymous Witness C gave evidence that someone by name Hoxha who would come and take the prisoners upstairs for interrogation and beat them.

Anonymous Witness C gave evidence that while he was not interrogated or beaten while he was detained in Klecke/Klecka all of his cellmates were badly beaten.

Anonymous Witness C said he did not recognise any of the soldiers in Klecke/Klecka.

On 3 April 1999, Anonymous Witness C was released by '**M**' /**AZ**, who Anonymous Witness C thought was a director of the prison.³⁰⁴

SD gave evidence that he had seen **SA** in Klecke/Klecka. **SA** was under investigation, but his case never reached **SD**. There were rumours that **SA** was a director of a prison in Vushtrri/Vucitrn or Mitrovica/Mitrovica³⁰⁵ and had tortured political prisoners.

³⁰³ It is noted by the Trial Panel that on the page 24 of the Indictment, which contains the Prosecution allegations as to inhumane treatment of the prisoners in Klecke/Klecka, the Prosecution has named amongst others **DV** appears to be reference to **DV**.

³⁰⁴ Anonymous Witness C, *supra*

It was also suspected that he was a chief of police and paid by the Serbs, who would provide him with weapons and financial support. He was arrested in Mitrovice/Mitrovica³⁰⁶.

SD testified that **SA** was kept in one of the two rooms on the ground floor. **SD** said he did not know what happened to him.³⁰⁷

Witness D, a soldier in the Serbian army, gave evidence that on 3 March 1999 he was arrested by KLA soldiers and taken to a two storey house and put in a basement. He said he was detained with six other prisoners, all Albanians. It was his evidence all the prisoners with whom he was detained were in a bad condition and they had been beaten.

Witness D recalled a prisoner, an old man, whom the others called '**S**'. Other prisoners said that before the conflict he was a director of Smrekonice/Smrekovnica prison. Witness D gave evidence that during his detention KLA soldiers came to their room and beat '**S**' in front of everyone. He said they would take '**S**' upstairs and they could hear him screaming. No other prisoners were mistreated in the presence of Witness D.³⁰⁸

Witness R gave evidence that **SA**, with the nickname '**S**' or '**Si**', disappeared on 15 March 1999, and was last seen in Mitrovice/Mitrovica. **SA** worked for 25 years as a director in Smrekonice/Smrekovnica district prison in Mitrovice/Mitrovica. Witness R did not know further details of disappearance of **SA**.³⁰⁹

³⁰⁵ Naim Miftari, 17 January 2012

³⁰⁶ Naim Miftari, 17 January 2012

³⁰⁷ **SD**, *supra*

³⁰⁸ Witness D, *supra*

³⁰⁹ Witness R, 22.12.2010, EULEX Police interrogation statement of the witness, SPRK binder C

The Trial Panel finds that **SA** was detained in the detention centre in Klecke/Klecka run by KLA, in March 1999 and that he remained there until 3 April 1999. There is no evidence he took any active part in hostilities during that time. The trial panel finds that he was a civilian.

Anonymous Witness C and Witness D described the treatment **SA** received as 'bad beating'. It emerges from C's statement that **SA** was beaten also in front of the other prisoners, in the cell, and when **SA** was taken upstairs his screams could be heard from the upstairs in the cell. The trial Panel finds that his treatment amounted to cruel treatment.

The Trial Panel finds that **SA** was mistreated in a way which caused him serious mental and physical suffering, and constituted a serious attack on human dignity.

With regard to **YG**, the Trial Panel notes that only Anonymous Witness C referred in his evidence to having met **I** or **Y** while detained in Klecke/Klecka. It is unclear whether, in fact, he was referring to **YG**. As such, evidence of Anonymous Witness C is not sufficient to support allegations in the Indictment that **YG** was detained in Klecke/Klecka, or that he was subjected to cruel treatment.

*ii. **BK, EK and NK2***

Witness V gave evidence that he was taken to Klecke/Klecka and detained for 56 days. During this time he was in one room with **BK**, and at some point also with two brothers whom he knew as **I** and **E**, who were from Caralluke/Crni Lug. The third brother was brought later and immediately released. The two brothers, **I** and **E**, were detained in the prison for between 20 and 30 days before being transferred to another prison.

The Trial Panel notes the discrepancy between the names of the brothers to which reference is made in the Indictment and the evidence of Witness V. The brothers **BK**, **EK** and **NK2** were from the village of Caralluke/Crni Lug.

Witness V gave evidence that **I** and **E** told him that they were accused of being spies. Witness V gave evidence that **I** and **E** were beaten two or three times while they were in detention in Klecke/Klecka. Witness V did not know by whom. He gave evidence that **I** and **E** were kicked, slapped and beaten with baseball bats. Usually those who beat them arrived in the evening.

SD gave evidence that he recalled three **K** brothers being taken by military police to the Klecke/Klecka prison. He said one of the brothers was called **B**. **SD** could not recall if he or the military police had interrogated the **K** brothers. They were accused of collaborating with Serbs. They were never transferred to **SD** for trial. **SD** heard that three **K** brothers were released by **FL**.³¹⁰

It seems probable Witness V was referring to **BK**, **EK** and **NK2**.

Witness T gave evidence that he knew three brothers, **B**, **E** and **NK2**, who lived in the village of Caralluke/Crni Lug. It was his evidence that **E** and **N** were arrested by the KLA in or about February 1999. He said **BK** was arrested by the KLA one month later. Witness T met **N** a couple of days after the brothers were released. He said **N** told him that nothing had been done to him.³¹¹ He did not, it appears, state what, if anything, had been done to his brothers.

The evidence regarding the identity of the brothers is inconsistent. Witness V referred to two brothers **I** and **E**, who were from Caralluke/Crni Lug. He said a third brother was brought later and immediately released. Witness T said **E** and **N** were arrested by the KLA in or about February 1999 and **BK** was arrested by the KLA one month later. Therefore, it appears that in

³¹⁰ **SD**, *supra*

³¹¹ Witness T, 03.05.2011, EULEX Police interrogation statement of the witness, pp.4, 5, 6, SPRK binder C.

his evidence Witness V is referring to **E** and **N** having been mistreated. However, Witness T stated that when he subsequently saw **N** he said he had not been mistreated.

The Trial Panel finds that **BK**, **EK** and **NK2** were taken into KLA custody in Klecke/Klecka in or about February 1999. The Trial Panel finds that none of the brothers were at the time of their detention taking any active part in hostilities.

The evidence of Witness V regarding the identity of the two brothers to whom he referred in his evidence is inconsistent with the evidence of Witness T. Nevertheless, Witness V described having observed injuries sustained by prisoners detained in Klecke/Klecka. Those injuries were the result of prisoners having been beaten.

iii. Anonymous witness H and his brother

Anonymous Witness H gave evidence that on 27 February 1999 he and his brother were taken by a group of four or five men, three of whom were in KLA uniforms and two in civilian clothes.

Anonymous Witness H and his brother were blindfolded and taken to a place where H was interrogated. Witness H gave evidence that during the interrogation he was surrounded by four or five men and constantly beaten with sticks and fists. When he fell to the ground they would pick him up and continue beating him.

Anonymous Witness H gave evidence he lost consciousness. He said that following the beating he could not stand up. He said he was lifted up and taken outside the house and thrown in the mud and snow.

Anonymous Witness H gave evidence that as he lay in the snow he could hear his brother's screams coming from inside the house.

It was his evidence that after a while men came out of the building, picked him up and took him to the top floor of the building where his brother was lying. They both were handcuffed with the hoods still on. Later two men in KLA uniforms took off the hoods.

Anonymous Witness H gave evidence that he was unable to walk. Later that night some men carried him downstairs into the basement. He gave evidence his brother was dragged down the stairway by his legs. In the basement they were laid on thin sponge mattresses.

Anonymous Witness H gave evidence that he could see injuries on his brother that included a deep cut on his forehead. Anonymous Witness H said he was very weak. He was able to reach a nearby bottle of water and gave some to his brother. He said his brother was unable to swallow. He said he screamed for help but nobody came.

Anonymous Witness H tried to revive his brother with mouth to mouth resuscitation and tried to massage his heart with an elbow, but his brother died.

That morning a group of persons came down, lead by a man dressed in civilian clothing who was approximately 55 years of age. This man addressed Anonymous Witness H in Serbian and asked him if he had been tortured and if his brother's death was caused by torture.

Anonymous Witness H responded that he and his brother were tortured and that his brother had died as a result of torture. Anonymous Witness H gave evidence that the man apologized and said that he would provide a doctor. The next day, a larger group of KLA members came to the basement and Anonymous Witness H and the body of his brother were given to the OSCE.

Anonymous Witness H gave evidence that he was taken to a hospital where for the first two days he was in the intensive care. He described having sustained several fractures in his face,

shoulder and hands during the beating. Anonymous Witness H gave evidence he stayed in that hospital for ten days before being transferred to another hospital.³¹²

Anonymous Witness H, having been blindfolded for most of the time, could not identify the location where he and his brother were detained. However, **SD** gave evidence that he was informed of two Serb prisoners who were being detained in Klecke/Klecka. **SD** said he immediately went to the prison in Klecke/Klecka. He said that when he arrived, one of the Serb prisoners was already dead, and it was evident that the other prisoner had been beaten as his face was swollen.

SD said he spoke to the detainee in the Serbian Language. The Serb prisoner said that he was not military and that the other prisoner was his brother, who was a soldier. **SD** recalled that both prisoners wore uniforms. **SD** called a physician who prepared a medical report. The Serb prisoner who was still alive was in a very bad condition. **SD** gave him some medication. After consulting with **BZ**, who was the head of the general headquarters, **SD** ordered that the two prisoners be handed over to the OSCE.³¹³

BZ recalled that **SD** spoke to him about two Serbs, but said that they had been taken to the detention centre in Lladroc/Ladrovac. A told him that one of them had died. **BZ** suggested that a doctor should visit the Serbs and certify the cause of death. He also recalled that both were handed over to some international organization.³¹⁴

The Trial Panel finds that evidence of Anonymous Witness H is consistent with the evidence given by **SD**. The Trial Panel notes that also **BZ** was informed by **SD** about two Serbs, one of whom had died. **BZ** stated that they were detained in Lladroc/Ladrovac. However, **BZ** did not personally see Anonymous Witness H and his brother in the detention centre and was likely

³¹² Anonymous Witness H, 24.08.2010, EULEX Police interrogation statement of the witness, SPRK binder B.

³¹³ **SD**, *supra*

³¹⁴ **BZ**, *supra*

relying on information given by others. Having considered the evidence of Anonymous Witness H and **SD** the Trial Panel finds that Anonymous Witness H and his brother were detained in Klecke/Klecka.

The Trial Panel finds that Anonymous Witness H and his brother were beaten in a way as described by Anonymous Witness H and further corroborated by **SD**. Such beating combined with Anonymous Witness H witnessing his brother death as a result of severe physical mistreatment, without Anonymous Witness H being able to seek medical assistance and with no medical assistance being provided, amounted to cruel treatment of Anonymous Witness H and his brother.

*iv. Torture of four Serbian military prisoners*³¹⁵

The Indictment averred that in mid/late April 1999 four Serbian military reservists were taken to the KLA main house in the village of Klecke/Klecka and detained on the ground floor. There they were beaten for one full day. It was averred **SS1** and **BS** took part in the beatings. The same day, the prisoners were transferred to one of the burnt houses in the village of Klecke/Klecka, and a few days later executed and their bodies buried.

Insofar as other charges in the Indictment refer to **DT**, **DV**, **BC**, **ZF**, **ZT**, **VM** and **ND** the Prosecution relies upon the evidence of **AZ**.

In addition to the evidence of **AZ** the Prosecution relies on evidence obtained following the exhumation of mortal remains and DNA identification evidence from two sites in Klecke/Klecka identified as KER01 and KEQ01.

³¹⁵ It is noted by the Trial Panel that on the page 24 of the Indictment, which contains the Prosecution allegations as to inhumane treatment of the prisoners in Klecke/Klecka the Prosecution has named amongst others **DV** that appears to be reference to **DV**.

At site KER01 the remains of five bodies were recovered.³¹⁶ The bodies exhumed at this site were identified by DNA evidence as those of **DT**, **DV**, **BC**, **ZF** and **ZT**.³¹⁷

At site KEQ01 the remains of two bodies were recovered.³¹⁸ The bodies exhumed at this site were identified by DNA as those of **VM** and **ND**.³¹⁹

TM gave evidence³²⁰ that in April 1999 he was the commander of the X Military Section of the Army of Yugoslavia. It was his evidence that on 9 April 1999 **ZF** and **ZT**, two members of the reserve forces of the Army of Yugoslavia, left their unit and went to abandoned houses where Muslims and Albanians lived and stole some personal items. Both were arrested and ordered to be taken to the court martial in Prishtine/Pristina. On 11 April 1999, **TM** issued an order for their transfer to Pristina. **ZF** and **ZT** were to be escorted to Pristina by **DV** and **BC**. **DT** was amongst those who set-out on the trip to Pristina. His rank was Captain in the reserve army. **TM** described Captain **T** as his “direct subordinate”³²¹

TM gave evidence that at approximately 4pm that day a KLA member who identified himself as ‘**B**’ sent a radio call stating that a vehicle with soldiers of the Army of Yugoslavia had been stopped and that **DV** was having coffee with him. ‘**B**’ did not mention the other soldiers who had accompanied **DV** in the vehicle.

³¹⁶ EULEX police, exhumation police report, 30.09.2009, case no.0068-09-ECW4, SPRK binder H; EULEX police, assessment police report, 24-26.08.2009, case no.0068-09-ECW4, SPRK binder H.

³¹⁷ UNMIK Office on Missing Persons and Forensics, 05.02.2010, KER01-001B, MPU 2000-010251 (**ŽF**), SPRK binder L; Ministry of Justice of Kosovo, KER01/004B, MPU 2000-000251 (**ŽT**), SPRK binder L; Ministry of Justice of Kosovo, Office of Missing Persons and Forensics, KER01-005B, MPU 1999-000047 (**BC**); UNMIK Office on Missing Persons and Forensics, KER01-006B, MPU 1999-010047 (**DV**), SPRK binder L; UNMIK Office on Missing Persons and Forensics, KER01-007B, MPU 2000-020251 (**DT**); International Commission on Missing Persons, list of DNA matching reports for: UNMIK-OMPF, 001/10, 186/09, 178/09, 177/09, 168/09, SPRK binder H.

³¹⁸ SPRK binder I.

³¹⁹ EULEX Office on Missing Persons and Forensics, confirmation of identity, KEQ01-002B, MPU 1999-000043 (**VM**), SPRK binder I; EULEX Office on Missing Persons and Forensics, confirmation of identity, KEQ01-001B, MPU 2001-000001 (**ND**), SPRK binder I.

³²⁰ SPRK binder P, pages P21a, P21b and P21c

³²¹ Statement of 27 January 2005, SPRK binder I, at P21b

When he was interviewed on 11 April 2005 **TM** gave a slightly different account of the radio message. On that occasion he said the radio call on 11 April 1999 said that **TD** (sic) had been kidnapped along with **ZF, ZT, DV** and **BC**.³²² In his further statement **TM** gave evidence that '**B**' commanded the KLA 'Black Eagles' and was known also as '**T**'. His first name was **I**, and his commander was **RH**. They both were stationed in Gllareve/Iglarevo.³²³

UK gave evidence that in April 1999 he was in Klecke/Klecka and saw four KLA soldiers, **MS, BK, SK** and **MK** with four Serbian prisoners whom they had arrested earlier that day. **UK** said the Serbian officers did not have their hands tied but their weapons had been taken. The military police members took charge of the Serbian officers and put them in the basement of the house. **UK** gave evidence he was told that name one of the officers was **DM** or, he said, 'something like that'. **UK** did not know what happened to them.³²⁴

TM gave evidence that he was contacted the same day by a KLA soldier who identified himself as '**B**' who was based in Gllareve/Iglarevo. '**B**' said he was having coffee with **DV**. Of course, **TM**' later account is somewhat different.

UK gave evidence that in April 1999 in Klecke/Klecka he saw four Serbian prisoners. He recalled that the name of one of the officer's was **DM** or 'something like that'. He was probably referring to **DV**.

v. *Killing of a Serbian military prisoner*

The Indictment averred that in April 1999, not before 11 April 1999 a Serbian military prisoner was taken to the KLA detention centre in the village of Klecke/Klecka and later executed by **NS**

³²² Exhibit P21b, **TM**, Department for Combating Organized Crime, Ministry of Interior of Republic of Serbia, record, 11.04.2005, Prosecution exhibits binder P1-P31.

³²³ Exhibit P21, **TM**, *supra*; Exhibit P 21, **TM**, *ibid*.

³²⁴ Exhibit P6, Anonymous Witness I.

who used a scythe. It was further averred the prisoner was executed upon the instructions of **FL**.

AZ gave evidence that he procured the scythe blade used by **NS** to kill the prisoner.

The Indictment averred that **AZ** passed the scythe blade to the Accused **AK**, who gave it to **NS**.

It was further averred in the Indictment that **RM** was part of the group that marched the prisoner to the place where he was executed by **NS**. In doing so **RM** placed the victim at the disposal of **NS** and also prevented the victims escape.

The description of events is based, in part, on the evidence of **AZ**.

With regard to the Accused **AK**, during the first trial³²⁵ the Prosecutor filed a partial withdrawal from the Indictment based upon medical evidence that on 18 April 1999 **AK** suffered multiple gunshot wounds. Given that evidence the Prosecution conceded **AK** had not been present when it was alleged the prisoner had been unlawfully killed by **NS**.

The evidence of **AZ** regarding the fact and manner in which a Serbian detainee was executed is consistent with evidence recovered in the village of Klecke/Klecka at site KER01.

The mortal remains of five bodies were recovered at site KER01. Through DNA analysis these have been identified as **DT**, **DV**, **BC**, **ZF** and **ZT**.

The autopsy report on **BC** records one gunshot wound to the rear of the skull³²⁶.

The autopsy report on **ZF** records two gunshot wounds to the rear of the skull³²⁷.

³²⁵ 11 November 2011

³²⁶ Binder L, pages L238 – L335

The autopsy report on **ZT** records two gunshot wounds to the rear of the skull³²⁸.

The autopsy report of **Dr. MK** dated 18 November 2009³²⁹ following his examination of the mortal remains of **DV** gives the cause of death as “cut of the neck by sharp instrument” and describes the following injuries to the body: “*on anterior aspect of cervical vertebrae number 3 (three) sharp incision oriented transversely. Incision on corpus vertebrae up to a few mm (a few millimeters) deep*”

The autopsy report of **Dr. MK** dated 19 November 2009³³⁰ following his examination of the mortal remains of **DT** gives the cause of death as “*cut of the neck by sharp instrument. Blunt force trauma to the chest and to the right forearm*” and describes the following injuries to the body: “*on anterior aspect of cervical vertebrae number 3 (three) sharp incision oriented transversely. Incision on corpus vertebrae up to a few mm (millimeters) deep. Incisions on corpus vertebrae elongated to processus costarius dexter on third cervical vertebrae.*” The pathologist also noted Blunt force trauma to rib number 4 on the left side. It is two fracture of corpus located at +/- 20cm from caput costae and the second fracture located at +/- 26cm from caput costae and fracture to the right arm.

A scythe blade was recovered from the grave. This was found parallel to the leg of **ZF** and under the legs of **ZT**.

Three ligatures were found in the grave and these were associated by the forensic archaeologist with the bodies of **ZF**, **BC** and **ZT**. The bodies of **ZT** and **BC** were noted to have had their hands tied behind their backs³³¹.

The Trial Panel finds that **DT**, **DV**, **BC**, **ZF** and **ZT** were unlawfully killed.

³²⁷ Binder L, pages L10 – L96

³²⁸ Binder L, pages L97 – L237

³²⁹ Autopsy performed on 29 October 2009

³³⁰ Autopsy performed on 29 October 2009

³³¹ SPRK binder L, page L432

vi. Killing of **ND** and **VM**

It was averred in the Indictment that on 3 April 1999 **AZ** was told that **FL** had ordered the killing of **ND** and **VM**, two Serbian police officers who had been detained in the burnt houses in Klecke/Klecka for about three months.

AZ gave evidence that he spoke with **FL** who, he said, was surprised the two prisoners were still alive. He gave evidence that the next day **FL** went to the Klecke/Klecka prison with **NK2**, **NK1** and **NS**. There, he ordered the prisoners to be taken out of the burnt house where they were being detained and to take them to a location known as Livadhi i Canit.

AZ gave evidence that he, the Accused **AK** and **BL** escorted the prisoners to that place. He said **FL** was present and ordered **AZ** to personally shoot the two prisoners.

The Indictment averred the Accused **AK** and **BL** put the victims at the disposal of the executioner, by marching them to the place of their execution.

The mortal remains of two bodies were recovered at site KEQ01. The grave was unmarked. Through DNA analysis these have been identified as the bodies of **VM** and **ND**.³³²

The post mortem report for **VM** gives the cause of death as gunshot to the head and trunk.³³³

³³² EULEX Office on Missing Persons and Forensics, confirmation of identity, 10.12.2010, case no. KEQ01-002B, MPU 1999-000043 (**VM**), SPRK binder I; EULEX Office on Missing Persons and Forensics, confirmation of identity, 10.12.2010, case no. KEQ01-001B, MPU 2001-000001 (**ND**), SPRK binder I.

³³³ Ministry of Justice of Kosovo, Office on Missing Persons and Forensics, autopsy report, Malisheva grave site, 14.09.2010, case no. KEQ01/002B, SPRK binder I.

The post mortem report for **ND** gives the cause of death as gunshots to the head.³³⁴ The same Report refers to three gunshots to the head. One of the gunshot wounds was to the back of the head.

Three gunshot wounds to the heads of both victims, the fact **ND** was also shot in the back of the head and the fact their bodies were interred in an unmarked grave supports the prosecution case this was an execution rather than a consequence of military action.

The death certificates of **VM** and **ND** state the place of death: Klecke/Klecka, Lipjan Municipality.³³⁵

The Trial Panel finds that **VM** and **ND** were unlawfully killed by gunshot wounds as described in the respective post mortem reports and their bodies interred at site KEQ01 in the village of Klecke/Klecka.

vii. Killing of AA

It was averred in the Indictment that on or about 3rd or 4th April 1999 in the immediate vicinity of the Klecke/Klecka prison, **AA**, a civilian prisoner was executed by gunshots fired by a group comprising **NK1**, **NK2**, **NS** and **RM**.

³³⁴ Ministry of Justice of Kosovo, Office on Missing Persons and Forensics, autopsy report, Malisheva grave site, 14.09.2010, case no. KEQ01/001B, SPRK binder I.

³³⁵ EULEX Office on Missing Persons and Forensics, death certificate, 14.12.2010, **VM**, MPU 1999-000043, KEQ01-002B, SPRK binder I; EULEX Office on Missing Persons and Forensics, death certificate, 14.12.2010, **ND**, MPU 2001-000001, KEQ01-001B, SPRK binder I.

It was averred in the Indictment the Accused **RM** was part of the group which escorted **AA**, kept **AA** at the disposal of the perpetrators, preventing his escape and participated in the collective action of pushing **AA** into the hole where he was shot dead.

The allegations in the Indictment were founded on the evidence of **AZ**.

Anonymous Witness C gave evidence that on 26 March 1999 he was put in a cell in Klecke/Klecka. In the cell were other four prisoners, including an Albanian named **AA**.

Anonymous Witness C gave evidence that during the period of their captivity **AA** told him that he was accused of collaborating with the Serbs.

Anonymous Witness C gave evidence that all of his cellmates were beaten.

Anonymous Witness C gave evidence that on 3 April 1999 he was released together with other prisoners, including **AA**. Anonymous Witness C escorted **AA** to Sankoc/Stankovce Village and handed him over to the chief of the village or coordinator, **SI**, and asked him to escort **AA** to the village of 'Dobrashevc', where **AA's** family was. The next day the Serbian offensive started. Anonymous Witness C gave evidence that he thought that Avdyli tried to reach 'Dobrashevc' irrespectively on his own.³³⁶

The evidence concerning **AA** is limited. Only Anonymous Witness C declared that he was released from the detention centre in Klecke/Klecka with **AA**.

AA is missing.³³⁷ No body has been found.

³³⁶ Anonymous Witness C, *supra*

³³⁷ Exhibit P3, memo of the EULEX Department of Forensic Medicine, 12.10.2011, 2011-DFM-129, Prosecution exhibits binder P1-P31.

H. RESPONSIBILITY OF THE ACCUSED

i. Mode of responsibility

Count 1 in the Indictment against **NK1** averred **NK1** is charged '*... in his capacity as KLA ... commander, and as a person holding a position of responsibility over the Klecke/Klecka detention centre ...*'

Count 1 against **FL** averred **FL** is charged '*... as KLA ... commander and as a person exercising overall control over the Klecke/Klecka detention centre ...*' Count 2 and Count 3 charge **FL** also in his capacity '*as KLA commander*'.

Count 1 against **NS** averred **NS** is charged '*... in his capacity as KLA member holding a position of responsibility within the Klecke/Klecka detention centre*'.³³⁸

None of the counts against **NK2** alleged command responsibility with regard to the Klecke/Klecka detention centre or, indeed, with regard any of the counts with which he was charged.

However, evidence upon which the prosecution relied, including the statements of witnesses I and L alleged **NK2** did in fact hold a position of command responsibility *vis a vis* the detention centre.

The Indictment does not specifically allege superior, or command, responsibility of any of the Accused. Indeed, there is no reference in the Indictment to the legal basis upon which any allegation of super responsibility might be founded. In its Ruling of 20 November 2012 the Supreme Court of Kosovo made no determination on this issue but instead decided to "...leave

³³⁸ Indictment, pp.3, 9, 11.

the question open". For its part, the Prosecution averred reference to certain defendants holding positions of authority was simply to highlight their respective role and should be considered by the court as an aggravating factor when determining any sentence.

a. Superior Responsibility

In order for an accused to be held responsible as a superior for the crimes committed by his subordinates, the following elements must be proved: (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) that the superior had failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Applicable law

ICTY Statute

Article 7

Individual Criminal responsibility

[...]

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or

had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

[...]

ICTY Jurisprudence

Kordić and Čerkez Appeal Judgment, 17 December 2004

839. *The elements [required for responsibility under Article 7(3) of the Statute] are:*

(i) the existence of a superior-subordinate relationship;

(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

*(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.*³³⁹

(i) The existence of a superior-subordinate relationship

Čelebići Appeal Judgment, 20 February 2001

In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

Article 7(3) provides the legal criteria for command responsibility, thus giving the word “commander” a juridical meaning, in that the provision becomes applicable

³³⁹ *Čelebići Trial Judgment, para. 346; Blaškić Appeal Judgment, para. 72.*

*only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.*³⁴⁰

Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

Blaškić Appeal Judgment, 29 July 2004

The Appeals Chamber takes note that the Trial Chamber concurred with the Čelebići Trial Judgment, which endorsed the view that a superior must have effective control

³⁴⁰ *Aleksovski Appeal Judgment, para 76.*

over “the persons committing the underlying violations of international humanitarian law.” The Trial Chamber also stated that “a commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.” Both conclusions of the Trial Chamber fall within the terms of Article 7(3) of the Statute, and both are not challenged by the Appellant.

[...]

*It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility. The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct.*³⁴¹

Kordić and Čerkez Appeal Judgment, 17 December 2004

The basis of the superior-subordinate relationship is the power of the superior to control the actions of his subordinates. The *Čelebići* Trial Chamber concluded that:

*It is necessary that the superior have [sic] effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.*³⁴²

Halilović Appeal Judgment, 16 October 2007

³⁴¹ *Čelebići* Appeal Judgment, para. 256. See Chapter III (B) (3) in this Judgment.

³⁴² *Čelebići* Trial Judgment, para. 378.

[...] the Appeals Chamber recalls that the concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.³⁴³ Against this backdrop, the Appeals Chamber recalls that the necessity of proving that the perpetrator was the “subordinate” of the accused (against whom charges have been brought under Article 7(3) of the Statute) does not require direct or formal subordination. Rather, the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator.

[...]

In any event, even assuming that Halilović had the ability to contribute to an investigation or to the punishment of the perpetrators of the crimes committed in Grabovica, these abilities can only amount to effective control relevant for Article 7(3) of the Statute if they are the consequence of a relationship of subordination between Halilović and these perpetrators.³⁴⁴ Indeed, the Appeals Chamber recalls that the material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy or chain of command.³⁴⁵ Of course, the concepts of subordination, hierarchy and chains of

³⁴³ Čelebići Appeal Judgment, para. 256.

³⁴⁴ See *supra*, para. 59.

³⁴⁵ Čelebići Appeal Judgment, para. 303, where the Appeals Chamber explained that the doctrine of command responsibility “developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others”. This approach also underlies the reasoning in the *Blaškić* Appeal Judgment, paras 372ff: the Appeals Chamber first ascertained whether Blaškić had “command authority” over the Military Police (an authority it found he could have for *ad hoc* missions pursuant to specific requests, paras 375-381), before assessing whether he had effective control over said Military Police (paras 382 ff). In the *Kajelijeli* Appeal Judgment (paras 85-86), the ICTR Appeals Chamber first recalled that “a superior is one who possesses power or authority over subordinates either *de jure* or *de*

*command need not be established in the sense of formal organisational structures so long as the fundamental requirement of effective control over the subordinate, in the sense of material ability to prevent or punish criminal conduct, is satisfied.*³⁴⁶

Indicators of effective control

Blaškić Appeal Judgment, 29 July 2004

The Appeals Chamber also notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I. The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate. [...]

Halilović Appeal Judgment, 16 October 2007

facto" (para. 85), before outlining the threshold to be reached in establishing a superior-subordinate relationship, namely "that it be found beyond reasonable doubt that the accused was able to exercise effective control over his or her subordinates" (para. 86). See also *Blagojević and Jokić Appeal Judgment*, paras 301-303.

³⁴⁶ *Čelebići Appeal Judgment*, para. 254.

[...] The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists.³⁴⁷ The Appeals Chamber considers that a material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to “prevent and punish” crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) vis-à-vis any perpetrator within that jurisdiction.

[...]

The Appeals Chamber considers that the qualification of a location as an IKM [Forward Command Post (Istureno Komandno Mesto)] bears significance as “IKMs were used by commanders in order to exercise command when they were in the field”³⁴⁸ and their establishment could as such amount to one of the “indicators of effective control” as outlined by the Trial Chamber.³⁴⁹

[...] the Appeals Chamber considers that proof that an accused is not only able to issue orders but that his orders are actually followed, provides another example of effective control.³⁵⁰ [...] The Appeals Chamber therefore finds that a reasonable trier of fact could have concluded that Halilović’s orders were not followed and could have taken into account this important consideration in the overall assessment of Halilović’s effective control over the perpetrators.

³⁴⁷ Čelebići Appeal Judgment, para. 303.

³⁴⁸ Trial Judgment, para. 212. See also Prosecution Final Trial Brief, para. 177.

³⁴⁹ Trial Judgment, para. 58 (citing Blaškić Appeal Judgment, para. 69) and paras 363-372 (making the findings based on the above-mentioned indicators).

³⁵⁰ Cf. Blaškić Appeal Judgment, para. 69.

Strugar Appeal Judgment, 17 July 2008

The Appeals Chamber recalls that a superior's authority to issue orders does not automatically establish that a superior had effective control over his subordinates, but is one of the indicators to be taken into account when establishing the effective control.³⁵¹ As the Appeals Chamber held in Halilović, in relation to such capacity, "the orders in question will rather have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators".³⁵² For instance, in Blaškić, the Appeals Chamber found that "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders".³⁵³

Indeed, as held by the Appeals Chamber in Blaškić, "the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate".³⁵⁴ Therefore, whether a given form of authority possessed by a superior amounts to an indicator of effective control depends on the circumstances of the case.³⁵⁵ For example, with respect to the capacity to issue orders, the nature of the orders which the superior has the capacity to issue, the nature of his capacity to do so as well as whether or not his orders are actually followed would be relevant to the assessment of whether a superior had the material ability to prevent or punish.

³⁵¹ Cf. Halilović Appeal Judgment, paras 68, 70, 139.

³⁵² Ibid., para. 204.

³⁵³ Blaškić Appeal Judgment, para. 485.

³⁵⁴ Ibid., para. 69. See also Hadžihasanović and Kubura Appeal Judgment, para. 199.

³⁵⁵ Cf. Halilović Appeal Judgment, paras 191-192; Hadžihasanović and Kubura Appeal Judgment, paras 199-201.

*The Appeals Chamber recalls that whether a superior's orders are in fact followed can be indicative of a superior's effective control over his subordinates.*³⁵⁶ [...]

(ii) The superior knew or had reason to know that the criminal act was about to be or had been committed

Krnojelac Appeal Judgment, 17 September 2003

The Appeals Chamber reiterates that an assessment of the mental element required by Article 7(3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.³⁵⁷

Blaškić Appeal Judgment, 29 July 2004

The Appeals Chamber considers that the Čelebići Appeal Judgment has settled the issue of the interpretation of the standard of “had reason to know.” In that judgment, the Appeals Chamber stated that “a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.” Further, the Appeals Chamber stated that “[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.” There is no reason for the Appeals Chamber to depart from that position.

³⁵⁶ See *Halilović* Appeal Judgment, para. 207.

³⁵⁷ *Čelebići* Appeal Judgment, para. 239.

Hadžihasanović and Kubura Appeal Judgment, 28 April 2008

Pursuant to Article 7(3) of the Statute, the knowledge required to trigger a superior's duty to prevent is established when the superior "knew or had reason to know that [his] subordinate was about to commit [crimes]". The Trial Chamber in Čelebići interpreted this requirement in light of the language used in Article 86(2) of Additional Protocol³⁵⁸ and held that, under the "had reason to know" standard, it is required to establish that the superior had "information of a nature, which at the least, would put him on notice of the risk of [...] offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates".³⁵⁹ As a clarification, the Trial Chamber added that "[i]t is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates".³⁶⁰

The Appeals Chamber in Čelebići endorsed this interpretation³⁶¹ and held that the rationale behind the standard set forth in Article 86(2) of Additional Protocol I is plain: "failure to conclude, or conduct additional inquiry, in spite of alarming information

³⁵⁸ Article 86(2) of Additional Protocol I provides: "The fact that a breach of the Conventions or of this Protocol was

committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach".

³⁵⁹ Čelebići Trial Judgment, para. 383 (establishing that a superior "had reason to know" of some crimes is tantamount

to establishing that he had an "implicit" or "constructive" knowledge of such crimes).

³⁶⁰ Čelebići Trial Judgment, para. 393.

³⁶¹ Čelebići Appeal Judgment, para. 241, citing Čelebići Trial Judgment, para. 393.

constitutes knowledge of subordinate offences”.³⁶² It noted that this information may be general in nature³⁶³ and does not need to contain specific details on the unlawful acts which have been or are about to be committed.³⁶⁴ It follows that, in order to demonstrate that a superior had the mens rea required under Article 7(3) of the Statute, it must be established whether, in the circumstances of the case,³⁶⁵ he possessed information sufficiently alarming to justify further inquiry.

[...]

While a superior’s knowledge of and failure to punish his subordinates’ past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this may, depending on the

³⁶² Čelebići Appeal Judgment, para. 232. At paragraph 233, the Appeals Chamber further found that, under Article 86 of Additional Protocol I, it is sufficient that the superior had in his possession “information, which, if at hand, would oblige [him] to obtain *more* information (*i.e.* conduct further inquiry).”

³⁶³ Čelebići Appeal Judgment, para. 238. The Appeals Chamber held that “[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, would be sufficient to prove that he ‘had reason to know’”. As an example of general information that may be available to a superior, the Appeals Chamber referred to the tactical situation, the level of training and instruction of the subordinates, and their character traits. The ICRC Commentary to Article 86 of Additional Protocol I indeed provides that “such information available to a superior may enable him to conclude either that breaches have been committed or that they are going to be committed”.

³⁶⁴ Čelebići Appeal Judgment, para. 238; Krnojelac Appeal Judgment, para. 155.

³⁶⁵ The Appeals Chamber in Čelebići held that “an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.” (Čelebići Appeal Judgment, para. 239). See also the ILC comment on Article 6 of the ILC Draft Code of Crimes against the Peace and Security of Mankind: “Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime [...]. In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime” (ILC Report, pp 37-38, quoted in Čelebići Appeal Judgment, para. 234).

*circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry.*³⁶⁶ *In making such an assessment, a Trial Chamber may take into account the failure by a superior to punish the crime in question. Such failure is indeed relevant to the determination of whether, in the circumstances of a case, a superior possessed information that was sufficiently alarming to put him on notice of the risk that similar crimes might subsequently be carried out by subordinates and justify further inquiry. In this regard, the Appeals Chamber stresses that a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed.*

(iii) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof

Halilović Appeal Judgment, 16 October 2007

*[...] The general duty of commanders to take the necessary and reasonable measures is well rooted in customary international law and stems from their position of authority.*³⁶⁷ *The Appeals Chamber stresses that “necessary” measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and “reasonable” measures are those reasonably falling within the material powers of the superior.*³⁶⁸ *What constitutes “necessary and*

³⁶⁶ *Krnjelac Appeal Judgment, para. 169.*

³⁶⁷ *See, for example, Aleksovski Appeal Judgment, para. 76.*

³⁶⁸ Article 86 of Additional Protocol I provides that superiors are responsible if, *inter alia* “[t]hey did not take all feasible measures within their power to prevent or repress the breach”; in this respect, the ICRC Commentary explains that, for a superior to be found responsible, it must be demonstrated that the superior “did not take the *measures within his power* to prevent it” and elaborates that these measures must be “‘feasible’ measures, since it is not always possible to prevent a breach or punish the perpetrators” (ICRC Commentary, paras 3543 and 3548, emphasis added); Article 87 adds the duty to “initiate such steps as are necessary to prevent such violations [...] and, where appropriate, to initiate disciplinary or penal action against violators thereof.” *See also the US Supreme Court’s holding in In re*

*reasonable” measures to fulfill a commander’s duty is not a matter of substantive law but of evidence.*³⁶⁹

Hadžihasanović and Kubura Appeal Judgment, 28 April 2008

As the Appeals Chamber previously held, “what constitutes [necessary and reasonable] measures is not a matter of substantive law but of evidence”;³⁷⁰ the assessment of whether a superior fulfilled his duty to prevent or punish under Article 7(3) of the Statute has to be made on a case-by case basis, so as to take into account the “circumstances surrounding each particular situation”.³⁷¹ Under Article 86 of Additional Protocol I, for example, superiors have a duty to take “all feasible measures within their power” to prevent or punish a breach of the laws of war and, under Article 87 of Additional Protocol I, such “feasible measures” may take the form of both “disciplinary or penal” measures.³⁷² It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute. In other words, whether the measures taken were solely of a disciplinary nature, criminal, or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under Article 7(3) of the Statute. The Prosecution’s argument is dismissed.

Blaškić Appeal Judgment, 29 July 2004

Yamashita, 327 US 1 (1945), at 16 (“such measures [...] within his power and appropriate in the circumstances”) and *US v. Karl Brandt et al.*, in TWC, Vol. II, p. 212 (“The law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command...”).

³⁶⁹ *Blaškić Appeal Judgment*, para. 72.

³⁷⁰ *Blaškić Appeal Judgment*, para. 72. See also *Halilović Appeal Judgment*, paras 63-64.

³⁷¹ *Blaškić Appeal Judgment*, para. 417.

³⁷² Article 86 of Additional Protocol I states that superiors are responsible if, *inter alia*, they did not take “all feasible measures within their power to prevent or repress the breach”. Article 87 of Additional Protocol I states that superiors have a duty to “initiate such steps as are necessary to prevent such violations [...] and, where appropriate, to initiate *disciplinary or penal* action against violators thereof” (emphasis added).

The Appeals Chamber considers that even though a determination of the necessary and reasonable measures that a commander is required to take in order to prevent or punish the commission of crimes, is dependent on the circumstances surrounding each particular situation, it generally concurs with the Čelebići Trial Chamber which held:

[i]t must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.³⁷³

b. Pleading Superior Responsibility

It is clearly established in the jurisprudence of the ICTY and the ICTR that the Prosecution must plead in the indictment the specific mode of liability with which the accused is charged, as well as the material facts underpinning that mode of liability. Where the accused is charged with Superior Responsibility, the jurisprudence has specified the material facts which must be pleaded in the indictment. Failure to plead such material facts with the necessary precision may lead to a finding that the indictment is defective.

Applicable law

³⁷³ Čelebići Judgment, para. 395.

ICTY Statute

Article 7

Individual Criminal responsibility

[...]

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

[...]

Article 21

Rights of the accused

[...]

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

[...]

ICTR Statute

Article 6

Individual Criminal Responsibility

[...]

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

[...]

Article 20

Rights of the accused

[...]

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

[...]

ICTY Jurisprudence

Prosecutor v. Blaagoje Simić, IT-95-9-A, Appeal Judgment, 29 November 2006:

21. The practice of both the International Tribunal and the ICTR requires that the Prosecution plead the specific mode or modes of liability for which the accused is being charged.

[...]

Prosecutor v. Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004:

218. In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in a case where superior criminal responsibility pursuant to Article 7(3) of the Statute is alleged, the material facts which must be pleaded in the indictment are:

(a)

(i) that the accused is the superior³⁷⁴ of (ii) subordinates sufficiently identified,³⁷⁵ (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct³⁷⁶ – and (iv) for whose acts he is alleged to be responsible;³⁷⁷

(b) the conduct of the accused by which he may be found to

(i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates,³⁷⁸ and (ii) the related

³⁷⁴ *Deronjić* Decision, Case No.: IT-02-61-PT, Decision on Form of the Indictment, 25 Oct. 2002, para. 15 (ordering the Prosecution to clearly plead the position forming the basis of the superior responsibility charges).

³⁷⁵ *Deronjić* Decision, Case No.: IT-02-61-PT, Decision on Form of the Indictment, 25 Oct. 2002, para. 19.

³⁷⁶ *Čelebići* Appeal Judgment, para. 256.

³⁷⁷ *Krnjelac* Decision on Preliminary Motion on the Form of Amended Indictment, 11 Feb. 2000, para. 18; *Brđanin and Talić* Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001, para. 19; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug. 2000, para. 9; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, paras 11, 17; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 10.

³⁷⁸ *Krnjelac* Decision on Preliminary Motion on the Form of Amended Indictment, 11 Feb. 2000, para. 18; *Krajišnik* Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug. 2000, para. 9; *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20

conduct of those others for whom he is alleged to be responsible.³⁷⁹ The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision,³⁸⁰ because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue;³⁸¹ and

(c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.³⁸²

With respect to the mens rea, there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.³⁸³ Each of the

Feb. 2001, para. 19; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 11; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 10.

³⁷⁹ *Krnjelac* Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999, para. 38; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 11; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 10.

³⁸⁰ *Krnjelac* Decision on Preliminary Motion on the Form of Amended Indictment, 11 Feb. 2000, para. 18; *Brđanin and Talić* Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001, para. 19; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 11; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 10.

³⁸¹ *Krnjelac* Decision on Preliminary Motion on the Form of Amended Indictment, 11 Feb. 2000, para. 18; *Brđanin and Talić* Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001, para. 19; *Prosecutor v. Kvočka et al*, Case No.: IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999, para. 17; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug. 2000, para. 9; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 11; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 10.

³⁸² *Brđanin and Talić* Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001, para. 19; *Krnjelac* 11 February 2000 Decision, para.18; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug. 2000, para. 9; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 11; *Deronjić*, Decision on Form of the Indictment, 25 Oct. 2002, para. 7; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 10.

³⁸³ *Brđanin and Talić* 26 June 2001 Decision, para. 33; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 11.

material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication.³⁸⁴ This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the legal pre-requisite.³⁸⁵

ICTR Jurisprudence

Ferdinand Nahimana et al. Appeal Judgment, 28 November 2007:

322. Under Articles 17(4), 20(2), 20(4)(a) and 20(4)(b) of the Statute and Rule 47(C) of the Rules, the Prosecutor must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved.³⁸⁶ The indictment is pleaded with sufficient particularity only if it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.³⁸⁷ An indictment which fails to duly set forth the specific material facts underpinning the charges against the accused is defective.³⁸⁸ The Appeals Chamber emphasises that the issue as to

³⁸⁴ *Brđanin and Talić* Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001, para. 48; *Prosecutor v. Brđanin and Talić*, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 10; *Deronjić* Decision on Form of the Indictment, 25 Oct. 2002, para. 9; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 12.

³⁸⁵ *Brđanin and Talić* Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001, para. 48; *Hadžihasanović* Decision on Form of the Indictment, 7 Dec. 2001, para. 10; *Mrkšić* Decision on Form of the Indictment, 19 June 2003, para. 12.

³⁸⁶ See, *inter alia*, *Simić* Appeal Judgment, para. 20; *Ntagerura et al.* Appeal Judgment, para. 21; *Kupreškić et al.* Appeal Judgment, para. 88.

³⁸⁷ *Simić* Appeal Judgment, para. 20; *Ntagerura et al.* Appeal Judgment, para. 22; *Kupreškić et al.* Appeal Judgment, para. 88.

³⁸⁸ *Ntagerura et al.* Appeal Judgment, para. 22; *Niyitegeka* Appeal Judgment, para. 195; *Kupreškić et al.* Appeal Judgment, para. 114.

whether a fact is material or not cannot be determined in the abstract: whether or not a fact is considered “material” depends on the nature of the Prosecution's case.³⁸⁹

323. The Appeals Chamber has, however, made it clear that, whenever an accused is charged with superior responsibility on the basis of Article 6(3) of the Statute, the material facts which must be pleaded in the indictment are: (i) that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (ii) the criminal acts committed by those others for whom the accused is alleged to be responsible; (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (iv) the conduct of the accused by which he may be found to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them.³⁹⁰ As regards this last element, it will be sufficient in many cases to plead that the accused did not take any necessary and reasonable measure to prevent or punish the commission of criminal acts.

324. An indictment may also be defective when the material facts that the Prosecutor invokes are pleaded without sufficient specificity.³⁹¹ In this regard, the Prosecutor's characterization of the alleged criminal conduct and the proximity between the accused and the crime charged are decisive factors in determining the degree of

³⁸⁹ *Ndindabahizi* Appeal Judgment, para. 16; *Ntagerura et al.* Appeal Judgment, para. 23.

³⁹⁰ *Ntagerura et al.* Appeal Judgment, para. 26, citing *Naletilić and Martinović* Appeal Judgment, para. 67, and *Blaškić* Appeal Judgment, para. 218.

³⁹¹ *Muhimana* Appeal Judgment, paras. 76, 167, 195 and 217; *Ntagerura et al.* Appeal Judgment, para. 27.

specificity with which the Prosecutor must plead the material facts of his case in the indictment.³⁹²

Tharcisse Renzaho v. The Prosecutor, Appeal Judgment, 1 April 2011:

64. The Appeals Chamber recalls that when an accused is charged on the basis of Article 6(3) of the Statute, one of the material facts which must be pleaded in the indictment is “that the accused is the superior of *subordinates sufficiently identified*, over whom he had effective control [...] and for whose acts he is alleged to be responsible”.³⁹³ A superior need not necessarily know the exact identity of the subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute.³⁹⁴ The Appeals Chamber has held that physical perpetrators of the crimes can be identified by category in relation to a particular crime site.³⁹⁵

Anatole Ntabakuze v. The Prosecutor, Case No. ICTR-98-41A-A, Appeal Judgment, 8 May 2012:

123. The Appeals Chamber recalls that in respect of [failure to prevent or punish], in many cases it will be sufficient to plead that the accused did not take any necessary and reasonable measures to prevent or punish the commission of criminal acts.³⁹⁶ This stems from the fact that the accused’s failure to prevent or punish may often be

³⁹² *Ntagerura et al.* Appeal Judgment, para. 23, referring to *Kvočka et al.* Appeal Judgment, para. 28. See also *Ntakirutimana* Appeal Judgment, paras. 73-74; *Kupreškić et al.* Appeal Judgment, para. 89.

³⁹³ *Muvunyi* Appeal Judgment, para. 19 (emphasis added).

³⁹⁴ *Muvunyi* Appeal Judgment, para. 55, referring to *Blagojević and Jokić* Appeal Judgment, para. 287.

³⁹⁵ See, e.g., *Simba* Appeal Judgment, paras. 71, 72.

³⁹⁶ *Renzaho* Appeal Judgment, para. 54; *Nahimana et al.* Appeal Judgment, para. 323.

inferred from the continuing or widespread nature of the violations committed by his subordinates as alleged in the indictment.³⁹⁷

125. [A] review of the Indictment reflects that the Prosecution did not explicitly plead Ntabakuze's failure to prevent or punish the crimes of his subordinates. However, the Appeals Chamber observes that paragraph 6.18 of the Indictment, which was specifically relied on in support of Ntabakuze's superior responsibility, pleads that the crimes alleged in the Indictment were carried out on his orders and directives. This, in the Appeals Chamber's opinion, gave notice to Ntabakuze that he was alleged to have failed to take the necessary measures to prevent or punish the crimes. Further notice was provided through the allegations of repeated and continuing crimes by Ntabakuze's subordinates from the Para-Commando Battalion,³⁹⁸ and the allegation at paragraph 6.44 of the Indictment that "[c]ertain units of the Para-Commando, Reconnaissance and Presidential Guard battalions were the most implicated in these crimes".³⁹⁹

³⁹⁷ Cf. *Muvunyi* Appeal Judgment of 29 August 2008, para. 62. The Appeals Chamber emphasises that the finding at paragraph 44 of the *Muvunyi* Appeal Judgment of 29 August 2008 relied on by Ntabakuze must be read in context. See [*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze, 24 June 2009, as corrected by Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze Second Corrigendum, 6 July 2009 ("Appeal Brief")], paras. 43, 44. In the *Muvunyi* case, the Appeals Chamber found that the Prosecution had failed to plead in the indictment the role played by Tharcisse Muvunyi's subordinates in an attack against the Beneberika Convent. See *Muvunyi* Appeal Judgment of 29 August 2008, paras. 40, 41. It is against this background that the Appeals Chamber concluded that the mere repetition of the legal elements of superior responsibility was not enough to provide notice of the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent or punish. See *ibid.*, paras. 44, 45. In another section of the *Muvunyi* Appeal Judgment of 29 August 2008 relating to attacks at the University of Butare, the Appeals Chamber dismissed Tharcisse Muvunyi's submission that his indictment was defective with respect to the pleading of his failure to prevent or to punish his subordinates. The Appeals Chamber reasoned that the Trial Chamber implicitly inferred Tharcisse Muvunyi's failure from the continuing nature of the violations committed by his subordinates, which followed from the assertion in the indictment that the attacks against the University were "widespread". See *ibid.*, para. 62.

³⁹⁸ See Indictment, paras. 6.8, 6.15, 6.19, 6.36, 6.41, 6.44. All these paragraphs were relied on in relation to superior responsibility under the relevant counts. See Indictment, pp. 46, 48-53.

³⁹⁹ Paragraph 6.44 of the Indictment was relied on in support of all relevant counts charged pursuant to Article 6(3) of the Statute. See Indictment, pp. 46, 48-53.

Footnote 88: The Appeals Chamber notes that the Prosecution appears to submit that, given the widespread nature of the massacres, and the involvement of virtually every unit of the army in perpetrating them in multiple locations throughout Kigali and other prefectures, it was “legitimate” for the Indictment to only provide examples of some locations where massacres occurred. *See [Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Prosecutor’s Brief in Response to Aloys Ntabakuze’s Appeal, 7 September 2009 (“Prosecution Response Brief”)], para. 31. See also AT. 27 September 2011 p. 39.* The Appeals Chamber considers this argument to be ill-founded. The Appeals Chamber has previously stated that “the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior F...ğ will usually be stated with less precision because the detail[s] of those acts are often unknown, and because the acts themselves are often not very much in issue”. *See Muvunyi Appeal Judgment of 29 August 2008, para. 58, citing Ntagerura et al. Appeal Judgment, para. 26, fn. 82, quoting Blaškić Appeal Judgment, para. 218.* However, the indictment must plead the criminal conduct of the subordinates for whom the accused is alleged to be responsible. *See infra, para. 100.* At a minimum, this includes pleading the location and approximate date of the alleged criminal acts and the means by which they were committed when this information is in possession of the Prosecution.

Therefore, in accordance with the jurisprudence of the ICTY, where superior criminal responsibility is alleged the material facts upon which the prosecution relies must be pleaded in the indictment.⁴⁰⁰

⁴⁰⁰ *Prosecutor v. Tihomir Blaškić*, ICTY, Appeal Judgment, 29.07.2004, para.218; *Prosecutor v. Miroslav Deronjić* Decision, para.15 (ordering the Prosecution to clearly plead the position forming the basis of the superior responsibility charges); *Prosecutor v. Milorad Krnojelac*, ICTY, Trial Chamber Decision on Preliminary Motion on Form of Amended Indictment, 11.02.2000, para.18; *Prosecutor v. Radoslav Brdjanin and Momir Talic*, ICTY, Trial Chamber Decision, 20.02.2001, para.19.

Counts 1 against the Accused, **NK1**, **FL** and **NS** and Count 2 against **FL** alleges the superior responsibility of the Accused as 'KLA commanders' and/or 'KLA members holding a position of responsibility' within the Klecke/Klecka detention centre, in the crime of violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka prison.

The Indictment names specific individuals subjected to inhumane treatment. In Count 1 against each of the Accused, the Prosecutor has not pleaded any further material facts.

Under Count 2 **FL** is charged as 'commander' in the crime of torture of a Serbian military prisoner, detained in the Klecke/Klecka detention centre.⁴⁰¹ However, the Indictment contains only material facts on **FL**'s active participation in the crime. In particular, the Indictment states that **FL** interrogated, punched and kicked the Serbian military prisoner, along with other specified Accused.⁴⁰²

The Indictment for Counts 1 against **NK1**, **FL** and **NS** and Count 2 against **FL** fail to plead and demonstrate material facts on the existence of a superior-subordinate relationship; and that the Accused knew or had reason to know that the criminal act was about to be or had been committed; and that the Accused failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Where superior responsibility is alleged the relationship of each of the Accused to his subordinates is essential. The threshold to be reached in establishing a superior-subordinate relationship is that of effective control over a subordinate - the material ability to prevent or punish criminal conduct, however that control is exercised.⁴⁰³

⁴⁰¹ Indictment, p.9.

⁴⁰² Indictment, pp.29, 30.

⁴⁰³ *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Appeal Judgment, 20.02.2001, para.256.

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

In addition, where the Prosecutor pleads superior responsibility, it is not proper to support that responsibility by allegations of the Accused's active participation, including ordering other perpetrators. Charges of superior responsibility seek to establish the responsibility for omissions - where superior responsibility is rightfully pleaded, an accused is held responsible for having failed to take necessary and reasonable measures to prevent certain acts, or for having failed to punish the perpetrators thereof. Where subordinates are alleged to have followed the orders of the Accused, the charge is not one of command responsibility.⁴⁰⁴

Where the Accused are charged both, with superior criminal responsibility and active participation (personal responsibility), the Indictment must separate these acts clearly because the same facts cannot simultaneously give rise to the two types of responsibility.⁴⁰⁵

In order for the principle of superior responsibility to be applicable, it is necessary that the superior has effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences'.⁴⁰⁶

ii. Law on the forms of liability charged in the Indictment

⁴⁰⁴ *Prosecutor v. Protais Zigiranyirazo*, ICTR, Trial Chamber Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion objecting to the Form of the Recast Indictment, 02.03.2005, para.19,

<http://www.unictr.org/Portals/0/Case/English/Zigiranyirazo/decisions/020305.pdf>.

⁴⁰⁵ See *Prosecutor v. Joseph Kanyabashi*, ICTR, Trial Chamber Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31.05.2000, paras.5.8-5.11,

<http://www.unictr.org/Portals/0/Case/English/Kanyabashi/decisions/defect.pdf>.

⁴⁰⁶ *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Trial Judgment, 16.11.1998, paras.377-378; and affirmed in *Prosecutor v. Zejnil Delalić, Zdravko Mucić, known as 'Pavo', Hazim Delić, Esad Landžo, known as 'Zenga'*, ICTY, Appeal Judgment, 20.02.2001, para.197.

a. Committing

“Committing” a crime is the physical perpetration of a crime or engendering a culpable omission in violation of criminal law⁴⁰⁷.

The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in law, through positive acts or omissions, whether individually or jointly with others⁴⁰⁸.

The requisite *mens rea* is that the accused acted with intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.

A crime may be committed through participation in a joint criminal enterprise

Individual criminal responsibility arises not only in respect of persons who perform the criminal act, but also, in certain circumstances, in respect of those who in some way make it possible for the perpetrator physically to carry out that act.

When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise in relation to that crime.

b. Co-Perpetration

Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes.

⁴⁰⁷ *Krstic* Trial Judgment, para 601; *Tadic* Appeals Judgment, para 188; *Kunarac* Trial Judgment, para 390

⁴⁰⁸ *Kordic* Trial Judgment, para 376.

Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for all the crimes committed in furtherance of that common purpose as a co-perpetrator.

Three types of joint criminal enterprise have been identified in the jurisprudence of the ICTY⁴⁰⁹. They all require, as to the *actus reus*, a plurality of persons, the existence of a common plan design or purpose, which amounts to or involves the commission of a crime provided for in the Statute of the ICTY, and participation of the accused in the common design:

- (a) The accused intends to perpetrate a crime and this intent is shared by all co-perpetrators;
- (b) The accused has knowledge of the nature of a system of repression, in the enforcement of which he participates, and the intent to further the common purpose. In such cases the requisite intent may also be able to be inferred from proved knowledge of the crimes being perpetrated and continued participation, as well as from the position of authority held by an accused; and
- (c) Those cases in which one of the participants commits a crime outside the common design. The *mens rea* in such cases is twofold:
 - i. the accused must have the intention to take part in and contribute to the common criminal purpose; and

⁴⁰⁹ Tadic appeals judgment; Kvocka appeals judgment and *Krnjelac appeals judgment*

- ii. in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly takes the risk that the crime might occur by joining or continuing to participate in the enterprise.

The presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required.

Responsibility for crimes committed beyond the common purpose of a joint criminal enterprise, but which were “a natural and foreseeable consequence thereof” arises only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him. Whether the crimes committed outside the common purpose of the joint criminal enterprise were “a natural and foreseeable consequence thereof” must be assessed in relation to the knowledge of a particular accused.

c. Ordering

The *actus reus* of “ordering” requires that a person in a position of authority instructs another person to commit an offence.

It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator. It is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.

There is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.

With regard to the *mens rea*, the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order

I. FINDINGS ON THE RESPONSIBILITY OF THE ACCUSED

AK was charged in three counts in the Indictment.

Count 1 charged **AK** with War Crime against the Civilian Population and Prisoners of War⁴¹⁰ alleging that, in his capacity as a KLA member, in co-perpetration with **FL, NK1, NK2, NS, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, he violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners who were detained in an improvised KLA detention centre in the village of Klecke/Klecka, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **AK** with War Crime against Prisoners of War⁴¹¹ alleging that, in his capacity of member of the KLA, in co-perpetration with **NK2, NS, RM, NK1** and cooperative witness X he participated in the killing of a Serbian military prisoner, detained in the Klecke/Klecka detention centre, and whose remains were found in a mass grave near Klecke/Klecka containing five bodies; more precisely, the defendant participated in the crime by providing **NS**, the direct perpetrator of the killing, with a scythe, although he knew, because explicitly informed of **NS's**

⁴¹⁰ under Articles 142, 144 of the CCSFRY, also foreseen in Articles 120, 121 of the CCK, read in conjunction with Articles 22, 24, 26 of the CCSFRY and 23, 25, 26 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴¹¹ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) APII

intentions, that the latter was going to kill the prisoner with that scythe; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 2 was withdrawn by the EULEX Special Prosecutor pursuant to a Partial Withdrawal of the Indictment, dated 09 November 2011, filed with the Court on 11 November 2011, as presented at the session on 11 November 2011.

Count 3 charged **AK** with War Crime against Prisoners of War⁴¹² alleging that, in his capacity as member of the KLA, in co-perpetration with **FL**, **NK2**, **NS**, **NK1**, **BL** and cooperative witness X, he participated in the killing of **ND** and **VM**, two Serbian Police officers detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by marching the two prisoners to the execution spot and by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew (because explicitly informed of **FL**'s orders), or at least could easily foresee from the orders received (marching the two Serbian prisoners to a remote location in the woods) what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 4th or 5th April 1999.

UK was a KLA member and was stationed in Klecke/Klecka for approximately one month between May and June 1999. **UK** recalled that the guard of the prison in Klecke/Klecka was **AZ**, nickname 'Murizzi'. He saw **AZ** in Klecke/Klecka on a regular basis.

UK also gave evidence that another prison guard was **AK**.⁴¹³

The evidence upon which the prosecution relies in support of the individual criminal responsibility of **AK** are based upon statements of the **AZ**.

⁴¹² under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) of APII

⁴¹³ Anonymous Witness I, *supra*

UK declared that he was stationed in Klecke/Klecka between May and June 1999. It was the finding of the Trial Panel above that Anonymous Witness H, his brother and **SA** were subjected to cruel treatment in the Klecke/Klecka prison. However, it was evidence of Anonymous Witness H that he and his brother were taken to Klecke/Klecka on 27 February 1999. Evidence indicated that **SA** was detained in the Klecke/Klecka prison in March 1999, likely, until 3 April 1999. The period of time between February until 3 April 1999 is not when **UK** stated to be based in Klecke/Klecka. In any event, the written statement of **UK**, in merely identifying **AK** as ‘another prison guard’, is obviously insufficient to enable the Trial Panel to reach the conclusions on the guilt of **AK**. Particularly, with regard to killing of **ND** and **VM**, the Indictment alleges that **AK** placed the victims at the disposal of the executioner, by marching them to the execution spot. Leaving aside **AZ**’s evidence, there is no evidence in the file to support a finding as to the alleged conduct of **AK** in the killing of **ND** and **VM**.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment.

The Trial Panel finds that **DT** and **DV** were unlawfully killed.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **AK** committed the offences with which he has been charged.

Count 2 was withdrawn by the EULEX Special Prosecutor pursuant to Partial Withdrawal of the Indictment, dated 9 November 2011, filed with the Court on 11 November 2011, as presented

at the session on 11 November 2011. However, that count remained in the Indictment. By reason thereof, Count 2 was rejected because the prosecutor withdrew the charge during the main trial.

NK1 was charged in six counts in the Indictment.

Count 1 charged **NK1** with War Crime against the Civilian Population and War Crime against Prisoners of War⁴¹⁴ alleging that he, in his capacity as KLA member and commander, and as a person holding a position of responsibility over Klecke/Klecka detention center, in co-perpetration with **FL, NK2, NS, AK, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **NK1** with War Crime against the Civilian Population⁴¹⁵ alleging that he, in his capacity as member of the KLA, in co-perpetration with **NK2, NS** and **RM**, killed **AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre, by shooting at him with an AK-47 firearm; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 03/04 April 1999.

Count 3 charged **NK1** with War Crime against Prisoners of War⁴¹⁶ alleging that he, in his capacity as member of the KLA and in co-perpetration with **NK2, NS** and two unidentified KLA

⁴¹⁴ under Articles 22, 142, 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 23, 120 of the Criminal Code of Kosovo, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of Protocol II Additional to the four Geneva Conventions

⁴¹⁵ under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII

⁴¹⁶ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII

soldiers, participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and identified through DNA as **BC**, **ZF** and **ZT**, who were executed with several rounds of AK-47 firearm by a group composed by **NK1**, **NK2**, **NS**, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 4 charged **NK1** with War Crime against Prisoners of War⁴¹⁷ alleging that he,, in his capacity as member of the KLA, in co-perpetration with **NK2** violated the bodily integrity and health of a Serbian military prisoner, detained in the Klecke/Klecka detention centre, by repeatedly beating him; the victim was subsequently killed and his remains were found in a mass grave near Klecke/Klecka containing five bodies; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 5 charged **NK1** with War Crime against Prisoners of War⁴¹⁸ alleging that he, in his capacity of member of the KLA, in co-perpetration with **NK2**, **NS**, **RM**, **AK** and cooperative witness X participated in the killing of a Serbian military prisoner, mentioned under Count 4 above; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, **NS**, although he knew, because explicitly informed about **NS**'s intention to kill the prisoner from the previous conversation between the latter and **FL**, that the prisoner would be executed, in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 6 charged **NK1** with War Crime against Prisoners of War⁴¹⁹ alleging that he, in his capacity as member of the KLA, in co-perpetration with **FL**, **NK2**, **NS**, **AK**, **BL** and cooperative witness X, participated in the killing of **ND** and **VM**, two Serbian Police officers, detained in the

⁴¹⁷ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII

⁴¹⁸ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII

⁴¹⁹ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) APII;

Klecke/Klecka detention center, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about **FL**'s intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 4th or 5th April 1999.

The Indictment alleges that **NK1**, as a KLA member and commander, and as a person holding a position of responsibility over the Klecke/Klecka detention centre, and in co-perpetration with other specified Accused, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment, but that out of the individuals listed in the Indictment Anonymous Witness H, his brother and **SA** were subject to cruel treatment.

Further, the Indictment alleges that **NK1**, acting in co-perpetration, killed **AA**; participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison; violated the bodily integrity and health of a Serbian military prisoner detained in the Klecke/Klecka prison; and thereafter participated in the killing of the Serbian military prisoner; and participated in the killing of **VM** and **ND**.

NK1's role in the Klecke/Klecka prison:

Several witnesses, including **QK**,⁴²⁰ and **BZ**,⁴²¹ knew **NK1** as a member of the 121st Brigade ('Kumanova' Brigade). During course of the Main Trial **NK1** confirmed that his nickname was '**BF**'.⁴²²

BZ, who was chief of staff of the KLA general headquarters from January 1999 until April 1999, stated that after November/December 1998 commander of the 121st Brigade became **HS**. It was the recollection of **BZ**, that '**BF**' was a member of the 121st Brigade under command of **FL** and later under command of **HS**.⁴²³

On the point of command, the Trial Panel observes that on the evidence of Anonymous Witness C, in the KLA headquarters in Llapushnik/Lapusnik, it was a Muslim judge who ordered the soldiers to arrest Anonymous Witness C. Thereafter Anonymous Witness C was driven to Terpeze/Trpeza.

Anonymous Witness C recalled that one of the KLA soldiers was addressed as '**BF**' or '**N**'. '**BF**' was one of the three KLA soldiers who drove Anonymous Witness C to Terpeze/Trpeza, and imprisoned C in Terpeze/Trpeza, interrogated him and was present when Anonymous Witness C was beaten and took part in beating, and later released and took Anonymous Witness C to Klecke/Klecka.⁴²⁴

However, Anonymous Witness C's statement is unclear on the identity of '**BF**'. He was never asked to identify the person he knew as **BF**. Anonymous Witness C declared that after the war he tried to find out who '**BF**' was and came to learn that his name was **NS**.⁴²⁵ As such, the Trial

⁴²⁰ **QK**, *supra*

⁴²¹ **BZ**, *supra*

⁴²² Minutes 11.11.2011, para.25, Court trial binder 3. At the detention hearing on 16 March 2011, **NK1** indicated that nickname '**BF**' he had during the war. See Record of the hearing on the detention on remand 16.03.2011, p.1, GJPP binder 2.

⁴²³ **BZ**, *supra*

⁴²⁴ Anonymous Witness C, *supra*

⁴²⁵ Anonymous Witness C

Panel is also unable to infer from Anonymous Witness C's evidence that it was Accused **NK1** who drove Anonymous Witness C to Klecke/Klecka, which could serve to indicate of **NK1**'s functions with regard to Klecke/Klecka.

In any event, **NK1** was not charged in connection with any alleged offences committed in Terpeza.

Further, Anonymous Witness C said he did not see the person he knew as **BF** in Klecke.

In relation to Klecke/Klecka, it was the recollection of **BZ** that he saw '**BF**' at the headquarters of the 121st Brigade in Klecke/Klecka or Berishe/Berisa, as the headquarters were moving at times.⁴²⁶ The evidence of **BZ**, however, did not provide further details on **NK1**'s role in the Klecke/Klecka detention centre, so as to enable the Trial Panel to draw any inferences.

NK1 stated that he had been in the prison in Klecke/Klecka occasionally, either to take persons there or to conduct interrogation but not to inspect the prison. He also visited Klecke/Klecka because command of the 121st Brigade was located there. According to **NK1** his work consisted of cases against KLA soldiers, however, he did not recall that civilians were taken to the Klecke/Klecka prison, although it was possible. **NK1** never saw any Serbian civilians or soldiers in Klecke/Klecka. As it follows from the statement of **NK1**, he worked closely with **SD** and in his work followed **SD**'s instructions.⁴²⁷

SD gave evidence that on certain occasions he would order individuals into detention in the Klecke/Klecka prison. In particular, **SD** referred to the case of **BK**, who was accused of desertion and **SD** ordered that **BK** be detained in the Klecke/Klecka prison pending enforcement of his sentence. However, on **SD**'s evidence the prison was under the physical control of the KLA military police, and a certain person was in charge of the prison- a prison 'director'- whose

⁴²⁶ **BZ**, *supra*

⁴²⁷ **NK1**, *supra*.

name **SD** could not recall. At the same time, **SD** knew '**BF**', but only as a military police officer. **SD** saw him in Klecke/Klecka and also in general headquarters, and **SD** issued to '**BF**' guidelines on behaviour of the military police.

It did not emerge from **SD**'s evidence that **NK1** ('Bashkim Fino') exercised command over the Klecke/Klecka prison. The Trial Panel observes, that, even though **SD** stated that he visited the Klecke/Klecka prison regularly, **SD** described '**BF**' as a military police officer.⁴²⁸

On this point, also **BZ** recalled '**BF**', but only as a member of the 121st Brigade, and **BZ** did not know further about the duties of '**BF**'.⁴²⁹

Anonymous Witness H gave evidence that, when H and his brother were taken by KLA members on 27 February 1999, at a certain point, Anonymous Witness H and his brother were kneeling down. A person, dressed in civilian clothes and armed with a machine gun, fired a shot right near Anonymous Witness H's head. Anonymous Witness H did not know if that was by accident or on purpose, but another person in civilian clothes said: '**B** what are you doing?' After the group spoke among themselves they ordered Anonymous Witness H and his brother to move another 10 meters up the hill and lay down. Anonymous Witness H thought they would be killed, but a person with a rifle told them not to be afraid as they were not going to kill them. Anonymous Witness H was informed that a commander would decide their fate. After around 10 minutes the commander arrived with a group of around four to six men, who all were wearing KLA uniforms with insignia. Further, Anonymous Witness H and his brother were put on the vehicle.⁴³⁰

It was finding of the Trial Panel that Anonymous Witness H and his brother were taken to the Klecke/Klecka prison and subjected to cruel treatment.

⁴²⁸ **SD**, *supra*

⁴²⁹ **BZ**, *supra*

⁴³⁰ Anonymous Witness H, *supra*

It was the evidence of Anonymous Witness H suggests that 'B' participated in taking Anonymous Witness H and his brother into custody, but that he in turn awaited the direction of a superior commander. The evidence indicates that 'BF' was nickname of **NK1**.

UK recalled that in April 1999, when four Serbian officers were brought to Klecke/Klecka, it was **NK1** ('BF') who took charge of the Serbian officers.⁴³¹ **UK** also indicated that **NK1** ('BF') was a 'zone police officer' and his duty was to conduct investigations and he could investigate anyone he wanted.⁴³²

With regard to evidence of Anonymous Witness H and **UK**, the Trial Panel must distinguish when that evidence attests to **NK1**'s role in the Klecke/Klecka detention centre, and the separate factual allegations on **NK1**'s active participation in the alleged crimes. With regard to the latter, the evidence of each of the Anonymous Witnesses relates to separate allegations and as such trigger Article 157(3) KCCP.

With regard to **NK1**'s role in the Klecke/Klecka detention centre, neither the evidence of Anonymous Witness H nor the evidence of **UK** indicate that **NK1** gave orders or instructions or exercised disciplinary powers in the Klecke/Klecka detention centre. While the evidence attests that **NK1** was seen in the Klecke/Klecka detention centre, the evidence falls short of establishing that **NK1** exercised command over the detention centre.

In examining the superior responsibility of **NK1** in the Klecke/Klecka detention centre, the Trial Panel notes that evidence suggests that **NK1** was linked also to two KLA teams in two locations, in Bellanice/Belanica and in Shale/Sedlare (Lipjan/Lipljan). Therefore, **NK1** does not appear exclusively linked to Klecke/Klecka and was rather split between, at least, three locations.

⁴³¹ Exhibit P6, Anonymous Witness I, *supra*

⁴³² Anonymous Witness I, *supra*

With regard to Bellanice/Belanica, the Trial Panel observes that **AH**, an administrator in the KLA military police, gave evidence that as of the end of 1998, he was based in Bellanice/Belanica, and his immediate supervisor was **UG** and higher in the chain of command was **NK1**.⁴³³ However, **AH** did not know the duties of **NK1**.

On the evidence of **IZ**, a former 121st Brigade member, a team of seven to eight military police officers was based in Bellanice/Belanica and their leader was **UG**. **IZ**, however, did not know who was a military police commander for the whole area.⁴³⁴

BZ gave evidence that in July/August 1998 he joined the military police and was stationed in Bellanice/Belanica. His team leader was **UG**. On **BZ**'s account nobody knew who reported to whom. Later **BZ** learned that **UG** reported to **NK2**. It was within duties of **BZ** to follow soldiers' movements. As a squad they never arrested anyone. **BZ** was never in Klecke/Klecka during the war.⁴³⁵

Whereas, in relation to Shale/Sedlare, it emerges from the evidence of **SB**, that as of mid-January 1999 he belonged to the military police and was stationed in Shale/Sedlare. His commander was **AS** and higher in command was **NK1**. On the evidence of **SB**, their duties in Shale/Sedlare were to keep order in the market place, where there was a movement by population, which had been displaced by Serbs. They also helped the displaced population in re-settling themselves. Part of **SB**'s duties was to investigate KLA soldiers for disciplinary violations, but **SB** did not remember such cases.⁴³⁶

NK1's responsibility:

⁴³³ AH, 14.12.2010, EULEX Police interrogation statement of the witness, SPRK binder D; AH, *supra*.

⁴³⁴ IZ, *supra*

⁴³⁵ BZ, *supra*

⁴³⁶ SB, *supra*

In view of the foregoing, the evidence does not enable the Trial Panel to find that superior-subordinate relationship existed between **NK1** and the individuals handling the prisoners in the Klecke/Klecka detention centre.

The evidence does not enable the Trial Panel to conclude so that it is sure that **NK1** knew or had reason to know that specific individuals, such as Anonymous Witness H, his brother or **SA** would be subjected to cruel treatment or had been subjected to cruel treatment; and that **NK1** failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrator thereof.

Therefore, the Trial Panel finds that it has not been proven that **NK1**'s exercised superior responsibility.

In addition to superior responsibility, the Indictment alleged **NK1**'s active participation in the violation of bodily integrity and health of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka prison. It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment, but that out of the individuals listed in the Indictment Anonymous Witness H, his brother and **SA** were subject to cruel treatment.

As previously referred to herein, evidence of Anonymous Witness H suggests that 'Bashkim' participated in taking Anonymous Witness H and his brother into custody. However, pursuant to Article 157 (3) KCCP the Trial Panel shall not find the accused guilty based solely, or to a decisive extent, on the evidence of Anonymous Witness H.

Furthermore, **SD** went to the Klecke/Klecka prison immediately after he became aware that Anonymous Witness H and his brother had been detained in Klecke/Klecka. It follows from **SD**'s statement that when he went to the prison he saw a prison 'director' and a certain woman

there at that time. **SD** consulted **BZ** and they agreed that the prisoners be handed over to the OSCE. Thereafter **SD** ordered their transfer.⁴³⁷ **SD** saw Anonymous Witness H and his brother after they had been subjected to cruel treatment in the Klecke/Klecka prison, however, there is no suggestion in **SD**'s evidence associating **NK1** to the crimes.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment, but that out of the individuals listed in the Indictment Anonymous Witness H, his brother and **SA** were subject to cruel treatment.

Therefore, the Trial Panel finds that it has not been proven that **NK1** subjected Anonymous Witness H, or his brother or **SA** to cruel treatment.

Further, the Indictment alleges that **NK1**, acting in co-perpetration, killed **AA**; participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison; violated the bodily integrity and health of a Serbian military prisoner detained in the Klecke/Klecka prison; and thereafter participated in the killing of the Serbian military prisoner; and participated in the killing of **VM** and **ND**.

The prosecution relies entirely on the evidence of **AZ** with regard to the alleged participation of **NK1** in the killing of **AA**;⁴³⁸ his participation in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison;⁴³⁹ his violating the bodily integrity and health and killing of the Serbian military prisoner detained in the Klecke/Klecka prison;⁴⁴⁰ and his killing of **VM** and **ND**.⁴⁴¹

⁴³⁷ *Ibid.*

⁴³⁸ Indictment, pp.28, 29.

⁴³⁹ Indictment, pp.32, 33.

⁴⁴⁰ Indictment, pp.29, 30, 30, 31. It is noted that on pages 29, 30 of the Indictment the Prosecutor has qualified the crime against the Serbian military prisoner as torture. However, the charge with regard to **NK1** does not include the crime of torture, but instead 'violation of the bodily integrity and health of a Serbian military prisoner' (see count 4 against **NK1** in the Indictment, p.4).

⁴⁴¹ Indictment, pp.27, 28.

With regard to these crimes there is no other evidence in the file attesting to **NK1**'s guilt. The finding of mortal remains does not assist in drawing conclusions on the identity of the perpetrators. With regard to killing of **AA**, the Prosecution refers to Anonymous Witness C and Witness D, but also those witnesses do not give evidence on the identity of the perpetrators.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel made a different finding on the credibility of **AZ** it could not make a determination on **NK1**'s guilt based on that evidence by reason of Article 157(4) KCCP, which prescribes that 'the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness'.

The Trial Panel finds that it has not been proven that **NK1** committed the offences with which he has been charged.

NK2 was charged in seven counts in the indictment.

Count 1 charged **NK2** with War Crime against the Civilian Population and Prisoners of War⁴⁴² alleging that he, in his capacity as a member of the KLA, in co-perpetration with **FL**, **NK1**, **NS**, **AK**, **BS**, **SS1**, cooperative witness X and **SS2** and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

⁴⁴² under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

Count 2 charged **NK2** with War Crime against Prisoners of War⁴⁴³ alleging that he, in his capacity as member of the KLA and in co-perpetration with cooperative witness X, **NS, SS1, BS**, tortured four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC, ZF** and **ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 3 charged **NK2** with War Crime against Prisoners of War⁴⁴⁴ that he, in his capacity as member of the KLA and in co-perpetration with **NK1, NS** and two unidentified KLA soldiers, participated in the killing of four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka, three of whom identified through DNA as **BC, ZF** and **ZT**, who were executed with several rounds of AK-47 firearm by a group composed by **NK1, NK2, NS**, and two unidentified KLA soldiers; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 4 charged **NK2** with War Crime against Prisoners of War⁴⁴⁵ alleging that he, in his capacity as member of the KLA, in co-perpetration with **NK1** violated the bodily integrity and health of a Serbian military prisoner, detained in the Klecke/Klecka detention centre, by repeatedly beating him; the victim was subsequently killed and his remains were found in a mass grave near Klecke/Klecka containing five bodies; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 5 charged **NK2** with War Crime against Prisoners of War⁴⁴⁶ alleging that he, in his capacity of member of the KLA, in co-perpetration with **NK1, NS, RM, AK** and cooperative

⁴⁴³ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁴⁴ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁴⁵ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁴⁶ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

witness X participated in the killing of a Serbian military prisoner, mentioned under Count 4 above; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, **NS**, although he knew, because explicitly informed about **NS**'s intention to kill the prisoner from the previous conversation between the latter and **FL**, that the prisoner would be executed; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 6 charged **NK2** with War Crime against the Civilian Population⁴⁴⁷ alleging that he, in his capacity as member of the KLA, in co-perpetration with **NK1**, **NS** and **RM**, killed **AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre, by shooting at him with an AK-47 firearm; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 3rd or 4th April 1999.

Count 7 charged **NK2** with War Crime against Prisoners of War⁴⁴⁸ alleging that he, in his capacity as member of the KLA, in co-perpetration with **FL**, **NK1**, **NS**, **AK**, **BL** and cooperative witness X, participated in the killing of **ND** and **VM**, two Serbian Police officers, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gunshots fired with a pistol; more precisely, the defendant participated in the crime by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about **FL**'s intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 4th or 5th April 1999.

The Indictment alleges that **NK2**, as a member of the KLA, and in co-perpetration with other specified Accused, violated the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre. It was a finding of the Trial Panel that Anonymous Witness H and his brother were subjected to cruel treatment

⁴⁴⁷ under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁴⁸ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

in the KLA detention centre in Klecke/Klecka, likely in February 1999, and **SA**, sometimes in March 1999 until 3 April 1999.

In allegations on violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, the Prosecution in the Indictment has referred to Anonymous Witnesses B, I, L and M, who saw **NK2** in the Klecke/Klecka detention centre.⁴⁴⁹ In this regard, the Trial Panel found that conditions of detention *per se* did not amount to cruel treatment.

The charges against **NK2** are brought by the Prosecution based on **NK2**'s active participation in the alleged crimes and not based on superior responsibility. Therefore, the Trial Panel is to examine only **NK2**'s responsibility based on his alleged active participation.

At all material times **NK2** operated in various locations in Kosovo.

BZ, who joined the military police in July/August 1998 and was based in Bellanice/Belanica, gave evidence that his squad leader was **UG**, who reported to **NK2**. **BZ** saw **UG** and **NK2** coming and going. Later **BZ** learned that **NK2** was based in 'Kosterc / Nishor', as head of the military police.⁴⁵⁰

In his statement **NK2** said that in December 1998 he was transferred to the Pashtrik operational zone, in Kasterc/Kostrce (Suhareke/Suva Reka), as a commander of the military police, and the 123rd Brigade was responsible for that area.⁴⁵¹

SD gave evidence that **NK2** was a military police officer operating in Pashtrik operational zone. Further, **SD** recalled contacting **NK2** when he went to Kervasari/Kravasarija prison.⁴⁵²

⁴⁴⁹ Indictment, p.26.

⁴⁵⁰ **BZ**,

⁴⁵¹ Certificate from TMK dated 17 September 2004, two documents signed by **NK2** dated 16 and 25 February 1999, attached to the record of examination of **AZ** on 5 July 2011

⁴⁵² **SD**, *supra*

On the evidence of **BZ**, **NK2** was a member of the 121st Brigade, and as of December 1998 or January 1999 he was a commander of the military police battalion, under direct command of the military police directorate headed by **FL**. Military police battalion was spread in various locations, Divjake/Divljaka, Berishe/Berisa and Lladroc/Ladrovac. As far as **BZ** knew, **NK2** was moving between these locations according to needs.⁴⁵³

However, the evidence also suggests that around and during the relevant period of time **NK2** was seen also in the Klecke/Klecka detention centre.

Anonymous Witnesses L, M, I and B gave evidence that **NK2** carried-out certain functions in the Klecke/Klecka detention centre, including, in the context of proceedings against KLA members. However, none of the witnesses linked **NK2** precisely to cruel treatment of specific individuals, such as Anonymous Witness H or his brother, or **SA**.

Anonymous Witness L stated that he was a member of the KLA, and in 1999 decided to join another brigade, and was summoned to Javor. When Anonymous Witness L arrived in Javor, he was arrested by a young KLA soldier, a member of the KLA military police, and taken to Klecke/Klecka and detained there. The next day he was interviewed by a KLA soldier Osman from Bellanice/Belanica. Anonymous Witness L was also told that he should not have joined the other brigade without a prior approval. Anonymous Witness L's interview was interrupted by one 'N', with a surname **Ka** or **Kr**, who after the war was a police officer in X. It was this 'N' who released Anonymous Witness L from the Klecke/Klecka detention centre. When he was interviewed on 12 April 2011 he identified **NK2** as the person he knew as 'N'⁴⁵⁴. Anonymous Witness L during his detention saw another imprisoned KLA soldier, who told Anonymous Witness L that he was beaten in front of his family when taken into custody. However,

⁴⁵³ **BZ**, *supra*

⁴⁵⁴ Statement of Anonymous Witness L dated 12 April 2011

Anonymous Witness L did not see anyone beaten in the Klecke/Klecka detention centre. Anonymous Witness L also did not see any other prisoners in Klecke/Klecka.⁴⁵⁵

UK declared that between May 1999 and June 1999 he was stationed in Klecke/Klecka. He personally knew a prison guard **AZ** ('**M**').

UK saw **AZ** in Klecke/Klecka on a regular basis. He often also saw **NK2** in the Klecke/Klecka detention centre, who was commanding nine brigades of the military police, from the 121st Brigade to the 129th Brigade. **UK** saw many other KLA soldiers and military police in Klecke/Klecka. He heard that many persons were taken to Klecke/Klecka but did not witness any crimes.⁴⁵⁶ In another statement, **UK** recalled that in April 1999, when four Serbian officers were brought to Klecke/Klecka, it was also **NK2** who took charge of the Serbian officers.⁴⁵⁷

Anonymous Witness M gave evidence that he was a civilian and was arrested in March or April 1999 and taken to Klecke/Klecka. The same day Anonymous Witness M was questioned by persons including a person that Anonymous Witness M described as a judge. Anonymous Witness M was threatened with wooden sticks, but was not hit. One person was standing at the door in a mask and threatened to beat Anonymous Witness M. In a later statement Anonymous Witness M declared that, after the judge finished his questioning, a person in a mask hit Anonymous Witness M twice on the back.⁴⁵⁸ It follows from Anonymous Witness M's statement that at a certain point **NK2** came together with the judge, and asked why Anonymous Witness M and certain other persons were there, opened the door and released them. Anonymous Witness M stated that he heard individuals screaming on the upper floor during their questioning. After they came back, they looked as if they had been beaten. However, Anonymous Witness M did not personally witness the beating. According to Anonymous Witness M, he did not know the organization and the hierarchical structure of the

⁴⁵⁵ Anonymous Witness L, *supra*

⁴⁵⁶ Anonymous Witness I, *supra*

⁴⁵⁷ Exhibit P6, Anonymous Witness I, *supra*

⁴⁵⁸ Anonymous Witness M, *supra*

Klecke/Klecka prison. Everyone, except for the judge, was wearing masks. Anonymous Witness M later heard rumours that name of the judge was **O** and he was from Bellanice/Belanica. Anonymous Witness M considered that Klecke/Klecka detention centre was under responsibility of **FL**, who was in charge of the 121st Brigade. It operated in that area and headquarters of the Brigade were in Klecke/Klecka. Anonymous Witness M did not know who was in charge of the prison.⁴⁵⁹

It is the evidence of Anonymous Witness M that **NK2's** was present in the Klecke/Klecka prison around the time when Anonymous Witness M heard certain individuals screaming on the upper floor and observed that individuals looked beaten. The statement of Anonymous Witness M contains considerable redactions in line with the measures to protect the identity of the Witness. It is not clear from Anonymous Witness M's statement who were these individuals, and if they could be Anonymous Witness H, his brother, or **SA**. Evidence of Anonymous Witness M is not sufficient to draw particular inferences as to the responsibility of **NK2**. Also, other evidence does not attest to conduct of **NK2** in subjecting specific individuals, such as Anonymous Witness H, his brother, or **SA** to cruel treatment.

In any event, Article 157(3) KCCP provides that the Trial Panel may not make a determination on Accused's guilt based '... solely, or to a decisive extent, on the testimony given by a single witness whose identity is anonymous to the defence counsel and the accused'.

According to Anonymous Witness B, a former KLA member, it is likely that in May 1999 he was detained in Klecke/Klecka. When Anonymous Witness B entered the yard of the house in Klecke/Klecka, he saw **NK2**, who Anonymous Witness B knew as head of the military police. **NK2** asked Anonymous Witness B why he was there and who gave him permission to go on the mountain top. Further Anonymous Witness B was told that he needed to stay in prison for as long as his case was investigated. Anonymous Witness B recalled that the supervisor of the

⁴⁵⁹ Anonymous Witness M, *supra*

prison was “A”. After five or six days Anonymous Witness B was brought upstairs, where Anonymous Witness B saw **NK2** again and another person. Anonymous Witness B once again explained that, upon being taken by Serbian military personnel, Anonymous Witness B had been forced to tell the Serbian forces the locations of the KLA and the names of KLA soldiers that Anonymous Witness B knew. Anonymous Witness B was released from Klecke/Klecka after 21 days, due to a risk of a Serbian offensive. During his imprisonment in Klecke/Klecka, Anonymous Witness B did not witness any crimes.⁴⁶⁰

The prosecution put in evidence a ruling dated 17 May 1999 from the KLA military court, ordering that Anonymous Witness B serve a period of detention from 14 May 1999 until 14 June 1999.⁴⁶¹ **SD** said it was his signature on the ruling.

At trial he said that he was informed by people he met in the mountains that **NK2** was a bus driver and head of the military police. When he arrived at Klecka he said he met a person wearing black clothing who he assumed was **NK2** but he now realises he was not. However, in his pre-trial statement he said he knew **NK2** before the war. When this was put to him at trial he said he did not and that he had only heard about him. It was clear he changed his evidence in order not to implicate **NK2**.

SD gave evidence that he regularly went to the Klecke/Klecka prison. He recalled **NK2** merely as a military police officer in Pashtrik operational zone. Whereas, the evidence of Anonymous Witnesses L, I, M and B suggests that **NK2** exercised certain authority in the Klecke/Klecka prison. Also, **NB**, a former KLA member, was told that **AK**, **AO1**, **AO2** and **DR** were detained in the Klecke/Klecka prison. All four, except **AO1**, belonged to the KLA military police. It was mentioned that **NK2** and ‘**BF**’ informed them that they were under arrest and asked to

⁴⁶⁰ Anonymous Witness B, *supra*

⁴⁶¹ Witness A, *supra*, attachment to the statement 0096-09-EWC2/025

surrender their weapons. Furthermore, **NK2** was issuing orders to prisoners and soldiers in the Klecke/Klecka prison and was in charge of the prison.⁴⁶²

It is possible that **NK2** was present in Klecke/Klecka at the relevant time. However, the Indictment alleges solely active participation of **NK2** in the crimes, and the Trial Panel may not exceed that scope. The Indictment, despite evidence that may support an allegation of superior responsibility, does not make such an accusation against **NK2**. As to **NK2**'s responsibility, the Trial Panel assesses that, while **NK2** had links to the Klecke/Klecka prison and was seen there, that does not link **NK2** to the specific alleged crimes, such as cruel treatment of Anonymous Witness H, his brother or **SA**.

The Indictment further alleges that **NK2**, acting in co-perpetration, killed **AA**; tortured; and participated in the killing of four Serbian military prisoners detained in the Klecke/Klecka prison; violated the bodily integrity and health of a Serbian military prisoner detained in the Klecke/Klecka prison; and thereafter participated in the killing of the Serbian military prisoner; and participated in the killing of **VM** and **ND**.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment.

The prosecution relies solely upon the evidence of **AZ** in support of these allegations. The Trial Panel finds that **DT**, **ZF**, **ZT**, **DV**, **BC**, **VM** and **ND** were unlawfully killed. The only evidence regarding the identity of the *perpetrators* of those crimes is the evidence of **AZ**.

The only evidence concerning the alleged unlawful killing of **AA** is that of **AZ**. No body has been recovered. **AA** is officially missing.

⁴⁶² Exhibit P 17, **NB**, SPRK record of the witness hearing in an investigation, 12.09.2011, Prosecution exhibit binder P 1 - P 31.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **NK2** committed the offences with which he has been charged.

BL was charged in two counts in the indictment.

Count 1 charged **BL** with War Crime against the Civilian Population and War Crime against Prisoners of War⁴⁶³ alleging that he, in his capacity as KLA member, in co-perpetration with **FL**, **NK1**, **NK2**, **NS**, **AK**, **BS**, **SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **BL** with War Crime against Prisoners of War⁴⁶⁴ alleging that he, in his capacity as member of the KLA, in co-perpetration with **FL**, **NK2**, **NS**, **NK1**, **AK** and cooperative witness X, participated in the killing of **ND** and **VM**, two Serbian Police officers, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by marching the two prisoners to the execution spot and by keeping the victims at the disposal of the direct

⁴⁶³ under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁶⁴ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

perpetrator of the execution, although he knew (because explicitly informed of **FL**'s orders), or at least could easily foresee from the orders received (marching the two Serbian prisoners to a remote location in the woods) what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 4th or 5th April 1999.

With regard to violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, the Indictment alleges that Accused **BL** was stationed in Klecke/Klecka and, like, **AK**, helped Cooperative Witness **AZ** to discharge his duties in guarding the prisoners kept in Klecke/Klecka detention centre run by KLA.⁴⁶⁵

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment.

With regard to killing of **ND** and **VM**, the Indictment alleges that **BL**, together with **AK** placed the victims at the disposal of the executioner, by marching them to the execution spot.⁴⁶⁶

The prosecution relies solely upon the evidence of **AZ** in support of these allegations. The Trial Panel finds that **VM** and **ND** were unlawfully killed. The only evidence regarding the identity of the *perpetrators* of those crimes is the evidence of **AZ**.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

⁴⁶⁵ Indictment, p.25.

⁴⁶⁶ Indictment, p.28.

The Trial Panel finds that it has not been proven that **BL** committed the offences with which he has been charged.

FL was charged in three counts in the indictment.

Count 1 charged **FL** with War Crime against the Civilian Population and War Crime against Prisoners of War⁴⁶⁷ alleging that he, in his capacity as KLA member and commander, and as a person exercising overall control over the Klecke/Klecka detention centre, in co-perpetration with **NK1, NK2, NS, AK, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **FL** with War Crime against Prisoners of War⁴⁶⁸ alleging that he, in his capacity as a member of the KLA and commander, tortured a Serbian military prisoner, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave containing five bodies near Klecke/Klecka, by punching and kicking him during an interrogation; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 3 charged **FL** with War Crime against Prisoners of War⁴⁶⁹ alleging that he, in his capacity as KLA member and commander, in co-perpetration with **NK2, NS, NK1, AK, BL** and cooperative witness X, participated in the killing of **ND** and **VM**, two Serbian police officers, detained in the

⁴⁶⁷ under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁶⁸ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁴⁶⁹ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun shots fired with a pistol; more precisely, the defendant participated in the crime by ordering cooperative witness X to execute the prisoners; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 4th or 5th April 1999.

The Indictment alleges that **FL**, in his capacity as a KLA member and commander, and as a person exercising overall control over the Klecke/Klecka detention centre, in co-perpetration with other specified Accused, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre.

The Trial Panel has found that conditions of detention *per se* did not amount to cruel treatment, but that Anonymous Witness H, his brother and **SA** were subjected to cruel treatment.

The indictment avers that **FL**, in his capacity as a KLA member and commander, tortured a Serbian military prisoner, detained in the Klecke/Klecka detention centre; and participated in the killing of **VM** and **ND**, two Serbian police officers detained in the Klecke/Klecka detention centre.

FL's role in the Klecke/Klecka prison

The Indictment alleges that **FL** exercised overall command and control over the detention centre. **FL** was head of the KLA military police in the area, and ordered where prisoners would

be detained. The Indictment states that **FL** exercised the power to order release and execution of certain prisoners.⁴⁷⁰

The Trial Panel finds that during the relevant period of time **FL** served as head of the KLA military police, within the KLA general headquarters in Divjake/Divljaka. Prior to his appointment to this office, he was a commander of the 121st Brigade. **FL**'s deputy was **HS** ('**T**'), who after **FL**'s appointment to the KLA general headquarters became commander of the 121st Brigade.

BZ gave evidence that in November or December 1998 there was a restructuring of the KLA Headquarters. He said that prior to that **FL** was the commander of the 121st Brigade. His deputy at that time was **HS**. During the restructuring, **FL** was appointed Director of the Military Police Directorate, a role he performed from January until April 1999.

BZ said the duties of the director of the military police were to "train the police, to issue regulations and to inspect work."

It was his evidence the Director of the Military Police Directorate did not have an executive function.

NM gave evidence that in the end of 1998 he was appointed to the KLA headquarters in Divjake/Divljaka. **NM** said that initially **FL** was commander of the 121st Brigade. When restructuring of the general headquarters took place, **FL** was appointed as head of the KLA military police, and **FL**'s deputy **HS** replaced him as a commander of the 121st Brigade.⁴⁷¹

Other witnesses, including **AQ**,⁴⁷² **AO**,⁴⁷³ **NB**,⁴⁷⁴ Witness G,⁴⁷⁵ **IZ**,⁴⁷⁶ **RI** (former member of the 121st Brigade),⁴⁷⁷ **FK** (former member of the KLA military police),⁴⁷⁸ indicated that during or

⁴⁷⁰ Indictment, p.26.

⁴⁷¹ **NM**, *supra*

⁴⁷² **AQ**, *supra*

⁴⁷³ **AO**, *supra*

around the relevant period of time **HS** was commander of the 121st Brigade. It was **BZ**'s evidence that 'Bahskim Fino' as a member of the 121st Brigade was initially under the command of **FL** and then **HS**.⁴⁷⁹

Evidence upon which the prosecution relies confirms the KLA military police operated in the KLA base in Klecke/Klecka. According to **UK**, the KLA military police stayed on the upper floor of the KLA base in Klecke/Klecka.⁴⁸⁰ **SD** said the KLA military police exercised physical control over the Klecke/Klecka prison.⁴⁸¹ Witness D was detained in March 1999 in the Klecke/Klecka prison for 10 days. In Klecke/Klecka Witness D saw many KLA soldiers. Witness D saw a KLA female soldier beating '**S**'. The said female soldier was wearing a camouflage uniform but had a badge on her arm, on which it was written 'military police' in the Albanian Language. According to Witness D, she was a sort of military police officer.⁴⁸² It was the recollection of Anonymous Witness B that, when he was detained in the Klecke/Klecka prison, a military police officer called '**F**' guarded the detained individuals.⁴⁸³

FK, who was assigned to the military police in the beginning of 1999, gave evidence that he never guarded any prisoners, but it was possible that any of the members of the military police guarded the prisoners in the KLA base in Klecke/Klecka.⁴⁸⁴

The evidence also indicates that KLA military police may have been in charge of conducting investigations. **SD** recalled the case of **SA**. It was said for **SA** that he was a prison director in Vushtrri/Vucitrn or Mitrovice/Mitrovica and had tortured many political prisoners. According to

⁴⁷⁴ Exhibit P 17, NB, *supra*

⁴⁷⁵ Witness G, *supra*

⁴⁷⁶ **IZ**, *supra*

⁴⁷⁷ **RI**, 24.05.2011, EULEX Police interrogation statement of the witness, p.3, SPRK binder D.

⁴⁷⁸ **FK**, *supra*

⁴⁷⁹ **BZ**, *supra*

⁴⁸⁰ Anonymous Witness I, *supra*

⁴⁸¹ **SD**, *supra*

⁴⁸² Witness D, 24.12.2010, EULEX Police interrogation statement of the witness, pp.5, 6, SPRK binder C.

⁴⁸³ Anonymous Witness B, *supra*

⁴⁸⁴ **FK**, *supra*

SD, the case of **SA** never reached him, and only investigators, meaning, KLA military police, worked on the case.⁴⁸⁵

Further, the Trial Panel finds that **NK2**, as a member of the KLA military police, was in the KLA base in Klecke/Klecka.

The Trial Panel finds that members of the KLA military police transported detainees to and from Klecke/Klecka. **SD** gave evidence that KLA military police had taken to the Klecke/Klecka prison **K** brothers, who were accused of collaborating with Serbs. **SD** recalled that it was likely that he asked the KLA military police to bring **BK** for additional questioning on the allegations of deserting.⁴⁸⁶ **AH**, who belonged to the KLA military police, recalled that on one occasion he escorted an arrested soldier to **SD**.⁴⁸⁷ Witness V, a former KLA member, who also served in the 121st Brigade, gave evidence that it was KLA military police that was in charge of transfer of the prisoners from the temporary prison in Shale/Sedlare to the prison in Klecke/Klecka.⁴⁸⁸ A similar method of operation can be seen also for other locations. In particular, on the evidence of **BZ** the disciplinary centre in Lladroc/Ladrovac was under the responsibility of the KLA military court, but KLA military police guarded the prison and the prisoners.⁴⁸⁹

UK gave evidence that he saw **FL** several times in Klecke/Klecka in 1999, and **FL** was based in the building where the kitchen was.⁴⁹⁰ At the same time evidence points towards various members of the KLA who on different occasions were identified as being in charge of the prison in Klecke/Klecka or giving orders to detain, release or execute certain individuals. On many occasions witnesses gave evidence that they were either asked to report to Klecke/Klecka or

⁴⁸⁵ **SD**, *supra*

⁴⁸⁶ **SD**, *supra*

⁴⁸⁷ **AH**, *supra*

⁴⁸⁸ Witness V, *supra*

⁴⁸⁹ **BZ**, *supra*

⁴⁹⁰ Anonymous Witness I, *supra*

were taken into custody into Klecke/Klecka, however, witnesses did not give evidence that would enable the Trial Panel to determine that it was under superior responsibility of **FL**.

SD was head of the legal department in the KLA general headquarters in Divjake/Divljaka and also held military trials as a judge. **SD** gave evidence that **BK**, a former commander of the KLA brigade, was arrested and brought to him. **BK** told **SD** that his entire brigade deserted, and he left to Albania. In view of seriousness of the case, **SD** sentenced **BK** to death by firing squad. However, the NATO intervention begun and **A** took responsibility not to execute his sentence and decided that **BK** deserved another chance. **BK** was released.⁴⁹¹ No reference is made to any role played by **FL** in this process.

Witness E gave evidence that **SD** told him the story of **BK** and that **BK** was imprisoned. **SD** was very worried about **BK**'s situation, and also asked Witness E what they should do about **BK**.⁴⁹²

BZ gave evidence a decision was made to arrest **BK** and bring him before the military court.⁴⁹³ **BZ** was not sure where **BK** was detained. Following the NATO intervention, the Serbian offensive started. As Serbian forces were breaking the front line, **SD** asked **BZ** with regard to the soldiers who were at the time in detention, including **BK**. **BZ** advised that they should be released and their cases reviewed after the war. **SD** shared that opinion.⁴⁹⁴

SD gave evidence that he was informed about two Serbian soldiers in the Klecke/Klecka prison. He said he went to the Klecke/Klecka detention centre to visit them. It was finding of the Trial Panel that the two prisoners were Anonymous Witness H and his brother. In releasing Anonymous Witness H and his brother, **SD** stated that he had consulted **BZ**, and ordered that both prisoners be handed over to the OSCE.⁴⁹⁵ The Trial Panel notes that according to

⁴⁹¹ **SD**, *supra*

⁴⁹² Witness E, *supra*

⁴⁹³ **BZ**, *supra*

⁴⁹⁴ **BZ**, *supra*

⁴⁹⁵ **SD**, *supra*

Anonymous Witness H, the person who visited Anonymous Witness H and his brother after their having been beaten, told Anonymous Witness H that he did not know that they had been taken by KLA. Anonymous Witness H thought that in this way the person implied that he could have done something if he knew that Anonymous Witness H and his brother had been taken by KLA.⁴⁹⁶

AQ, a former KLA member, gave evidence that it appeared that **HS** was in charge of the house in Klecke/Klecka.⁴⁹⁷ Even though **SD** in his statement referred to the director of the Klecke/Klecka prison, he did not give evidence on identity of the director. He said Commander **M** was responsible for the day-to-day supervision of the prison.

With regard to **HS**, **SD** said that he did not know anyone by name **HS**, but recalled a '**T**', who was commander at the time. **SD** saw '**T**' in Klecke/Klecka.⁴⁹⁸

Aferdita Qerkini said she stayed at the KLA house in Klecka for only two – three hours. Thereafter, she went “to the mountains” where she remained until June 1999. That contradicted the evidence of **AZ** who said she was involved in the interrogation of prisoners.

Witness V gave evidence that he was detained in the Klecke/Klecka prison for 56 days and stayed together with **BK**. According to Witness V, the commander and head of the prison was '**M**', with name **A**,⁴⁹⁹ and **HS** and '**M**' checked who came in and out of the prison.

UK, who was stationed in Klecke/Klecka around May 1999, June 1999 stated that **AZ** ('**M**') was a guard of the Klecke/Klecka prison. **AZ** was dressed in a black uniform with military police patches on the left arm. Another guard of the prison was **AK**.⁵⁰⁰

⁴⁹⁶ Anonymous Witness H, *supra*

⁴⁹⁷ **AQ**, *supra*

⁴⁹⁸ **SD**, *supra*

⁴⁹⁹ Witness V, *supra*

⁵⁰⁰ Anonymous Witness I, *supra*

Anonymous Witness C said that he was released from the Klecke/Klecka prison by 'M'. Anonymous Witness C thought that 'M' was a director of the prison. Also, on the account of Anonymous Witness C, the prisoners were taken from the basement upstairs for interrogation by a person that C heard someone calling 'commander H'.⁵⁰¹

Anonymous Witness B declared that supervisor of the prison was A.⁵⁰²

Witness V was interrogated twice by FL, HS, SD and 'M'. SD acted as a judge, FL and HS were accusers. Witness V was represented by a lawyer from Peje/Pec. The proceedings were conducted in Novoselle/Novo Selo, in a private building⁵⁰³. At the conclusion of the proceedings, Witness V went home.⁵⁰⁴

Witness V gave evidence that BK was interrogated by SD, FL, but most of the time by HS ('T'). One day BK received a letter, which Witness V thought was a letter on death sentence. According to Witness V, the only person with the authority to write the letter was SD. Witness V recalled the beating of a young man, around 17 years of age, who had stolen some things. Witness V could hear the young man being beaten. The young man indicated that he was beaten by BH, whom it was alleged also guarded the prisoners.⁵⁰⁵

Witness G, a former member of the 121st Brigade, gave evidence that he was called for interview to Klecke/Klecka because of an argument or fight he had been involved in. In Klecke/Klecka commander HS ('T') had the antagonists shake hands, and told that they were not supposed to fight with each other.⁵⁰⁶

⁵⁰¹ Anonymous Witness C, *supra*

⁵⁰² Anonymous Witness B, *supra*

⁵⁰³ Not at the prison in Klecka

⁵⁰⁴ Witness V, *supra*

⁵⁰⁵ Witness V, *supra*

⁵⁰⁶ Witness G, *supra*

The evidence upon which the prosecution relied, including a report stating prisoners had been “released by **C**”, a nickname used by **FL**, during the period February – May 1999⁵⁰⁷ suggests that **FL** was in a position to authorise the release of prisoners. It does not prove he was physically present in the prison or that he was in overall command and control of the prison.

SD gave evidence that he heard that brothers by the name **K** had been released from the Klecke/Klecka prison by **FL** and that only **FL** had such powers as he was head of the military police.⁵⁰⁸

Witness T gave evidence that he was told by one of the detained brothers, **NK2**, that he had been released by **FL**.⁵⁰⁹ That evidence is hearsay. A similar assertion was made by Anonymous Witness M, whose opinion was that **FL** was in charge of different functions in the Klecke/Klecka detention facility. At the same time, Anonymous Witness M declared that he did not know who was in charge of the prison and if that could be called a prison, as it was merely a house.⁵¹⁰

SD, Witness T and Anonymous Witness M did not, in fact, witness **FL** giving any instructions or orders or exercising disciplinary powers in Klecke/Klecka.

UK gave evidence that in April 1999 four KLA soldiers brought to Klecke/Klecka four Serbian officers. He said the military police took charge of them. It was his evidence **FL** was present that day in Klecke/Klecka. **UK** saw **FL** in the kitchen, however, he did not know if **FL** dealt with these prisoners at all.⁵¹¹

⁵⁰⁷ Exhibit 0096 – 09 – EWC2/024

⁵⁰⁸ **SD**, *supra*

⁵⁰⁹ Witness T, *supra*

⁵¹⁰ Anonymous Witness M, *supra*

⁵¹¹ Exhibit P6, Anonymous Witness I, *supra*

Further, the Trial Panel finds that the evidence does not prove that **FL** knew or had reason to know that specific individuals, such as Anonymous Witness H, his brother or **SA**, would be subjected to cruel treatment or that they had had been subjected to cruel treatment; and that **FL** failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators thereof.

SD gave evidence that during his visits to the prison none of the prisoners complained or showed signs of their having been mistreated.

BZ gave evidence that **FL** was appointed Director of the Military Police Directorate, a role he performed from January until April 1999. Evidence suggests that, thereafter, **FL** went to Albania to prepare for Operation Arrow. Whether or not that evidence is correct, it is simply averred in the indictment that **FL** exercised command and control over the prison in Klecka and was “head of the KLA military police in the area”. **SD** gave evidence that the prison in Klecka was under the control of the Legal Services Department of the KLA.

Very often it remained unclear upon whose directions individuals were arrested and detained in the Klecke/Klecka prison. **SD** did not know who had arrested **BK** and where **BK** had been detained until he was brought before the court.⁵¹² The same was declared by Witness E.⁵¹³

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

⁵¹² Sokol Dobruna, *supra*

⁵¹³ Witness E, *supra*

and contacted one of the soldiers there, who tried to slap him, but other soldiers intervened. Thereafter, **BK** was told by another KLA soldier that he should report to the base every three hours.⁵¹⁴

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

AO, a former KLA member, declared that around 45 days after the NATO intervention started he was asked by KLA soldiers to go to Klecke/Klecka and to report to 'T' on accusations of injuring a civilian. While in the KLA base in Klecke/Klecka, **AO** did not see 'Topi'. **AO** was questioned by three or four KLA soldiers. **AO** insisted to be provided with a decision in writing as to the accusations against him. **AO**, however, was not provided any such formal decision, and he was released the next day.⁵¹⁵

Witness F gave evidence that in March 1999 he was arrested by KLA members, in black uniforms, and driven to the KLA base in Klecke/Klecka. The people who arrested Witness F did not introduce themselves. In Klecke/Klecka Witness F was questioned by four or five persons and it was concluded that F had been detained by mistake. Witness F did not know any of the persons who had arrested him, nor the guards, nor the persons who questioned him.⁵¹⁶

Anonymous Witness B gave evidence that he did not know who were the KLA military police officers who had asked him to report to Klecke/Klecka.⁵¹⁷

FL's responsibility:

⁵¹⁴ **BK**, *supra*

⁵¹⁵ **AO**, *supra*

⁵¹⁶ Witness F, *supra*

⁵¹⁷ Anonymous Witness B, *supra*

The evidence upon which the prosecution relies does not prove that **FL** held superior responsibility over the Klecke/Klecka detention centre so as to make him liable for the cruel treatment of specific individuals, such as Anonymous Witness H, his brother, or **SA**. The evidence also does not attest to **FL**'s active participation in cruel treatment of specific individuals, including Anonymous Witness H, his brother, or **SA**.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment.

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

The prosecution relies solely upon the evidence of **AZ** in support of these allegations. The Trial Panel finds that **VM** and **ND** were unlawfully killed. The only evidence regarding the identity of the *perpetrators* of those crimes is the evidence of **AZ**.

The only evidence concerning the alleged torture of a Serbian military prisoner is that of **AZ**.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **FL** committed the offences with which he has been charged.

RM was charged in two counts in the indictment.

Count 1 charged **RM** with War Crime against the Civilian Population⁵¹⁸ alleging that he, in his capacity as member of the KLA, in co-perpetration with **NK1**, **NK2** and **NS**, killed **AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre; more precisely, the defendant participated in the crime by keeping the victim at the disposal of the perpetrators and by pushing him into a hole in the ground where he was subsequently executed by **NK1** and **NK2** with AK-47 firearms; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 3rd or 4th April 1999.

Count 2 charged **RM** with War Crime against Prisoners of War⁵¹⁹ alleging that he, in his capacity of member of the KLA, in co-perpetration with **NK1**, **NS**, **NK2**, **AK** and cooperative witness X participated in the killing of a Serbian military prisoner; more precisely, the defendant participated in the crime by marching the prisoner to the execution spot and by keeping him at the disposal of the direct perpetrator, **NS**, although he knew, because explicitly informed about **NS**'s intention to kill the prisoner from the previous conversation between the latter and **FL**, that the prisoner would be executed; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

The Indictment averred that **RM** was part of the group which escorted **AA** back to Klecke/Klecka, after his release, and kept **AA** at the disposal of the perpetrators, preventing his escape, and participated in pushing **AA** into the hole, where he was shot.⁵²⁰ Further, the Indictment alleges that **RM** was part of the group which, together with **NS**, marched a Serbian

⁵¹⁸ under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵¹⁹ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵²⁰ Indictment, p.29.

military prisoner to the execution spot and placed the victim at the disposal of the perpetrator and prevented his escape.⁵²¹

With regard to killing of a Serbian military prisoner, the Indictment referred to the evidence of the pathologist **Dr. MK** and avers his statement 'leaves little doubt that someone pulled the victim's head backwards, thus confirming the presence of additional perpetrators at the crime scene'.⁵²² This in no way links any of the particular Accused to the alleged crime, and is merely an assertion that more than one perpetrator may have killed the victim.

The prosecution relies solely upon the evidence of **AZ** in support of these allegations. The Trial Panel finds that **DT** and **DV** were unlawfully killed.

The only evidence concerning the alleged unlawful killing of **AA** is that of **AZ**. No body has been recovered. **AA** is officially missing.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **RM** committed the offences with which he has been charged.

NS was charged in six counts in the indictment.

⁵²¹ Indictment, p.31.

⁵²² Indictment, p.31.

Count 1 charged **NS** with War Crime against the Civilian Population and War Crime against Prisoners of War⁵²³ alleging that he, in his capacity as KLA member holding a position of responsibility within the Klecke/Klecka detention centre, in co-perpetration with **FL, NK1, NK2, AK, BL, BS, SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **NS** with War Crime against Prisoners of War⁵²⁴ alleging that he, in his capacity as member of the KLA and in co-perpetration with cooperative witness X, **NK2, SS1, BS**, tortured four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC, ZF** and **ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 3 charged **NS** with War Crime against Prisoners of War⁵²⁵ alleging that he, in his capacity as member of the KLA and in co-perpetration with **NK1, NK2** and two unidentified KLA soldiers, participated in the killing of four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka, three of whom identified through DNA as **BC, ZF** and **ZT**, who were executed with several rounds of AK-47 firearm by a group composed by **NK1, NK2, NS**, and two unidentified KLA soldiers; in

⁵²³ under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵²⁴ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵²⁵ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

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

Count 4 charged **NS** with War Crime against Prisoners of War⁵²⁶ alleging that he, in his capacity of member of the KLA, in co-perpetration with **NK1**, **NK2**, **RM**, **AK** and cooperative witness X killed a Serbian military prisoner, detained in the Klecke/Klecka detention center, whose remains were found in a mass grave near Klecke/Klecka containing five bodies, by inflicting several blows to his body (and in particular to his neck) with a scythe; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

Count 5 charged **NS** with War Crime against the Civilian Population⁵²⁷ alleging that he, in his capacity as member of the KLA, in co-perpetration with **NK1**, **NK2** and **RM**, participated in the killing of **AA**, a Kosovo Albanian civilian who had been previously detained in and released from the Klecke/Klecka detention centre; more precisely, the defendant participated in the crime by keeping the victim at the disposal of the perpetrators and by pushing him into a hole in the ground where he was subsequently executed by **NK1** and **NK2** with AK-47 firearms; in Klecke/Klecka, Lipjan/Lipljan Municipality, on or about 3/4 April 1999.

Count 6 charged **NS** with War Crime against Prisoners of War⁵²⁸ alleging that he, in his capacity as member of the KLA, in co-perpetration with **FL**, **NK1**, **NK2**, **AK**, **BL** and cooperative witness X, participated in the killing of **ND** and **VM**, two Serbian police officers, detained in the Klecke/Klecka detention centre, who were executed by cooperative witness X with several gun

⁵²⁶ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵²⁷ under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵²⁸ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

shots fired with a pistol; more precisely, the defendant participated in the crime by keeping the victims at the disposal of the direct perpetrator of the execution, although he knew, because explicitly informed about **FL**'s intention to kill the prisoners, what would happen to them; in a location known as Livadhi i Canit near Klecke/Klecka, Lipjan/Lipljan, on or about 4/5 April 1999.

The Indictment alleges that **NS**, in his capacity as a member of the KLA, holding a position of responsibility within the Klecke/Klecka detention centre, in co-perpetration with the specified Accused violated the bodily integrity and health of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre.

It was finding of the Trial Panel that conditions of detention *per se* did not amount to cruel treatment, and that from the individuals named in the Indictment Anonymous Witness H, his brother and **SA** were subjected to cruel treatment in the prison in Klece/Klecka.

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

NS's role in the Klecke/Klecka prison:

The Indictment alleges that **NS** was among those responsible for the management of the prison, including the admission and registration of prisoners. Certain prisoners were handed over to **NS**'s responsibility upon their arrival to the prison.⁵²⁹

⁵²⁹ Indictment, p.25.

Several witnesses recalled **NS** ('F'). **QK** knew **NS** as member of the KLA.⁵³⁰ **SD** knew the nickname 'F', but did not know his real name. **SD** said that he had seen 'F' in Klecke/Klecka very often.⁵³¹ **BZ** recalled that 'F', was an officer within command of the 121st Brigade.⁵³² **UK** saw 'F', with first name **N**, on a couple of occasions in Divjake/Divljaka. According to **UK**, 'F' stayed in the barracks but was also allowed to enter the general headquarters.⁵³³

In another statement, **UK** recalled that in April 1999, when four Serbian officers were brought to Klecke/Klecka, it was also military police officer **NS** ('F') who took charge of the Serbian officers.⁵³⁴

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

NS's responsibility:

The evidence upon which the Prosecution relies does not prove that **NS** held a position of superior responsibility over the Klecke/Klecka detention centre. By reason thereof, the Trial Panel finds that he cannot be held responsible for the cruel treatment of specific individuals, such as Anonymous Witness H, his brother, or **SA**. The evidence also does not establish **NS**'s active participation in cruel treatment of specific individuals, including Anonymous Witness H, his brother, or **SA**.

The evidence upon which the prosecution relies does not prove that **NS** participated in the torture of four Serbian military prisoners; participated in the killing of four Serbian military prisoners, detained in the Klecke/Klecka detention centre; killed a Serbian military prisoner,

⁵³⁰ **QK**, *supra*

⁵³¹ **SD**, *supra*

⁵³² **BZ**, *supra*

⁵³³ Anonymous Witness I, *supra*

⁵³⁴ Exhibit P6, Anonymous Witness I, *supra*

detained in the Klecke/Klecka detention centre; participated in the killing of **AA**; and/or that he participated in the killing of **VM** and **ND**. The prosecution case rests upon the evidence of **AZ**.⁵³⁵ There is no further evidence to attest to conduct of **NS** in commission of those crimes.

The prosecution relies solely upon the evidence of **AZ** in support of these allegations. The Trial Panel finds that **DT, DV, BC, ZF, ZT, VM** and **ND** were unlawfully killed.

The only evidence concerning the alleged unlawful killing of **AA** is that of **AZ**. No body has been recovered. **AA** is officially missing.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **NS** committed the offences with which he has been charged.

SS1 was charged in two counts in the indictment.

Count 1 charged **SS1** with War Crime against the Civilian Population and War Crime against Prisoners of War⁵³⁶ alleging that he, in his capacity as KLA member, in co-perpetration with **FL, NK1, NK2, NS, AK, BL, BS**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers,

⁵³⁵ Indictment, pp.28, 29, 30, 31, 32, 33.

⁵³⁶ under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **SS1** with War Crime against Prisoners of War⁵³⁷ alleging that he, in his capacity as member of the KLA and in co-perpetration with cooperative witness X, **NK2**, **NS**, **BS**, tortured four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as **BC**, **ZF** and **ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

With regard to violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, the Indictment alleges that **SS1** was in Klecke/Klecka on a regular basis and would replace **NK1** in exercising his duties when he was absent. In particular, prisoners were brought to **SS1** for admission to the Klecke/Klecka prison.⁵³⁸ Further, the Indictment alleges that **SS1** took part in the beating of the four Serbian military prisoners who were brought to Klecke/Klecka in mid or late April 1999. In this way **SS1** contributed to the torture of the four Serbian military prisoners.⁵³⁹

The prosecution relied on the statement of **UK** who said that he saw **SS1** in Klecke/Klecka in 1999.⁵⁴⁰ The Trial Panel observes that **UK** gave evidence that he saw **SS1** also in other places in

⁵³⁷ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵³⁸ Indictment, p.25.

⁵³⁹ Indictment, pp.31, 32.

⁵⁴⁰ Indictment, p.25.

the course of the war.⁵⁴¹ In any event, it says no more than there is a possibility that **SS1** was in Klecke/Klecka in 1999.

It is a finding of the Trial Panel that conditions of detention in the Klecke/Klecka prison *per se* did not amount to cruel treatment.

The Trial Panel finds that **DT, DV, BC, ZF** and **ZT** were unlawfully killed.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **SS1** committed the offences with which he has been charged.

SS2 was charged in one count in the indictment.

SS2 was charged with one count of War Crime against the Civilian Population and War Crime against Prisoners of War⁵⁴² whereby it was alleged that, in his capacity as KLA member, in co-perpetration with **FL, NK1, NK2, NS, AK, BL, BS, SS1**, cooperative witness X, and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipjan/Lipljan Municipality, from early 1999 until mid-June 1999.

⁵⁴¹ Anonymous Witness I, *supra*

⁵⁴² under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

With regard to the allegation of violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, the Indictment alleges that when **AZ** was absent from the prison in Klecke/Klecka he was replaced by **SS2**.⁵⁴³

The allegations as to individual responsibility of **SS2** are based upon evidence of **AZ**. Leaving aside **AZ**'s evidence, the EULEX Special Prosecutor has referred also to the statement of Anonymous Witness M, who 'was kept in the Klecke/Klecka detention centre' and 'observed **SS2** and **NK2** discharging functions as responsible persons in the prison'.⁵⁴⁴ Anonymous Witness M gave evidence that he was arrested by KLA members in March or April 1999.⁵⁴⁵

With regard to treatment in the detention centre in Klecke/Klecka it was the finding of the Trial Panel that Anonymous Witness H, his brother and **SA** were subjected to cruel treatment.

It was evidence of Anonymous Witness H that he and his brother had been taken to Klecke/Klecka on 27 February 1999, which is not the time when Anonymous Witness M stated to be detained in Klecke/Klecka, when he saw **SS2** there.

Evidence indicated that **SA** was detained in the Klecke/Klecka prison in March 1999, likely, until 3 April 1999. Anonymous Witness M gave evidence that he was detained in Klecke/Klecka in March or April 1999, when he saw **SS2** 'discharging functions as responsible person in the prison'. The Trial Panel observes that statement of Anonymous Witness M lacks clarity as to whether it was in March or April 1999, and if in April 1999, if prior to 3 April 1999, when M saw **SS2** 'discharging functions as responsible person in the prison'.

The Trial Panel has found that **AZ** is not a credible witness and that in consequence it would be unsafe to rely upon his evidence. Even had the Trial Panel concluded that **AZ** was a credible

⁵⁴³ Indictment, p.25.

⁵⁴⁴ Indictment, p.25.

⁵⁴⁵ Anonymous Witness M, *supra*

witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

In any event, pursuant to Article 157 (3) KCCP the Trial Panel shall not find the accused guilty based solely, or to a decisive extent, on the evidence of Anonymous Witness M.

The Trial Panel finds that it has not been proven that **SS2** committed the offences with which he has been charged.

BS was charged in two counts in the indictment.

Count 1 charged **BS** with War Crime against the Civilian Population and War Crime against Prisoners of War⁵⁴⁶ alleging that he, in his capacity as KLA member, in co-perpetration with **FL**, **NK1**, **NK2**, **NS**, **AK**, **BL**, **SS1**, cooperative witness X, **SS2** and other so far unidentified KLA soldiers, violated the bodily integrity and the health of an undefined number of Serbian and Albanian civilians and Serbian military prisoners, detained in the Klecke/Klecka detention centre, by keeping them in inhumane conditions (including prisoners chained, premises inappropriate, excessive cold, lack of sanitation, inadequate nutrition, frequent beatings); in Klecke/Klecka, Lipan Municipality, from early 1999 until mid-June 1999.

Count 2 charged **BS** with War Crime against Prisoners of War⁵⁴⁷ alleging that he, in his capacity as member of the KLA and in co-perpetration with **NK2**, **NS** and **SS1** tortured four Serbian military prisoners, detained in the Klecke/Klecka detention centre, whose remains were found in a mass grave near Klecke/Klecka and at least three of which were identified through DNA as

⁵⁴⁶ under Articles 22, 142, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

⁵⁴⁷ under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII

BC, ZF and **ZT**, by repeatedly beating them; in Klecke/Klecka, Lipjan/Lipljan Municipality, on an undetermined date in April 1999, not before 11 April 1999.

With regard to violation of the bodily integrity and the health of Serbian and Albanian civilians and Serbian military prisoners, the Indictment alleges that Accused **BS** was on a regular basis in Klecke/Klecka detention centre and would replace **NK1** in his absence. This is based upon the evidence of **AZ**. The Indictment states that **NK1** was responsible for the management of the prison, along with **NS**.⁵⁴⁸ Further, the Indictment alleges that **BS** participated in the beating of the four Serbian military prisoners which amounted to torture.⁵⁴⁹

Even had the Trial Panel concluded that **AZ** was a credible witness, Article 157 (4) of the KCCP provides that the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

The Trial Panel finds that it has not been proven that **BS** committed the offences with which he has been charged.

The Trial Panel reviewed all of the evidence set out in the Annexes beneath. In particular the Trial Panel considered the witness statements set out from 1 to 33 of Annex 1. During the main trial session on 18 April 2013 the prosecutor and defence counsel agreed the testimony of these witnesses could be read into the record without the need for them to give *viva voce* evidence. Where the evidence set out in the Annexes was of assistance to the Trial Panel in determining the issues before it this is referred to in the above reasoning.

For the reasons stated herein, the Trial Panel finds as in the enacting clause of this Judgment.

⁵⁴⁸ Indictment, p.25.

⁵⁴⁹ Indictment, p.32.

Judge Malcolm Simmons

Presiding Judge

Judge Mariola Pasnik

Panel Member

Judge Shpresa Hasaj-Hyseni

Panel Member

Nexhmije Mezini

Recording Officer

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

ANNEX I

Witnesses

Viva Voce evidence

1. **BZ**
2. Anonymous witness B
3. Anonymous witness M
4. Anonymous witness C
5. Witness A
6. **UK**
7. **GZ**
8. **CC**

Expert Witnesses

- 1) Exhibit P50, Graphic expertise of manuscripts, dated 30 December 2012 of Professor **AB**;
- 2) Exhibit P51, Graphic expertise of manuscripts, dated 2 July 2013 of Professor **AB**;
- 3) Defence Exhibit D (FL) 9 Graphic expertise of manuscripts dated 2 February 2012 of Dr. **HK** and CV of **HK**;
- 4) Defence Exhibit D (FL) 10 Graphic expertise of manuscripts dated 26 February 2012 of Dr. **HK**;
- 5) Defence Exhibit D (FL) 11 Graphic expertise of manuscripts dated 30 May 2013 of Dr. **HK**;
- 6) Exhibit C1, Report of **Dr. XD** dated 12 July 2013.
- 7) Exhibit C2, Report of **Dr. FD** dated 15 July 2013.

- 8) Exhibit C3, Report of **Dr. NSH** dated 15 July 2013.
- 9) Exhibit C4, Report of **Dr. MK** dated 13 July 2013.
- 10) Exhibit C5, Report of **Dr. RL** dated 12 August 2013
- 11) Exhibit C6, Addendum to the report of **Dr. RL** dated 27 August 2013
- 12) Exhibit C7, Email of **Dr. RL** dated 30 August 2013
- 13) Exhibit C8, Supplemental Report of **Dr. XD** dated 19 August 2013.
- 14) Exhibit C9, Supplemental Report of **Dr. FD** and **Dr. NSH** dated 21 August 2013.
- 15) Exhibit C10, further Supplemental Report of **Dr. XD** dated 29 August 2013.
- 16) Exhibit C11, further Supplemental Report of **Dr. FD** and **Dr. NSH** dated 29 August 2013.
- 17) Exhibit P52 Report of **Dr. FR** dated 29 August 2013

Save where otherwise referred to herein and admitted into evidence in these proceedings, the parties agreed that the following written statements be considered as read:

1. **AG**, 20 October 2011;
2. **AA**, 23 September 2011;
3. **AS28**, September 2011;
4. **BS** 28 September 2011;
5. **ER**, 20 October 2011;
6. **FS** 27 September 2011
7. **FZ**, 1 November 2011;
8. **FM** 24 October 2011;
9. **FH** 26 September 2011;
10. **HA**, 13 September 2011;
11. **HT**, 8 November 2011;
12. **HS**, 14 September 2011;
13. **IH**, 13 October 2011;
14. **JS**, 2 November 2011;
15. **KV**, 26 September 2011;

16. **II**, 13 September 2011 and 27 October 2011;
17. **MJ**, 27 September 2011;
18. **NB** , 13 October 2011;
19. **NK**, 20 October 2011;
20. **RB**, 26 September 2011;
21. **RS**, 27 September 2011;
22. **RS**, 20 October 2011;
23. **SA**, 29 September 2011;
24. **SS**, 2 November 2011;
25. **ST**, 13 October 2011;
26. **SB**, 26 September 2011;
27. **SB**, 2 November 2011;
28. **SS**, 27 September 2011;
29. **BT**, 24 November 2011;
30. **NR**, 12 January 2012;
31. **NM**, 17 January 2012;
32. **HG**, 30 November 2011;
33. **IZ**, 27 March 2012 and 29 January 2013;
34. **GK**, 9 May 2012;
35. **AC**, 3 August 2011 and 1 November 2011;
36. **BZ**, 29 July 2011 and 25 October 2011.

ANNEX II

EVIDENCE SUBMITTED BY THE PROSECUTION

SPRK binder A

1. Record of Examination of **AZ** on 4 February 2010, pages **A1 – A14**
2. Record of Examination of **AZ** on 9 February 2010, pages **A15 – A70**
3. Record of Examination of **AZ** on 11 February 2010, pages **A71 – A115**
4. Record of Examination of **AZ** on 16 February 2010, pages **A116 – A132**
5. Record of Examination of **AZ** on 17 February 2010, pages **A133 – A149**
6. Record of Examination of **AZ** on 10 March 2010, pages **A150 – A166**
7. Record of Examination of **AZ** on 16 March 2010, pages **A167 – A193**
8. Record of Examination of **AZ** on 25 March 2010, pages **A194 – A218**
9. Record of Examination of **AZ** on 9 June 2010, pages **A219 – A266**
10. Record of Examination of **AZ** on 20 August 2010, pages **A267 – A303**
11. Record of Examination of **AZ** on 5 October 2010, pages **A304 – A385**
12. Record of Examination of **AZ** on 7 October 2010, pages **A386 – A389**

SPRK binder A/bis

13. Record of cross-examination of Cooperative **AZ** by defence counsel on 5 July 2011, pages **A1 7–A56**;
14. Record of cross-examination of Cooperative **AZ** by defence counsel on 6 July 2011, pages **A57 – A93**;
15. Record of cross-examination of Cooperative **AZ** by defence counsel on 7 July 2011, pages **A94 –**

A220;

16. Record of cross-examination of Cooperative **AZ** by defence counsel on 9 July 2011, pages **A221 – A259**.

SPRK binder B

- 1) **Witness Y**, 20 April 2012, SPRK record of the witness hearing, pages **B2 – B16**;
- 2) **Anonymous Witness C**, 21 September 2010, SPRK record of the witness hearing in an investigation with attachment, pages **B17 – B35**;
- 3) **Anonymous Witness I**, 22 November 2010, report – interrogation statement of the witness, pages **B36 – B88**;
- 4) **Witness A**, 23 September 2010, SPRK record of the witness hearing in an investigation with attachments, pages **B89 – B165**;
- 5) **Witness F**, 2 January 2011, report – interrogation statement of the witness with attachments, pages **B166 – B278**;
- 6) **BK**, 4 October 2010 and 15 October 2010, SPRK record of the witness hearing in an investigation with attachment, pages **B279 – B289**;
- 7) **Witness E**, 28 October 2010, SPRK record of the witness hearing in an investigation, pages **B290 – B310**;
- 8) **Anonymous Witness B**, 4 December 2010, report – interrogation statement of the witness with attachments, pages **B311 – B354**;
- 9) **Witness G**, 11 January 2011, report – interrogation statement of the witness with attachments, pages **B355 – B394**;
- 10) **Anonymous Witness H**, 24 August 2010, report – interrogation statement of the witness with attachments, pages **B395 – B444**.

SPRK binder C

- 11) QK, 14 June 2011, report – interrogation statement of the witness, pages **C3 – C14**.
- 12) AQ, 7 June 2011, report – interrogation statement of the witness with attachment, pages **C15 – C34**;
- 13) Witness T, 3 May 2011, report – interrogation statement of the witness, pages **C35 – C49**;
- 14) Witness S, 21 April 2011, report – interrogation statement of the witness, pages **C50 – C54**
- 15) Witness V, 18 April 2011, interview in the capacity of a witness with attachment, pages **C55 – C97**;
- 16) HB, 8 April 2011, SPRK record of the witness hearing in an investigation, pages **C98 – C101**;
- 17) IA, 7 April 2011, report – interrogation statement of the witness, pages **C102 – C110**;
- 18) NM, 6 April 2011, report – interrogation statement of the witness with attachment, pages **C111 – C120**;
- 19) NM, 5 April 2011, SPRK record of the witness hearing in an investigation with attachments, pages **C121 – C138**;
- 20) BZ, 5 April 2011, SPRK record of the witness hearing in an investigation with attachments, pages **C139 – C150**;
- 21) DD, 4 April 2011, report – interrogation statement of the witness, pages **C151 – C158**;
- 22) ZK, 1 April 2011, SPRK record of the witness hearing in an investigation, pages **C159 – C164**;
- 23) BK, 8 January 2011, report – interrogation statement of the witness with attachments, at **C165 – C203**;
- 24) Witness N, 4 January 2011, report – interrogation statement of the witness with attachments, pages **C204 – C245**;
- 25) Witness D, 24 December 2010, report – interrogation statement of the witness; 18 January 2011, SPRK record of the witness hearing in an investigation, pages **C246 – C267**;
- 26) Witness R, 22 December 2010, report – interrogation statement of the witness with attachments, pages **C268 – C308**;
- 27) NH, 2 December 2010, report – interrogation statement of the witness, pages **C309 – C322**;
- 28) AO, 30 November 2010, report – interrogation statement of the witness with attachments, pages **C323 – C370**;

- 29) **HK**, 20 October 2010, SPRK record of the witness hearing in an investigation with attachments, pages **C371 – C388**;
- 30) **BT**, 8 October 2010, report – interrogation statement of the witness with attachments, pages **C389 – C411**;
- 31) **JU**, 24 August 2010, report – interrogation statement of the witness with attachment, pages **C412 – C420**;
- 32) **GB**, 24 August 2010, report – interrogation statement of the witness, pages **C427 – C433**;

SPRK binder D

- 33) **Anonymous Witness L**, 12 April 2011, SPRK record of the witness hearing in an investigation, pages **D1 – D7**;
- 34) **Anonymous Witness M**, 30 March 2011, report-interrogation statement of the witness; 20 May 2011, SPRK record of the witness hearing in an investigation, pages **D8 – D30**;
- 35) **AH**, 14 December 2010, report-interrogation statement of the witness; 27 May 2011, SPRK record of the witness hearing in an investigation, pages **D31 – D46**;
- 36) **SB**, 27 May 2011, SPRK record of the witness hearing in an investigation, pages **D47 – D54**;
- 37) **Witness U**, 25 June 2011, report-interrogation statement of the witness, pages **D55 – D77**;
- 38) **Witness W**, 16 June 2011, report-interrogation statement of the witness, pages **D78 – D91**;
- 39) **IZ**, 19 May 2011, report-interrogation statement of the witness, pages **D92 – D102**;
- 40) **BZ**, 23 May 2011, report-interrogation statement of the witness, pages **D103 – D115**;
- 41) **ST**, 25 May 2011, report-interrogation statement of the witness, pages **D116 – D124**;
- 42) **RI**, 24 May 2011, report-interrogation statement of the witness, pages **D125 – D134**;
- 43) **FK**, 31 May 2011, report-interrogation statement of the witness, pages **D135 – D148**;
- 44) **ZS**, 18 May 2011, report-interrogation statement of the witness; 23 July 2011, SPRK record of the witness hearing, pages **D149 – D169**;
- 45) **VS**, 17 May 2011, report-interrogation statement of the witness; 23 July 2011, SPRK record of the witness hearing, pages **D170 – D185**;
- 46) **LS**, 18 May 2011, report-interrogation statement of the witness; 23 July 2011 SPRK record of the witness hearing, pages **D186 – D201**;

- 47) **Witness O**, 24 May 2011, report-interrogation statement of the witness, pages **D202 – D214**;
- 48) **Witness Q**, 26 May 2011, report-interrogation statement of the witness, pages **D215 – D227**;
- 49) **Witness P**, 25 May 2011, report-interrogation statement of the witness, pages **D228 – D239**;
- 50) **BT**, 5 April 2011, report-interrogation statement of the witness, pages **D240 – D249**.

SPRK binder E

- 51) Document marked as **0096-09-EWC2/001**;
- 52) Document marked as **0096-09-EWC2/002**;

SPRK binder F

- 53) Document marked as **0096-09-EWC2/003**;
- 54) Document marked as **0096-09-EWC2/004**;
- 55) Document marked as **0096-09-EWC2/005**;
- 56) Document marked as **0096-09-EWC2/006**;
- 57) Document marked as **0096-09-EWC2/007**;
- 58) Document marked as **0096-09-EWC2/008**;
- 59) Document marked as **0096-09-EWC2/009**;
- 60) Document marked as **0096-09-EWC2/010**;
- 61) Document marked as **0096-09-EWC2/011**;
- 62) Document marked as **0096-09-EWC2/012**;
- 63) Document marked as **0096-09-EWC2/013**;
- 64) Document marked as **0096-09-EWC2/014**;
- 65) Document marked as **0096-09-EWC2/015**;
- 66) Document marked as **0096-09-EWC2/016**;
- 67) Document marked as **0096-09-EWC2/017**;
- 68) Document marked as **0096-09-EWC2/018**;

- 69) Discharge list, document marked as 0096-09-EWC2/019;
- 70) Certification, document marked as 0096-09-EWC2/020;
- 71) Certificate for service in KLA, document marked as 0096-09-EWC2/021;
- 72) Manual on procedure implementation towards detainees, document marked as 0096-09-EWC2/022;
- 73) Note to military prison, document marked as 0096-09-EWC2/023;
- 74) Duty report, document marked as 0096-09-EWC2/024;
- 75) Judgment, document marked as 0096-09-EWC2/025;
- 76) Judgment, document marked as 0096-09-EWC2/026;
- 77) Duty report, document marked as 0096-09-EWC2/027;
- 78) Duty report, document marked as 0096-09-EWC2/028;
- 79) Duty report, document marked as 0096-09-EWC2/029;
- 80) Decision, document marked as 0096-09-EWC2/030;
- 81) Request, document marked as 0096-09-EWC2/031;
- 82) Request, document marked as 0096-09-EWC2/032;
- 83) Decision, document marked as 0096-09-EWC2/033;
- 84) Ordinance, document marked as 0096-09-EWC2/034;
- 85) Appeal, document marked as 0096-09-EWC2/035;
- 86) Notification, document marked as 0096-09-EWC2/036,

SPRK binder G

- 87) Police Report dated 7 June 2010, pages **G1 – G4**;
- 88) Documents seized during a search of the residence of **FL** on 29 April 2010 – pages **G5 – G244**;

SPRK binder H

- 89) EULEX Police WCIU report with investigation diary, EWC number 0068-09-EWC4, pages H2-H5;
- 90) Exhumation Police report, 30 September 2009, pages H6-H20.
- 91) Summary of information, pages H21-H25.
- 92) Appendix, page H26
- 93) Assessment Police report with attachments, 24-26 August 2009, pages H30-H40.
- 94) Order for exhumation, post mortem inspection, autopsy and identification, PPP no.685/09, 8. September 2009, page H41.
- 95) Communication from WCIU to EULEX PP, 27 September 2009, pages H45-H46.
- 96) Chain of custody statements, pages H47-H48.
- 97) ICMP printed statements on missing persons, pages H49-H53.
- 98) UNMIK autopsy reports 29 October 2009, pages H54-H59.
- 99) Chain of custody statement, page H60.
- 100) Handover forms of exhumed bodies, 23 September 2009 and 25 September 2009, pages H61-H66.
- 101) Death certificate of **BC**, 12 December 2009, H67-H68.
- 102) Victim identification information, pages H69-H91.
- 103) Death certificate of **DV**, 12 December 2009, pages H92-H93.
- 104) Victim identification form no.1999-010047, pages H94-H111.
- 105) Photo sheet KER overview, pages H112-H134.
- 106) CD on exhumation grave site KER, page H135.

SPRK binder I

- 107) CD containing electronic versions of evidence,
- 108) Autopsy reports with annexes on two bodies found in grave site KEQ, pages 1-198.

SPRK binder L

- 109) CD containing electronic version of autopsy and ante mortem reports;
- 110) **MG**, 20 January 2010, record of expert witness hearing in investigation at pages **L1 – L3**;
- 111) **TF**, 20 January 2010, record of expert witness hearing in investigation at pages **L4 – L6**;
- 112) Picture case grave site KER, pages **L7-L9**;
- 113) Autopsy report and ante mortem report for body KER01/001B, pages **L10-L96**;
- 114) Autopsy report and ante mortem report for body KER01/004B, pages **L97-L237**;
- 115) Autopsy report and ante mortem report for body KER01/005B, pages **L238-L335**;
- 116) Autopsy report and ante mortem report for body KER01/006B, pages **L336-L412**;
- 117) Autopsy report and ante mortem report for body KER01/004B, pages **L413-L516**.

SPRK binder M

- 118) Preliminary police report with attachments and CD, pages **M2 – M137** (Statements of **AZ** dated 20 and 30 November 2009 are at **M5 – M7** and **M12 – M29** respectively);
- 119) Police report on restitution of items to **NK1**, pages **M138 – M144**;
- 120) Police report dated 20 June 2011 on expert examination of items seized at residence of **NK1**, pages **M145 – M180**;
- 121) Police report on expert examination of items seized at residence of **NS**, pages **M181 – M184**;
- 122) Police report on search of premises of **NS** (file no.1-3), 18.03.2011, pages **M185 – M206**;
- 123) Police report on expert examination of items seized at residence of **NK1** and **NS** dated 6 May 2011, pages **M207 – M211**;
- 124) Final forensic report on mobile phones seized from **NS** and attached CD, pages **M212 – M214**;
- 125) Police report on expert examination of items seized at residence of **NK1** dated 6 June 2011, pages **M215 – M244**;
- 126) Search order GJPP 25/10 (PPS 07/10), dated 17 March 2011;
- 127) Application for police employment of **NK2**, dated 23.04.2002, pages **M245 – M258**;
- 128) Police report on search conducted at University Clinical Centre Kosovo in Pristina, 2 February 2011, with attachments, pages **M259 – M290**;

- 129) Search records **M291 – M306**;
- 130) Photographs seized at **NS**'s residence, labeled as exhibits **NS1 – NS19** of SPRK binder M.
- 131) Search order GJPP 25/10 (PPS 07/10), dated 19 November 2010.

SPRK Binder O

- 132) CD of Defendants detention on remand;
- 133) **AK**, detention on remand hearing minutes dated 14 April 2011, pages O1 – O25
- 134) **AK**, Suspect Interview dated 12 May 2011, pages O26 – O30
- 135) **NK1**, detention on remand hearing minutes dated 16 April 2011, pages O31 – O34
- 136) **NK1**, Suspect Interview dated 12 May 2011, pages O35 – O48
- 137) **NK2**, detention on remand hearing minutes dated 16 April 2011, pages O49 – O51
- 138) **NK2**, Suspect Interview dated 11 May 2011, pages O52 – O113
- 139) **BL**, detention on remand hearing minutes dated 14 April 2011, pages O114 – O116
- 140) **BL**, Suspect Interview dated 11 May 2011, pages O117 – O124
- 141) **FL**, detention on remand hearing minutes dated 13 May 2011, pages O125 – O127
- 142) **FL**, Suspect Interview dated 17 May 2011, pages O128 – O150
- 143) **RM**, detention on remand hearing minutes dated 14 April 2011, pages O151 – O155
- 144) **RM**, Suspect Interview dated 11 May 2011, pages O156 – O163
- 145) **NS**, detention on remand hearing minutes dated 16 March 2011, pages O164 – O169
- 146) **NS**, Suspect Interview dated 11 May 2011, pages O170 – O178
- 147) **SS1**, detention on remand hearing minutes dated 16 March 2011, pages O179 – O182
- 148) **SS1**, Suspect Interview dated 11 May 2011, pages O183 – O200
- 149) **SS2**, detention on remand hearing minutes dated 16 March 2011, pages O201 – O205
- 150) **SS2**, Suspect Interview dated 12 May 2011, pages O206 – O209
- 151) **BS**, detention on remand hearing minutes dated 16 March 2011, pages O210 – O213
- 152) **BS**, Suspect Interview dated 12 May 2011, pages O214 – O225

Prosecution Exhibits Binder I

- 153) Copy of so-called 'German Diary' of Witness X;
- 154) Exhibit **P2**, EULEX WCIU officer's report 10 November 2011 regarding significant locations regarding Klecka case with attached photographs;
- 155) Exhibit **P3**, response of Department of Forensic Medicine EULEX Kosovo regarding missing person **AA**;
- 156) Exhibit **P4**, **AZ**'s death certificate;
- 157) Exhibit **P6**, **Anonymous Witness I**, 2 November 2011, record of the witness hearing in an investigation;
- 158) Exhibit **P7**, **MB**, 8 November 2011, record of the witness hearing in an investigation;
- 159) Exhibit **P8**, **BG**, record of the witness hearing in an investigation;
- 160) Exhibit **P9**, **JS**, 2 November 2011, report-interrogation statement of the witness;
- 161) Exhibit **P10**, **FZ**, 27 October 2011, report-interrogation statement of the witness;
- 162) Exhibit **P11**, **SZ**, 26 October 2011, report-interrogation statement of the witness;
- 163) Exhibit **P12**, **FZ**, 26 October 2011, report-interrogation statement of the witness;
- 164) Exhibit **P13**, **NZ**, 25 October 2011, report-interrogation statement of the witness;
- 165) Exhibit **P14**, **IZ**, 24 October 2011, SPRK record of the witness hearing in an investigation;
- 166) Exhibit **P15**, **BH**, 23 November 2011, SPRK record of the witness hearing;
- 167) Exhibit **P16**, **BT**, 24 November 2011, report-interrogation statement of the witness;
- 168) Exhibit **P17**, **NB**, 12 September 2011, report-interrogation statement of the witness;
- 169) Exhibit P18, Record of Defendant **FL** dated 29 September 2011;
- 170) Exhibit P19, Record of Defendant **NS** dated 25 October 2011;
- 171) Exhibit P20, Record of Defendant **BS** dated 25 October 2011;
- 172) Exhibits **P21a**, **P21b**, **P21c**, **P21d**, **P21f**, decision of the EULEX Special Prosecutor Maurizio Salustro to acquire part of the case file no.2003/224/PEJ, statement of **TM** to the investigative authorities of the Republic of Serbia, 27 January 2005 and 11 April 2004 and annex (2);
- 173) Exhibit **P22**, **AZ**, 23 November 2011, record of the witness hearing in an investigation;
- 174) Exhibit **P23**, **IZ**, 23 November 2011, record of the witness hearing in an investigation;
- 175) Exhibit **P24**, **CC**, 6 December 2011, record of the witness hearing in an investigation;
- 176) Exhibit **P25**, **GK**, 7 December 2011, record of the witness hearing in an investigation;

- 177) Exhibit **P26, SD**, 8 December 2011, record of the witness hearing;
- 178) Exhibit **P27, MZS**, 12 December 2011, record of witness hearing;
- 179) Exhibits **P28a, P28b-P28f**, letter from forensic archaeologist to the EULEX Special Prosecutor Maurizio Salustro, 8 December 2011, and comparison tables (5);
- 180) Exhibits **P29a** and **P29b**, Department of Forensic Medicine report DFM KEQ 01, 10 – 11 August 2010, and Department of Forensic Medicine report DFM KEQ 02, 10 – 11 August 2010;
- 181) Exhibits **P30a-P30e**, letter from WCIU Investigator to the EULEX Special Prosecutor Maurizio Salustro, 15 September 2011, regarding exhumation reports, exhumation Police report, 24 September 2009, additional exhumation Police report, 17 August 2010, photo sheet KEQ overview Klecka;
- 182) Exhibit **P31, HS**, 24 January 2012, record of the witness hearing;

Prosecution Exhibits Binder II

- 183) Exhibit **P33, BK**, 7 February 2012, record of the witness hearing;
- 184) Exhibit **P34**, PPS 07/10 photo board – attachment to **Witness V** 18 April 2011 hearing;
- 185) Exhibit **P35, GA**, 8 February 2012, SPRK record of the witness hearing;
- 186) Exhibit **P36**, Police file from the Police Headquarters Duisberg concerning the death of **AZ**, 28 September 2011;
- 187) Exhibit **P37**, single document containing official note from Chief Inspector of the Criminal Police, 29 September 2011, reply of the General Practitioner, 29 September 2011, autopsy note;

Additional Evidence Exhibited During Re-Trial

- 188) Exhibit P38, Officers Report (WCIU Case No. WCU-0096-09-EWC2) dated 2 April 2012 [relating to the handover of diary evidence seized in Germany]⁵⁵⁰ together with documents to which reference is made therein and dated 19 March 2011, 5, 6 and 8 June 2011, 3 July 2011, 25 and 28 August 2011, ;
- 189) Exhibit P39, Documents tendered by Witness Y comprising extracts of **AZs** diary during her testimony on 14 May 2013 [comprising copies of documents exhibited at P38]

⁵⁵⁰ Received by the court during the hearing on 15 May 2013

- 190) Exhibit P40, document entitled 'Statement or lawsuit' dated 29 December 2010 purportedly signed by **AZ**;
- 191) Exhibit P41, Receipt on Temporary Seizure of Items dated 26 March 2012 signed by Michael Pavich and original documents to which reference is made therein;
- 192) Exhibit P42, Note For File dated 26 March 2012 signed by Alberto Pasquero;
- 193) Exhibit P43, Court orders for the interception of telephones in the possession and use of (a) ES, (b) ST and (c) FL, dates various;
- 194) Exhibit P44, three DVD recordings of telephone interceptions of (a) ES, (b) ST and (c) FL;
- 195) Exhibit P45, transcripts of the DVD recordings at exhibit P44;
- 196) Exhibit P46, letter dated 16 July 2013 from the Witness Support Unit to the Prosecution;
- 197) Exhibit P47, Letter dated 12 July 2013 from Prosecutor to "The Head of the EULEX Witness Protection Program"
- 198) Exhibit P48, Letter dated 18 July 2013 from Head of the Witness Security Department to prosecution;
- 199) Exhibit P49, Statement of **AZ** given on 16 and 17 July 2007
- 200) Exhibit P53, Letter dated 3 September 2013 from KFOR
- 201) P54, Letter dated 4 September 2013 from EULEX Office for Criminal Intelligence to the Prosecutor
- 202) Exhibit C16 Letter dated 29th July 2013 from Head of the Witness Security Department to Presiding Judge
- 203) Exhibit C12 Letter dated 30th July 2013 from the Office of the Prosecutor, Mechanism for International Criminal Tribunals, The Hague
- 204) Exhibit C13 Letter 13 August 2013 from the Office of the Prosecutor, Mechanism for International Criminal Tribunals, The Hague
- 205) Exhibit C14 letter dated 27 August 2013 2013 from KFOR
- 206) Exhibit C15, Judgment in the case of **ZK** et al dated 19 March 2013
- 207) Exhibit C17, letter dated 9 September 2013 from UNMIK Head of the Rule of Law Liaison Office
- 208) Exhibit C18, email dated 11 September 2013 from the Office of the Prosecutor, Mechanism for International Criminal Tribunals, The Hague

Medical Records of AZ

- 209) Medical Records of **AZ** from the Psychiatric Ward of the X District Hospital, dates various;
- 210) Medical Records of **AZ** from the Psychiatric Ward of the Pristina Hospital, dates various;

ANNEX III

EVIDENCE SUBMITTED BY THE DEFENCE⁵⁵¹

- 18) Defence Exhibit **D (NeK) 1**, Bundle of 32 pgs. Document submitted by Defence Counsel Mahmut Halimi on 6 March 2012, contained in the Defence exhibits binder I. The bundle contains:
- 'Informacije o saobračajnim prekršajima na Kosovu', PZ A No. 033264 (in Serbian Language);
 - Two separate UNMIK 'Formular Deklarate', **AZ** and **BH** (in Albanian Language);
 - Kosovo Police Service, 'Initial / Incident Report', case No. 2005-GR-5628, 7 November 2005 (in English Language);
 - Order of the District Court of X, Pndr. Nr. 1/2008, 3 January 2008 (in Albanian Language);
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- Kosovo Police Service, X Police Station, 'Raporti i policit', 9 January 2008 (in Albanian Language);
 - Kosovo Police Service, 'Initial / Incident Report', case No. 2008-GI-4, 4 January 2008 (in English Language);
 - Kosovo Police Service, 'Formulari per ekzaminim i laboratorit te kriminalistikes se SHPK-se', case No. 2007-GA-3880 (in Albanian Language);
 - Passport copy of **FK** and 2 pgs. of the text in Albanian Language;
 - Judgment of the District Court of X, P nr. 63/2008, 30 April 2008 (in Albanian Language);
 - Kosovo Police Service, 'Initial / Incident Report', case No. 2005-XP5-12, 9 June 2005 (in English Language);
 - UNMIK 'Initial / Incident Report', report No. 2001-JA-4083, 16 November 2001 (in English Language);
 - Kosovo Police Service, 'Initial / Incident Report', case No. 2005-XP5-22, 11 September 2005 (in English Language).
- 19) Defence Exhibit **D (RM) 1**, Letter to EULEX, 14 November 2011, submitted by Defence Counsel **NQ**, contained in the Defence exhibits binder I.
 - 20) Defence Exhibit **D (RM) 2**, Letter of Complaint to the SPRK, 29 November 2011, submitted by Defence Counsel **NQ**, contained in the Defence exhibits binder I.
 - 21) Defence Exhibit D (FL) 1 Extract from diary of **AZ**.
 - 22) Defence Exhibit D (FL) 2 Extract from diary of **AZ**.
 - 23) Defence Exhibit D (FL) 2a Extract from diary of **AZ**.
 - 24) Defence Exhibit **D (FL) 4a**, EULEX OCIU Seized property schedule, 28 April 2010 (in Ministry), contained in the Defence Exhibits Binder I.
 - 25) Defence Exhibit **D (FL) 4b**, EULEX OCIU Seized property schedule, 28 April 2010, 29 April 2010 (in X apartment; in Llapushnik; in X), contained in the Defence exhibits binder I.
 - 26) Defence Exhibit **D (FL) 4c**, Statement, 5 March 2012, **DL**, contained in the Defence exhibits binder I.
 - 27) Defence Exhibit **D (FL) 4d**, Pre-trial judge's search order, 28 April 2010, PPS 425/09, GjPP 91/10, contained in the Defence Exhibits Binder I.
 - 28) Defence Exhibit **D (FL) 5b**, Request to Koha Ditore, 8 February 2012, **ES**, contained in the Defence exhibits binder I.

- 29) Defence Exhibit D (FL) 5c Extract from diary of **AZ**.
- 30) Defence Exhibit **D (FL) 5e**, Request to Kosova Sot, 8 November 2011, **ES**; Kosova Sot response, 15 November 2011, n/n, contained in the Defence exhibits binder I.
- 31) Defence Exhibit **D (FL) 5g**, Request to Klan Kosova, 8 February 2012, **ES**; Klan Kosovo response, 8 February 2012, **BH**, contained in the Defence exhibits binder I.
- 32) Defence Exhibit **D (FL) 6**, Notification to **AZ**, 24 August 2009, Kosovo Ministry of Internal Affairs, Investigation Department, **VH**, contained in the Defence exhibits binder I.
- 33) Defence Exhibit **D (FL) 7**, Letter of KKQC to Chief EULEX Prosecutor, 31 January 2012 (with two annexes: Letter of K.Khan QC to EULEX Special Prosecutor Maurizio Salustro, 10 January 2012; Penal representation of **GZ**, 29 November 2011), Letter of KKQC to EULEX Special Prosecutor Maurizio Salustro, 10 January 2012, contained in the Defence Exhibits Binder I.
- 34) Defence Exhibit **D (FL) 8**, list of 'Statements Prosecution had but not disclosed when X was examined' handed-up during the main trial session on 7 March 2012.
- 35) Defence Exhibit **D (NK) 1**, Military Police Reports [dates various] numbered 1 - 10;
- 36) Defence Exhibit D (NK) 2, Judgment of the Municipal Court in X in case number 2725/05 dated 15 August 2007;
- 37) Defence Exhibit **D (RM) 3**, Letter from Red Cross dated 11 November 2011
- 38) Defence Exhibit **D (AK) 1**, Medical Records of **AK**;
- 39) Defence Exhibit **D (AK) 2**, 5 colour photographs depicting **AK**

The Court also reviewed all Pre-Trial binders and Court Trial Binders, including those relating to the first trial and all appeals.